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THE

SOUTHWESTERN REPORTER,

(ANNOTATED),

VOLUME 121,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS, KENTUCKY, MISSOURI, TENNESSEE, AND TEXAS.

PERMANENT EDITION.

AUGUST 18—NOVEMBER 24, 1909.

WITH TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

ALSO,

TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE COURT OF CIVIL APPEALS.

ALSO,

ALPHABETICAL AND NUMERICAL TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 86, 87, ARKANSAS REPORTS; 128, KENTUCKY REPORTS; 217-219, MISSOURI REPORTS; 134, 135, MISSOURI APPEAL REPORTS; 46, TEXAS CIVIL APPEALS REPORTS; 54, TEXAS CRIMINAL REPORTS.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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JUDGES

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CARROLL D. WOOD. SAMUEL FRAUENTHAL.

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W. E. SETTLE, CHIEF JUSTICE.[2]

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E. J. BROADDUS, PRESIDING JUDGE.

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[1] Became Chief Justice September 20, 1909. [2] Became Judge September 20, 1909.

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COURT RULES.

COURT OF APPEALS OF MISSOURI.

Rules of Practice in the St. Louis Court of Appeals.

Revised July 20, 1909. To be in Force August 15, 1909.

Rule 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the court room.

Rule 2.—WORDS APPELLANT AND RESPONDENT—WHAT THEY INCLUDE. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—MOTIONS. All motions in a cause shall be in writing, signed by counsel and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of the court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—HEARING OF CAUSES. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

Rule 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Rule 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

Rule 7.—NOTICE OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—REVIEWING INSTRUCTIONS. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—BILLS OF EXCEPTIONS IN EQUITY CASES. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court

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or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—DUTY OF THE CLERK IN MAKING UP TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original, or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ———, 190—, executed on the ——— day of 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—ABSTRACTS IN LIEU OF TRANSCRIPTS, WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

Rule 13.—PRINTED TRANSCRIPTS. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—ABSTRACTS, WHEN FILED AND SERVED. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing; and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—ABSTRACTS, WHAT THEY SHALL CONTAIN. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, in the pleadings and such documentary evidence must be set out in full with the indorsements thereon, and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—WHEN APPEAL IS RETURNABLE—CERTIFICATE OF JUDGMENT—TRANSCRIPT. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes of 1899, within the time designated in said section, and the

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date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—COSTS, WHEN ALLOWED FOR PRINTING ABSTRACTS AND RECORDS. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes of 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court, a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as prima facie evidence of the reasonableness thereof; and if the adverse party objects thereto such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—BRIEFS, WHAT TO CONTAIN AND WHEN SERVED. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the paging or side paging shall be set forth.

Authorities incorrectly cited as to book page or title of case, will be disregarded.

Rule 20.—EXTENSION OF TIME. Hereafter in no case will extension of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—PENALTY FOR FAILURE TO COMPLY WITH RULES 12, 14, 15, 16 AND 18. If any applicant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the

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courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—MOTIONS FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471, —— Mo. App. ——.

Rule 24.—ORAL ARGUMENTS. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying, if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for the cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

Unless by permission of the court, counsel will not read to the court in extenso the written or printed argument on file, nor from reports or text books.

Rule 25.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—MOTION FOR AFFIRMANCE. On motion for affirmance under section 812, Revised Statutes of 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—APPEARANCE OF COUNSEL. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—ALLOWANCE TO GARNISHEES. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

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Rule 29.—SERVICE OF ABSTRACTS AND BRIEFS IN CRIMINAL CASES. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—RETURN OF ORIGINAL WRITS. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—WITHDRAWING RECORDS. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—REPEAL OF FORMER RULES. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs, and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

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WRITS OF ERROR

WERE DENIED OR DISMISSED BY THE

SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE

COURT OF CIVIL APPEALS

PRIOR TO DEC. 8, 1909.

[Cases in which writs of error have been denied or dismissed, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

WRITS OF ERROR DENIED.

FIRST DISTRICT.

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THE SOUTHWESTERN REPORTER.

VOLUME 121.

COIN v. JOHN H. TALGE LOUNGE CO.

(Supreme Court of Missouri, Division No. 2. July 13, 1909.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTY OF MASTER.

The master is bound to use reasonable care to furnish his servants safe appliances, and keep them in good order and condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 170–174; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume the risk of the danger from the use of unsafe machinery, unless the defects are so obvious that a reasonably prudent man would not attempt to use it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 614, 616; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTIES OF MASTER.

A master is not bound to use the newest and best appliances, but he performs his duty when he furnishes machinery and appliances reasonably safe, which means safe according to the usages and habits and ordinary risks of business; the standard of due care being the conduct of the average prudent man.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 181, 182; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTY OF MASTER—HAZARDOUS EMPLOYMENT.

The operation of a band saw for the purpose of cutting wood is not an extrahazardous employment, requiring the master to use more than reasonable care and precaution in furnishing safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 101, 102.*]

5. NEGLIGENCE (§ 2*)—EXISTENCE OF DUTY.

Negligence is a relative term, and, where there is no duty, there can be no actionable negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 3; Dec. Dig. § 2.*]

6. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—CAUSE OF INJURY.

Where an injury to a servant may have been caused by either of two things, for only one of which the master is responsible, he cannot be held liable unless it is shown with reasonable certainty that the cause for which he is liable produced the result.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

7. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—MASTER'S DUTY—CONTRACT.

The master's obligation to furnish safe appliances for his servants is cast upon him by law, and is not a matter of contract.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 101, 102.*]

8. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—SAFETY OF MACHINERY—AGREEMENT OF MASTER.

The rule that, where a master has expressly promised to repair a defect, the servant can recover for an injury from failure to fulfill, does not apply where the master promised to furnish or equip a band saw with gates or guards; there being no defect in the saw or appliances.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 221.*]

9. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

If a servant before he enters the service knows, or if he afterward discovers, or by the exercise of ordinary observation or diligence may discover, that the machine or appliances are unsafe, and he continues in the employment without objection, he is deemed to assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 583; Dec. Dig. § 217.*]

10. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—AGREEMENT.

A promise of a master's superintendent to furnish a guard for machinery which was not defective was without consideration, and did not give rise to any duty not recognized by law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 221.*]

11. MASTER AND SERVANT (§ 209*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant, having accepted employment to work with a band saw, and having worked with it for three years, could not require his master to make changes by providing new and different appliances; but must be held to have assumed the usual and ordinary dangers in operating such saw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 552; Dec. Dig. § 209.*]

12. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—MACHINERY—PROMISE TO REPAIR.

To render a master liable for failure to repair machinery after promising to do so, the promise must have been the inducing motive which kept the servant at work, and without which he would have quit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638–647; Dec. Dig. § 221.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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13. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where a band saw fell from the wheels on which it was running to the floor, and the servant operating it might have thrown off the power, but, instead of so doing, he picked up the saw and attempted to throw it from him, and in so doing caused the injury, the coming off of the saw was not the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 258; Dec. Dig. § 129.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Joseph A. Coin against the John H. Talge Lounge Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rusk & Stringfellow, for appellant. Jas. W. Boyd and C. F. Strop, for respondent.

GANTT, P. J. This is an action for damages from personal injuries received by the plaintiff, who was at the time an employé of the defendant company, which was engaged in the manufacture of lounges and folding beds, and in connection with said manufacture operated or caused to be operated certain band saws for the purpose of cutting the wood according to various designs for said lounges and beds.

In substance, the plaintiff states: That he was an employé of said defendant, and engaged as an operator upon one of said band saws, and that the motive power of said saw was furnished from the central steam plant owned and controlled by defendant. That the saw upon which plaintiff worked was propelled by and upon two wheels, around which wheels the said saw ran. That said saw was intended to and supposed to run around the center of the outside surface of each of said wheels, which were some distance apart. That said machine or appliance was so constructed that, by the adjustment of said wheels, said saw would be held in position, and all of the slack taken therefrom, thereby causing said saw to become a tight band around said wheels. That in order to operate said saw successfully, and with reasonable safety to the employé, it was necessary that the same should be suspended perpendicularly, and it was necessary that said wheels be so adjusted and set that the one was directly over the other and perpendicular therefrom. That, in connection with the upper one of said wheels, there was a set screw, a regulating or adjusting screw which was used for the purpose of expanding said saw, and for the purpose of raising said wheel so as to cause said expansion. That there was also in connection with said wheel an automatic weight or safety appliance which was used and intended to be used, and which had the effect, when in proper working condition, of automatically adjusting the distance between said wheels and keeping all the slack out of said band saw. Plaintiff states that said saw and wheels and set screws and automatic adjusting appliances and all parts of said machinery had become old and worn and unfit for use, so that it was difficult in operating said saw to keep the wheels around which said saw revolves in proper position, and was and had become difficult to keep the slack out of the saw and keep it in position, whereby the tendency of said saw was to run off of said wheels when in actual use for cutting timbers or wood.

Plaintiff states that there is always danger in operating a band saw, constructed after the manner in which this one was, of said saw leaving the wheels around which it runs and slipping therefrom, and the slipping therefrom is always attended by danger to the operator; that the frame upon which said wheels were fastened were improperly and poorly constructed, and the wheels did not have a correct alignment, and that said frame was old, bent, and warped, and that said wheels did not run directly over each other and did not track with each other, which had the effect of causing said saw to leave said wheels and endanger the safety of plaintiff; that defendant knew of this condition of the saw, and that said appliances were old and worn and improperly constructed, and that said band or cushion around said upper wheel had become worn and unfit for use, and well knew the tendency of the saw to leave said wheels, and, if it did, the person operating the same would be in danger; that said saw and machinery upon which the same was worked could have easily been provided with a shield or protection which would have in no wise interfered with the successful operation of said saw and would have removed all danger from the operator in charge thereof, even if the saw left the wheels, irrespective of what might have caused the saw to leave the wheels; that such shields were in general use and well known by defendant prior to the time plaintiff received his injuries. Plaintiff states that prior to the happening of the accident he requested the defendant's superintendent, Mr. Eddins, to provide shields and screens for said machinery and said superintendent promised and agreed to so equip said saws and machinery, but failed to do so, and, in reliance upon said promises, plaintiff continued to operate said machine. Plaintiff states that he also called the attention of the superintendent to the condition of the rubber band around said wheel, and to the fact that the condition of said wheel caused by said defective rubber band would likely cause the saw to leave the wheel and endanger plaintiff, and the defendant's super-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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intendent promised and agreed to correct said defect, but failed to do so.

Plaintiff states defendant was guilty of negligence in permitting said wheels to be out of alignment and in using the frame which was improperly constructed and which had become bent and warped, and permitting the adjusting screw and automatic appliances to become out of repair, and in permitting the aforesaid rubber band to become worn, stretched, and out of position and in using the same when it was unfit for use, and in failing to repair the same after promising so to do, and in failing to provide shields and screens in front of said machinery after being requested so to do. Plaintiff states that on the 14th of September, 1905, while he was operating the aforesaid saw and while in the exercise of due care on his part, the aforesaid saw slipped off of the aforesaid wheel and struck plaintiff, and plaintiff became entangled while the same was in motion, and after the same had left the said wheel and thereby said saw cut, maimed, and mangled plaintiff's left arm in such a manner that plaintiff will be a cripple for life, and said arm has become useless and almost paralyzed. Plaintiff laid his damages at $25,000.

The answer of the defendant is a general denial, with pleas of assumption of risks and contributory negligence. On the trial all the instructions asked by the plaintiff submitting the charges of negligence made in the petition were refused by the court, and thereupon the court submitted the case to the jury on an instruction given by itself in the following words:

"The court instructs the jury that the law did not require the defendant to provide guards to prevent the band saw from striking the plaintiff; but in this case the plaintiff claims that he requested the defendant a short time prior to the happening of the accident to him to furnish or equip said machines with gates, and that the defendant promised and agreed with plaintiff to so equip said band saw, and instructed the plaintiff to continue working therewith until the defendant had sufficient time in which to so equip said band saw with gates, and that the defendant assured plaintiff that he could proceed with his work with safety without said gates until they could be provided. And plaintiff, relying upon said assurances and said promise, continued to operate said machine. Upon this charge of negligence, and this charge alone, the case is submitted to the jury. If, therefore, the jury believe and find from the evidence that the plaintiff did request the defendant to furnish or equip said band saw with gates, and that the defendant did promise and agree with plaintiff to so equip said machine, and instructed plaintiff to continue working therewith until the defendant had a sufficient time to so equip said band saw with gates, and assured plaintiff that he could proceed with his work with safety until the said gates could be provided, and the plaintiff, relying upon said assurances and said promise, continued to operate said machine, and you further find from the evidence that the defendant negligently and carelessly failed to so provide said band saw with gates, and that such gates or guard, if provided, would have prevented the accident and injury to plaintiff shown in the evidence, then the plaintiff is entitled to recover in this case, and your verdict should be for him."

The evidence tended to show that the plaintiff, Joseph A. Coin, was 23 years of age, a woodworker by trade, and had been employed in the factory of the defendant for eight years; that he was a roustabout for two years and a half, and was then put to work on machines, working first on the carving machine; that he began to use the band saw three or three and a half years before the accident out of which this action arose; that during these three and a half years his work was confined to the band saw and the carving machine; that he was an expert operator on the band saw; that he operated the band saw to suit himself, adjusting it in any way he wanted it, had entire charge of and control over it for three years immediately prior to the accident; that it was his place to adjust it to suit himself when he was running it; that there was no machinist or any other person in the factory whose duty it was to inspect, adjust, or align the machine, to braze broken saws, or to put in repair bands on the wheels when needed or remove the ridges that necessarily form on the rubber bands from use; that those were the duties of the man who operated the machine. Plaintiff testified that one of the rubber bands around the wheel upon which the band saw ran had become worn, had ridges in it, and had become loose from the wheel, and that he had called the attention of the foreman to the condition of this rubber band, and he always had agreed to have it repaired.

Plaintiff testified that, while he had no knowledge of what appliances or safe devices were in general use, he did know that in another plant in the city of St. Joseph there was a safety device which consisted of shields or gates which could be closed or opened in front of the band saw, and which had the effect of preventing the saw from injuring the operator in case it left the wheels; that he had called the attention of his foreman to this device which he had seen at the Huttig-Moss factory in St. Joseph, and on several occasions had been promised by the foreman that the machine on which plaintiff worked should be provided with such appliances; and that he had continued to work upon the strength of the promises made to him.

Plaintiff explained his injury as follows:

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He was sawing a lounge leg. That he pulled the board back, and the saw came off and fell on the floor near him to one side, and slipped behind him. The saw was still in the board he had been sawing, but was entirely off both wheels. It was lying on the floor not revolving or moving except to palpitate slightly, because the lower edge of the lower wheel in its revolutions touched the saw. He stepped back, and caught the left leg of his trousers in the teeth of the saw. He picked up the saw, and attempted to throw it from him, but in so doing this caused the other part of the saw to catch in the lower wheel and the part in his hand cut his arm, and lacerated it. He says: "I thought I was going to catch, and I reached down and lifted the saw to get it loose from my pants. I tried to throw it away from me, and, as I let go, it cut me. * * * Q. When you threw it from you, it went into the wheel? A. Yes, sir." No other witness saw the accident. The saw was found broken into two pieces. One piece was sticking in the board which plaintiff had been sawing, and the other piece was entangled in the lower wheel and wrapped around its hub. The only evidence the plaintiff himself gave touching any defect in the machine was that the rubber band on the upper wheel was loose. He produced two witnesses, Sanborn and McGee, who testified that the loose band would have a tendency to make the saw come off. The plaintiff's testimony that the rubber band was actually loose was not corroborated by any other witness, and was contradicted by all the other witnesses who were present in the shop at the time of the accident.

Various witnesses both for the plaintiff and defendant testified that a saw will frequently come off in spite of all you can do, and many reasons would cause it to come off, such as the wheels being out of alignment, and the band having ridges on it. Sanborn, a witness for the plaintiff, testified that he had formerly worked at this shop of the defendant, but had left it some five or six months before the accident to plaintiff. He also testified that five years before this time he had help set up this machine, that at that time the boxes of the machine were immovable, and the wheels could not be aligned. He did not know anything about the wheel at the time of the accident. This inability to make the wheels align was the only defect he found in the machine. He did not consider it dangerous on that account, but simply told the foreman the saw did not run properly. All the other witnesses contradicted his testimony in regard to the saw having immovable boxes, and could not be properly aligned. Thus Mr. Crooks, a witness who had been operating band saws for about 40 years, testified: "Well, when we first got it there, they had some one else to run it, and they could not get it to align, it being new, so Mr. Talge come to me and says, 'Harry, get that saw to running'; and I said, 'All right,' and in 15 minutes I did so, in perfect alignment and good order." This witness also testified that he operated the adjoining band saw, and that this machine had always been adjustable and first-class in every respect, both the upper and lower wheels being adjustable. Various other expert witnesses and machinists from other shops examined and tested the machine by the plumb line test, and found it to have adjustable wheels easily alignable at the pleasure of the operator and in perfect alignment. Two factory inspectors, Gamm and Pickel, had a plumb line test made, and found the wheels in perfect alignment. All witnesses testified that this saw could remain on the wheels but a short time; indeed, not to exceed one revolution of the wheels after it was out of alignment. There was no direct testimony either that the wheels were out of alignment at the time of the accident or that the cause of the saw coming off was nonalignment or misalignment, or that the coming off of the saw was the cause of the accident.

In regard to the use of guards to protect the workmen on machines like this one, the testimony was that no guard had ever been used in this shop. Crooks, the other band sawer with 40 years' experience, had used one in 1866, and had discarded it as too much trouble, and had never seen one since 1866. Plaintiff had used this saw without a guard for over three years. He testified that some five or six months before this accident he had seen a gate swinging in front of a wheel of a band saw at the Huttig-Moss factory, and had told the foreman about it, and the foreman said it was a pretty good thing, and then the plaintiff asked him if he would put on a shield. The foreman said he was busy then, but would as soon as possible. Nothing more was said about it until the day before the accident, when, speaking to the foreman about the rubber band being loose, he says he reminded the foreman of these shields or guards, and the foreman said when he fixed one he would fix the other, and that the saw was safe enough to work with. The foreman swore that no such conversation as the plaintiff testified to had ever taken place; that plaintiff had never complained of the rubber band being loose, and had never asked for a shield or guard, and had never complained of any other defect in the machine, but plaintiff on this guard question introduced two other witnesses.

Sanborn testified that there were several devices. One was a gate of iron or wood, another was a two by four gate swung across the face of the wheel, and still another was a wooden button on the frame of the machine, and at one time he stated that these were in general use in the big factories. On cross-examination, however, he testified that he had worked on band saws off and on for

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17 or 18 years in different states, California, Washington, and Missouri, and in 10 shops, and had visited and examined many other shops and machines, and in all that time and experience he had actually seen just one guard and slat gate and that one in San Francisco 15 years ago. McGee, plaintiff's other witness, had worked in several shops in St. Joseph and had been in shops in Kansas City and Chicago, and he had seen just one machine with a guard, and that one was improvised by the workman who used it. He would not testify that these guards were in general use. On the other hand, the defendant introduced 16 witnesses, men of age and experience who qualified themselves to testify to the customary usage, and they stated that band saws were customarily used without guards. These witnesses included, among others, two factory inspectors, whose duties required them to inspect and visit every shop in the state and the foreman of the Huttig-Moss factory where one of the only three guards was located. This customary usage covered not only St. Joseph, Atchison, Topeka, but Kansas City, St. Louis, and other cities in this state, and Colorado Springs, Duluth, Chicago, New York, and other cities in New York state. It also showed that no manufacturer of band saws ever furnishes a guard, shield, or gate with a band saw. Mosteller testified that in his opinion an attempt to confine the saw close to the wheels and prevent its coming clear off and falling dead would be only added danger. Other witnesses testified to the same effect, and that no guard could prevent the saw from falling just as it did.

Mr. Miller, the foreman of the Huttig-Moss factory, in which plaintiff saw the guard, was not permitted to state the reason why said guard was used in his factory, but did testify that they always used these band saws without a guard. Inasmuch as the court confined the jury to the negligence and carelessness of the defendant in failing to provide said band saws with gates after having promised and agreed with plaintiff to so equip said band saw, a reference to the testimony on that subject will be helpful in determining the propriety of the court's instructions. Plaintiff testified that the foreman assured him that the saw was perfectly safe to work on until repaired. This statement is said to have been made when Coin's complaint to the foreman was about the alleged loose rubber bands, and there was only an incidental reminder of the conversation five or six months before about the gate being a good thing. And in this logical connection a fair inference would be that this alleged assurance of safety referred to the rubber band and not to the absence of a gate or guard. Thus counsel inquired of him if he ever called the foreman's attention to the condition of the rubber band, and he answered that he did twice, about a week before he got hurt the first time, and the day before the last time. "Q. What did you say, and what did he say to you? A. I asked him about having it fixed, and he said he would have it fixed as soon as possible. Q. On the second occasion what did you say to him? A. I asked him to take and have it fixed again, and he said, 'All right, I will do it.' Q. What did he say about using the saw, if anything? A. He told me that the saw was safe to work on. Q. Did he say anything about when he would have it fixed? A. He said he would as soon as he could get time is all he said. He said he would take and fix it right away." Now, in regard to the gate or guard, he was asked if he had ever had any talk about devices of any kind to prevent the saw from coming off and striking the operator, and he answered that he did more than once. As to the first time he said: "I do not remember exactly, but it was in the first part of the summer or spring when I reminded him of this rubber. I also reminded him of what he promised about putting the guard on, and he said when he fixed one he would fix the other, and he says the saw was safe to work on until it is fixed. Q. Was anything else said?" And he answered, "No, sir."

Other facts may be noted in the course of the opinion, but the foregoing is substantially the evidence in the case.

The contention of the plaintiff is that he suffered his injuries on account of the negligence of the defendant in failing to furnish him proper and safe appliances with which to do his work, and that this duty upon the part of the defendant was not performed by its furnishing appliances that were ordinarily and reasonably safe for the character of work which he was employed to do. It is the settled law of this state that the master is bound to use reasonable care and precaution to furnish his servants safe appliances with which to do his work, and in keeping them in good order and condition, and the servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so glaring and obvious that a reasonably prudent man would not attempt to use them. All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and of reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages and habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for consequences not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by the law to a higher degree of skill than a fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of neg-

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ligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Steinhauser v. Spraul, 127 Mo. 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Minnier v. Railroad, 167 Mo., loc. cit. 112, 66 S. W. 1072; Chrismer v. Bell Telephone Company, 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492; Brands v. St. Louis Car Company, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701.

The contention of the plaintiff in this case that his employment takes him out of this rule because his employment was extra hazardous, and therefore a greater degree of care was due him, we think is not supported by the testimony. We see nothing in the facts of the case or in the history of this character of a machine which would justify us in denominating it as extrahazardous. In Curtis v. McNair, 173 Mo. 280, 73 S. W. 168, it was said by this court: "It is the duty of the master to exercise reasonable care commensurate with the nature of the business to protect its servants from the hazards incident to it. This duty the law imposes on the master, and will not allow him to cast off, and this statement of the law was proved in Phippin v. Railway, 196 Mo., loc. cit. 347, 93 S. W. 410." Negligence is a relative term, and, where there is no duty, there can be no actionable negligence. When we come, then, to measure the defendant's liability in this case, it will be seen from the accompanying statement that there was no evidence of any defect in this machine at the time of the accident, except the defendant's testimony that there was a loose rubber band on one of the wheels, and that only to the extent of about six inches of the band. From the evidence it appears that this band was attached to this wheel by some kind of cement, and the great weight of the evidence was to the effect that the fact that this part of the band was loose furnished no reason for the saw coming off of the wheel. In regard to the alignment of the two wheels, we think the circuit court was correct in declining to submit that as a question of fact and negligence to the jury.

Common sense and common reason confirm the testimony of all the other credible witnesses that one revolution of the wheel only would have been necessary to have thrown this band saw off of the wheel, if these two wheels had not been aligned properly, and the court refused to submit, and we think properly so, to the jury whether the accident was caused by the band being loose on the wheel. The circuit court found that as to the rubber band, while plaintiff testified it was loose for a space of six inches—that is to say, loose in the sense that the cement that was on the band did not hold for six inches—which condition it is claimed might have caused the saw to come off, yet the testimony of plaintiff's witnesses also showed that another condition existed at the same time which was equally liable to cause the saw to come off, namely, the ridges on the band, a condition for which it was uncontroverted the defendant was not liable, and the circuit court therefore held that where two conditions existed, either of which might have caused the saw to come off, for one of which the defendant might have been held responsible, and for the other of which the defendant could not be held responsible, there was nothing to submit to the jury on that point. There was also evidence tending to show that the plaintiff had pulled the saw off in handling the lounge leg which he was using. It is conceded by the plaintiff that no human agency could detect and demonstrate what the exact cause of the saw leaving the wheel was. The trial court was right in holding that where an accident may have been caused by either of two things, one for which the master is responsible, and for the other the master is not responsible, the master cannot be held liable. Trigg v. Land & Lumber Company, 187 Mo. 227, 86 S. W. 222.

With the plaintiff's concession that no human being could demonstrate the cause of this saw leaving the wheel at this time, and the testimony of the plaintiff's own witnesses that it might have been thrown off either by the ridges on the rubber, or by the want of alignment, and that it would come off in spite of either of these defects, we see no escape from the conclusion which the circuit court reached that that question ought not to be submitted to the jury. In Warner v. Railroad Co., 178 Mo., loc. cit. 134, 77 S. W. 70, it was said: "If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and, if the evidence leaves it to conjecture, the plaintiff must fail in his action." The proposition advanced by the plaintiff that it is not always necessary to prove a case by direct testimony, and that it would be sufficient to show by indirect evidence that an injury was caused by proved negligent conduct is all well enough, and is fully sustained by the numerous cases cited by plaintiff, but that is a very different proposition from the one just announced that where an action is brought for damages, which are occasioned by one of two causes for one of which the defendant is responsible, and for the other not, the plaintiff must fail if his evidence fails to show that the damages were produced by the first, or, at least, the probabilities are stronger that the damages were caused by the first instead of the latter. Fuchs v. St. Louis, 133 Mo., loc. cit. 196, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; Patton v. Tex.

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& Pac. Ry., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

Agreeing, then, with the learned circuit court that there was nothing in the charge that the wheels upon which the saw revolved were not properly aligned, and agreeing, also, that in view of the testimony of the witnesses for the plaintiff that the leaving of the wheel by the saw could not be attributed to the fact that the cement was loosened for about six inches on the rubber band, we are brought to the issue which the court of its own motion submitted to the jury in its instruction, to wit, that the plaintiff requested the defendant to furnish him a shield or guard for the said band saw, and that if the defendant promised and agreed with plaintiff to so equip said machine, but negligently and carelessly failed to so provide said band saw with said gate, guard, or screen, and, if such gate or guard had been provided, they would have prevented the accident to plaintiff, then plaintiff was entitled to recovery. As already said, an employer is under no obligation to his employé to furnish the newest and best machinery or implements for his work. The legal test of reasonable safety in machinery or methods is customary use by those engaged in like employment and work, and the jury cannot be permitted to set up any other. An employer is under an obligation to use reasonable care to furnish his employé with reasonably safe machinery and appliances, but it is not in every case for the jury to determine the standard of safety. The master's obligation arises from his relation of master to his servant and is cast upon him by the law, and not as a matter of contract. It is a duty which the master is not allowed to escape by contract with his servant.

The trial court having determined from the evidence that there was no evidence of any such defects in the appliances with which plaintiff was working as would constitute negligence on the part of the defendant, the case is narrowed down to the proposition that the defendant voluntarily upon the request of the plaintiff agreed to furnish or equip the said band saw with gates or guards, and that, if plaintiff was injured because such gates or guards were not provided, then the defendant is liable in this action. It seems to us that, if there can be any groundwork for this action at all, it must rest upon a promise to repair as known in our law of negligence. In numerous cases in this state the rule as announced by Shearman & Redfield on Negligence, that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby within such a period of time after the promise, as it would be reasonable to allow for its performance, and for the injury suffered in any period which would not preclude all reasonable exceptions that the promise might be kept, has been approved. Conroy v. Iron Works, 62 Mo. 35; Flynn v. Railroad, 78 Mo. 195, 47 Am. Rep. 99; Holloran v. Iron & Foundry Company, 133 Mo., loc. cit. 479, 480, 35 S. W. 260.

It will be noted that an essential element of this rule is that there must be a defect in the appliances or machinery which it was the duty of the employer to repair and remedy. This must be evident, because, in the absence of such a defect, we would simply have an appliance which, though not the most modern, would still not be defective in the sense that a master would be liable for not remedying it. In Leonard v. Herrmann, 195 Pa. 222, 45 Atl. 723, the Supreme Court of Pennsylvania, among other things, said: "The plaintiff was familiar with the elevator in the use of which he was injured. He had been employed at the defendant's works for a number of years, and he had operated the elevator for at least one year. There was not the slightest evidence that the elevator was out of repair, and the overwhelming evidence was that it was of a kind in ordinary use. There was no room for doubt on these subjects, and there was nothing which would have warranted a contrary finding by the jury. The plaintiff's main reliance was upon his testimony that a week before the accident he had told the superintendent that there should be guards at the sides of the elevator, and that the superintendent had promised to provide them. But this testimony could not help the plaintiff's case unless it appeared that there was, in fact, a defect which it was the duty of the employer to remedy. This did not appear, and no promise made by the defendant could give rise to a duty not recognized by law. The instruction by the learned judge was clearly right, and the judgment is affirmed." In Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102, it appeared that the plaintiff had worked three or four days operating a mangle in a laundry. Testimony showed the machine jerked and jarred. There was complaint and promise to rectify this condition. The court said: "In the absence of proof of defects which added to the danger of the operation of the mangle, the promise by one of the defendants to fix it imposed no liability on them. As it did not appear that the legal duty to furnish reasonably safe machinery and appliances had been violated, there was no ground upon which they could be held liable for plaintiff's loss. The judgment is reversed."

In Jones v. Yazoo, etc., R. R. Co., 90 Miss. 547, 43 South. 813, it appeared that the plaintiff's father was killed by the derailment of an engine caused by striking a cow. The engine was equipped with a stub pilot, which it was alleged was too short and which had a stationary coupler bar, which interfered with the throwing off of the track of the objects struck. There was a complaint and a promise to substitute safer and less dangerous appliances. Said the Supreme Court of Mississippi: "The appliance in itself was not defective or unsafe. The

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change desired in the appliance, which it is contended the railroad promised should be made, if it be conceded, if the facts show there was a promise, was not a defect called to their attention and a promise to repair a defect existing in the appliance, but was a promise to change from a safe to a safer appliance. In all the cases cited by the learned counsel for the appellant the facts show that, where there was a promise to repair and the master was held liable, it was a promise to repair an existing defect admittedly so. The proof in this case utterly fails to show that the pilot in use was in any sense a defective pilot. In the language of the case of Hatter v. Railroad Co., 69 Miss. 642, 13 South. 827: "To hold the employer liable for the injury sustained would, as it appears to us, be to declare that railroads are responsible for injuries to their servants in all cases in which the safest appliances in use are not secured them.' We cannot so hold." Sweeney v. B. & J. Envelope Company, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722.

In a very exhaustive and able discussion of this point by counsel for the defendant many other decisions from the highest courts of the Union have been cited, all tending to the same result as those we have just noted. The rule itself is an exception to the general rule that the servant when he enters the employment of his master assumes, not only the risks incident to his employment, but all dangers which are apparent and obvious as a result thereof. It is the duty of the servant to take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly or heedlessly to his work, but must inform himself. If the servant before he enters the service knows, or if he afterwards discovers or by the exercise of ordinary observation or reasonable skill or diligence in his department of service he may discover, that the machine or appliances in connection with which he is to labor are unsafe or unfit, and if notwithstanding such knowledge he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of danger thus known, and to waive any damages against the master in case it shall result in injury to him. It is out of this principle that this promise to repair has grown. Its office is simply to rebut the defense of assumption of risk. But a careful examination of the authorities leads us to the conclusion that this doctrine of a promise to repair does not apply to a case where the promise is made to furnish additional appliances to a machine not defective. While it is true that Labatt in his work on Master and Servant, p. 1186, states that there is apparently no adequate ground upon which it can be maintained that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger should not be deemed equivalent in its legal effect to a promise to remedy a defect in some instrumentality, the use of which is to be continued, an examination of the authorities upon which the learned author bases his statement will show that in each instance the promise was to replace a defective appliance or part of an appliance with a sound part. Thus in one case the promise was to furnish a new dog on a machine in place of a worn out dog, and this was held properly to be a promise to repair. But in this case the promise was not to repair a machine, which the court found, and the evidence showed, was not a defective machine, but was to supply an appliance in the shape of a guard, and, as we have seen in the absence of a defect which it was the duty of the defendant to remedy, the promise of the superintendent to furnish this guard was without consideration, and could not give rise to a duty not recognized by law.

The testimony of the plaintiff on this point was to the effect that he had discovered a better and safer appliance than that which he was required to work with, and he sought to have the defendant adopt this new style of machinery, and, as we have seen, the law did not require the defendant to do this, and the servant had no right to dictate it. Plaintiff had worked with this machine for three years. He was fully and thoroughly acquainted with its use and management, and we do not agree with counsel for the plaintiff that this was an antiquated machine. It may not have been the very latest and newest design, but it was not a defective machine, and the plaintiff, having accepted employment to work with this machine and having worked on it for three years, could not require the defendant to make changes by providing new and different appliances, but must be held to have assumed by his contract of employment the usual and ordinary dangers in operating said band saw.

But there is another view of this case which will prevent a recovery by the plaintiff. Giving to the plaintiff's evidence its full import, it does not appear to us that this promise of the superintendent to furnish this gate at some time was the inducement to the plaintiff to remain in the service of the defendant. In order to bring his case within the doctrine of a promise to repair, the authorities are quite numerous to the effect that the promise must have been the inducing motive which kept the servant at work and without which he would have quit; otherwise it is not binding. Holloran v. Iron & Foundry Company, 133 Mo. 470, 35 S. W. 260; Yerkes v. Railway Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961.

It follows that in our opinion the trial court submitted this cause to the jury upon an issue not justified by the pleadings or the evidence. The instruction permitted the recovery based upon a promise which was

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not founded upon any defect in the appliances or in any increased hazard, and the evidence did not justify the inference that the plaintiff intended to quit the employment and would have quit, but for the inducement held out to him by the promise. That the plaintiff has suffered a very serious and painful and perhaps permanent injury we think the evidence fully justified. But, on the other hand, that injury does not appear to us to be traceable to the coming off of this band saw as its proximate cause. Obviously when the saw left the wheels it ceased to revolve and fell upon the floor dead and to all intents and purposes harmless if plaintiff had only by the slightest act thrown off the power, but, instead of so doing, he picked up the saw and attempted to throw it from him, and in so doing caused it to become entangled in the lower wheel, and thus drawn across his arm whereby the teeth of the saw lacerated and tore the flesh and the tendons. It was certainly an unprecedented accident and a most unfortunate one, but it does not appear to us that it was due to any negligence of the defendant.

In our opinion the circuit court properly held that there was no evidence upon which to submit the case to the jury upon the allegations of negligence in the petition and improperly evolved a theory of the case, which was not justified by the law or the evidence. And accordingly the judgment of the circuit must be, and is, reversed.

BURGESS and FOX, JJ., concur.

TURNER v. MORRIS.

(Supreme Court of Missouri. Division No. 1. July 1, 1909.)

1. COURTS (§ 231*)—NATURE OF CONTROVERSY—JURISDICTION.

Before the Supreme Court can entertain an appeal on the ground that title to real estate is involved, within Const. art. 6, § 12 (Ann. St. 1906, p. 218), the record must show that the title to the real estate mentioned in the pleadings will be directly affected by the judgment to be rendered, and the fact that the title may be incidentally, collaterally, or unnecessarily inquired into at the trial to determine the issues is insufficient, when the judgment rendered does not directly affect title, and may be satisfied by the payment of money.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

2. COURTS (§ 231*)—NATURE OF CONTROVERSY—JURISDICTION.

A judgment, awarding relief, as prayed for in replevin for wheat claimed by defendant, on the ground that he had purchased by warranty deed from plaintiff the land on which the wheat grew, does not affect the title to the real estate purchased, and an appeal does not lie to the Supreme Court on the ground that title to real estate is involved, within Const. art. 6, § 12, (Ann. St. 1906, p. 218).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

Appeal from Circuit Court, Barry County; F. C. Johnston, Judge.

Action by George M. Turner against A. B. Morris. From a judgment for plaintiff, defendant appeals. Cause certified to the St. Louis Court of Appeals.

This is a suit in replevin, brought by the plaintiff before a justice of the peace, in Barry county, to recover 66⅔ bushels of wheat, the value of which was assessed by the jury at the sum of $82.50. The defendant filed answer, under oath, alleging that title to real estate would be an issue in the case, for the reason that he had purchased, by general warranty deed from plaintiff, the land on which the wheat in controversy grew, during the month of February, 1905, and that plaintiff made no reservation of the growing wheat thereon in said deed, and that all of plaintiff's interest in the wheat was sold to defendant as a part of the land. Thereupon, under and by authority of section 3951, Rev. St. 1899 (page 2173, Ann. St. 1906), the justice certified the cause to the circuit court of Barry county. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff. In due time defendant filed a motion for a new trial and in arrest of judgment, which were by the court overruled. After excepting to the action of the court in that regard, defendant appealed the case to this court.

J. S. Davis, for appellant. C. M. Landis, for respondent.

WOODSON, J. (after stating the facts as above). Counsel for respondent insists that this court has no jurisdiction to entertain or determine this appeal, for the reason that the amount involved is under $4,500, and that title to real estate is not involved within the meaning of section 12, art. 6, of the Constitution (Ann. St. 1906, p. 218), which gives this court appellate jurisdiction of cases involving title to real estate. In our opinion that insistence is well taken, for the reason that we have repeatedly held that, before an appeal can be entertained by this court on the ground that title to real property is involved within the meaning of that section of the Constitution, the record must show that the title to the real estate mentioned in the pleadings will be directly affected by the judgment or decree to be rendered in the cause. And, although the title thereto may be incidentally, collaterally, or unnecessarily inquired into at the trial, for the purpose of determining the issues involved, yet, if the judgment or decree rendered by the trial court does not directly affect the title to the real estate, and can be satisfied by the payment of money, then the appeal should go to the Court of Appeals. Price v. Blankenship, 144 Mo. 203, 45 S. W. 1123; Balz v. Nelson, 171 Mo. 688, 72 S. W. 527; Christopher v. Home Saving Ass'n, 180 Mo. 568, 79 S. W. 899. Under no possible circum-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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stances could the judgment rendered by the circuit court in this case affect the title to the real estate purchased by appellant from respondent, and the same may be satisfied by paying $82.50, the amount of the judgment, with interest and costs.

We are therefore of the opinion that this court has no jurisdiction over this appeal, except to certify it to the St. Louis Court of Appeals, which is accordingly done. All concur.

Ex parte SHULL.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. HABEAS CORPUS (§ 85*)—PUNISHMENT FOR CONTEMPT—NATURE OF PROCEEDINGS—PRESUMPTIONS.

Commitment for contempt for alleged disrespect to the court is a criminal proceeding by which the citizen is deprived of his liberty, and hence persumptions and intendments will not be indulged to sustain a conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 78; Dec. Dig. § 85.*]

2. CONTEMPT (§ 64*)—COMMITMENT—DESCRIPTION OF OFFENSE—STATUTES.

Rev. St. 1899, § 3576 (Ann. St. 1906, p. 2023), provides that it shall be the duty of the court or magistrate to forthwith remand the party appearing on habeas corpus if it appears that he is detained in custody for any contempt plainly charged in the commitment by some court, officer, or body having authority to commit for the contempt charged. *Held*, that a commitment for contempt for treating the court disrespectfully in refusing to answer questions as a witness, failing to state in what respect the disrespect consisted, or to find that the questions were material and pertinent, was fatally defective.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 208; Dec. Dig. § 64.*]

Petition for habeas corpus on relation of Samuel S. Shull. Writ allowed. Relator discharged.

Warren C. Rogers, for relator.

GANTT, P. J. By this proceeding we are asked to review a commitment of petitioner by the circuit court of Buchanan county for an alleged contempt. It appears that on May 7, 1909, the petitioner appeared in division No. 1 of the circuit court of Buchanan county, in obedience to a subpœna duces tecum, requiring his presence in said court to testify in a certain cause wherein Mrs. William F. Keller was plaintiff and Eva R. Roth and the Bank of North St. Joseph were defendants, and to bring with him certain tax bills mentioned in the petition in said cause, which the plaintiff therein sought to have canceled. It appears that when said cause was called for trial by Hon. C. A. Mosman, the judge of said court, the plaintiff announced ready for trial provided the tax bills called for in the subpœna were in court. Petitioner was then called to the witness stand and was asked if he had said tax bills, and he answered that he did not have them when the subpœna was served and had not had them since that in his possession or under his control. He declined and refused to answer when he last had them or how shortly before the service of the subpœna duces tecum upon him. Petitioner at all times objected to being interrogated because there was no case on trial. He insisted he was there to obey the subpœna duces, and it would be time enough, when the plaintiff and defendants had announced ready and the trial begun, to ask him for said tax bills, and had no right to subject him to said examination in this manner before announcing ready in the cause and proceeding to trial. After a lengthy parley between the opposing counsel, the court, and the witness, the court finally directed him to answer whether he had said tax bills in his possession when a notice to produce them had been served upon him prior to the service of the subpœna duces, and petitioner refused on the ground that no foundation had been laid for such an order, that section 738, Rev. St. 1899 (Ann. St. 1906, p. 728), provided how plaintiff should proceed, but in any event he had stated he did not have the tax bills when the subpœna duces was served on him, nor had he possession of them since that time. They were not in the possession of any agent of his or subject to his control, and such a proceeding would be futile and unavailing, and he therefore requested the court not to require him to answer further under the circumstances; but the court required him to do so, and upon his refusal the court ruled it would commit petitioner for contempt.

Thereupon the following commitment was entered of record and was issued by the court: "In the Circuit Court of Buchanan County, Missouri, Division No. 1. Mrs. William F. Keller, Plaintiff, v. Eva Roth et al., Defendants. No. 18,838. State of Missouri, Plaintiff, v. Samuel S. Shull, Defendant. Now at this time Samuel S. Shull being in contempt of court, having treated the court disrespectfully in refusing to answer proper and legal questions propounded to him in this case while a witness on the witness stand in the case of Keller, Plaintiff, v. Roth et al., Defendants, No. 18,838, after it had been repeatedly ruled by the court that he should answer them, and after being admonished by the court that in the judgment of the court the questions were legal and proper, and declining and refusing to answer them or any of them, saying to the court that he did not think the questions were proper and legal and that he would not answer them, and that he willfully and intentionally refused to answer such questions as were propounded to him after it had been decided by the court that the questions were legal and proper and should be answer-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ed by him as a witness. It is hereby ordered and adjudged that the said Samuel S. Shull is guilty of contempt of court in treating the court disrespectfully, and he is hereby committed to the jail of Buchanan county, and the sheriff of said county is hereby commanded to take charge of the body of the said Samuel S. Shull and commit him to jail and there safely keep him for a period of five days unless he shall in the meantime before the expiration of said five days come into court and make answers in court to the questions propounded to him. A true copy. Attest. Ambrose Patton, Clerk, By J. H. Farris, D. C. [Seal.]" By virtue of this commitment the sheriff took petitioner into his custody and committed him to jail, and thereupon petitioner sued out this writ of habeas corpus, and the sheriff has made his return, and both parties have submitted the case to this court upon briefs.

Two grounds are advanced by the petitioner for his discharge, to wit: First, the court had no jurisdiction to adjudge petitioner guilty of contempt for refusing to answer the questions asked, because the cause of Keller v. Roth was not on trial and no question for decision, and the questions were irrelevant to any issue in said cause. Second, because the said commitment is void upon its face for the reason that it fails to state the facts which constitute a contempt of court. Considering them in their reverse order, does this commitment comply with our statute, which provides: "Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstance of his offense shall be set forth in the order or warrant of commitment." Section 3576 (page 2023) provides: "It shall be the duty of the court or magistrate forthwith to remand the party, if it shall appear that he is detained in custody, * * * third, for any contempt, specially and plainly charged in the commitment, by some court, officer or body, having authority to commit for a contempt so charged." By section 1616 (page 1199) it is provided: "Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts, and no other: First, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory."

Contempt of court is "a specific criminal offense," and a fine imposed is a judgment, in a criminal case. The adjudication "is a conviction, and the commitment in consequence thereof is execution." Church on Habeas Corpus (2d Ed.) § 308; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391. It is in recognition of this principle that the General Assembly by the foregoing statutory provisions requires that, when a citizen is committed to prison for a contempt, the commitment itself shall contain "the particular circumstances of his offense," or, in the language of section 3576, the contempt itself must be plainly and specially charged in the commitment. When the commitment in this case is tested in the crucible of the law, it is found to fall far short of the requirements of the statute. Similar statutes are found in other states. If we look at the recitals of the order leading up to the adjudication of the contempt, there is no effort made to state the particular questions, the refusal to answer which constituted the contempt. We are simply told that the petitioner had treated the court disrespectfully in refusing to answer proper and legal questions propounded to him. It is not even found that said questions were material and pertinent; but, aside from this last consideration, the statute requires the facts themselves to be stated, not merely the court's conclusion that the questions were legal and proper, and, when we come to the adjudication of the contempt itself, it is not then put upon the ground of the refusal to answer questions; but the finding and the only finding is that petitioner had treated the court disrespectfully. In what manner or how the petitioner treated the court disrespectfully the court did not adjudge and state in its judgment.

If it should be said it can be inferred by the matter of inducement set out in the record, the answer of all the courts is that, as this is a criminal proceeding by which the citizen is deprived of his liberty, presumptions and intendments will not be indulged in order to sustain a conviction for contempt of court. Hawes v. State, 46 Neb. 149, 64 N. W. 699; Batchelder v. Moore, 42 Cal. 412. In Wilcox v. State, 46 Neb. 402, 64 N. W. 1072, the witness refused to be sworn and testify. He was prosecuted for contempt, and the court found him guilty. On review the Supreme Court, referring to the statute which provided that "the contumacious and unlawful refusal of any person to be sworn or affirmed as a witness and when sworn or affirmed, the refusal to answer any legal and proper interrogatory," held that a judgment of contempt, which found that the witness merely refused to be sworn, and did not find that he also refused to affirm, was totally defective, and that presumptions and intendments would not be indulged to sustain the conviction. In California the statute requires that the court or officer make a statement of the

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facts. In Ex parte Shortridge, 5 Cal. App. 371, 90 Pac. 478, the order committing an attorney for contempt recited that he "interrupted" the court proceedings without stating what he did, and it was held it did not comply with the statute requiring the court to recite the facts. The court quoted with approval the statement of the Supreme Court in Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580, to wit: "The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused." And hence the order of adjudication must state facts which show the prisoner guilty of contempt not mere conclusions, and such is the obvious meaning and purpose of our statutes. Sections 1619 and 3576, Rev. St. 1899 (Ann. St. 1906, pp. 1199, 2023); 9 Cyc. 48, 50. Without further discussion, we think the judgment of contempt and the commitment are fatally defective in not finding and adjudging the facts which would show petitioner had acted so disrespectfully towards the circuit court as to constitute a contempt within the statute. It is settled law in this state that one imprisoned for the violation of an order or judgment in excess of the jurisdiction of the court rendering it can be discharged by writ of habeas corpus. Having reached the conclusion that the commitment was insufficient in view of the stress of other work, we deem it unnecessary to discuss and determine the other points pressed in the brief of counsel.

The prisoner is discharged.

BURGESS and FOX, JJ., concur.

STATE v. NICHOLAS et al.

(Supreme Court of Missouri, Division No. 2. July 13, 1909.)

1. CRIMINAL LAW (§ 1210*)—EXTENT OF PUNISHMENT—BURGLARY AND LARCENY.

If a defendant, in committing a burglary, also commits a larceny, it is immaterial what was the value of the property, and, if convicted of both, the punishment for the larceny is in addition to that for the burglary by imprisonment in the penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3300; Dec. Dig. § 1210.*]

2. CRIMINAL LAW (§ 1210*)—EXTENT OF PUNISHMENT—BURGLARY AND LARCENY.

If a defendant tried for burglary and larceny is acquitted of the burglary and convicted of the larceny, the character of the larceny of which he may be convicted depends entirely on the value of the property stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3300; Dec. Dig. § 1210.*]

3. LARCENY (§ 68*)—QUESTIONS FOR JURY.

If there is any conflict whatever in the testimony as to the value of property stolen on which the character of the larceny of which accused may be convicted depends, the question should be submitted to the jury by appropriate instructions.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 180; Dec. Dig. § 68.*]

4. CRIMINAL LAW (§ 845*)—TRIAL—INSTRUCTIONS—SUFFICIENCY OF OBJECTION.

After the court instructed the jury, defendants, by their counsel, interposed the following objection: "Comes now the defendants and object to all of the instructions in this case by the court and except to the same, and especially except to the court in not instructing on all the law in the case and not instructing on the different degrees of larceny." *Held*, that this was sufficient to call the court's attention to its failure to embrace in the instructions, in the event the jury should find defendants not guilty of burglary, the subject of larceny from a dwelling house.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2026; Dec. Dig. § 845.*]

5. LARCENY (§ 79*)—INSTRUCTIONS—CHARACTER OR DEGREE OF OFFENSE.

Rev. St. 1899, §§ 1900, 1901 (Ann. St. 1906, pp. 1300, 1301), punishes the stealing of property from a dwelling house of the value of $30 or more, by imprisonment in the penitentiary for not less than two nor more than seven years, and, if its value is less than $30, by imprisonment in the penitentiary not less than two nor more than seven years, or in the county jail not exceeding three months, and hence, in a prosecution for burglary and larceny from a dwelling house, wherein there was testimony both ways as to the value of the property being more or less than $30, it was the duty of the court to designate in its instructions relating to larceny the punishment the jury might assess, taking into consideration their finding of the value of the property stolen, and where the only instruction given concerning larceny was that of grand larceny, and the only punishment authorized was imprisonment in the penitentiary not less than two years, it failed to instruct concerning larceny from a dwelling house and submit the issue of the value of the property, as well as the nature and character of the punishment authorized to be assessed, and such failure was manifestly erroneous.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 187, 188; Dec. Dig. § 79.*]

6. CRIMINAL LAW (§ 825*)—TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST THEREFOR.

It is not absolutely essential that an instruction should be requested; but, if it is sufficiently indicated to the court that it has failed to cover other subjects involved in the issues presented to the jury, that is all that is required.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

7. CRIMINAL LAW (§ 772*)—TRIAL—NECESSARY INSTRUCTIONS—ELEMENTS OF DEFENSE.

It is the duty of the court to require the jury to find all the essential elements of an offense embraced within the charge, and designate the nature and character of the punishment they are authorized to assess.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812–1814; Dec. Dig. § 772.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Press Nicholas and another were convicted of grand larceny, and they appeal. Reversed.

Ward & Collins, for appellants. Elliott W. Major, Atty. Gen., and Jno. M. Atkinson, Asst. Atty. Gen., for the State.

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BURGESS, J. The defendants were convicted of grand larceny, and their punishment assessed at imprisonment in the penitentiary for a term of two years, under an information charging them jointly with having burglarized the dwelling house of one Kate Jones, and stolen therefrom one trunk and certain household articles, all of the values of $50.

The testimony discloses that defendant Nicholas lived at Portageville, in New Madrid county, and that defendant Cates, for some time prior to the date of the alleged offense, had been residing in the state of Tennessee. On the 4th day of December, 1907, the defendants and Fred Nicholas, a younger brother of defendant Nicholas, came to Caruthersville, Pemiscot county, from Tennessee, where they had been at work picking cotton. Kate Jones, the prosecuting witness, was a prostitute, living in a small house or "shack" in a part of the town of Caruthersville called the "Eddy," or "Bad Lands." Near her lived Myrtle Patillo, and, in another house, Bert Holyer and Jennie Holyer, all bearing bad reputations for morality. The defendants, together with Fred Nicholas, visited at the house of the prosecuting witness, Kate Jones, and also at the house of Bert and Jennie Holyer, about 6 o'clock in the afternoon of the day of the alleged offense, and soon afterwards took their departure. Between 6 and 7 o'clock that evening, Kate Jones and the Holyer man and woman, after locking the doors of their respective houses, went to a restaurant located in the business section of Caruthersville and had supper, and they remained uptown for an hour or an hour and a half; the prosecuting witness doing some trading at the stores. On their return they came upon the defendants, who were carrying a trunk between them along the railroad track. The defendants, as soon as they saw Kate Jones and her companions, dropped the trunk, and defendant Nicholas ran away; but Cates, who appeared to be drunk, was caught and held by Bert Holyer. Kate Jones went for the city marshal, who soon arrived upon the scene and placed Cates under arrest, and soon afterwards succeeded in arresting defendant Nicholas, whom he found uptown. On the person of Cates were found a number of small articles, such as hair and tooth brushes, combs, soaps, towels, and pillow slips, and other like articles were found in the possession of defendant Nicholas; the same having been taken from the house of the prosecuting witness. The back door of the house occupied by Kate Jones was found broken, and the drawers of a bureau in one of the rooms open and rifled of their contents. In the trunk, which was the property of the prosecuting witness, were found a blue dress skirt, two underskirts, three or four nightgowns, a woman's hat, and other wearing apparel, all belonging to Kate Jones; also some shirt waists which belonged to and were taken from the home of the Holyer woman. The testimony showed that Myrtle Patillo, whose house was near that of the prosecuting witness, left her home on the afternoon of the day of the burglary, and upon her return that night she found the door of her house broken. It was also discovered that the lock on one of the doors of the Holyer house had been broken, and the house entered. To a question propounded to the prosecuting witness as to the value of the property taken from her house by the defendants, she answered, "I guess about $40, all of it." The defendants, testifying in their own behalf, admitted that they took the trunk and other articles from the house of the prosecuting witness, but stated: That they did so at her request and the request of the Holyer woman; that they were taking said articles to the railroad depot at the time they were intercepted; that Kate Jones wanted to leave town that night to escape prosecution for keeping a house of ill fame; and that Jennie Holyer wanted to leave her husband, Bert Holyer, because he beat her, and she was afraid of him. They denied having broken into the house of the prosecuting witness. This testimony on the part of the defendants was corroborated by Fred Nicholas, the young brother of Press Nicholas, and who was with the defendants at the time they were discovered carrying away the trunk. There was testimony by one of the defendants that the value of the trunk and property charged to have been stolen was of the sum of $10 or $15. This sufficiently indicates the testimony. At the close of the testimony, the court instructed the jury upon the offenses as charged in the information; that is, burglary and larceny. Appropriate instructions were given upon the question of recent possession and reasonable doubt. The cause being submitted to the jury upon the instructions and evidence, they returned their verdict finding the defendants guilty of grand larceny, assessing their punishment at imprisonment in the penitentiary for a term of two years, and they further returned a verdict finding the defendants not guilty of burglary. Timely motions for new trial and in arrest of judgment were filed and by the court taken up and overruled. Sentence and judgment were entered in accordance with the verdict returned, and from that judgment they prosecute this appeal.

This record presents for our consideration but one legal proposition; that is, did the trial court, upon the evidence as introduced in this cause, fail to fully instruct the jury upon the offense of larceny of which the defendants were convicted? The record discloses that there was testimony on the part of the state tending to show that the value of the property stolen was more than $30. There was also testimony on the part of the defendants tending to show that the property stolen was of the value of $10 or $15. The offense charged in the information, and upon which the defendants were tried,

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was that of burglary and larceny. It is well settled by the uniform decisions of this court, that, if a defendant in the commission of a burglary also commits a larceny, it is immaterial what was the value of the property, and, if convicted of both burglary and larceny, the punishment for the larceny is in addition to the punishment for the burglary by imprisonment in the penitentiary. On the other hand, it is equally well settled that, if a defendant upon trial for burglary and larceny is acquitted of the burglary and convicted of the larceny, the character of larceny of which he may be convicted depends entirely upon the value of the property stolen, and if there is any conflict whatever in the testimony as to the value of the property—that is to say, whether it was of the value of $30 or more, or less than $30—that question should be submitted to the jury by appropriate instructions.

The only instruction given by the court in this cause upon the question of larceny and the punishment to be assessed for that offense was instruction No. 2, which was as follows: "If you believe and find from the evidence that the defendants, Press Nicholas and Arnold Cates, broke and entered the dwelling house of said Kate Jones as defined and explained in the preceding instruction, and that breaking into and entering the same the defendants took and carried away therefrom the personal property mentioned in the information in this case or any part of it, and that they did so with the intent to fraudulently convert the same to their own use and to permanently deprive the owner thereof without the consent and without any honest claim of right thereto, and that said personal property was the property of the said Kate Jones, and was of any value whatever, you will find the defendants guilty of grand larceny also, and assess their punishment at imprisonment in the penitentiary, in addition to the punishment for the burglary for a term of not less than two nor more than five years." The record discloses that, after the court had instructed the jury, the defendants, by their counsel, interposed the following objection: "Comes now the defendants and object to all of the instructions in this case by the court and except to the same, and especially except to the court in not instructing on all the law in the case and not instructing on the different degrees of larceny." This was a sufficient calling of the attention of the trial court to its failure to embrace in the instructions, in the event the jury should find the defendants not guilty of burglary, the subject of larceny from a dwelling house. In this case the jury found the defendants not guilty of burglary. Hence it follows that, if guilty of larceny, they were guilty of larceny committed in a dwelling house. This being true, the punishment which the jury were authorized to assess depended upon the value of the property stolen.

Under the provisions of section 1900, Rev. St. 1899 (Ann. St. 1906, p. 1300), property stolen from a dwelling house, of the value of $30 or more, the offender is punishable by imprisonment in the penitentiary for a term of not less than two nor more than seven years On the other hand, if the property stolen is of a value less than $30, the offender may be punished by imprisonment in the penitentiary not less than two nor more than seven years, or by imprisonment in the county jail not exceeding three months. Section 1901, Rev. St. 1899 (Ann. St. 1906, p. 1301). The record disclosing testimony both ways, that the property stolen was of a value more than $30 and less than $30, and it appearing from the evidence that this was a larceny committed in a dwelling house, it was clearly the duty of the court to have covered this offense by its instructions, designating the punishment they were authorized to assess, taking into consideration their finding of the value of the property stolen. In State v. Brinkley, 146 Mo. 37, 47 S. W. 793, the defendant was charged with burglary and larceny, and this court, in treating of what should have been the proper directions to the jury, said: "If acquitted of burglary and found guilty of larceny, the larceny would be grand or petit, according to the value of the property stolen. State v. Barker, 64 Mo. 282. The jury were properly informed as to what their verdict should be if they found the defendant guilty of burglary, and if they found him guilty of both burglary and larceny; but they should have been further told that they could acquit of burglary and find defendant guilty of larceny; in which event the larceny would be petit larceny only under this indictment." While the trial court, by instruction No. 3, told the jury that under the information, evidence, and instructions in the cause they might find the defendants or either of them guilty of both offenses, or might acquit them of both offenses, or they might convict them of the burglary and acquit them of the larceny, or convict them of the larceny and acquit them of the burglary, according as they might find the facts to be from the evidence, yet it will be observed that the only instruction given in the cause concerning larceny was that of grand larceny, and the only punishment authorized by the directions of the court was that of imprisonment in the penitentiary not less than two years. Hence it follows that the court failed to instruct the jury concerning larceny from a dwelling house and submitting to them the issue of the value of the property as well as the nature and character of the punishment which the jury under the law was authorized to assess. This failure, in our opinion, was manifestly erroneous.

The learned Attorney General insists that the defendants are not in a position to complain, for the reason that no instructions were requested concerning the character or degree of larceny, and cites in support of that

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insistence State v. Groves, 194 Mo. 452, 92 S. W. 631, State v. Urspruch, 191 Mo. 43, 90 S. W. 451, and State v. Finley, 193 Mo. 211, 91 S. W. 942. It is sufficient to say upon that proposition that an examination of those cases will clearly demonstrate that it is not absolutely essential that an instruction should be requested; but, if it is sufficiently indicated to the court that it has failed to cover other subjects involved in the issues presented to the jury, that is all that is required. But, aside from all this, it was plainly the duty of the court, by its instructions, to require the jury to find all of the essential elements of an offense embraced within the charge, and designate to them the nature and character of the punishment they were authorized to assess.

With these views the judgment of the trial court should be reversed, and the cause remanded, and it is so ordered.

GANTT, P. J., and FOX, J., concur.

HAYDON et al. v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 1. May 31, 1909. Rehearing Denied July 1, 1909.)

1. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—DEED TO REAL ESTATE—CANCELLATION.
A decree dismissing a suit to cancel a contract and deed to certain real estate is appealable to the Supreme Court as involving title to land.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

2. TRIAL (§ 150*)—DEMURRER TO EVIDENCE—GROUNDS.
Where a bill to set aside a contract and a deed to real estate contained a general offer to do equity, its failure to offer to put defendant in statu quo ante was no ground for demurrer to the introduction of any evidence in support thereof.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 348; Dec. Dig. § 150.*]

3. EQUITY (§ 423*)—CONDITIONS OF RELIEF.
Where relief in equity is invoked, the court may require as a condition of its decree that complainant shall submit to equitable terms.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 992; Dec. Dig. § 423.*]

4. DEEDS (§ 144*)—CONSTRUCTION—COVENANTS.
The court will construe clauses in deeds as covenants rather than conditions if they can reasonably do so; the question whether a clause is a condition or a covenant being one of intent, to be gathered from the whole instrument by following out the object and spirit of the deed or contract.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 469; Dec. Dig. § 144.*]

5. CANCELLATION OF INSTRUMENTS (§ 3*)—COVENANT—NONPERFORMANCE.
Rescission of a deed is an equitable remedy which will be applied only in exceptional cases, where there is a failure of the entire consideration of the contract, or where there is such radical nonperformance of a mutual dependent covenant as amounts to abandonment of the contract, and releases the other party from any duty to further recognize its obligations.
[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 3.*]

6. CANCELLATION OF INSTRUMENTS (§ 15*)—ADEQUATE REMEDY AT LAW.
A bill for rescission of a deed cannot be maintained where the ground of relief is a mere breach of contract for which plaintiff can obtain adequate compensation in an action at law.
[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 14; Dec. Dig. § 15.*]

7. CANCELLATION OF INSTRUMENTS (§ 14*)—GROUND—BREACH BY DEFENDANT.
Complainant conveyed certain property on which defendant railroad company was wrongfully maintaining a switch, and by contract released their right to damages in consideration of payment of a specific sum, the contract containing further provision that defendant should not use the switch to stand cars on, but should keep it open and free from cars except when in actual use. *Held*, that the railroad's breach of such latter requirement was not a failure to perform the whole consideration, and that complainant could not maintain a suit to cancel the contract and deed therefor, but was limited to a suit for damages.
[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 15; Dec. Dig. § 14.*]

Appeal from Circuit Court, Greene County.

Action by Margaret C. Haydon and another against the St. Louis & San Francisco Railroad Company to cancel a contract and deed. A decree of dismissal was appealed to the St. Louis Court of Appeals, where it was affirmed (117 Mo. App. 76, 93 S. W. 833), and the case was certified to the Supreme Court on division by the Justices. Affirmed.

W. A. Gardner and Guy D. Kirby, for appellants. W. F. Evans and Woodruff & Mann, for respondent.

LAMM, P. J. In 1902 plaintiffs sued in the Greene circuit court in equity for the cancellation of a certain contract and a deed made pursuant. Such contract and deed evidenced a compromise arrangement between plaintiffs and defendant whereby damages in tort, past, present, and prospective, were released. Accordingly, in addition to rescission, plaintiffs sought to recover, not only the damages compromised, but damages for a continuance of the wrong (the maintenance of a switch track and switching and standing cars thereon) down to the date of suit, laid at $3,000 actual and $1,000 punitive. When plaintiffs offered their first witness, defendant objected to any evidence, putting its objection on the ground the petition did not state facts sufficient to constitute a cause of action in equity and making five specifications under such general head; the divisions being immaterial. That objection was sustained, plaintiffs excepting. Suffering a nonsuit, and failing to get it set aside, plaintiffs appealed to the St. Louis Court of Appeals. There Judge Goode did not sit. The two sitting judges disagreed—Bland, P. J., holding the ruling right, Nor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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toni, J., contra. Eventually such steps were taken that the Honorable B. Schnurmacher sat as special judge and wrote the opinion on a motion for rehearing, concurring with Bland, P. J. 117 Mo. App. 76, 93 S. W. 833. Thereupon, on the dissent of Nortoni, J., the cause was transferred to this court on the theory that the majority opinion was in conflict with Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007.

1. It seems our jurisdiction need not stand alone on the reason given by the St. Louis Court of Appeals. This because the bill had for one of its objects the cancellation of a deed to real estate. This being so, title to real estate is involved. Hence the cause belongs here on appeal. Balz v. Nelson, 171 Mo. 682, 72 S. W. 527; Thomas v. Scott, 214 Mo. 430, 113 S. W. 1093.

2. The only question being whether the bill states a cause of action, a resumé of its averments should precede the determination of the point. Attending to the bill, it alleges a contract between plaintiffs and defendant dated September 1, 1898—setting it forth in full. That contract narrates the pendency of two certain suits. In one the present plaintiffs sued the city of Springfield and John F. Myers & Sons. In the other they sued the present defendant and said Myers & Sons. In the first plaintiffs obtained judgment for $100 damages and costs, and defendants took steps to appeal to the St. Louis Court of Appeals. The second was pending in the Webster circuit court on change of venue. The contract further narrates that all said litigation had arisen because of the location by defendant railway company and Myers & Sons of a railway switch in front of plaintiffs' property in Springfield, Mo. (describing it), and the subject-matter was the damages accruing and injunctive relief. The contract continues as follows: "Now as a fair and complete settlement of all questions connected therewith, and full payment for all damages, past, present and prospective for the location and operation of said switch in front of plaintiffs' property, defendants, the railroad company and John F. Myers & Sons, agree to pay the plaintiffs the sum of six hundred dollars ($600.00) as satisfaction in full for all damages aforesaid, and also to pay all costs and expenses attending said litigations and save said plaintiffs harmless on account thereof, and free from all costs necessary to be incurred for the final dismissal and settlement of said suits, and on account of said $600.00 paid to plaintiffs, receipt of which is hereby acknowledged and payment of costs as aforesaid, said plaintiffs grant and convey to defendants full power and authority to use said switch freely in front of their said property for railroad and milling purposes, but with the distinct understanding, that neither the milling company nor railroad company shall be permitted to use said switch in front of plaintiffs' property to stand cars thereon, but that the switch in front of their said property shall be kept open and free from cars except when in actual use as aforesaid." After setting forth the compromise contract, plaintiffs' bill avers full performance of all its terms on their part, and that defendant railway company paid plaintiffs the compromise sum of $600 and the costs incurred in the two suits mentioned in the contract, and then charges as follows: "Your petitioners further allege that, by the agreement above mentioned, the plaintiffs granted to the defendant railroad company the power and authority to use said switch in front of said property upon the express condition (without which said agreement would not have been made) that it would not use said switch to stand or store cars thereon, and that said switch was to be kept free and open from cars. But the plaintiffs allege that the defendant railroad company, wholly disregarding its obligations in this behalf, continued to stand and store its cars on said track in front of plaintiffs' said property. Your petitioners further allege that, in pursuance of said agreement and as a part thereof, they did about the time said above-mentioned agreement was made, to wit, on the 13th day of September, 1899, execute and deliver to defendant a quitclaim deed, granting them the right to maintain and use said switch track in front of said premises, but not granting the right to store or stand cars thereon in front of said premises. But the plaintiffs say that no other consideration was given to or received by the plaintiffs for said deed than that given for the above-mentioned agreement, and the plaintiffs say that no other rights were intended to be granted by said deed than those expressed by said above-mentioned contract, but that the rights and privileges granted by said deed were upon the same conditions as stated by said agreement. That is to say, that said company was not to stand its cars in front of said property. Your petitioners further state, to wit, about two years prior to the making of said agreement said railroad company had wrongfully and unlawfully built a switch, and had been unlawfully standing its cars thereon, in front of said premises, and had thereby caused a depreciation of the rental of said property, and your petitioners had been damaged by the wrongful acts of defendant at the time of the making of the said agreement, to wit, in the sum of fifteen hundred dollars ($1,500), and that the payment by said railroad company of the said sum of $600 was on account of the damages your petitioners had suffered by the wrongful acts of said company prior to the making of said agreement, and was made with the distinct understanding that said cars of said defendant were not to be stood in front of said premises. Your petitioners therefore ask that the said sum of $600 be regarded as part payment of so much as was really due by said railroad company to the plaintiffs at the time of the making of the said agreement, as your

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petitioners will fully show upon the trial of the issues herein was much more than said sum of six hundred dollars ($600), and petitioners offer to accept and do on their part whatever equity requires in the premises. Your petitioners further state that they have been damaged by the wrongful acts of said defendant company in building the switch as aforesaid, and keeping its cars standing in front of said premises from the time their tracks were laid as aforesaid to the 1st day of November, A. D. 1902, the sum of $3,000 depreciation in the rental value thereof. Your petitioners further state that the placing of said cars in front of the premises aforesaid without the permission of the plaintiffs was a wanton and willful disregard of the duty of the defendants, to the damage of the plaintiffs in the sum of one thousand dollars ($1,000), for which they ask judgment. Your petitioners further say that they have been damaged by the wrongful acts of the defendant in the total sum of four thousand dollars ($4,000). Your petitioners therefore pray this honorable court that it cancel and annul said agreement and deed, and set the same aside and hold them for naught, that the said defendant may be required to pay the damages which have accrued to the plaintiff because of the depreciation in the rental value of said premises, because of the building of said switch, and standing cars on said switch, in front of said premises from the date of the laying of said tracks to the 1st day of November, 1902, as aforesaid, less $600 paid as aforesaid, and such punitive damages as this court may see fit to inflict upon the defendant because of the premises and such other and further relief as may be deemed just and equitable." The answer, barring an admission of defendant's incorporation, is a general denial.

(a) It is argued the bill is obnoxious to the cardinal equity maxim that he who seeks equity must do equity; that it makes no offer to put defendant in statu quo ante, in that no tender or offer is made to return the $600 and costs paid under the compromise, but that the only offer is to credit that sum upon an unliquidated amount of damages, guessed off at $1,500. Changes are rung in defendant's brief on the foregoing contentions, but the pith of it all is as put by us. Can the demurrer to the introduction of evidence stand on such fact? If the case were at law, the contention would be sound beyond question; but it is in equity, and the better doctrine seems to be that under a bill (good otherwise) containing a general offer to do equity the chancellor, as the price of his decree, may let conscience have full play in doing her perfect work in disentangling the relations of the parties, and in placing them where they were before as nigh as may be. Such is the doctrine of Whelan v. Reilley, 61 Mo., loc. cit. 569 et seq., and cases cited. That case was followed in Clark v. Drake, 63 Mo., loc. cit. 360. In Kline v. Vogel, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408, the doctrine of the Whelan Case was somewhat shaken. But in a later case (Paquin v. Milliken, 103 Mo. 79, 63 S. W. 417, 1092) the question was again up, and our decisions were marshaled, distinguished, and applied. The reasoning of the Whelan Case was greatly corroborated and fortified by the exhaustive consideration given in the Paquin Case, and the doctrine needs no new exposition. In leaving the matter we may refer to Shuee v. Shuee, 100 Ind., loc. cit. 481. In that case it was said: "It is urged that the court below should have sustained a demurrer to the bill, because it failed to show an offer to rescind on the part of the plaintiff before filing the bill, and it is argued that because it appears from the facts as found by the court that no offer to rescind was made, nor to return the money paid as the consideration of the settlement, before the suit was commenced, the court could make no decree in plaintiff's favor setting aside the settlement. It is always within the power of a court of equity, where its decree is invoked, to require, as 'the price of its decree,' that the person invoking it shall submit to equitable terms, and accordingly a chancellor always inquires concerning the equities which the plaintiff must do, in order that he may be entitled to the relief which he seeks. Whenever any benefit has been received under a contract which the court is asked to set aside the court will fasten a trust on the conscience of the party in respect of such receipts, and direct an account and repayment." Such, too, was the conclusion reached by all the judges in Haydon v. Railroad, 117 Mo. App., supra, loc. cit. 90–94, inclusive, 93 S. W. 833. The promises considered, we rule the point against defendant. In doing so we put aside certain contentions. For instance, it is pointed out (as we grasp it) that the plan of the bill is to offset the hard cash paid by defendant by way of compromise against a running account of unliquidated damages. It is argued that this cannot be done, that the compromise amount is a fixed sum settled by contract, and that the other is in nubibus (mere moonshine). But it must be apparent that question, if we state it accurately, is afield at this stage of the case. This because the chancellor could mold his decree so as to adjust all its ramifications to the very nicest requirements of full equity. If on the equity of the whole case on the hearing defendant be entitled to repayment of the compromise sum and costs as the price of rescission, the decree could go that way. Clearly there is nothing in plaintiffs' mere offer putting the conscience of the chancellor in bonds in that behalf. Again, it is argued the bill is bad for that it commingles a cause of action in equity with one at law—that plaintiff should have sued in two counts, one in equity for a rescission and one at law triable to a jury for the unliquidated damages for the tort. But the same disposition should be

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made of this as of the other contention. The question in hand might (whether well or ill) arise on special demurrer, but cannot arise on a mere objection to the introduction of any testimony based on the ground that the bill fails to state a cause of action in equity. No one would contend that the matter of rescission was not in equity. That being clear, we need look no further. Therefore a ruling on this phase of the case is reserved.

(b) With the foregoing preliminary questions at rest, we confront the main proposition, viz.: Under the allegations of the bill, is there a cause of action stated for rescission of the compromise contract and deed? In determining the question it is well at the outset to remind ourselves of some general propositions indicating the trend of the judicial mind in this behalf. The question of rescinding deeds and contracts for the nonperformance of conditions precedent or subsequent has been often before this court. The question always hinges on the dependence or independence of the covenant in the deed or contract. Thus in Freeland v. Mitchell, 8 Mo. 487, Thomas sold to Freeland some land, and bound himself in the penal sum of $600 to give Freeland possession. Presently (Thomas dying) Mitchell, his administrator, brought an action of debt for the balance of purchase price. The declaration did not aver any delivery of possession, and defendant demurred on that ground. The question was whether the delivery of possession of the land was a condition precedent to the recovery of the purchase money. The conclusion reached by the court was that, if a penal sum had not been fixed by the contract for failure to give possession, then the covenant in the contract would have been considered dependent; i. e., no delivery of possession, then no payment of the purchase price. But, as there was a penal sum provided for in the contract for such failure, the covenants were not interdependent, but were independent. The general principle guiding to that determination was said to be this: "The only principle to be extracted from the numerous cases in relation to the dependence or independence of covenants is that they are to be construed according to the intention and meaning of the parties and the good sense of the case." Studdard v. Wells, 120 Mo. 25, 25 S. W. 201, is an illuminating case on the general law. There the widow and children of Theodore Studdard brought ejectment against the executor of the last will of Chas. F. Studdard. Chas. F. was the father of Theodore, and, with Matilda, his wife, conveyed the locus to Theodore by a deed reciting a consideration of $3,000 paid, and further reciting that the land was a gift, that it was to remain in possession of grantors during their natural lifetime, and was to become the property of Theodore on the death of grantors. A provision was inserted that Theodore was to pay the taxes, followed by this: "And has to support the said Charles F. Studdard and Matilda Studdard during their natural lifetime. * * *" At the date of the deed all parties resided on the land. Matilda died, then Theodore. Up to his death he had supported his father and also his mother while she lived. Shortly after Theodore's death, a squabble arose between his widow and Chas. F. and the widow left the premises, and thereafter furnished no support to him, nor did Theodore's estate. The merits of the quarrel were not deemed controlling by this court. Two or three years subsequently Chas. F. died testate, and by his will made disposition of the land different from that in his former deed. Thereupon the widow and minor children of Theodore sued for possession. It was ruled that the support of Chas. F. was not expressly made a condition precedent in the deed. The remaining question was whether the conveyance was made upon a condition subsequent. In ruling on that question, it was pointed out as of significance that in most of the cases in this court arising out of conditions subsequent the conditions were clearly expressed. Messersmith v. Messersmith, 22 Mo. 369, Moore v. Wingate, 53 Mo. 398, Clarke v. Brookfield, 81 Mo. 513, 51 Am. Rep. 243, Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23, and O'Brien v. Wagner, 94 Mo. 94, 7 S. W. 19, 4 Am. St. Rep. 362, are cited as cases so marked and distinguished. Black, P. J., writing for the court, commented on those cases as follows: "In these cases words of condition were used or there were clauses of re-entry or reverter. It is a familiar rule often asserted in the books that conditions subsequent are not favored in the law, because they have the effect in case of breach to defeat vested estates; and, when relied upon to work a forfeiture, they must be created in express terms or by clear implication. 2 Wash. on Real Prop. (5th Ed.) 7; Morrill v. Railroad, 96 Mo. 174, 9 S. W. 657. And courts will construe clauses in deeds as covenants rather than conditions, if they can reasonably do so. 2 Wash. on Real Prop. (5th Ed.) 4. It is also true that the question whether a clause in a deed is a condition or a covenant is one of intent to be gathered from the whole instrument by following out the object and spirit of the deed or contract. St. Louis v. Wiggins Ferry Company, 88 Mo. 618. Now, the substance of this deed is that the grantors convey the land to their son, reserving to themselves a life estate, with the further statement that he is to pay the taxes and support the grantors during their lives, and at their death he is to have possession. No apt or appropriate words to create a condition are used; nor is there any clause of forfeiture or of reentry or of reverter. We are unable to find anything in this deed, whether we treat it as a gift or as made for a money consideration, which will justify us in saying it is a deed upon condition subsequent. To say the stipulation in the deed to pay the taxes and support the grantors is a condition subsequent, the nonperformance of which will de-

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feat the estate granted, is to make a stipulation for the parties which they did not see fit to make for themselves. This we cannot do." In addition to the general principles outlined above, we may add that it is familiar doctrine that forfeitures (putting it with mildness) are not favored in equity, and that (while not controlling) it is not entirely without significance that there is no express provision making the subsequent standing of cars on the switch a condition subsequent, or a mutual dependent covenant, nor is there shown to be any clause of reverter in the deed, and we are left to an interpretation of the contract by the good sense of the thing in the light of its subject-matter and language used. Further, the bill does not proceed on the theory of fraud, accident, surprise, mistake, or duress; and it must be admitted that as a general rule rescission is an equitable remedy restricted to cases of that character.

However, there is another doctrine, viz.: Rescission is an equitable remedy applied in exceptional cases where there is failure of the entire consideration of the contract or where there is such radical nonperformance of a mutual dependent covenant going to the very root and life of the contract as amounts to "abandonment of the contract and releases the other party from any duty to further recognize its obligations." 7 Am. & Eng. Ency. (2d Ed.) p. 121. A sensible limitation on the last doctrine is stated in the work last cited (volume 24, p. 619) to be: "A bill for rescission cannot ordinarily be maintained where the ground of relief is merely a breach of contract for which the complainant can obtain adequate compensation in an action at law. Courts of equity sometimes, however, exercise jurisdiction to rescind contracts upon the ground of a breach or nonperformance by the defendant in cases where the plaintiff's remedy at law would be inadequate." Plaintiffs must stand or fall on the doctrine last announced, and we have come to the conclusion that the bill, measured by that doctrine and the general principles already outlined, does not state a good cause of action in equity. This because the bill does not measure up to the requirements of the law nor state a case on all fours in principle with cases relied upon by learned counsel to sustain it. Those cases are discussed in the separate opinion of Judges Bland, Nortoni, and Schnurmacher in Haydon v. Railroad, 117 Mo. App. 76, 93 S. W. 833, supra. Those opinions should be read in connection with this; for it would serve no useful purpose to fully restate the reasoning employed by the majority of the Court of Appeals.

Reliance is put by learned counsel of plaintiffs on Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007. That case was a suit for rent arising on a written lease. The parties to that lease had the forethought to insert a fire clause. That clause provided that the landlord rebuild or repair in case of fire as soon as possible, and in that immediate connection it was further provided that, in consideration of the delivery of the new building to the tenants for occupancy, the tenants agreed to pay the heavy rent reserved for the period of the erection of said new building. A fire occurred. The landlord was guilty of inexcusable delay in rebuilding. The tenants were compelled to make permanent arrangement for another building to conduct the mercantile business. They paid two months' rent after the fire while the demised premises were unfit for business purposes, and presently were sued for the rent of subsequent months. In defense they pleaded the provisions of the lease referred to, asked its rescission, and to recover the two months' rent paid after the fire. This court had no difficulty in reasoning out the conclusion, obviously sound, that in a case of that sort it would be against conscience to permit the landlord to violate the provisions of the lease requiring him to rebuild and at one and the same time exact from the tenant rent for premises rendered unfit for use through the landlord's tortious delay. It was well held that the covenant to pay rent during the time the premises were devastated by fire was dependent upon the covenant to rebuild. This, in effect, was a holding that there was an entire abandonment and repudiation of that portion of the lease yet to be performed. A total failure of consideration for the executory part of the lease and rescission was decreed with recovery of the rent paid after the fire in reliance on performance. Not only is the case dissimilar to the case at bar in vital features, but observe there was no attempt to have the lease ripped up from its inception and to recover for all rents paid. The executed part of the lease stood and the rescission related back to the fire. Here there is an attempt to cancel the compromise agreement in toto, whether executed or executory, and to put the parties where they were at the start with plaintiffs' right to recover all past and settled damages, as well as future, restored to them. In the absence of fraud charged and proved, the rescission of an executed contract is not equitable doctrine, but a rescission might go as to part unperformed where there is a breach amounting to abandonment. If the doctrine of the Nathan Case be applied closely to this, the rescission would only relate back to the time when the defendant violated its covenant, if covenant it be; and, in that view of the matter, plaintiffs do not contend there was any necessity to go into equity to rescind the contract as to unreleased damages subsequent to the compromise for allowing cars to stand on the switch. This for the plain reason that they can stand on that provision at law and recover their damages. Other cases are relied on by learned counsel. For example, City of Grand Haven v. Grand Haven Waterworks, 99 Mich. 106, 75 N. W. 1075; Farmers' Loan & Trust Co. v. Galesburg, 133 U. S.

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156, 10 Sup. Ct. 316, 33 L. Ed. 573. Those cases are considered and properly distinguished in the opinions of Judges Bland and Schnurmacher, supra (q. v.). There contracts were entered into to furnish water suitable in quality and amount, and proper fire pressure to extinguish fires in Galesburg and Grand Haven. It was ruled there was not only an entire failure of consideration, but more, to wit, an inability to perform, and rescission was decreed. A close glass of those cases shows that the drastic result reached was predicated on vital facts absent from the case at bar. In a soundly reasoned case —Union Pac. R. R. Co. v. Travelers' Ins. Co., 49 U. S. App. 752, 83 Fed. 676, 28 C. C. A. 1 —the test formulated by Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273, is approved, viz.: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, he shall not plead it as a condition precedent." Judge Sanborn speaking for the court commented as follows: "The breach of a covenant of that class, a dependent covenant which goes to the whole consideration of the contract, gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach [citing authorities]. But a breach of the covenant of the second class, a covenant which does not go to the whole consideration of the contract, but is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or put an end to the agreement, but the injured party is still bound to perform his part of the contract, and the only damages he can recover consist in the difference between the amount which he actually received or lost and the amount which he would have received or lost if the broken covenant had been kept [citing numerous cases]." Now, what was the "whole consideration" of the contract and deed to be rescinded here? Damages to accrue in the future from blocking access to or egress from plaintiffs' real property by allowing cars to unnecessarily stand on the switches? Not at all. That character of damages flowing from that character of wrong, then nonexisting because future, was merely incidental. To get at the real consideration, we must look to the character of the controversy. Plaintiffs were contending that the switch was unlawfully laid, and that any movement of cars whatever on that unlawful switch was actionable, and that the unlawful location of the switch was actionable. They were willing to accept money to settle that controversy. They did accept money and by that act, in the absence of fraud, settled it forever, and by deed conveyed to defendant the right to locate and use the switch for switching purposes, on the theory, presumably, that they held the fee in the land appropriated by the switch (probably a street). Such was the controversy and main consideration in its settlement. The good sense of the thing is that the location and use of this switch, barring the standing of cars thereon unnecessarily, were, as said, set at rest for all time by the compromise, and that all past and prospective damages incident to the location of the switch and the proper use of it were estimated, paid, and wiped off the slate. The contract means that future damages for the improper use of the switch were not settled, and that defendant agreed not to make such specified improper use of it.

Moreover, do not courts favor amicable settlements in the absence of fraud, as here? Does equity proceed in rescission in a revengeful mood? Why rip up this settlement when the failure to perform does not go to the whole consideration, and when there is no obstacle in the road of recovery of full damages by a suit at law for nonperformance in one particular? If the words of the contract following the phrase, "but with the distinct understanding," be construed as a covenant that defendant will keep its switch cars moving and not unnecessarily standing in front of plaintiffs' property, then what legal reason can be given why full relief by way of damages for its breach may not be recovered? We know of none. Or, if plaintiffs prefer to ignore the contract and sue for the wrong done them in obstructing access to and egress from their property since the compromise agreement, could defendant interpose the contract as a defense? Would not its very profert in court show that such "prospective" damages were not compromised? It has been loosely said that, if the contract would not have been entered into but for the covenant broken, then there is such failure of consideration as will entitle the innocent party to rescission. We find but one case going to that extent, an old one in Louisiana—Moreau v. Chauvin, 8 Rob. 157. That case seems to have ridden off on a construction of the Louisiana Code—a code based on the civil law. As a general proposition we do not agree to the rule announced. Many provisions in many contracts do not go to the whole consideration or touch the life and essence of the contract, and yet, peradventure, the contract would not have been made if the provision had not been inserted. The approved doctrine is contrary to the holding in the Moreau Case, and the rule announced there is too narrow. Therefore, if plaintiffs had proved by oral testimony that they would not have entered into the contract of compromise and executed the deed, except the provision we have been considering had been put into it, yet it is for the court to construe the contract, and, if such evidence were admissible, we must still hold the contract and deed were not subject to be rescinded on the case made by the bill.

Let the judgment of the circuit court be affirmed. All concur.

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GRIMES v. MILLER et al.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. ACTION (§ 46*)—CAUSES OF ACTION—JOINDER—EJECTMENT AND PARTITION.

Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), providing that plaintiff may unite in the same petition several causes of action whether denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of action, authorizes the joinder of a cause of action for ejectment with a count in partition, where they relate to the same land.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 461; Dec. Dig. § 46.*]

2. JUDGMENT (§ 707*)—CONCLUSIVENESS—PERSONS NOT PARTIES.

An absent heir who was presumed to be dead, and whose interest was not considered in a suit for partition of property to which he was not made a party, was not bound by the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

3. DEATH (§ 2*)—PRESUMPTION—ABSENCE.

Where an absent heir had no knowledge that his mother was dead or that she left an estate, or of a former partition proceeding between the other heirs, disregarding his interest, and when he left the state he had no property liable to be affected by his absence, and his mother did not die until 12 years after his removal therefrom, the fact that he had been absent for more than 7 years, and in the meantime the other heirs had partitioned and sold the property to which he was entitled to an undivided interest to a bona fide purchaser, did not raise a conclusive presumption of his death, so as to preclude his recovering his interest on his return.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1–3; Dec. Dig. § 2.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Suit by Peter O. Grimes against Henry Miller and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Mytton & Parkinson and Charles C. Crow, for appellants. Chas. F. Strop, Henry M. Ramey, Jr., and Eugene Silverman, for respondent.

GANTT, P. J. This is an action in two counts; the first being ejectment for possession of an undivided one-fourth of the northeast quarter of the northeast quarter of section 26, township 56, range 35, all in Buchanan county, Mo. The ouster was laid on the 19th of January, 1900. The second count was one for partition of the same land. It was admitted that the plaintiff was the son of Mahala Grimes, and that the said Mahala Grimes at the time of her death owned said real estate, and that, if plaintiff had any interest, it was a one-fourth interest; the only evidence offered by plaintiff being as to the value of the monthly rents and profits. It appeared from the evidence offered by the defendant that in 1896 a partition of the premises was had among all the heirs of Mahala Grimes, deceased, except the plaintiff herein, and he was not a party to said partition suit. In that action, the premises were divided in kind, and the defendant became the owner of the interest of the distributees and heirs by deeds from them about a year after that partition was made. Upon this state of facts, the circuit court rendered judgment for possession of the one-fourth interest in said property to which he was entitled as the son of Mahala Grimes. The cause then proceeded on the second count of the petition, and the same evidence and the same admissions were offered, together with the judgment in ejectment on the first count. And thereupon the court rendered a decree of partition adjudging plaintiff was entitled to one undivided one-fourth of the said premises and the defendant three-fourths. It was agreed, and the court so adjudged, that the lands could not be divided in kind without injury to the rights of the parties, and accordingly it was ordered sold, and the proceeds divided according to the rights of the parties as adjudged. From that judgment the defendants have appealed.

1. Section 593, Rev. St. 1899 (Ann. St. 1906, p. 619), provides that "the plaintiff may unite in the same petition several causes of action whether they be such as have heretofore been denominated legal or equitable or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action." The subject-matter of this action is the land and the parties are the same and we can see no reason why the count in ejectment was not properly joined with the count in partition. Morrison v. Herrington, 120 Mo. 665, 25 S. W. 568; Lane v. Dowd, 172 Mo. 174, 72 S. W. 632; Scarborough v. Smith, 18 Kan. 399. Indeed, it seems too plain for discussion that, where an heir is denied recognition in the division of his ancestor's land, he has no other recourse except to bring his action in ejectment to compel a recognition of his right, and, if he succeeds therein, there is no reason why he should not proceed at once with his right to partition.

2. The real reason alleged by the defendants for the reversal of this judgment is that the plaintiff's family and the defendants who purchased from them believed that the plaintiff was dead at the time that the defendant acquired her interest in the lands in controversy. The evidence tended to show: That the plaintiff left Buchanan county 21 years before December, 1905, and had not been heard from until 1900 or 1901. That in 1896 his mother, Mahala Grimes, died the owner of the fee in this land, and in the same year a granddaughter of Mahala Grimes instituted a partition suit in the circuit court of Buchanan county against

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Cicero Smith and Homer Smith, alleging in her petition that she and the said Cicero and Homer Smith were the sole and only children and grandchildren of Mahala Grimes, deceased, and the said defendants Homer and Cicero Smith in their answers in said partition suit admitted the said allegations to be true, and thereupon the court found that the said Effie Thomas and the said Cicero and Homer Smith were the sole heirs at law of the said Mahala Grimes, deceased, and judgment in partition was rendered and said land divided among the said Effie Thomas and the said Cicero and Homer Smith, and thereafter the said Cicero and Homer Smith and Effie Thomas conveyed their several interests in said lands to the defendant Henry Miller, and the said Henry Miller then conveyed the same to Elgie Miller. Defendants invoke the presumption of death arising from the absence of the plaintiff from Buchanan county, and insist that the plaintiff, having created this legal presumption by his absence, is now precluded from claiming against an innocent person who purchased said land in good faith after a decree in partition between the remaining heirs at law. As to the partition suit between Effie Thomas and Cicero and Homer Smith, the plaintiff herein was no party thereto, and, of course, is not bound by the decree in that case. This is too plain for discussion. It is not pretended that there is any evidence of any inducement by the plaintiff to the defendants in this case to purchase the land, or that he did any act which would estop him from claiming his interest in this land, unless it is his absence from the state for more than seven years. In Scott v. McNeal, 154 U. S., loc. cit. 49, 14 Sup. Ct. 1114, 38 L. Ed. 896, the Supreme Court of the United States said: "The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as if not overcome by other proof is such prima facie evidence of his death that the probate court may assume him to be dead and appoint an administrator of his estate, and that such an administrator may sue upon a debt due to him. But proof under proper pleadings even in a collateral suit that he was living at the time of the appointment of the administrator controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority, and he is not bound either by the order appointing the administrator or by the judgment in any suit brought by the administrator against a third person because he was not a party to and had no notice of either." It was not shown that the plaintiff knew that his mother was dead or that she left an estate, or that he had any knowledge whatever of the former partition proceedings between the other heirs. When plaintiff left this state, he had no property here that was liable to be affected by his absence, and his mother did not die until 12 years after his removal from the state, and there is absolutely no evidence, as already said, that he had notice of his mother's death, or that she left an estate to which he was an heir. In the case of Scott v. McNeal, above referred to, the Supreme Court of the United States referred to the case of Lavin v. Emigrant Industrial Savings Bank (C. C.) 1 Fed. 641, 18 Blatchf. 1, in which it was held "that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration valid against him would deprive him of his property without due process of law within the meaning of the fourteenth amendment of the Constitution of the United States. This court concurs in the proposition there announced 'that it is not competent for a state by a law declaring a judicial determination that a man is dead made in his absence and without any notice to or process issued against him conclusive for the purpose of divesting him of his property and vesting it in an administrator for the benefit of his creditors and next of kin either absolutely or in favor of those who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever as against him, although it is done by process of law against other people, his next of kin to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy which has the immediate effect of divesting him of his property is a direct violation of this constitutional guaranty.'" So in this partition suit between plaintiff's brothers and niece he was not made a party to the suit, and, of course, his rights were unaffected thereby. We have given due consideration to the argument of defendants' counsel that, if this case is affirmed, they will have paid their money for a portion of this land and will lose it, but this is no answer to the claim of the plaintiff that this is his property, and that he has done no act and been guilty of no representation or inducement to mislead the defendants. He is not responsible for the fact that his brothers and niece made representations in their suit for partition to the effect that they were the only heirs at law of Mahala Grimes. To deny him his recovery in this case would be to deprive him of his property without due process of law, and leave him absolutely without remedy for the loss of his estate. On the other hand, the defendants had it within their power to require their grantors to give them warranty deeds and a perfect abstract of

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title before investing their money in this land.

The equity of the case coincides in our opinion with the plain law of the case, and that is that the circuit court properly decreed this one-fourth of this land to belong to the plaintiff; and its judgment is therefore affirmed.

BURGESS and FOX, JJ., concur.

GIVENS et al. v. OTT.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. DEEDS (§ 211*)—CAPACITY TO EXECUTE—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to support a finding that grantor possessed the requisite knowledge and intent to convey when he executed a deed in articulo mortis.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638–640; Dec. Dig. § 211.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—EQUITY CASE.

In an equity case the Supreme Court will proceed de novo, deferring somewhat to the trial court's findings; but, if its findings and judgment are not sustained by the evidence and law, then the Supreme Court will make its own findings and enter judgment as equity may require.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

3. DEEDS (§ 58*)—DELIVERY—TO THIRD PERSON.

Grantor employed a lawyer to draft a deed, which he did, and sent it by a justice of the peace to grantor for his acknowledgment. Before the justice signed the certificate of acknowledgment, and before he delivered the deed to the lawyer, grantor died. *Held*, that there was no delivery of the deed during the lifetime of grantor.

[Ed. Note.—For other cases, see Deeds, Cent Dig. § 132; Dec. Dig. § 58.*]

4. DEEDS (§ 56*)—VALIDITY—DELIVERY—EFFECT OF DEATH.

The death of grantor removes all authority to thereafter deliver the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 123; Dec. Dig. § 56.*]

5. WILLS (§ 88*)—CONVEYANCES DISTINGUISHED FROM OTHER TRANSACTIONS—TESTAMENTARY CHARACTER.

An instrument to be good as a deed must convey a present interest, and, where it is to take effect and become operative alone upon the death of grantor, it is testamentary in character and insufficient as a deed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208, 209; Dec. Dig. § 88.*]

6. WILLS (§ 858*)—CONSTRUCTION—RESIDUARY CLAUSE—PRESUMPTION AGAINST INTESTACY.

Under a will giving to testator's widow one half of the proceeds to a sale of his land and the other half to a university, and giving all his other property to his widow, the university having declined to accept its one-half of the proceeds, the same passed to the widow by virtue of the residuary clause and cannot be held not to be thereby covered, for it will be presumed from the execution of a will that testator intended to dispose of his entire estate and not to die intestate as to any portion of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2180; Dec. Dig. § 858.*]

7. WILLS (§ 725*)—OPTION OF BENEFICIARY TO TAKE LAND INSTEAD OF PROCEEDS THEREOF.

The owner of both the legal and equitable title to funds that would arise from a sale of real estate under the direction of a will may, if he so elect, prior to the actual sale, under the doctrine of equitable conversion and reconversion, take the real estate itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1732; Dec. Dig. § 725.*]

8. ADVERSE POSSESSION (§ 62*)—ACCRUAL OF CAUSE OF ACTION—OCCUPATION OF PREMISES BY VIRTUE OF WIDOW'S QUARANTINE.

The right of a widow to the possession and occupancy of the messuages and plantation is incidental to and dependent upon her possession and occupancy of the mansion house of her deceased husband, and without the latter she has no right to the possession and occupancy of the former by virtue of her quarantine, and, if she occupies the plantation without having the mansion house, then such possession is not incidental to her quarantine, and, having no quarantine, there is nothing to prevent the statute of limitations from running when the widow takes possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 329, 330; Dec. Dig. § 62.*]

Graves, J., dissenting in part.

Appeal from Circuit Court, Jackson County; C. O. Tichenor, Judge.

Action by Martha E. Givens and others against Christian Ott, Jr. Judgment for defendant, and plaintiffs appeal. Affirmed.

The plaintiffs are the collateral heirs of James Chambers, deceased, and they brought this suit under section 650, Rev. St. 1899 (page 667, Ann. St. 1906), to have the court ascertain and determine the title to the real estate described in the petition. The petition contains two counts; one based upon said section, and the other is ejectment in the usual form. The answer is in the nature of a cross-bill, based upon the same section of the statute, and a plea of the statutes of limitations. The reply was a general denial. A trial was had before the court without the intervention of a jury, which resulted in a judgment in favor of defendant, from which plaintiffs appealed.

The substantial facts of the case are undisputed, and are stated as follows in appellants' brief, with slight interpolations in one or two places:

On the trial it was admitted that both parties claim through James Chambers, deceased, and that he was in possession of the land at the time of his death, and that he owned the land. Plaintiffs introduced evidence tending to prove that they were and are the heirs at law of the said James Chambers. It was admitted that the defendant was in possession at the time the suit was brought and tried. The land in controversy is the W. ½ of the S. W. ¼ of section 22, and the E. ½ of

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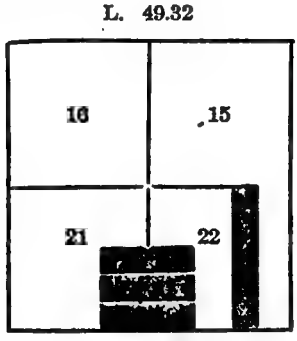
the S. E. ¼ of section 21, all in township 49 of range 32 in Jackson county, Mo. "James Chambers probably entered this land. At any rate he owned it as far back as 1858. In that year at a partition sale of the land of his wife's father he bought the W. ½ of the E. ½ of section 22, which is separated from this tract 1,320 feet by an intervening 80 acres lying north and south, and the S. W. S. E. of section 15, all in the same township and range, making 200 acres. This tract is referred to in the testimony as the 200-acre tract, and the land in controversy is referred to as the 160-acre tract. They are both shown, and their relation to each other, by the accompanying plat:



'He and his family lived on the 200-acre tract, and used both tracts together as one farm; the house being towards the south of the 200-acre tract." This they did up to the time of his death and the death of his widow, who survived him many years. His family consisted of a wife and two children, one a boy who was killed in the battle of Independence on August 11, 1862, the other a daughter, named Evaline, who married a man named Smith, and is referred to in the evidence as Evaline Smith On April 29, 1865, James Chambers and his wife made a deed of gift to Evaline Smith of the 200-acre tract, but continued to live on it as before.

"On July 27, 1868, James Chambers made a will, to the following purport·

"'In the name of God, Amen: I, James Chambers, of the county of Jackson, in the state of Missouri, although afflicted in body, being of sound and disposing mind and memory, do make and publish this my last will and testament, as follows:

"'Item 1. I will that my body be buried in a decent Christian manner.

"'Item 2. That my funeral expenses and all my just debts be paid as soon after my decease as possible out of my personal property or other of my estate.

"'Item 3. I am now the legal owner in fee of the following described tracts of land situated in county of Jackson, state of Missouri, to wit: The west half of the southwest quarter of section 22, and the east half of the southeast quarter of section 21, all in township 49, range 32. And it is my will and desire that my executrices hereinafter named and appointed, at such time after my death as they may see fit and proper, sell said land at either public or private sale on such terms as they may think best, one-half of the amount of the proceeds of the sale of which I will and bequeath to my beloved wife, Margaret B. Chambers, and whatever shall remain thereof after the payment of my funeral expenses, just debts and necessary expenses of settling up my estate, I will and bequeath to the Theological Department of the Cumberland Presbyterian University, located at Lebanon, Tenn., and to be paid to the proper officers of said university by my said executrices so soon after they shall sell said land and collect the proceeds thereof as may be convenient, and to be held and used by said officers of said university as part of the endowment fund of said theological department thereof.

"'Item 4. Having heretofore amply provided for my daughter, Mrs. Eva C. Smith, I have made her no bequest herein.

"'Item 5. I hereby will and bequeath unto my dear wife all other property, assets and effects of every kind and description of which I may die seised and possessed.

"'Item 6. I appoint my dear wife, Margaret B. Chambers, and my dear daughter, Mrs. Eva C. Smith, executrices of this my last will and testament.

"'Witness my hand and seal, this 27th day of July, 1868.'

"On the 28th of May, 1870, Evaline Smith made her will, and in November, 1873, died, and the will was probated on November 14, 1873. In it she says: 'I will and bequeath to the trustees of the Cumberland University at Lebanon, Tenn., for the endowment of and professorship in part, of either the Theological Department, or the concurrent course of said University as the trustees think best, one tract of land lying in Jackson county, Missouri, to wit, the southwest quarter of the southeast quarter of section 15, township 49 of range 32; also the west half of the southeast quarter and the west half of the northeast quarter of section 21, same township and range. This property to remain in the hands of my mother, Mrs. M. Chambers, until her death in case she should survive me, and then to go to the trustees of Cumberland University, but in this case it is only the use of the land that is bequeathed to my mother and not the right to dispose of it.'"

James Chambers died on the 29th of June, 1876. About 30 minutes before his death he and his wife, Margaret Chambers, signed and acknowledged a deed of gift of the 160-acre tract (the land in controversy) to the Board of Publication of the Cumberland Presbyterian Church of Nashville, Tenn., and the following is the finding of Judge Tichenor regarding the execution of that deed:

"The death of James Chambers was due

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to a kick of a mule received a few days before he died. About an hour before his death, he executed a deed to the land in controversy to the Board of Publication of the Cumberland Presbyterian Church of Nashville, Tenn. At the time he was suffering greatly, and the evidence is not so clear as to his mental condition as I could wish it, yet it is certain that he wished and intended to make this deed some time before he did so, and all say that he recognized the official who took the acknowledgment. I find that he had sufficient capacity to make a deed—knew and intended what he was doing when he did so. I find, however, that the grantor died while the deed was in the hands of the official who took the acknowledgment and before he signed the certificate. This deed was recorded July 7, 1876, and is for a recited consideration of $1. It is the usual form that it ends as follows: 'To have and to hold the same unto said second party, their successors and assigns forever; this conveyance not to take effect till our death and that of the survivor of us. Witness our hands and seals this 29th day of June, 1876. his James X Chambers. [Seal.] M. B. Chambers. [Seal.]' On the 22d of July, 1876, after the death of James Chambers, his widow, Margaret Chambers, probated the will which he had executed in 1868 and qualified as executrix, and made final settlement on the 11th day of November, 1878, and was discharged as such executrix.

"James Chambers resided on the 200-acre tract and used the two pieces of land as one farm from 1858 to the time of his death, and his widow after him until her death. James Chambers and his son and daughter Evaline Smith and his widow all died without descendants. The plaintiffs are descendants of his brothers and sisters. On November 14, 1896, Margaret Chambers made a deed to the Board of Publication of the Cumberland Presbyterian Church of Nashville, Tenn. This is a quitclaim deed and 'remises, releases and forever quitclaims unto the second party subject to the life estate hereinafter described the following lands: [Here described the 160-acre tract.] Said first party reserves a life estate, together with the possession, rents and profits thereof.' On November 4, 1898, Margaret B. Chambers made a warranty deed to the Board of Publication of the Cumberland Church of Nashville, Tenn. This deed recites: 'Whereas, the party of the first part is the owner of the remainder interested in the real estate hereinafter described; and whereas, the party of the first part has agreed in consideration of an annuity to be paid to her during her natural life by the party of the second part to sell her life estate to said property: Now therefore the party of the first part does hereby grant, bargain and sell unto the party of the second part, its lawful successors and assigns, said real estate, situate in Jackson county, Missouri, and described as follows, to wit: [Describes the 160-acre tract.]' On the 19th day of February, 1901, the Board of Publication of the Presbyterian Church of Nashville, Tenn., made a warranty deed to the land in controversy to the defendant, Christian Ott, Jr. This is an ordinary warranty deed, with the usual covenants. Four days before that, on the 15th day of February, 1901, Margaret B. Chambers made a deed to Christian Ott, Jr., conveying this land to him. On the 22d day of February, 1901, the Trustees of the Cumberland University made a deed to defendant, Christian Ott, Jr., in which they recite: 'Whereas the Board of Publication of the Cumberland Church of Nashville, Tenn., is the owner of a tract of land in Jackson county, Missouri [here it describes the land in controversy], and whereas the board is about to sell the land to Christian Ott, Jr., and whereas it has been suggested that possibly under the will of James Chambers the undersigned may have some interest in the same, and a deed from the undersigned is desired by said Ott: Now therefore the undersigned claiming no interest whatever in said property does nevertheless hereby grant, bargain, sell, quitclaim and convey to said Christian Ott, Jr.,' etc." The defendant claims title under the will of James Chambers and these deeds.

John N. Southern and Hughes & Whitsett, for appellants. Gates, Sea & English and Gage, Ladd & Small, for respondent.

WOODSON, J. (after stating the facts as above). 1. Counsel for appellants assign many errors to the rulings of the court during the progress of the trial; but, viewing the case as we do, it will be unnecessary to consider but few of them. The first insistence of appellants' counsel is: The deed from James Chambers and his wife to the Board of Publication of the Cumberland Presbyterian Church was inoperative to convey the title to the land in controversy to the grantee therein named, for the reason: First, the deed was not delivered in the lifetime of the grantor; and, second, that the deed is limited to take effect in the future; and, third, the grantee was a religious corporation and could not take the title to this land under article 21, § 8, of the Constitution of Missouri (Ann. St. 1906, p. 131). We will consider those objections to the deed in the order stated.

The evidence shows: That the grantor in the deed resided some miles from the city of Independence, in the country; that on the day of his death he sent for Horace Sheeley, a justice of the peace, who also resided in Independence, to go out to his place and take his acknowledgment to the deed; that when he reached the residence of Mr. Chambers he found him in a state of articulo mortis, almost if not quite unconscious.

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However, he recognized Mr. Sheeley, but never made any response when Sheeley asked him if he acknowledged the instrument to be his act and deed. Sheeley at first refused to take his acknowledgment, for the reason, he said, Chambers was half dead and did not have sense enough to make a deed; but after some persuasion he consented to do so, and by the assistance of Dr. Sewall, who held Chambers' hand and placed the pen to the deed, Sheeley made his mark thereon, and went through the form of taking his acknowledgment, as before stated. Before Sheeley had time to reach Independence, and before he signed the certificate of acknowledgment to the deed, Mr. Chambers died. Upon that evidence the trial court found Chambers "had sufficient capacity to make a deed—knew and intended what he was doing when he did so." While counsel for appellants do not complain of that finding of the trial court, yet, in our opinion, it is entirely unsupported by the evidence in the case, and should not be passed by and permitted to stand as a precedent in future litigation. "It has been uniformly held that in equity cases this court would on appeal proceed de novo to hear and determine the cause, deferring somewhat to the findings of the trial court; but, if its findings and judgment were not sustained by the evidence and law, then this court would proceed to make its own finding and enter judgment as equity and justice might require. Blount v. Spratt, 113 Mo. 48, 20 S. W. 967; Courtney v. Blackwell, 150 Mo. 267, 51 S. W. 668; State ex rel. v. Jarrott, 183 Mo. 204, 81 S. W. 876." Gibbs v. Haughowout, 207 Mo., loc. cit. 391, 105 S. W. 1067.

But, waiving that point, we will pass to the first objection urged by counsel against the validity of said deed, namely, that it was not delivered in the lifetime of the grantor, Mr. Chambers. The evidence shows: That J. W. Buchanan, a lawyer of Independence, was employed to draft this deed; that he did so, and sent it with Sheeley out to Mr. Chambers for the latter's acknowledgment; that before Sheeley signed the certificate of acknowledgment, and before he delivered the deed to Buchanan, Chambers died. Under this evidence the trial court found that there had been no delivery of the deed during the lifetime of Chambers. In that finding we concur, which is supported by an unbroken line of authorities. Huey v. Huey, 65 Mo. 689; Standiford v. Standiford, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Allen v. De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; White v. Pollock, 117 Mo. 467, 22 S. W. 1077, 38 Am. St. Rep. 671; Williams v. Latham, 113 Mo. 165, 20 S. W. 99. The death of Chambers removed all authority of Sheeley, Buchanan, and all others to deliver the deed thereafter. This is elementary and needs the citation of no authority to support it.

We are also of the opinion that the second objection made to this deed is well taken. The deed in express terms provides that it is not to take effect or be in force until after the death of the grantors, James Chambers and his wife. The law of this state is well settled that an instrument to be good as a deed must convey a present interest in the property attempted to be conveyed, and, where it is to take effect and become operative alone upon the death of the grantors, it is testamentary in character and is insufficient as a deed of conveyance. Murphy v. Gabbert, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733; Miller v. Holt, 68 Mo. 584; 1 Devlin on Deeds, § 309; 8 Wash. on Real Prop. p. 266.

The third objection urged against the validity of this deed involves the question of fact, as to whether or not the Board of Publication of the Cumberland Presbyterian Church of Nashville, Tenn., was a religious corporation. The evidence upon that question is somewhat voluminous and conflicting, and, on that account, the opinion would be greatly extended in length should we undertake to determine whether or not under our Constitution said board could legally receive and hold real property located in this state. For that reason we will not pass upon the question, as no practical good would result therefrom, since we have already held the deed to be void for three other reasons.

2. It is next contended by counsel for appellant that neither of the two deeds from Margaret Chambers to said board—one, a quitclaim deed, dated November 14, 1896, and the other a warranty deed, dated November 4, 1898—conveyed to it any right, title, or interest in or to the land in controversy. The former purported to convey the reversion after the termination of her life estate, and the latter her life estate therein in consideration of the annuity therein mentioned. It is true, as contended by counsel, said deeds did not convey to said board the interest she acquired in this land through and by virtue of the deed executed by her husband on June 29, 1876, for the reason that said deed was void, as we have shown and held in paragraph 1 of this opinion; but it does not necessarily follow therefrom that her deeds of November 14, 1896, and of November 4, 1898, did not convey the equities in said land to said board, for the reason that, if she acquired title thereto under the will of her husband, then, unquestionably, they conveyed the same to said board, if it was capable of receiving it

3. This brings us to the consideration of the main legal proposition involved in this case, and that is: What interests, if any, were disposed of by the will of James Chambers, and to whom, if any one, were they given?

Counsel for respondent contend that, conceding the deed of June 29, 1876, executed

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by James Chambers and wife to the Board of Publication of the Presbyterian Church, to be void, as insisted by appellants, then the title to the land in question remained in Chambers up to the time of his death, and that upon his death the title passed under and by virtue of the will to his executrix, with directions for her to sell same, and to retain one-half of the proceeds thereof for her own use and benefit, and to pay over the other one-half to the Theological Department of the Cumberland Presbyterian Church, as provided for by the terms of the will; or, if it be true, as insisted by counsel for appellants, that the university refused to accept the bequest made to it, then counsel for respondent contend that the one-half of the proceeds of said sale intended for the university also passed to and became vested in his widow, Margaret Chambers, by virtue of the residuary clause of the will. Counsel for appellants deny that contention of respondent, and insist that the residuary clause did not and could not have any reference to property disposed of by any previous clause of the will. The third clause gave one half of the proceeds of the sale of this land to the widow, and the other half to the university, as before stated; and the fifth clause reads as follows: "I hereby will and bequeath unto my dear wife all other property, assets, and effects of every kind and description of which I may die seised and possessed."

Having heretofore reached the conclusion that James Chambers never parted with his title to this land during his life, then it must be conceded that he died seised and possessed of it; and if the university declined to accept the one-half of the proceeds of the sale thereof, as provided for under the third clause of the will, as insisted by appellants, then it must have passed to and become vested in his widow by virtue of said residuary clause, without the above contention of counsel for appellants is tenable. In our judgment that contention of counsel for appellants is more plausible than sound. This identical question came before this court in the case of Carr v. Dings, 58 Mo. 400. The will in that case gave the entire estate to the executors in trust, to pay debts, and, after the payment of the debts, it provided: "To convey what may remain of my estate to my wife, Susan Kerr, to be used and appropriated by her in and about her maintenance and support, with power to my said wife to dispose of one-fourth of same remaining at the time of her death, as to her shall seem fit, and the residue of what shall so remain at her death to pass to and be vested in the children of my deceased brother, George Washington Kerr." The widow died without disposing of the one-fourth she was authorized to dispose of, and the question was whether the children of George Washington Kerr got all of the residue, or only three-fourths of it. The court held that the whole of it passed to them, and on pages 406 and 407 said: "It is insisted that the 'residue of what remains,' as the words are used in the will, confines or limits the bequest to the children of George Washington Kerr to three-fourths of the estate, the same being what would remain after excluding the one-fourth which was subject to the disposition of the widow, and that, as the widow made no disposition of the fourth of the property remaining at her death, as to that part of the estate the testator died intestate, and it would descend to his heirs or next of kin under the law. By a technical construction of the language used in the will, the bequest to the children might be so limited; but, in construing wills, the intention of the testator is the object to be obtained, and, in order to ascertain this object, it frequently becomes necessary to look at the whole will, by which it will sometimes become necessary to qualify particular clauses so as to bring them in harmony with the general intention as the same may be indicated by other clauses. When a doubt arises as to the extent of the application of the word 'residue' as used in a will, whether it was intended to apply to the residue of the whole estate, or to be confined to a particular part of the estate, courts generally incline to extend to it the whole estate, where there is no other residuary clause. 2 Redf. Wills, 448. In reference to the will under consideration, it appears to have been the intention of the testator to dispose of his whole estate and to die intestate as to none of it."

In Watson v. Watson, 110 Mo. 164, 168, 171, 19 S. W. 543, 544, 545, the testator first gave a life estate in a certain 240 acres of land to his wife, and then provided: "I further will in regard to my other land that if the heirs can agree upon a satisfactory division of them that they divide them to their own notion." The court held that, by the words "my other land" in this last-quoted clause, the testator included the remainder in the 240 acres of land devised to his widow for life. Judge Black delivered the opinion of the court, and said: "The real question is whether the testator intended these words should include this remainder. One of two things must be true, and that is: That it is included, or that there is an intestacy as to it. The will, taken as a whole, shows a very clearly expressed purpose on the part of the testator to dispose of all of his property, real and personal. This purpose can only be executed by allowing the words "my other land" to include the estate in remainder in the 240 acres."

In Sullivan v. Larkin, 60 Kan. 545, 57 Pac. 104, the words of the residuary clause were: "I will and advise that all other property which I may own at the time of my death, both in Kansas and Missouri," shall be sold, etc. Held to be a general residuary clause; the court saying: "This clause of the will is general and inclusive, and the tendency of the courts is to give the widest and most

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liberal construction to a residuary devise. Jarman on Wills (Bigelow's 6th Ed.) p. 635."

In Cogswell v. Armstrong, 2 Kay & Johnson, 227, the residuary clause was almost precisely as in the case at bar. There it was: "And I give, devise and bequeath all other real and personal estate of which I may die possessed unto and equally among my children." Held a general residuary clause, and that it passed a prior specific devise of land which had lapsed. "The intention to carry lapsed and void devises, as well as the estate undisposed of, to the residuary legatee, is not to be defeated in construction by expressions like 'all other land' or 'all land not hereinbefore devised.' Shouler on Wills (1st Ed.) § 521."

In Moffett v. Elmendorff, 152 N. Y. 475, 488, 46 N. E. 845, 849, 57 Am. St. Rep. 529, the testator gave "all my real estate except the portions thereof hereinafter otherwise given or disposed of." The court held this to be a general residuary clause, and to pass to the wife the specific devises, afterwards made, but which failed to take effect, and said: "Moreover, a gift of 'all other land' or of 'all land not hereinbefore devised' is regarded as a devise of the residue."

If the residuary clause should be read and construed independent of the other provisions of the will, then there would be much force in the contention of appellants' counsel, because such technical construction would exclude the idea that the testator intended by that clause to give to his wife any of the property disposed of, or attempted to be disposed of, by him in the previous paragraph of his will; but, as said in the case of Carr v. Dings, supra: "The intention of the testator is the object to be obtained, and, in order to ascertain this object, it frequently becomes necessary to look at the whole will, by which it will sometimes become necessary to qualify particular clauses so as to bring them in harmony with the general intention as the same may be indicated by other clauses." So in this case, when we read the entire will, it is manifest the testator was attempting to dispose of his entire estate, giving a portion of it to the Theological Department of the Cumberland Presbyterian Church, and the residue to his wife, and to no one else, and by the insertion of the residuary clause he intended to give to her all of his property of which he might die seised and possessed. This language was sufficiently comprehensive to include the property willed to the church if for any reason that bequest should become inoperative. In arriving at this conclusion, we indulge the presumption that where a testator executes a will, it is presumed he intended to dispose of his entire estate thereby, and not to die intestate as a portion of it. We therefore conclude: That, under the third clause of the will, Mrs. Chambers, as executrix, took the legal title to all of the land in question, and the equitable interest to one-half of the proceeds of the sale of the same; that (conceding, as counsel for appellants contend, the university declined the bequest made to it) the portion of the proceeds of the sale of the land willed to the university passed to and became vested in Mrs. Chambers also, under and by virtue of the residuary clause of the will; that the legal title to this land so acquired by Mrs. Chambers was subject to be divested by a sale thereof by her as executrix of the will, as was contemplated by the will, and, no such sale having been made, the legal title remained in her, and she conveyed both the legal and equitable interest in the proceeds of the same by her deeds, hereinbefore mentioned, to the respondent, Ott, and his grantor, the said Board of Publication; and that, if it be true said university did not decline the bequest made in its behalf, then Ott became the owner of that interest under and by virtue of the deed, dated February 22, 1901, executed to him by the trustees of the Cumberland University, whereby it conveyed unto him all its right, title, and interest in and to this land.

From the foregoing observations it is seen that it is wholly immaterial whether the university accepted the bequest made to it or not, for, if it did, then its deed to Ott conveyed that interest to him; but, if it declined it, then that interest passed to Mrs. Chambers under the residuary clause of the will, and was by her conveyed to Ott, by her deed before mentioned. So, in either event, Ott is the owner of both the legal and equitable title to those funds, and, under the doctrine of equitable conversion and reconversion, he had the right to the land itself; and our reasons for so holding are stated in the case of Williams v. Lobban, 206 Mo. 399, 417, 418, 104 S. W. 58, 63. In that case Judge Gantt, in a most exhaustive and able opinion, stated the law as follows: "As we construe these cases [referring to certain cases cited by counsel for defendant], they unquestionably do hold that less than the whole number of beneficiaries cannot produce a reconversion of the estate into real estate; but the cases we have cited hold that each beneficiary for himself may make his election by selling and conveying his individual interest, and that if they all make conveyances a reconversion will be held to have (been) taken place we think is inevitable from the doctrine announced in Reed v. Underhill, 12 Barb. (N. Y.) 113, and the cases that we have cited approving that case and our own decision of Eneberg v. Carter, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664. Indeed, in McDonald v. O'Hara, 144 N. Y. 566, 39 N. E. 642, it was expressly said: 'It is, however, well settled that the persons who are exclusively entitled to the fund arising from the sale may, if they so elect prior to the actual sale, take the real estate in

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its unconverted form.' It must logically follow that, if each and every one of the beneficiaries conveys his interest to a common grantee, such common grantee becomes the person entitled to the fund which would arise from the sale, and subsequently may elect to take the real estate as land, and not as personalty, and thus dispense with the sale. The case of Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61, on this point, is exactly like this case. There the testator devised to his wife an estate for her life or widowhood, and then provided for a sale of the land and distribution of the proceeds among the children. The children by separate deeds conveyed their respective interests in the property by mesne conveyances. All the right, title, and interest conveyed by the deeds of the children were transferred to the complainant, and, although there was a limitation in the will upon the power of the children to convey, the court in a most learned and exhaustive opinion held that the complainant had acquired all the interest in the property, and as such was entitled to take the land free from the power of sale contained in the testator's will. Our conclusion is then that, as it clearly appears that the plaintiff has acquired, by proper conveyances and proceedings, the interest of all the beneficiaries under the will of Samuel Lobban, he would, in the event of a sale under the power contained in the will, be entitled to the entire proceeds, and is entitled to the land, and is not bound to submit to a sale of the property and the attendant expenses and costs thereof, and the court below was right in granting him a perpetual injunction to prevent the sale." The following authorities announce the same rule of law: Prentice v. Janssen, 79 N. Y. 478, 484, 485, 486; Armstrong v. McKelvey, 104 N. Y. 184, 10 N. E. 266; Craig v. Leslie, 3 Wheat. 563, 576, 4 L. Ed. 460; Trask v. Sturges, 170 N. Y. 482, 63 N. E. 534; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; De Vaughn v. McLeroy, 82 Ga. 687, 10 S. E. 211; Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160; Evans' Appeal, 63 Pa. 183; Pomeroy's Eq. Jur. (2d Ed.) § 1175 et seq.; 2 Jarman on Wills (Am. Notes by Randolph & Talcott) top p. 188; Adams, Eq. (7th Am. Ed.) 137; Martin v. Andrews (decided May 9, 1908) 59 Misc. Rep. 298, 111 N. Y. Supp. 40.

4. Counsel for respondent also interposed the statutes of limitations as a defense to this suit, and insist that the record discloses that the respondent and those through whom he claims title have been in the exclusive, open, notorious, adverse, and continuous possession of this land, claiming to be the owners thereof against all the world in general, and especially against the heirs of James Chambers, deceased, ever since June 29, 1876, the date of his deed purporting to convey this land to the Board of Publication of the Presbyterian Church, and reserving a life estate therein to his wife. Counsel for appellants, upon the other hand, insist that the statutes have not run against their clients, for the reason that said deed was void, and, instead of Mrs. Chambers claiming and holding possession of the land under that deed, she was in possession of that land and occupied it as the widow of James Chambers, and, her dower never having been assigned, her possession and the possession of those claiming under her were not adverse to appellants.

The law is well settled that, where the widow is in the possession and occupancy of land by virtue of her dower interests or by one who holds it by virtue of his purchase of those interests, the statutes of limitations do not begin to run in her or in his favor as against the owner of the title until dower is assigned or the death of the widow occurs. Nor is the owner's action of ejectment for the recovery of the property barred until 10 years after the widow's death, if dower had never been assigned. Osborn v. Weldon, 146 Mo. 185, 47 S. W. 936; Reed v. Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578; Thomas v. Black, 113 Mo. 66, 20 S. W. 657; Brown v. Moore, 74 Mo. 633. The reason for this rule is that under section 2955, Rev. St. 1899 (page 1703), and previous revision, the widow is entitled to the possession and occupancy of the mansion house of her deceased husband, and the messuages or plantation thereto belonging, called "her quarantine," until dower is assigned. Roberts v. Nelson, 86 Mo. 21. And during said occupancy she holds possession of the premises by virtue of her quarantine, and not adversely. Thomas v. Black, supra. But the trouble with that law is it does not fit the facts of this case, for at the time of the death of her husband, James Chambers, he had no mansion house of his own. He and his wife were residing with and upon the farm of their daughter, Evaline Smith, and had been ever since April 29, 1865, the date upon which he conveyed the 200-acre farm to Evaline. The law seems to be well settled that the right of the widow to the possession and occupancy of the messuages and plantation is incidental to and dependent upon her possession and occupancy of the mansion house of her deceased husband, and that without the latter she has no right to the possession and occupancy of the former by virtue of her quarantine, and, if she occupies the plantation without having the mansion house, then that possession is not incidental to her quarantine, and the latter will not arrest the running of the statutes of limitations.

In the case of McKaig v. McKaig, 50 N. J. Eq. 325, 25 Atl. 181, under a statute identical with ours as to quarantine, it was held that the widow had no quarantine in the messuages and plantation of the husband, where the widow owned the homestead on which she and her husband lived at the

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time of his death. In that case she owned the homestead or mansion in which she and her husband resided at the time of his death, and the husband owned an adjoining tract of land which was used in connection with her homestead; and the court held she had no quarantine in the adjoining tract of her husband, for the reason that the mansion house in which he resided was not his, but belonged to her, and, consequently, his land was not land belonging to the husband's mansion house, which was necessary to give the widow a right of quarantine to his land. In the case of Sell v. McAnaw, 138 Mo. 267, 39 S. W. 779, where the evidence showed that the land in question was no part of the plantation of the deceased husband, nor in any wise connected with his mansion house. it was held that the widow was not entitled to the possession of and use of the property, under the quarantine statute, and not at all until her dower was assigned to her, and that in the meantime the statute would run in her favor and against the heir. See, also, McClanahan v. Porter, 10 Mo. 746; Smith v. Shaw, 150 Mass. 297, 22 N. E. 924.

Section 2954, Rev. St. 1899 (page 1702, Ann. St. 1906), reads as follows: "Until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereto belonging, without being liable to pay any rent for the same." The reasoning of that court in those cases applies equally well to this statute. The daughter of James Chambers, Evaline Smith, and not he, owned the mansion in which he resided at the time of his death, and he, instead of owning the adjoining tract of land, the one in controversy, it was located some distance away from the mansion of Evaline. That being true, it cannot be said that this land was "the messuage or plantation belonging to the mansion house of her husband," and, consequently, she never had quarantine in this land, and, having no quarantine, there was nothing to prevent the statute from running when she took possession of this land under his deed, dated June 29, 1876. Though inoperative to convey title, as before held, yet that deed was color of title; and when she and those claiming under her occupied the land under that deed for a period of more than 10 years, claiming title thereunder, the statute not only barred appellants' cause of action, but also transferred the title to the land in question to her and them. We therefore hold that respondent also acquired title to this land by virtue of the statutes of limitations.

Entertaining the views before expressed, it becomes unnecessary to discuss any of the other numerous questions presented by counsel in their respective briefs.

We are therefore of the opinion that the judgment was for the right party, and should be affirmed.

It is so ordered. All concur; GRAVES, J., in separate opinion.

GRAVES, J. (concurring). I concur in the result of this case as reached by my Brother WOODSON. I do not concur in all that is said in paragraph 1 of his opinion. That paragraph to my mind properly holds that there was no delivery of the deed, and other things therein decided are unnecessary for the case in hand. No delivery defeats the deed. Whether the party making it was in such state of mind as to be able to make a deed is immaterial, if in fact it was not delivered, and upon the question of mental capacity I express no opinion. To that portion of this paragraph 1 which holds that the deed is testamentary in character, I do not agree. The doctrine therein announced in my judgment trenches upon the holding of this court in O'Day v. Meadows et al., 194 Mo. 588, 92 S. W. 637, 112 Am. St. Rep. 542. The deed being ineffective for want of delivery, this too is unnecessary for a decision of the case, and might be said to be obiter; but I prefer to disavow the holding on this particular point, although it might be considered as mere obiter dictum.

Nor do I concur in all that is said in paragraph 4 of the opinion. This portion of the opinion seems to be opposed to the rule expressed by Sherwood, J., in Gentry v. Gentry, 122 Mo., loc. cit. 217, 26 S. W. 1094, whereat it is said: "Nor does it matter that the mansion house was located on land in which Gentry had only a life estate. This fact does not militate against a widow's right of quarantine in that portion of the land owned by the husband in fee. In Agan v. Shannon, 103 Mo. 661, 15 S. W. 757, it was distinctly recognized as an undoubted legal principle that the fact of the accident of the location of the mansion house on an adjacent 40 not belonging to the home tract, *and to which the decedent had no title*, would not in any way affect the quarantine right of the widow in the plantation which her husband owned; and in doing this we followed the ruling made in Brown v. Brown's Adm'r, 68 Mo. 388, where it was held that notwithstanding the dwelling house of the husband was on an adjacent 80, and not on the remaining part which he owned in fee, this would not prevent the widow from successfully asserting her right to a homestead in the residue of the farm which her husband owned." The italics in the quotation are ours. It would seem in the Gentry Case we have held that, although it turns out that the mansion house is on a tract of land to which decedent had no title whatsoever, yet, if the lands actually owned by decedent were used in connection with this mansion house, then the widow was not debarred of her quarantine right. The fiction of the law that she shall remain quarantined in the mansion house with full possession of all its messuages seems to have been

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eliminated by pure practical law in this Gentry Case. In the Gentry Case the widow could not hold the mansion house after the death of her husband, because upon his death that property, which was held by him as tenant by the curtesy, immediately reverted to Gentry's children by a former widow, and in them was the right of possession. The widow in that case was a second wife, and her right to quarantine could not have been based upon a right to remain in (quarantine) the mansion house, because the death of the husband terminated such right. This, it occurs to me, was the occasion for the use of the italicized words above quoted. We at least held that Mrs. Gentry was entitled to her quarantine rights in the other lands, notwithstanding the fact that she did and could not hold the mansion house, which had been used in connection therewith. So, considering the Gentry Case, I prefer not to concur in much of the discussion of paragraph 4 of the opinion.

I concur in the result and other portions of the opinion.

McCOY et al. v. RANDALL et al.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

While, as respects original jurisdiction in lower courts, it is as a rule only necessary to consider the value of plaintiff's interest to determine whether the court has jurisdiction of the amount in controversy, on appeal the interests of both parties must be considered; and where, on appeal in an action to enjoin suit to collect special tax bills, issued against different parcels of ground, it appeared that a defendant bank owned all the tax bills amounting to over $4,500 in amount, though the amount of the bills issued against the property of each plaintiff in no case equaled that amount, the Supreme Court, and not the Court of Appeals, had jurisdiction, under Rev. St. 1899, § 1649a, added by Laws 1901, p. 107 (Ann. St. 1906, p. 1208), providing that the St. Louis and Kansas City Courts of Appeals shall have jurisdiction of appeals and writs of error where the amount in dispute, exclusive of costs, shall not exceed $4,500.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 659; Dec. Dig. § 231.*]

2. MUNICIPAL CORPORATIONS (§ 314*)—LOCAL IMPROVEMENTS—FILING PLANS BEFORE LETTING CONTRACT—"PLANS"—"SPECIFICATIONS."

Rev. St. 1899, § 5859, as amended by Laws 1901, p. 65 (Ann. St. 1906, p. 2967), provides that, when the council of a city of the third class deems a street improvement necessary, it shall take certain steps, and, if a majority of the owners of the front feet of property owned by residents of the city abutting on the street do not file a protest, the council may cause a contract for the work to be let to the lowest and best bidder on plans and specifications filed therefor with the city clerk by the city engineer, etc. *Held*, that the word "plans" as used means a profile, drawing, or picture showing, in a general way, the character of the work to be done, while "specifications" means a detailed statement of the character of the improvements, the purpose of the provision being that by filing the plans and specifications information would be furnished to prospective bidders to enable them to intelligently figure on the cost thereof; and, where there was nothing complicated or difficult to understand about grading or paving the street sought to be improved, and all the details of the work were fully stated, both in the ordinance authorizing the work to be done, and in the specifications filed in the clerk's office, the omission to file plans with the specifications did not invalidate the contract for the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 827; Dec. Dig. § 314.*

For other definitions, see Words and Phrases, vol. 6, p. 5399; vol. 8, p. 7755; vol. 7, pp. 6606, 6607.]

3. MUNICIPAL CORPORATIONS (§ 314*)—STREET IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS FILED.

Inasmuch as the grade of a city street can only be established by ordinance, the grade having been so established, and the ordinance presumably being on file as a public law of the city, in the office of the city clerk where the specifications were filed, so that bidders could as easily examine the ordinance as the specifications, the specifications were not insufficient because not stating what was the established grade of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 827; Dec. Dig. § 314.*]

4. MUNICIPAL CORPORATIONS (§ 335*)—STREET IMPROVEMENTS—CONTRACTS—ACCEPTANCE OF BIDS.

The charter not requiring that the city council should accept a bid for doing the work by ordinance, but merely providing that it should have power to cause a contract for the work to be let to the lowest and best bidder, and the acceptance of the bid and awarding of the contract not being the exercise of legislative functions, an ordinance accepting the bid was not necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 861; Dec. Dig. § 335.*]

5. MUNICIPAL CORPORATIONS (§ 362*)—STREET IMPROVEMENTS—CONTRACTS—EXTENSION OF TIME—VALIDITY.

Where an original ordinance, authorizing street improvements, to be made, provides for an extension of time for completion of the work, and an ordinance granting an extension is passed prior to the expiration of the time first given, the extension is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 895; Dec. Dig. § 362.*]

6. APPEAL AND ERROR (§ 1009*)—REVIEW—ISSUES OF FACT IN EQUITY CASE.

In an equity case, the Supreme Court should defer largely to the finding of the trial court as to issues of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Jackson County.

Action by L. F. McCoy and others against Joseph J. Randall and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This was an equitable proceeding begun in the circuit court of Jackson county for the purpose of enjoining defendants from prosecuting any suits to collect special tax

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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bills issued against the respective lots or parcels of grounds belonging to the plaintiffs by the city of Independence, a city of the third class, for grading and paving West College avenue from the west line of Delaware street to the western limits of the city, a distance of about 3,800 feet, and for the purpose of having said tax bills declared illegal, null, and void, and the cloud cast upon the title of the respective plaintiffs to said lots or parcels of ground by reason thereof removed. The tax bills involved in this case are in the usual form, and aggregate the sum of $4,992.47, with interest. There was a trial had before the court, which resulted in a finding of the facts and a rendition of judgment in favor of the defendants. In due time and in proper manner plaintiff appealed to this court. In conformity to the charter of cities of the third class a resolution by the city council was duly passed declaring the grading and paving necessary. On April 4, 1903, a special ordinance was duly enacted authorizing the grading and paving to be done. On May 22, 1903, by viva voce vote, the work, after having been duly advertised, was awarded to W. C. Rice for the sum of 94 cents per square yard, he being the only bidder. No plans for doing the work were filed with the city clerk by the city engineer at any time, as provided by the charter of such cities, but specifications therefor, as thereby provided for, were on file during all of the times hereinafter mentioned. Said specifications were as follows:

"Specifications for grading and paving with broken stone West College avenue from west line of Delaware street to the west line of the northeast quarter of the northwest quarter of section 3, township 49, range 32.

"Resolution No. 132, approved March 7, 1903.

"Ordinance No. 1749, approved April 4, 1903.

"Time to complete the work ——— days from date of contract.

"Grading. Said street shall be graded from street line to street line to the established grade and cross-section. Under this head will be included all work necessary for the formation of the roadway, sidewalks and park spaces, including removing timber, brush, rock, etc.

"Paving. That said street for a width of thirty feet in the center thereof be paved with good hard limestone. Said portion of said street to be paved shall * * * be brought to a subgrade, twelve inches below and parallel to the finish grade and cross-sections of said street, which shall be rolled with a steam roller weighing not less than ten tons until the subgrade presents a uniform hard surface with proper cross-sections and elevations; any soft or spongy places are to be removed and filled with proper material and re-rolled.

"Upon this subgrade shall be placed a six-inch course of broken stone ranging in size from one to four inch cubes, which shall be rolled with a steam roller weighing not less than ten tons until throughly compacted, after which a course of broken stone ranging in size from one to three inch cubes shall be spread on the first course to such a depth that after being thoroughly compacted that the surface of said paving shall conform to the grade and cross-section of said street, after which a thin course of rock screening shall be spread evenly over the surface of said pavement and thoroughly worked into the interstices until they are full by liberal use of water and steam roller.

"Bidders will state price per square yard of stone pavement, including all work required by these specifications.

"The work must be executed strictly in accordance with these specifications and under the instruction of the city engineer and strictly to grade and cross-section as shown by the stakes set from time to time.

"All work must be finished in a neat, substantial manner.

"Payments will be made in special tax bills against the property liable therefor.

"H. H. Pendleton, City Engineer."

The ordinance authorizing the work to be done provided, among other things, that "in all other particulars the work both of grading and paving shall conform to the plans and specifications now on file in the office of the city clerk." The work by the terms of the ordinance was to be completed in 120 days from the date on which the contract was awarded unless stopped or delayed, etc., and before the expiration of that time an extension of 60 days was duly given by ordinance, and before the expiration of the 60 days the work was completed. After the completion of the work the city, by ordinance duly enacted, levied the special taxes, the collection of which is hereby sought to be enjoined. Such additional facts as may be necessary for the proper determination of the case will be noted during the course of the opinion.

A. R. Strother and James G. Smart, for appellants. Paxton & Rose, for appellees.

WOODSON, J. (after stating the facts as above). 1. While appellants brought this case to this court on appeal, yet they now insist that it has no jurisdiction to hear and determine the same, but the jurisdiction over the same rests with the Kansas City Court of Appeals, and that it should be certified to that court for adjudication. The appellants contend that because of the common interest they had in the legal questions involved, and to avoid a multiplicity of suits and to save costs, they had the right to join in bringing this suit, and that while the aggregate amount of the tax bills levied against their respective properties was in excess of $4,500, yet not one of them was equal to that sum.

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It is therefore argued by counsel for appellants that the aggregate amount of said tax bills should not be considered for the purpose of fixing jurisdiction in this case, but the amount issued against the property of each plaintiff should control in determining that question. Upon the contrary, counsel for respondents contend that this court has jurisdiction of this cause, for the reason that the record shows that the amount of these tax bills is about $5,000, and that all of them belong to, and are owned by, the respondent bank, which fact fixes the amount in dispute at a sum in excess of $4,500. The record discloses the fact that the respondent bank is the real party in interest in this case, that it is the real owner of all of the tax bills in question, and that all of the other respondents are but nominal parties; they having disposed of all of their interest in and to the bills to the bank. That being true, the amount in dispute between the appellants and the respondent bank is in excess of $4,500, which amount gives this court jurisdiction. Sess. Acts 1901, p. 107, adding section 1649 to the Revised Statute of 1899 (Ann. St. 1906, p. 1208).

This question came before the Supreme Court of the United States in the case of Washington Market Company v. Hoffman, 101 U. S. 112, 25 L. Ed. 782. In that case the Washington company had offered to the highest bidders at public auction the stalls in the market house for a specific term. After the expiration of that time some of such bidders filed their bill to enjoin the company from selling the stalls leased to them, claiming that they had the right to occupy them as long as they chose to carry on their business as butchers, provided that they thereafter paid rent as it from time to time should become due. From a judgment of the Supreme Court of the District of Columbia in favor of the stall men, the market company appealed to the Supreme Court of the United States. In the latter court the stall owners moved to dismiss the appeal, for the reason that the value of no one of their claims or interest exceeded the sum of $2,500, the amount which, under an act of Congress, would entitle any one of them to an appeal to the Supreme Court; but, in passing upon that motion, the latter court refused to dismiss the appeal, for the reason that the record showed that the aggregate value of the company's rights to those stalls was $60,000, which sum gave the latter jurisdiction under said act.

In Gartside v. Gartside, 42 Mo. App. 513, the plaintiffs' petition showed no value, so that, so far as they were concerned, the appeal was to the Court of Appeals. That case is like the one at bar in this: That the lower court held against the plaintiffs, and they took the appeal. When it reached the Court of Appeals, the record showed that the defendant was trustee of a valuable estate, and that his trusteeship was reasonably worth to him much more than $2,500; and the court, because of defendant's interest, although plaintiffs appealed, transferred the case to this court, which took charge of it without question. Id., 113 Mo. 348, 20 S. W. 369.

In Evens & Howard Fire Brick Co. v. St. Louis Smelting & Refining Co., 48 Mo. App. 634, plaintiff's petition showed no interest which could be stated in money, but defendant's plant was valued at $400,000. The plaintiff, as in the case at bar, failed in the lower court, and took the appeal; and the St. Louis Court of Appeals, in transferring the case to this court, said (page 635): "It is settled that, where the right of appeal depends on the value of the matter in dispute, such value must be estimated in money. When the object of the suit, however, is not to obtain a money judgment, but other relief, the amount involved must be determined by the value in money of the relief to the plaintiff, or of the loss to the defendant, should the relief be granted, or vice versa, should the relief be denied. If either is necessarily in excess of the sum within the appellate jurisdiction of this court, then the Supreme Court has exclusive cognizance of the appeal. We took this view in the case of Gartside v. Gartside, 42 Mo. App. 513, in transferring that case to the Supreme Court, and that court, in refusing to remand the cause to us upon a motion made to that effect, affirmed our holding." (Syl.) "The Supreme Court has jurisdiction of an appeal by an attaching creditor from a judgment in favor of an interpleader in a suit by attachment, if both the value of the property attached and the aggregate of the demands of the several attaching creditors exceed $2,500; and this, though the demand of the appellant alone is less than that sum." Kuh v. Garvin, 53 Mo. App. 64. And the court said (page 65): "The case of Humphreys v. Milling Co., 98 Mo. 542, 10 S. W. 140, presented quite a similar state of facts. There the defendant, Judson, held the sum of $9,818.24 in trust for certain creditors of the Atlantic Milling Company, known as creditors of the 'new running.' Humphreys was one of the secured creditors to the extent of $2,046. He brought his action in equity for the appointment of a receiver to take charge of the fund, and that he be paid out of it the amount of his debt. He alleged that the transaction with Judson was to hinder and delay creditors. The Supreme Court compelled this court by mandamus to certify the case, upon the ground that more than $2,500 was in dispute." Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847. And as suggested in brief by counsel for respondents: "Suppose, for instance, the case at bar were transferred to the Court of Appeals, and suppose, further, that that court were to cancel tax bills of more than $5,000 in value belonging to the First National Bank, then it would be a

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manifest absurdity to say that there had never been more than $4,500 in dispute."

According to the foregoing authorities, we are clearly of the opinion that this court, and not the Kansas City Court of Appeals, has jurisdiction over this appeal. And the authorities cited by counsel for appellants, and relied upon as holding that the cause should be transferred to the Court of Appeals, are not applicable to the facts of this case. They concern only questions of original jurisdiction in lower courts, where, as a rule, it is only necessary to consider the value of the plaintiff's interest in order to determine such jurisdiction; but upon appeal the interest of both parties must be considered in determining the amount in dispute. We, therefore, hold that this court has jurisdiction of this appeal.

2. It is next insisted by counsel for appellants that the tax bills in question are null and void, for the reason that there were no plans of the proposed work filed with the city clerk, as required by the city charter, prior to the time the contract for doing the same was awarded, or at any other time, for that matter. Section 5859, Rev. St. 1899 (Ann. St. 1906, p. 2967) as amended in 1901 (Acts 1901, p. 65) provides, if no remonstrance is filed, that "then the council shall have the power to cause a contract for said work to be let to the lowest and best bidder on plans and specifications filed therefor with the city clerk by the city engineer, or other proper officer, not less than one week's advertisement for bids thereon being made in some newspaper published in the city," etc. Counsel for appellants take the position that the filing of these plans and specifications with the city clerk is jurisdictional, a condition precedent to the letting of the contract, and that no valid contract for doing the work could be entered into without that condition had first been performed. While, upon the other hand, it is contended by counsel for respondents: First, that said provision of the charter is directory only, and not mandatory; and, second, that if mandatory, then there was a substantial compliance in this case with its provision. It is not contended that specifications for doing the work were not filed with the clerk, as provided by the charter, but the contention is that the contract is void, because plans therefor were not also filed with the clerk.

The word "plans" as used in the charter means a profile, drawing, chart, or picture showing, in a general way, the character of the work to be done, while the word "specifications" means a detailed statement of the character of the improvements which are to be done. The clear purpose of this charter provision is that, by filing the plans and specifications with the city clerk, information would thereby be furnished to prospective bidders which would better enable them to understand the character of the improvements to be made, and, also, to better enable them to intelligently figure upon the cost thereof. With such knowledge all bidders would be better able to make an intelligent bid for the work, and thereby make the competition between them real, and the cost thereof to the property owners more reasonable than it would more likely be where they did not possess such knowledge. Viewing this contract in the light of that charter provision, can we declare it void as a matter of law for the reason simply that plans were not filed along with the specifications in the office of the city clerk? Counsel for appellants insist that we should answer that question in the affirmative, while respondents contend it should be answered in the negative. The former cite and reply upon the following cases as supporting their insistence: City of De Soto ex rel. v. Showman, 100 Mo. App. 323, 73 S. W. 257; Barber Asphalt Paving Co. v. O'Brien, 128 Mo. App. 267, 107 S. W. 25; City of Independence v. Nagle (Mo. App.) 114 S. W. 1129; Dickey v. Holmes, 109 Mo. App. 721, 83 S. W. 982; McCormack v. Moore (Mo. App.) 114 S. W. 40. None of those cases cover the exact question presented by this record and now under consideration, for in all of those cases there was neither plans nor specifications filed, as required by the charter, but in each and all of them there was a total disregard of the charter provision.

Counsel for respondents rely upon Morley v. Weakley, 86 Mo. 451, and Sheehan v. Owen, 82 Mo. 458, as supporting their contention. In the former case the ordinance authorizing the work to be done provided, in detail, as to the material to be used and the manner of doing the macadamizing, while a general ordinance then in force required a plan or profile of the work, with specifications, to be filed, showing the character of the material and work to be done. This latter ordinance was not complied with, and for that reason the proper owner tried to escape paying the tax bill. In discussing this question in the former case, Judge Black, in speaking for the court, used this language: "The ordinance with respect to macadamizing, curbing, and guttering provides in detail of what material these classes of work shall be made, how the stone shall be placed, and how prepared. In short, they are themselves specifications, and there was no need of anything further to give either bidders or the public full information. The ordinance requiring plans and specifications can have full application in matters of grading and the like, where they are essential to give bidders a full understanding of the work to be done and the manner of doing it, but it should not be construed to require the engineer to do that, by way of specifications, which was clearly stated in the ordinance." And in the latter case Judge Henry, speaking for the unanimous court said: "It is conceded that no profile or specifications were filed in the engineer's office;

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but it was proved that it was not customary to make profiles of that kind of work, but only of bridges and similar structures, and that the work in this instance was let according to the usual course pursued before and since. We cannot see that a profile of the work in question was necessary to enable one to bid on it intelligently. It consisted of macadamizing, paving, and guttering. A view of the street upon which the work was to be done, with the ordinance before the bidder, served better than a profile to give an idea of the extent and character of the work. The ordinance ordering the work expressly stated of what materials and the manner in which the work was to be done, and the precise quality of the work upon the street, and was as minute and exact in these particulars as could be required in any specifications the engineer might have prepared. We do not think that plaintiff should, as defendant would have him, sustain such a loss for the omission of the city officials to do an act which, done or omitted, could not materially have affected defendant's interests. The ordinance was published in a daily paper, recorded in the city book of ordinances, and the street upon which the work was to be done was open to inspection, and gave those who wished to bid on the work a better idea of the extent and character of the work than any profile could possibly have done, and it is by no means clear that the city officials have not properly construed the ordinance as not requiring the profiles of such work." The only difference existing between those cases and this is in the former two the ordinance required the plans to be filed, while in this the charter made the requirement. But clearly that difference could in no manner have a different legal effect upon the contract for doing the work, for in each case the plans and specifications were required to be filed for the purpose of furnishing information to prospective bidders, and they would furnish no more or less information when required by charter than when required by ordinance.

As was said in the Sheehan-Owen Case, supra, when we read the ordinances ordering this work to be done, in the light of the specifications which were on file with the city clerk, and in the presence of the street which was to be improved, it is difficult to see what possible harm was done or injury inflicted upon the property owners by the omission of the city engineer to make and file with the clerk plans for the work in addition to the specifications. There was nothing complicated or difficult to understand about grading and macadamizing this street which could call for a profile or picture of it, which might be of great assistance when bidding for and constructing bridges or other large structures; but in this simple class or character of work, with all of the details thereof fully stated in both the ordinance authorizing the work to be done and in the specifications which were on file in the clerk's office, no possible wrong or injury could be done to any one by the simple omission to file the plans as required by the charter. We, therefore, hold that the bills in question are not void for that reason.

3. The third insistence of counsel for appellants is that the specifications on file in the clerk's office "were inadequate and insufficient." We are somewhat at a loss to understand just what is meant by this contention, as counsel have not pointed out in just what way the specifications are insufficient, without it is its failure to state what was the established grade of the street. If that is what counsel have in mind, then that insistence is untenable, for the reason that the grade of a street can only be established by ordinance, which was done in this case, and that ordinance was a public law of the city, and was, presumably, on file in the office of the city clerk, the same office wherein the specifications were on file; and it would have been no more trouble for bidders to have examined the ordinance establishing the grade than it would have been for them to have examined the specifications upon that point, which could have been nothing more than an abridgment or copy of the ordinance. By following those directions and specifications no trouble or inconvenience would have been encountered either in bidding for the work, or in performing it according to the terms of the contract. By so doing the improvements would be done according to contract, and that is just what was done in this case, as was shown by the testimony of all of the witnesses for both sides. Those for appellants as well as those for respondents united in saying the work was a good job—no substantial criticism fell from the lips of any of them. And, after all that, the objection here urged seems to come too late to command serious consideration, even though there had been merit in it, which we deny, had it been timely presented to the proper city authorities.

4. The fourth contention of appellants is that the contract for doing this work was null and void for the reason that the bid for doing the same was by the city accepted and awarded by a viva voce vote of the council, and not by an ordinance duly enacted. There is no language contained in the charter of the city which requires such acceptance to be made by ordinance. The charter in that regard simply provides that "the council shall have power to cause a contract for said work to be let to the lowest and best bidder." It is not contended that the bid accepted was not the lowest and best, but it is insisted that the contract is void because the bid was not accepted or contract awarded by an ordinance duly executed. No authority has been cited which sustains the contention of appellants' counsel, and no good reason has been suggested why such solemn form of acceptance should

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have been resorted to. The work was authorized to be done by special ordinance, according to the specifications on file, and according to the general ordinances then in force in the city. That is all this court has ever required in that regard; and, in our judgment, that was sufficient in this case, where the record shows the contract was accepted by a viva voce vote. This was the view taken of this question by this court when it was presented in the case of Morley v. Weakley, 86 Mo. 451. On page 456 the court uses this language: "The various ordinances, general and special, under which the work was done, were all approved by the mayor. The mere matter of awarding the contracts, under existing laws, was not the exercise of legislative functions, so that the authorities cited by plaintiff in error have little or no application here. Moreover, we do not understand the ordinances to require the mayor to act separately in awarding contracts, but rather that he shall act in conjunction as presiding officer." The same is true of this case. The acceptance of the bid by the city of the awarding of the contract to the successful bidder is not the exercise of legislative functions, and there can be no earthly reason for holding such should have been done by ordinance.

5. It is next insisted by counsel for appellants that the record discloses the fact that Joseph J. Randall was interested in the contract for doing this street improvement, and that being a member of the council which ordered the work to be done and the contract executed nullified the latter, and consequently the tax bills are illegal, null and void. We have carefully read all of the evidence introduced bearing upon that question, and we are fully satisfied that it was not sufficient to justify any court in finding Randall was interested in said contract. The trial court found against appellants upon that issue, and very properly so, in our judgment. The evidence was not sufficiently strong to raise even a suspicion against the official conduct and good faith of Randall in the matter. The courts should not condemn the acts of public officials without the evidence is sufficient to show misconduct upon their part.

6. The sixth objection urged against the validity of these tax bills is that the work was not completed within the time stipulated for in the contract. The contract provided that the work should be completed within 120 days from the date thereof, unless, etc. The contract was executed May 22, 1903, and on August 3, 1904, by ordinance, the time for completing said work was extended 60 days from and after the expiration of the original 120 days. The evidence shows, and the court found, that the work was completed 3 days before the expiration of the 60 days' extension given. This court has held that, where the original ordinance authorizing the improvements to be made provides for an extension of time for its completion, and the ordinance granting the extension was passed prior to the expiration of the time first given, then such extension was valid. Hund v. Rackliffe, 192 Mo. 312, 91 S. W. 500. The facts of this case bring it within the rule announced in that, which is controlling upon us in this.

7. The last insistence of counsel for appellant is that the work was not done according to the contract. In another paragraph we touched upon this question, and there stated that the evidence showed that the contract had been substantially complied with. All the testimony in the case shows, not only a substantial compliance, but almost a literal compliance, with the terms of the contract; in fact, much more so than any of the cases to which our attention has been called. So, looking at this case from any of the view points suggested by counsel for appellants, we must hold that none of them are tenable, and for that reason the trial court correctly found for respondents. And, in addition, this being an equity case, we should defer largely to the findings of the trial court as to all issues of fact. Huffman v. Huffman (Mo.) 117 S. W. 1.

We are therefore of the opinion that the judgment should be affirmed, and it is so ordered. All concur.

EVANS v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 2. July 13, 1909.)

1. DEATH (§ 57*)—ACTION—PLEADING AND PROOF—NECESSITY FOR CONFORMANCE.

Where the petition in a death action specifically charges certain particular acts of negligence, which are alleged to have been the cause of the death, plaintiff must recover, if at all, upon the specific charges alleged.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

2. WORDS AND PHRASES—"VIS MAJOR."

"Vis major" is an irresistible, natural cause, which cannot be guarded against by the ordinary exertions of human skill and prudence.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7329.]

3. MASTER AND SERVANT (§ 276*)—DEATH OF SERVANT—EVIDENCE.

Evidence *held* to show that a storm, in progress at the time a railway fireman was injured in a collision, which obliterated the view of the track ahead, was a violent and unprecedented local storm, which could not have been reasonably anticipated by the employés of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

4. MASTER AND SERVANT (§ 97*)—SAFE PLACE TO WORK—EXTRAORDINARY STORMS.

A master is not required to provide against storms, extraordinary and unprecedented in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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their character in the locality, and, if an injury resulted to a servant during such a storm, there could be no recovery upon a mere proof of injury; but something that the master did or omitted to do must be proved to have been the cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

5. MASTER AND SERVANT (§ 279*)—DEATH OF SERVANT—EVIDENCE.

In an action for the death of a locomotive fireman in a collision with another train, evidence *held* not to show that the engineer of decedent's engine negligently failed to keep a proper lookout ahead for signals.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

6. MASTER AND SERVANT (§ 279*)—DEATH OF SERVANT—EVIDENCE.

In an action for the death of a locomotive fireman in a collision with a freight train, evidence *held* not to show that those in charge of the freight train, which had been compelled to stop because of fallen telegraph poles over the track, negligently failed to give proper signals to the engineer of the decedent's train, to prevent the accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

Appeal from Circuit Court, Chariton County.

Action by Anna Evans against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Respondent is the widow of George W. Evans, who was killed in a collision between a passenger train and a freight train, near the city of Brunswick, Chariton county, on December 12, 1903. The deceased was fireman on an engine, pulling passenger train No. 12 on appellant's railroad, which passenger train ran into freight train No. 91 about two miles east of Brunswick while said freight train was standing still, and which collision resulted in the death of said Evans.

The material portions of respondent's petition, or those parts which formulate the charges of negligence against appellant, are as follows: "That on said December 12, 1903, between the hours of 11 and 12 o'clock in the forenoon of that day, the defendant, by its agents and servants, while running and operating its said locomotive engine and train of passenger cars at a point on defendant's said railroad about two miles east of the city of Brunswick, in the county of Chariton, in the state of Missouri, so negligently and carelessly ran and operated same that said locomotive engine and train of passenger cars ran into and collided with another locomotive engine and train of freight cars, being then and there operated by defendant, which said locomotive engine and train of freight cars were bound west and were being run to Kansas City, Mo., and were then and there on the same track with said passenger train which was running east. That said freight train and engine attached to same were at the time of said collision, and for a period of 20 minutes prior thereto, standing still on defendant's said track at the point aforesaid, and the agents and servants of defendant then and there in charge of said locomotive engine and freight train attached thereto saw said passenger train approaching it, and failed and neglected to sound the steam whistle on said freight engine, and failed and neglected to give proper signals to said eastbound passenger train then approaching on said track; same being the main track. That said collision occurred on a straight track where the engineer on said passenger engine could have seen said freight engine and train for more than a mile by keeping a proper lookout ahead. That the engineer of said passenger engine and train failed and neglected to keep a lookout ahead, and failed and neglected to see said freight engine and train standing on said track as aforesaid, when same could have been seen by him as aforesaid, and failed and neglected to stop said engine and passenger train, and so negligently and carelessly ran said engine that same collided with said freight engine and train of cars, and by reason thereof said passenger engine was wrecked, and plaintiff's said husband, George W. Evans, was, while then and there in the service and employ of defendant, as aforesaid, and while engaged in the operation of defendant's said railroad, struck by the wreckage, and by the coal on the tender of said passenger engine being thrown with great force against him, the said George W. Evans, by reason of said collision, and he, the said George W. Evans, the husband of plaintiff, as aforesaid, was then and there, without fault or negligence on his part, instantly killed. That the death of plaintiff's said husband, George W. Evans, was caused by the carelessness and negligence of defendant's engineer running said passenger engine, in failing and neglecting to keep a proper lookout in front of his said engine, and in failing and neglecting to observe the said freight engine and train standing on said track, and by the carelessness and negligence of the engineer and train crew of said freight train aforesaid, in failing and neglecting to give the proper signals to the engineer of said passenger engine in time to avoid said collision, thereby causing said collision and killing plaintiff's said husband, as aforesaid."

The answer denies generally the allegations of the petition, pleads contributory negligence on the part of deceased, and then, further answering, "defendant says that the death of plaintiff's husband, at the time and place stated in her petition, was solely the result of a sudden, unusual, unprecedented, unforeseen, and extraordinary storm then and there prevailing on the line of the railroad of defendant, which rendered it impossible to prevent said injury and death." The record does not disclose the filing of a replication.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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On December 12, 1903, freight train No. 91 going west on appellant's railroad had, by proper order, until 11 o'clock a. m., to run to Brunswick and take siding for passenger train No. 12. By the order referred to passenger train No. 12, going east, could not leave Brunswick before 11 o'clock; but after that time, even though train No. 91 had not reached Brunswick, the passenger train held the right of way, and might proceed, regardless of No. 91. Train No. 91 had passed Dalton, a station about five miles east of Brunswick, and was proceeding to make said meeting point and clear for the passenger train in due time, when it was stopped about two miles east of Brunswick by eight or nine telegraph poles which had blown across the track by a very severe wind, sleet, and snow storm which was then raging. Train 91 was a heavy freight, and running slow. The engineer of the engine pulling this train discovered the poles, and, as he was running only 8 or 10 miles an hour, stopped after running into at least one of them. This was about 10:45 o'clock a. m. Immediately after the train was stopped, a flagman was sent to the rear to stop freight train No. 67, which he succeeded in doing; and as soon as the conductor of train 91 could get to the engine he dispatched Brakeman Byers with a red flag and probably a torpedo, to Brunswick, with orders to flag and hold anything which might be coming. Byers left some 20 or 25 minutes before the collision occurred. The conductor, brakeman, engineer, and fireman of train 91, a part of the crew of train 67, a track walker, and some farmers living near, had reached the point where the poles were down across the track, and some were engaged in getting the poles off, when the form of passenger train No. 12 was discovered coming about a quarter of a mile away. This was about 11:05 a. m. At first it was thought to be an engine coming to help, and, as soon as it was discovered to be the passenger train, the conductor, brakeman, and engineer of train 91 hallooed and gave the stop signals. At this time the wind was blowing severely, and it was snowing very hard. The passenger train was running 40 or 45 miles an hour. No one on the engine appeared to notice the efforts made to signal them, and the train never checked its speed until it struck train 91. The passenger train was going east, and the storm, an unprecedented wind and snow storm, was raging from the northwest. The smoke from the engine and steam caused by the falling snow on the boiler was blowing against the engineer's side, who sat on the right of the engine. Engineer Mathias, who was in charge of the passenger engine, says: That the storm was not so severe when he left Brunswick; but that as he proceeded east it kept getting worse; that he could not see anything ahead of him, because of the sleet, wind, steam, and snow; that he neither saw nor heard any signals, and knew nothing of the collision until it occurred. His engine knocked several telegraph poles off the track; but, owing to the wind and noise of the storm and rapidity with which he was running, he did not know of these occurrences. The brakeman, Byers, did not testify; nor is there any evidence showing what, if anything, he did in the way of flagging No. 12. No showing was made as to why he was not produced as a witness, more than to show that he left the Wabash shortly after and was seen by one of the witnesses in Kansas City. We will here collate the testimony on some of the principal questions to be considered in this cause:

The character of the storm:

Witness Millner, for respondent, and brakeman on No. 91, said: "The storm was so severe I don't suppose he could see us. There was no slacking of the speed of the passenger train." Says Byers had gone ahead to flag No. 12. "I didn't see him. The storm was so severe I couldn't see him." Says he discovered No. 12 "coming through the snow." There were nine poles across the track. "The storm was from the northeast. Don't know how long the poles had been there. The storm blew them down." After passing Dalton, he says: "The wind got stronger all the time. It seemed like the snow came in flurries, big bunches at a time. Then it would lighten up a bit, and then come another flurry. A man could not see very clear then; but when it would rise a bit he could see farther. That was the condition of things when we were at the point where these poles were down. If the dense clouds of snow had not been coming and going, we could have seen No. 12 leaving Brunswick." Again, he says: "The smoke and steam from No. 12 was blowing back over the train. It was from northeast to southwest. Mr. Mathias was sitting on the right-hand side of the train, the south side. The storm would come right into his window. I did not see him. His train was running probably 40 miles an hour. It only took him a few seconds to come the distance from the time we first saw him until he struck us. We saw his engine in just about time enough to get out of the way." Further, he says: "The storm was a kind of a streak. It come down through a streak of the country, in that bottom. The storm was accompanied by a very severe wind. Just about the time they hit it, had kind of checked up; but a second or two before that there was a big cloud went by. The snow kept us from seeing No. 12 coming a greater distance than a quarter of a mile. It was so dense we could not see through it."

Conductor Allen, on train No. 91, says there was about nine poles down. Says engineer of passenger done nothing that he noticed to slack the speed of the train; that the passenger train was running full speed when the collision occurred. "It was a pretty bad snowstorm. * * * Mathias, in the cab, would be facing the snow. The snow was blowing towards Mathias' engine as he came

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down the track. * * * The poles were blown down by the storm. * * * We first met the severe part of the storm just about Dalton. It would slacken up, and then again it would come in a bluster and gale. The snow would drift so you could hardly see at all. That sort of snow was going on when he came to the wreck and afterwards. * * * The storm must have kept him (Mathias) from seeing us, and the snow was blowing against him. The storm carried the steam and smoke of his engine at a kind of an angle right back over his engine, right in his face." Says passenger engine was running about 40 miles an hour when it hit engine of train 91. Further said: "If his [Mathias'] view not been obstructed, he could have seen my signals. If the view had been clear, there would have been no trouble." Says the storm was spotty; would be heavy and dark in one place, and light in another. Says the wind was sufficient to blow down seven or eight telegraph poles.

R. C. Hardister, witness for respondent, testified: He was brakeman on train 67. Was up at engine of train 91. After discovering No. 12 through the storm, had just time to get right off of way when the collision occurred. Says there was snow and sleet and wind blowing, which obstructed his view of No. 12. "It was a pretty bad morning to start with; but it seemed as though the storm was worse in places than it was in others. It was pretty bad at the time of the collision."

W. C. Clifford, witness for respondent, conductor of train 67, said: "The storm was about the severest at the time of the accident. * * * Suppose the storm caused the poles to fall. In ordinary weather you can see a long distance up that track. The storm was coming from the north and east. It would be in the face of the engineer of No. 12, and the storm and smoke of the engine would be in his face."

Harvey C. Noble, witness for respondent, and brakeman on train 67, said of the storm: "I think it was about as bad as I have been out in. Have been railroading five years. About the most severe I was ever in. It was storming from the time we went through Keytesville; but it wasn't so severe until we got to Dalton. It seemed to get worse then up to the time of the collision, till the time we stopped, and continued so. I know the storm was pretty fierce until noon."

Charles Hall, witness for respondent, and engineer on Wabash Railway, said: "The snow was awful bad, and it was more ice than snow, and it was cutting, snowing awful hard. That kind of a wind would blow the smoke in the engineer's face. That would obscure his view. * * * There were times that morning in the storm that I couldn't see anything at all. I couldn't see the engine behind me nor the track ahead." After the collision he was sent out from Brunswick, where he had his engine, to the wreck. This was very soon after it happened. Says: "We were running slow, because we were going out to the wreck, and we didn't know where it was, or what had transpired out there. When we picked Conductor Allen up, we were right into them, probably 50 feet, before I seen him. We were on the lookout for him. * * * It was snowing so bad and blowing so hard. I was leaning out of the cab at the time." About a mile further he picked up Conductor Cusheva of the passenger, but it had cleared some then, and he discovered him easily.

Samuel Lewis, section hand, witness for respondent, said he was out all morning, and that there were times he could not see much over 300 or 400 feet, and then it would rise, and he could see a half mile. Says, when he was inside of a quarter from train 91 standing, he could not tell that it was a train or what it was.

Nicholas Mathias, witness for appellant, and engineer pulling train No. 12, testified that he had been engineer on the Wabash over 30 years. "There was a severe storm that morning, as severe as I have ever seen since I have been railroading. It was snowing, and the wind was blowing. I couldn't see at all. I was sitting against the snow, facing it, and I put my face out of the cab. I did not notice any telegraph poles blown down on that morning. Did not either see or hear any poles being broken or blown down. I was going about 40 miles an hour, and the snow was coming towards me from the northeast, and the wind was blowing a perfect gale. Did not hear any torpedoes exploded. Did not see any signals given by the other train, nor hear any torpedoes. * * * The storm was not so severe when I left Brunswick station. It began to snow east of the coal chute, and kept on getting worse. * * * The snowstorm was right in that place and had been for some little time. I could see by the way it had been piled abouf there, but it was not bad when we left Brunswick, but it began to get worse, and was a very severe storm. * * * I never, in all my experience on the Wabash, saw as severe a storm as that one. * * * I could not see on account of the storm and snow, although the track was straight there for several miles. The storm prevented my hearing the signals. I did not hear any torpedo on account of the wind blowing in my face and causing me to shut my eyes. I was running against the storm. If there were any signals given, I did not hear them."

W. H. Holser, witness for appellant, who was the engineer in charge of engine pulling train 91, testified: "It was a very severe storm, about the worst I ever saw. We were about two miles east of Brunswick. It had been storming there. It commenced snowing when I left Keytesville. That is about 11 miles from Brunswick. It was not storming at Keytesville. We struck the unusual storm about three miles east of Brunswick. That

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is about a mile west of where the collision occurred. It was so severe you could hardly see anything; but, just as luck would have it, before I came to where these telegraph poles were, we saw the poles blown down." Says he was only going 8 or 10 miles an hour. There were eight poles blown down. Says the storm was so severe that he could not see No. 12 very far. Further said: "I have never seen a snowstorm as severe as that one on that part of the road. * * * I would have cleared him five minutes but for this storm and the poles. It was impossible to see in that storm. You could not see far at all."

O. D. Blackwell, witness for appellant, fireman on train 91, said: "There was a severe storm that day. I call it a blinding snowstorm. * * * I never saw as severe a storm as that in that part of the country. * * * The storm was raging at the time of the collision." Says when he saw No. 12 he could just discern a form or shape through the cab window. First thought it was a light engine coming with men to clear away the poles.

Was passenger train No. 12 flagged?

George Milliner, witness for respondent, and brakeman on train 91, said: "When I first saw the passenger train, it was probably a quarter of a mile, coming down the track. We flagged the train. The storm was so severe I don't suppose he could see us. It kept coming ahead and collided with us. There was no slacking of speed of the passenger train. * * * We gave signals with our hands and our hats. That is all we had to flag with. I don't know what Byers did. * * * When we first saw it, we gave the signal to stop and commenced flagging." Also says he thinks the track walker flagged. "We saw his engine in just about time enough to get out of the way, and we waived our hats and hands to give the alarm."

Robert Allen, witness for respondent, and conductor of train 91, says: "The first thing I did was to send a flag out ahead, after I got on the engine. I sent a man by the name of Byers." Says he instructed Byers to go ahead to Brunswick and hold everything till they came, and tell them what the trouble was. Says the last he saw of Byers he was going up the track about a quarter away; that was 20 or 25 minutes before the passenger came. Says: That just before the collision he heard something coming; that he got on the south side of the track, started west, and commenced waiving his hands and hallooing. Says Byers took a red flag with him as a danger signal. Says he does not know where Byers is now or where he lives. He left the Wabash shortly afterwards. Had been gone ever since. Further said: "I did not neglect any precaution known to railroad service to protect and care for my engine. I sent a flagman each way, armed with a flag and proper instructions; all I could do. Nothing was left undone to protect my train." Says that in the use of torpedoes two are usually put down as a warning signal, and one is a signal to stop. They are placed on the rail on the engineer's side. He does not know whether there were any torpedoes on his train or not. Snow on the track would deaden the sound of a torpedo.

Engineer Hall, witness for respondent, said: "There is no code signal to keep from being collided with that can be made by an engineer with his whistle. Don't know of any such regulation. * * * An engine going east 40 miles an hour, and the wind blowing a perfect gale from the northeast, bearing snow and ice, and meeting the engine on the quarter, and there is smoke and steam escaping from the engine, blowing backward, that would obstruct the engineer's view. It would blow the steam right in his face and obstruct his view. The rate the engine was going would make it more severe. It wouldn't affect a man standing on the ground; but an engineer going 40 or 45 miles an hour wouldn't be able to see anything. He couldn't keep his head out.

Samuel Lewis, witness for respondent, a track walker, says the conductor and brakeman flagged No. 12. Gave them the signal by waiving both arms and hands. Says he met Byers at a point just two miles from Brunswick going west on the track. This was about 25 minutes before No. 12 showed up.

Engineer Mathias, witness for appellant, said: "I was going about 40 miles an hour, and the snow was coming towards me from the northeast, and the wind was blowing a perfect gale. Did not hear any torpedoes exploded. Did not see any signals given by the other train nor hear any torpedoes."

W. H. Holser, engineer on train 91, witness for appellant, says he saw Byers walking west on the track with a red flag. Byers claimed he had one torpedo. Says, when No. 12 showed up "my conductor and the hind brakeman and several more gentlemen there, I don't recollect now, tried to stop him. * * * They hallooed and signaled, and I did too; but I seen the man couldn't see and didn't see us, and I got out of the way as far as I could. I gave him a stop signal. That was done with my hand. * * * I noticed that he didn't see us when we signaled." Says both the conductor and brakeman flagged and tried to stop the train.

This substantially presents the testimony upon which this cause was submitted to the jury. At the close of the evidence, the defendant requested the court to give an instruction in the nature of a demurrer to the evidence, directing the jury to find the issues for the defendant. This request was denied, defendant properly preserving its objections and exceptions to the action of the court in denying such request. The court

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then proceeded, according to its views of the law, to instruct the jury upon all subjects to which the testimony was applicable. The cause was then submitted to the jury upon the instructions and evidence, and they returned a verdict finding the issues for the plaintiff and assessed her damages at the sum of $5,000. Timely motions for new trial and in arrest of judgment were filed and by the court taken up and overruled. From the judgment rendered in this cause, the defendant prosecuted its appeal, and the record is now before us for consideration.

Jas. L. Minnis, for appellant. Willard P. Cave, for respondent.

FOX, J. (after stating the facts as above). The record in this cause assigns numerous errors as a basis for the reversal of this judgment. However, it is apparent that the main and controlling proposition confronting us is the challenge on the part of the appellant to the sufficiency of the evidence to authorize the submission of this cause to the jury. This leading question was properly presented to the trial court by requesting an instruction at the close of the testimony on the part of the plaintiff, as well as at the close of the whole case, directing the jury to find the issues for the defendant. If this contention by the appellant that the testimony was insufficient to authorize the submission of the cause to the jury should be sustained, then it will not be necessary to consider the several other assignments of error why the judgment should not be permitted to stand. We shall therefore first direct our attention to this main proposition.

In order to fully appreciate this important question, it is essential that we make a brief reference to the issues as presented by the pleadings in the cause, to the end that we may give due effect to the testimony introduced upon those issues. Respondent, by her petition, alleges, in substance: That on December 12, 1903, between the hours of 11 and 12 o'clock in the forenoon, the defendant, by its agents and servants, while running and operating a passenger train, so negligently and carelessly ran and operated same that said passenger train ran into and collided with a freight train; that said freight train was on appellant's tracks and had been standing still for 20 minutes; that the agents and servants in charge of said freight train saw said passenger train approaching, and failed and neglected to sound the steam whistle; that said collision occurred on a straight track, where the engineer on said passenger train could have seen said freight train for more than a mile by keeping a proper lookout ahead, failed and neglected to see said freight engine standing on the same track, failed and neglected to stop said passenger train, and so negligently and carelessly ran said engine that same collided with said freight engine and cars; and that by reason thereof said passenger engine was wrecked, and George W. Evans, deceased, husband of respondent, and fireman on said passenger engine, was killed. Then follows these specific allegations in the petition: "That the death of plaintiff's said husband, George W. Evans, was caused by the carelessness and negligence of defendant's engineer running said passenger engine, in failing and neglecting to keep a proper lookout in front of his said engine, and in failing and neglecting to observe the said freight engine and train standing on said track, and by the carelessness and negligence of the engineer and train crew of said freight train aforesaid, in failing and neglecting to give the proper signals to the engineer of said passenger engine in time to avoid said collision, thereby causing said collision, and killing plaintiff's said husband as aforesaid."

The statements contained in the petition, as above quoted, are to be found at the close of plaintiff's petition, and it is manifest that these allegations were intended as a specific summary of the more general allegations which preceded them. Obviously this summary of the general allegations embraced in the petition must be treated as the construction placed on such preceding allegations by the learned counsel who drafted the petition. Upon this state of the pleadings it is clear that the plaintiff undertakes to charge, as causes of the collision which resulted in the death of her husband, three distinct and specific acts of negligence; that is to say: First, the carelessness and negligence of appellant's engineer in charge of the passenger engine, in failing and neglecting to keep a proper lookout in front of his engine; second, the negligence of the engineer on said passenger engine in failing and neglecting to observe the freight engine and train standing on the track; third, the carelessness and negligence of the engineer and train crew of said freight train aforesaid in failing and neglecting to give proper signals to the engineer of said passenger engine in time to avoid said collision. Emphasizing the correctness of the conclusion that the trial court, as well as counsel for respondent, construed the cause of action as stated in the pleadings as being based on specific charges of negligence, it is only necessary to direct our attention to the instructions requested and given by the court on the part of the plaintiff. Instruction No. 1 told the jury that if "George W. Evans was then and there crushed and killed, without fault or negligence on his part, and that the said collision and death of plaintiff's said husband was directly caused by the negligence of said engineer of said passenger engine, then and there in the employ of defendant, in carelessly and negligently failing to keep a lookout for signals, then your verdict must be for plaintiff." By

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instruction No. 2 the jury were told that if George W. Evans was, while engaged in the service of appellant as fireman on said passenger engine, without fault or negligence on his part, crushed and killed, and that his death was directly caused by the carelessness and negligence of any of appellant's said employés in charge of said freight train No. 91, whose duty it was to give signals to approaching trains, in negligently and carelessly failing to give to the engineer of the passenger train necessary and proper signals to stop in time to avert said collision, and that said collision and death of plaintiff's husband could have been prevented by the use of ordinary care and caution on the part of the aforesaid employés, then the verdict should be for respondent. It is clear, from these declarations of law given by the court as a guide to the jury in the consideration of the evidence, that this cause was tried upon the theory that the defendant was guilty of one or two specific acts of negligence; that is to say: First, the failure of the passenger engineer to keep a lookout ahead for signals; or, second, the failure of the crew in charge of train No. 91 to give proper stop signals. There is an entire absence from this record of any instructions based on any charge of general negligence contained in the petition.

Learned counsel for respondent for the first time during the progress of this cause by his brief filed herein invokes the doctrine of res ipsa loquitur, and in support of that theory directs our attention to the case of Shuler v. Railway Co., 87 Mo. App. 618. We have carefully analyzed that case, and in our opinion it has no application to the case at bar. It will be observed that the Court of Appeals in that case, in announcing its conclusion, used this language: "It must therefore follow that, since the company is liable to a servant whether the negligence is its own or that of a fellow servant, proof of collisions of trains makes a prima facie case for an employé against the company equally as well as if he had been a passenger." Upon an examination of the Shuler Case, it will be found that the petition did not base the cause of action upon specific acts of negligence, but simply alleged general negligence. There was not the slightest attempt in that case to specifically state the cause or causes of the accident, and the conclusions reached by the Court of Appeals were expressly predicated upon the ground that the petition stated only general negligence. That is not the case before us. It is plainly manifest that the petition in the record now under consideration is definite and specific in charging the particular acts of negligence which are alleged to have been the cause of the collision which resulted in the death of plaintiff's husband. This being true, it logically follows that, if plaintiff is entitled to recover at all, such recovery must be based upon the specific charges of negligence as contained in her petition.

In Beave v. Transit Company, 212 Mo. 331, 111 S. W. 52, this division of the court, in treating of the proposition which is now urged by counsel for respondent in the case at bar, thus stated the rule: "The law is well settled in this state that a person will not be permitted to plead one cause of action and recover upon another. The respondent seeks to evade the operation of the above rule by contending that the petition in the case at bar is so broad in its charges of negligence that it is equivalent to an averment of general negligence, which is a sufficient allegation in cases like this; that is, that plaintiff would have made a prima facie case by merely alleging and proving that he was a passenger, that the collision occurred, and that he was injured in consequence thereof. As an abstract proposition of law, that contention is sound, and, if the petition had been drawn upon that theory, than the instruction in this case would have been a correct declaration of law; but that rule has no application where the petition, as in this case, alleges the specific acts of negligence relied upon for a recovery. * * * The reason of this rule is apparent. Charging the specific acts of negligence relied upon for a recovery is equivalent to stating that there are not other acts of the company which caused or contributed to the injury; and if, after stating his cause of action, the plaintiff is permitted to introduce evidence of and recover upon another and different cause, not stated in the petition, the defendant would thereby be taken by surprise and would not be prepared to meet the new issues thus presented." "But," as said in the case of Roscoe v. Railway, 202 Mo. 576, 101 S. W. 32, "if plaintiff by his petition is shown to be so sufficiently advised of the exact negligent acts causing or contributing to his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits he does so know it in his petition, then he must prove it, and, if he recovers, it must be upon the negligent acts pleaded, and not otherwise. In other words, the burden of proof is upon the plaintiff, as it would be in any other kind of a case."

1. This leads us to the consideration of the evidence developed upon the trial of this cause. In considering the evidence offered to establish the acts of negligence relied on, we must bear in mind that, just before and at the time of the accident, a very unusual and extraordinary snow and wind storm was raging. This storm is assigned by appellant as the cause of the death of Evans. It is not claimed by appellant that the accident was due to an "act of God" in the strict interpretation of that phrase, but rather that it was due to the doctrine involved in the phrase "vis major," which is defined to

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be an irresistible natural cause which cannot be guarded against by the ordinary exertions of human skill and prudence. 29 American & English Ency. of Law, p. 1064. The facts developed concerning the storm that was raging at or about the time of this accident are practically undisputed, and the evidence clearly shows that the snow and wind storm which was raging at the time of the collision was of a most extraordinary and unprecedented character in that locality. There are no contradictions upon this subject among the witnesses. Every witness who testified gave it that character. It was such a storm that could not reasonably have been anticipated by the agents, servants, and employés of the appellant. The description of that storm by the numerous witnesses testifying in this cause in reference to its local character renders it most extraordinary and peculiar.

In Turner v. Haar, 114 Mo. 335, 21 S. W. 737, the plaintiff, Turner, sought to recover damages for injuries received by reason of the falling of a building in which he was at work. The defense interposed to that action was that the building was destroyed by a violent and unprecedented storm. Judge MacFarlane, speaking for this court, very clearly and correctly announced the proper rule as applicable to this subject. Among other things, he said: "While there is no doubt that defendants owed to plaintiff, as one of their employés, the duty of care in supplying her a safe place in which to work, it is equally well settled that a master is not required to provide against storms, extraordinary and unprecedented in their character, in that locality, but only for such as could reasonably have been anticipated. * * * If the injury is shown to have resulted from a condition which is extraordinary and not to be expected, it is not enough simply to prove an injury to plaintiff. Something that the defendants did, or that they omitted to do, must be proved to have been the cause of the injury." While in the Turner Case there was no specific assignment of negligence, yet the court held that, where a building was destroyed during the prevalence of an unprecedented storm, the destruction of the house would be attributed to the storm, and the prima facie case made by the falling of the building would thus be rebutted.

Mr. Labatt, in his work on Master and Servant (vol. 1, p. 306), makes the following clear and pertinent observations: "A principle frequently applied is that in certain states of the evidence a court is entitled to declare, as a matter of law, that the catastrophe in question, though a natural and possible result of the conditions which existed, was so 'rare and peculiar,' or so far 'outside the range of ordinary experience,' or 'out of the common course,' that the master could not reasonably be expected to conduct his business in such a manner as to eliminate the risk of its occurrence. His nonliability is assumed to be a conclusive inference from the principle that 'ordinary care' does not require that every possible contingency must be anticipated and guarded against, but only such as are liable to occur."

Upon the trial it was developed by the evidence introduced on the part of the plaintiff: That the storm of wind, sleet, and snow was raging violently from the northeast and blew down and across the track eight or nine telegraph poles just a short time before the collision; that freight train No. 91 was stopped by these poles; and that immediately thereafter the conductor did what was usual on such occasions, and started flagmen each way with instructions to stop everything. Passenger train No. 12, upon which plaintiff's husband was the fireman, was due at Brunswick about 11 o'clock. This was a passenger train and had the right of way, and, having no orders to the contrary, had the undoubted right to pull out of Brunswick and proceed on its journey east, in the direction of freight train No. 91. Immediately after leaving Brunswick the storm increased. The engineer pulling the passenger train No. 12, or the fireman on said train, facing the smoke, snow, and wind, could not see anything ahead of them. This train had passengers aboard, and the conductor, engineer, and the crew operating same could not afford to stop it for the reason of the danger of being run into either in front or behind. Hence the only appropriate thing they could do, being a passenger train and having the right of way, was to proceed. The evidence on the part of the respondent further shows that, by reason of the density of the snow and the terrible wind and storm that was raging, the crew of train No. 91 did not discover the approach of passenger train No. 12 (and then could only discover a mere form) until it was within seven or eight telegraph poles of No. 91. The evidence as to how this collision occurred is fully set out in the statement of the facts of this cause, and it was under the circumstances as detailed in such statement that this collision occurred.

The primary showing made by respondent's evidence was that the collision was due to the extraordinary and unprecedented snow and wind storm then prevailing. Therefore, this being true, it then devolved upon respondent to prove one or both of the acts of negligence submitted to the jury by instructions Nos. 1 and 2; that is to say, she must have shown that the collision was due to the failure and neglect of Engineer Mathias to keep a proper lookout ahead for signals, or to the failure and neglect of any of the crew in charge of train 91 to give the necessary and proper signals to Engineer Mathias to stop his engine and the passenger train. As to whether there is any evidence in the record tending to establish either or both of said propositions will be our next inquiry.

Does the evidence show that Engineer Mathias failed to keep a proper lookout ahead

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for signals? There is absolutely no direct or positive evidence of any failure or default on the part of Mathias, more than that he did not check or stop his train when signaled by the crew of train 91. He says he saw no signals nor heard any torpedoes. Says he could not see ahead, nor could he keep his head out the side window at the rate of speed he was going. He was going east and was sitting on the right or south side of the engine. The wind, snow, and sleet from the northeast, as well as the smoke and steam from his engine, absolutely obscured his view and prevented him seeing anything ahead. Engineer Hall, who ran his engine slowly out to the wreck shortly after, and who kept his head out all the way, says he was within 50 feet of Conductor Allen before he could see him. Says he could not have kept his head out had he been going 45 miles an hour, as Mathias was. Those at the head of train No. 91, standing with their backs to the wind, did not discover, nor could they see, train No. 12 on a track, which is straight for miles, until it was within a quarter of a mile of the freight engine. They could then only discern a form approaching through the blinding snow. After reading and re-reading the testimony carefully, we see no escape from the conclusion that there is no testimony tending to show that Engineer Mathias negligently failed to keep a proper lookout ahead for signals. That he was not looking out ahead is quite clear; but that he could not do so because of the extraordinary severe wind and storm then raging is equally clear. It must be remembered that the storm was not so violent when he pulled out of Brunswick, but kept getting worse as he proceeded. It was evidently of a local character, and reached a climax of severity at about the point of the collision. It must have been of a most "rare and peculiar" character, and "out of the common course," to have blown down eight or nine telegraph poles within a distance of about a quarter of a mile. Owing to its local and severe character, it could not reasonably have been anticipated by appellant's agents in time to have averted the catastrophe.

2. This brings us to the consideration of the question as to whether or not there was a negligent failure on the part of any of the employés of appellant in charge of freight train No. 91, who were charged with the duty of giving signals to approaching trains, to give the necessary and proper signals to Engineer Mathias to stop his engine and said passenger train. Respondent's own testimony developed that at once, upon train No. 91 being stopped by the fallen telegraph poles, Conductor Allen, in charge of that train, caused Brakeman Milliner to go back east with a red flag and Brakeman Byers to proceed west with a red flag. His instructions to Byers were to stop everything and to go on to Brunswick, which was about two miles away, and report the fallen poles. As soon as passenger train No. 12 was discovered approaching, Conductor Allen, Engineer Holser, in charge of engine pulling train No. 91, Brakeman Milliner, who had gone to the front of his train after flagging freight train No. 67, all signaled the engineer of train No. 12 with their arms and hats and hallooed at him. In fact it is shown by respondent's evidence that the members of the crew of freight No. 91, who were at or near the engine, did everything in their power to signal the approaching train. It is true that the whistle on the freight engine was not blown; but it was not shown that the sounding of that whistle would have been any more effective than the signals which were given. Under the circumstances, Engineer Mathias going at a speed of 40 miles an hour, surrounded as he was by the noise of the storm and working engine, it is not at all likely that the sound of the whistle on the freight engine would have reached him. Thus far the allegation that the members of the crew running and operating freight train No. 91 were negligent in failing to signal appellant's passenger engineer is not only not proven, but the uncontradicted evidence shows that they acted promptly and used every available means to stop the passenger train; but respondent says the negligence of Byers, the brakeman sent ahead by Conductor Allen, was palpable. Learned counsel for respondent argues as follows: "He left the place where train No. 91 stopped, knowing that the passenger train was soon due. He had half an hour to go a scant mile and a half, with the wind at his back. He was instructed to go to Brunswick and hold everything there until 91 got there. He had ample time to reach the coal chute east of Brunswick, where the passenger train stopped and took coal. His failure to do his duty was negligence that directly contributed to the collision."

The record discloses that Byers did not testify, nor is there any testimony showing what he did before reaching Brunswick and informing Engineer Hall of the wreck. What he did can only be surmised by inference. That he did not reach Brunswick before the passenger train left may be inferred from the information he gave Engineer Hall. That the passenger train passed him on the way may be inferred from the fact that he knew there was a collision. It might be inferred that he concluded the trains would collide from the fact that owing to the severity of the storm he was unable to communicate a signal to Engineer Mathias. But, as already pointed out, this case cannot be determined by inference or presumptions. It cannot be presumed from the fact of the collision that either Byers or Mathias were derelict in the duty alleged. The burden was on respondent to show that Byers failed to give the proper signals, and in this there is a complete failure of proof. Byers may have had torpedoes, and may have placed them on the track, or he may not. He

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may have used his red flag and attempted to signal the engineer, and he may not. With this extraordinary and unprecedented storm raging, the mere fact of a collision is not sufficient proof that Byers, the flagman, failed to discharge his duty. We repeat, that the burden was upon plaintiff to show, under the conditions existing at the time of the accident, that he failed to discharge the duty imposed upon him. The conclusion that Byers did not give the signals can only be reached by a surmise alone, and, when the evidence in its entirety as given by the engineer and all the other witnesses is considered, it is just as reasonable, if not more so, to conclude that Byers did give the signals, and that owing to the unprecedented storm they were not seen, as to conclude that he failed to give them.

In our opinion it is clear that the plaintiff sought a recovery for the death of her husband predicated upon charges in her petition of specific acts of negligence on the part of the defendant. This being true, the burden rested upon her to prove by substantial testimony the specific acts of negligence charged in her petition. We have carefully read in detail the evidence as disclosed by the record in this cause, and in our opinion there was a failure to prove the acts of negligence, or any one of them, alleged in the petition. Hence it was the duty of the trial court to have granted the request of the defendant and directed the jury to find the issues for it.

We have indicated our views upon the controlling proposition in this cause, which results in the conclusion that the judgment of the trial court should be reversed. All concur.

STATE ex rel. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES v. VANDIVER, Insurance Superintendent.†

(Supreme Court of Missouri. May 22, 1909.)

1. INSURANCE (§ 20*)—INSURANCE COMPANIES—REGULATION—STATUTES.

Act March 1, 1907 (Laws 1907, p. 315), regulating the salaries of officers of life insurance companies, and providing that the insurance commissioner shall not issue a license authorizing any insurance company paying a salary to any one person of more than $50,000 per year to do business within the state, applies to all life insurance companies doing business in Missouri, as well as those which should thereafter apply for a license therefor.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

2. STATUTES (§ 109*)—TITLE—PLURALITY OF SUBJECTS.

An act does not violate Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that a statute shall contain but one subject, to be clearly expressed in its title, where the title does not mislead as to what the bill contains, and is not designed to cover vicious and incongruous legislation, though the title does not express in detail, or point out the substance of, the various elements that go to make up the subject-matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. § 109.*]

3. STATUTES (§ 113*)—TITLE—PLURALITY OF SUBJECTS.

Act March 1, 1907 (Laws 1907, p. 315), is entitled "An act relating to the salaries and compensation of officers of life insurance companies." Section 1 declares that no domestic insurance company shall pay a salary to any one person of more than $50,000, unless authorized by vote of the board of directors, and section 2 declares that no life insurance company which pays a salary or compensation for services of more than $50,000 per annum shall be licensed to do business within the state. *Held*, that section 2 was in the nature of a penalty, and that the statute was not therefore objectionable as containing a double subject not expressed in the title, under the rule that any matter germane thereto, and naturally connected with the subject contained in the title, is sufficiently covered thereby.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 113.*]

4. INSURANCE (§ 20*)—REGULATION—LICENSES.

Act March 1, 1907 (Laws 1907, p. 315), prohibiting the issuance of a license to insurance companies paying a salary greater than $50,000 to any one person, does not attempt to fix the salaries such companies may pay, nor require the expulsion of any company from the state paying greater salaries, but merely prohibits the granting of a new license to such a company after the expiration of its current license.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

5. INSURANCE (§ 20*)—LICENSE—EFFECT.

A license authorizing an insurance company to do business within the state is not a contract, but a mere grant of authority for the space of one year.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

6. INSURANCE (§ 20*)—LICENSE—REFUSAL—EFFECT.

The only effect of the insurance commissioner's refusal to renew an insurance company's license to do business within the state is to prevent it from making new contracts, or transacting new business, in the state after the expiration of its current license, being without effect on any former transaction.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

7. CONSTITUTIONAL LAW (§ 120*)—OBLIGATION OF CONTRACTS—FOREIGN CORPORATIONS—BUSINESS WITHIN STATE—LICENSE.

Statutes, providing for the control and management of corporations doing business within the state, and licenses issued pursuant thereto, are not contracts, but are mere police regulations, which may be amended or appealed by the Legislature at pleasure, without violating any right of corporations previously licensed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 286; Dec. Dig. § 120.*]

8. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—REGULATION.

The Legislature being authorized to exclude all foreign corporations from the state, such a corporation cannot complain of conditions imposed by law precedent to its right to a license to continue business within the state.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 636.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied July 9, 1909.

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9. INSURANCE (§ 20*) — FOREIGN CORPORATIONS—LICENSE—RENEWAL—REFUSAL.

That a foreign insurance company had invested large sums of money in Missouri, relying on a license previously granted under statutes then in force, did not prevent the insurance commissioner from refusing a renewal license, under Act March 1, 1907 (Laws 1907, p. 315), forbidding renewal to companies paying salaries to any one officer of more than $50,000, on the theory that there was an implied contract between the corporation and the state; the insurance commissioner not being authorized to enter into any contract, express or implied, but to issue a license only, and the Legislature being without power to contract away the police power of the state inherent in and inseparable from sovereignty, except so far as released in the federal Constitution.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

10. INSURANCE (§ 20*) — REGULATION — FOREIGN CORPORATIONS—LICENSE.

Act March 1, 1907 (Laws 1907, p. 315), prohibiting the issuance of a renewal license to an insurance company paying more than $50,000 per annum salary to any one person, was not objectionable as an attempt to regulate the internal affairs of such corporations, but was a valid police regulation for the protection of the citizens of Missouri accepting insurance in such companies, to prevent the profligate waste of assets.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 20.*]

Graves, Fox, and Lamm, JJ., dissenting.

In Banc. Mandamus by the State, on relation of the Equitable Life Assurance Society of the United States, against William D. Vandiver, Superintendent of Insurance. Writ denied.

Relator, a foreign insurance company organized under the laws of New York, seeks by mandamus to compel the State Superintendent of Insurance to renew its license to do business in this state as per the conditions fixed by Rev. St. 1899, § 7888 (Ann. St. 1906, p. 3745), which section reads: "Renewal of Authority.—If the said annual statements mentioned in sections 7880 and 7887 shall have been made in conformity with the requirements of said sections, and the superintendent, after deducting from said statement all worthless and doubtful assets, shall be satisfied as to the solvency or condition of the company filing the same, and its ability to meet all its engagements at maturity, he shall issue a renewed certificate of authority to such company to continue business; and no company not incorporated under the laws of this state shall continue to do business until a renewed certificate is issued." An alternative writ was issued, from which we gather that relator was, at the time of, and for a long time prior to, its application for a renewal of its license or certificate to do business in this state, paying, and had been paying, one of its officers a salary in excess of $50,000 per year; that relator for many years had been doing business in Missouri, and that, when it applied for and received its original certificate or license to do business in the state, said section 7888 was then in force, as were also what are Rev. St. §§ 7842, 7989 (Ann. St. 1906, pp. 3726 and 3798); that the relator at the date of its entrance in the state, under the statutes aforesaid, paid the fees and complied with all conditions required by law for its admission to do business in the state, and that, during all the time since said date, has complied with the law, and has received each year a renewal of its certificate of authority to do business in the state, the last renewal being of date March 1, 1907; that prior to March 1st it complied with all the provisions of said section 7888, and otherwise complied with the laws of the state, so as to entitle it to a renewal of its certificate to do business on said date, and that it thereby became the duty of respondent, the Superintendent of Insurance, to issue such renewed certificate. The alternative writ then shows the vast volume and character of relator's business in Missouri, as well as the vast sums it has invested in the state in real estate and mortgages, as also the taxes paid to the state by it. The writ then shows that the respondent refused the renewal of its certificate solely because relator pays one of its officers a salary in excess of $50,000 per year, and because to issue the same would be in violation of the following act of the Legislature, enacted in the year 1907:

"An act relating to the salaries and compensation of officers and agents of life insurance companies.

"Section 1. No domestic life insurance company shall pay any salary, compensation, or emolument to any officer, trustee or director thereof, nor any salary, compensation or emolument amounting in any way to more than $50,000 to any person, firm or corporation, unless such payment be first authorized by a vote of the board of directors of such life insurance company and the record of such entered in the minutes of the meeting when such action was taken.

"Sec. 2. No life insurance company, which pays as salary or as compensation for services or as an emolument or allowance of any kind whatever more than $50,000 per annum to any one person shall be licensed to transact business in this state."

From the alternative writ it appears that relator attacks the validity of this act of the General Assembly of Missouri, for the reasons expressed in this language: "Said act of 1907 is invalid, void, and of no effect as against relator, in that: (a) The act as properly construed does not apply to foreign insurance companies; (b) the act is unconstitutional, in that it limits the compensation of officers, agents, and employés of a corporation for all their services within or without the state of Missouri, thereby interfering with the right of contract, contrary

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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to the provisions of sections 4 and 15, art. 2, of the state Constitution, and section 10, art. 1, of the fourteenth amendment to the Constitution of the United States; (d) the act is unconstitutional in that it contains more than one subject, and the subject is not clearly expressed in the title, contrary to the provisions of section 28, art. 4, of the state Constitution; (e) the act should not in any event be construed to apply to the renewed certificate of authority mentioned in section 7888." Respondent entered his appearance, and by way of return demurred to the sufficiency of the allegations contained in the petition and alternative writ herein, and thereupon asked the judgment of the court. The case is therefore one of law, pure and simple.

O. M. Spencer, Franklin Ferriss, and Frank Hagerman, for relator. Herbert S. Hadley, Atty. Gen., and John Kennish, Asst. Atty. Gen., for respondent.

WOODSON, J. (after stating the facts as above). 1. In my judgment the Act of 1907 (Laws 1907, p. 315), entitled "An act relating to the salaries and compensation of officers of life insurance companies" is an unwise piece of legislation and should be repealed, but that is a matter to be addressed to the Legislature, and not to the courts. The latter have only to do with the constitutionality and the interpretation of the laws, and not the enactment and repeal thereof. The act in question in express terms applies to all life insurance companies which pay any of their officers or agents over $50,000 a year as salary or compensation, and there is not a word or line therein which remotely indicates, as contended by counsel for relator, that it applies only to companies which were doing business in the state at the time of its enactment; but, upon the contrary, the very object the Legislature intended to accomplish conclusively shows that it applies to all life insurance companies, regardless of the time when they were authorized to do business in the state. The purpose of the act was clearly to prevent the companies from paying their officers and agents compensation in excess of what the Legislature thought their services were really worth, and thereby misappropriate and waste the assets of the companies, which should be preserved for the purpose of paying their policies and other obligations. The Legislature thought, and had good grounds to think, that some of the foreign life insurance companies doing business in this state were paying some of their officers and agents too large a compensation for the services they were rendering to their respective companies, and were thereby jeopardizing the interest of the policy holders of those companies, and in order to obviate that abuse the act of 1907 was enacted. The reason which gave birth to the act applies as well to the companies which were doing business here at the time of its enactment as it did to those which should subsequently come into the state. And if we recall the history of the investigation of the foreign life insurance companies which were doing business in this state during and just prior to the enactment of this law, then there could be no room for doubt as to the companies to which it referred. The disclosures made by that investigation showed that some of those companies were paying some of their officers and agents unreasonable and exorbitant salaries for the services they were rendering, amounting in some instances almost to profligacy. Clearly that was the cause of the enactment; and, if that and other extravagances and abuses then disclosed had continued unabated, it would have been only a question of time when their solvency would have been challenged. In the light of that history, when we read the act in question, there can be no doubt but what the Legislature intended the act to apply to all life companies then doing business in the state, as well as those which should thereafter enter.

2. In my judgment that act is not in conflict with section 28, art. 4, of the Constitution, which provides that no bill shall contain more than one subject, and that such subject must be clearly expressed in the title of the bill. The title of the bill in question reads as follows: "An act relating to the salaries and compensation of officers and agents of life insurance companies." It is not disputed but what the title of the act clearly indicates that it relates to the salaries and compensation life insurance companies were paying their officers and agents for services rendered and to be performed by them; but the objection lodged against the act is that it contains an additional subject-matter to the one stated in the title of the bill, namely, that a license to do business in this state should not issue to any life insurance company which pays any of its officers or agents more than $50,000 a year for their services. It is true the act contains the prohibitive section No. 2, above mentioned, and that no reference thereto is made in the title of the bill to it. If that section constitutes a separate and independent subject from the subject stated in the title, then clearly the act would be double and unconstitutional, not only on that account, but also for the reason that it is not stated in the title of the act; but if said section 2 does not contain a separate and independent subject from that expressed in the title of the act, but is germane thereto, and naturally relates to the subject therein stated, then the act is single, and does not offend against said constitutional provision. State v. Miller, 45 Mo. 495; Ewing v. Hoblitzelle, 85 Mo. 64; State ex rel. v. Miller, 100 Mo. 439, 13 S. W. 677; Town of Kirkwood v. Heege, 135 Mo. 112, 36 S. W. 614; Elting v. Hickman, 172 Mo. 237, 72 S. W. 700.

In the consideration of this constitutional question it should be borne in mind that no

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statute is valid without a penalty of some kind is prescribed for its violation, and that such penalty may be of any character the Legislature may deem proper to impose, within constitutional limitations. Knowing that fact, the Legislature, in my judgment, enacted the second section of the act as a penalty, if I may so term it, prohibiting the issuance of a license to any life insurance company to do business in this state which pays more than $50,000 to any officer or agent of the company. No authority has been cited holding that the Legislature may not constitutionally impose that kind of a penalty if it sees proper to do so; and I am unable to see any legal objection to its exercise of that power. We have numerous statutes of similar character, among others those which prohibit the issuance of a license to a person to run a dramshop who is a man of bad character; or to a person to practice law who is a person not of good character, or who does not possess the required legal qualifications; or to a person to practice medicine or dentistry who is a man of bad character, or who does not possess the required medical knowledge or dental skill; or to any foreign corporation to do business in this state which does not first file with the Secretary of State a certified copy of its charter, and pay into the state treasury the license fee prescribed by the statute. Clearly none of those statutes are obnoxious to that constitutional provision, yet the act in each instance prescribed the qualifications of the person and the conditions upon which a license will issue; and, in addition thereto, those statutes prohibit the issuance of the license if the party applying for the license does not possess those qualifications and perform those conditions. Is there any legal distinction between the various statutes mentioned and the act in question? Certainly not; and I suppose it would not be seriously contended that the latter acts are unconstitutional and void because they are double, or for the reason that the titles of the respective acts do not state both the qualifications and conditions upon which the licenses will issue, and the penalty, if I may so term it, or, more accurately speaking, the section prohibiting the proper officer of the state or county, as the case may be, from issuing the license in the absence of the required qualifications and the performance of the conditions imposed. The validity of all of those acts, including the one in question, and many others, rests upon the well-settled rule of constitutional construction that an act is not double, nor does its title violate the Constitution, when it does not mislead those who read it as to what the bill contains, and is not designed as a cover to vicious and incongruous legislation, even though the title does not express in detail, or specifically point out, the substance or the various elements which go to make up the one subject-matter which section 28, art. 4, of the Constitution requires to be clearly expressed in the title of the bill. Any matter germane to, and naturally connected with, the subject so stated in the title is sufficiently covered thereby, and is not double within the meaning of that section. In re Burris, 66 Mo., loc. cit. 446; State ex rel. v. Mead, 71 Mo. 266; State ex rel. v. Ranson, 73 Mo. 78; State ex rel. v. Laughlin, 75 Mo. 358; State v. Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774; State v. Great Western Coffee Co., 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; State v. Bengsch, 170 Mo. 81, 70 S. W. 710; State ex rel. v. Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; State ex rel. v. Marion County, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

Upon the principle before announced the following, among numerous other acts, has been held by this court to be valid. Act 1869, p. 25, § 13, requiring insurance companies to give information touching their business, and making the offending company guilty of a misdemeanor. State v. Matthews, 44 Mo. 523. The error counsel for relator have fallen into, as it seems to me, is that they erroneously assumed that the act of 1907, the one in question, fixes the maximum salaries which life insurance companies may pay their officers and agents, and that it also provides for their expulsion from the state. In my judgment, that is a clear misconception of the provisions of the act. The act does not attempt to fix the salaries such companies may pay, nor does it provide for the expulsion of any company from the state. The act prevents the insurance commissioner of the state from issuing a license to any company which pays a salary of more than $50,000 a year to any of its officers when such company applies for it. The act in question did not revoke the license of relator which had theretofore been issued to it, but simply prohibits the granting of a new license to it after the expiration of the old one. The license is issued for only a year, and it only authorizes the company to do business in the state during that period. The license is not in the nature of a contract. Respondent could withdraw from the state at any time it deemed proper to do so, and there is nothing contained in the statute under which its present license was issued indicating that the state is under any legal obligation to renew the license after the expiration of the one it now holds. Nor would the refusal on the part of the state to renew the license, as contended for by counsel for relator, have the effect of impairing the legal obligations of the contracts made and entered into by and between it and third parties during the existence of its present and all former licenses, any more than would the voluntary withdrawal of the company impair them. The only effect the refusal would have upon the company would be to prevent it from making any new contract, or to transact any

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new business in the state, after the expiration of the license it now holds, but would in no manner affect any former transaction. Enactments of the Legislature, providing for the control and management of corporations doing business in this state for the protection and well-being of its citizens, and licenses issued in pursuance thereof to such corporations to do business herein, are in no sense of the term contracts between the state and the corporations to which they are issued, but are police regulations, which may be amended or repealed by the Legislature at pleasure; and those claiming under such acts have no right to complain, and are remediless in the premises.

In the case of Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148, the Supreme Court of the United States, in discussing this question, said: "The power to revoke can only be restrained if at all, by an explicit contract upon good consideration to that effect." In 8 Cyc. at page 938, it is said: "As a license authorizing a person to practice a profession or to carry on a particular business is not a contract which vests a right, but merely the grant of a privilege, such a license is not protected by the constitutional prohibition as to the impairment of the obligation of contracts." And in footnote 52 of the same page it is further said: "License to a corporation to do business does not curtail the authority of the state to regulate the conduct of the corporation in the future." In 15 American and English Encyclopedia of Law, discussing the constitutional provision now under consideration, at page 1038, the same principle is announced in the following language: "A license to engage in a business or do a thing is not a contract in the constitutional sense, and the law authorizing the license may be repealed." In the case of State v. Gilmore, 141 Mo., loc. cit. 513, 42 S. W. 819, this court said: "Now, in reference to the claim made by defendant that his predecessor's estate had a contract which could not be impaired by subsequent legislation, it is sufficient to say that there can be no contract without a consideration, 'so that the state can be supposed to have received a beneficial equivalent; for it is conceded on all sides that, if the exemption is made as a privilege only, it may be revoked at any time.' Cooley, Const. Lim. (6th Ed.) 388, 148, and cases cited." That being unquestionably the law, the relator would have no legal right to complain of the legislation, should it repeal the statutes authorizing it, and all other foreign corporations, from doing business in this state, much less so where the act only excludes them upon condition that they do certain things required, or refrain from doing certain things prohibited in the act.

The foregoing observations are fully supported by what is said by the following: In Beale on Foreign Corporations, in section 126, discussing the equal protection of the last clause of the fourteenth amendment, that author says: "So, where a foreign insurance company was doing business in New York under a license renewable by the law of New York every year, it was held to be within the power of New York to impose new conditions; for the corporation was within the jurisdiction of New York only for a year. At the end of the year the corporation ceased to have the power to act within the state, and therefore to be within the jurisdiction, until it complied with the new conditions. It could not be of right within such jurisdiction until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, as license fee for the future, should be paid." Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Manchester Fire Ins. Co. v. Herriott (C. C.) 91 Fed. 711; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

In the Philadelphia Fire Association Case, supra, it appears from the agreed statement of facts that the insurance company was organized under the laws of Pennsylvania, and had been doing an insurance business in the state of New York since 1872, its license having been renewed annually, as required by the laws of New York; that after it had been doing business in said state of New York for about 10 years, the latter state enacted a law requiring the payment by a foreign insurance company of certain fees and taxes, in addition to what had been required theretofore; that said insurance company refused to pay such additional fees and taxes, for the reason that the act of the General Assembly requiring such payment was unconstitutional and void. A suit was instituted by the Superintendent of Insurance for the recovery of such fees, and the insurance company challenged the constitutionality of said act of the Legislature, on the ground that it was violative of the fourteenth amendment of the federal Constitution, in that it denied to the defendant the equal protection of the laws. The facts in that case are fully set out in the opinion, and are, in many respects, similar to the facts in the case at bar. After the cause had passed through the courts of the state of New York, it was removed by writ of error to the Supreme Court of the United States, which court, discussing the law and the facts agreed upon, at page 116 of 119 U. S., and page 111 of 7 Sup. Ct. (30 L. Ed. 342), said:

"The provision of the fourteenth amendment, which went into effect in July, 1868, is that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The first question which arises is whether this corporation was a person within the jurisdiction of the state of New York, with reference to the subject of controversy, and within the meaning of the amendment. The defendant on the assump-

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tion that, if it was within the jurisdiction of the state of New York, it was, though a foreign corporation, 'a person,' and so entitled to the benefit of the amendment, contends that it was within such jurisdiction. The argument is that it established an agency within the state in 1872, which it had ever since maintained; that it complied, from year to year, with all the requirements and conditions imposed by the laws of the state on foreign fire insurance companies doing business in the state; that it received from year to year certificates of authority from the Superintendent of the Insurance Department, as provided by statute; that, under these circumstances, it was legally within the state and within its jurisdiction; that being in the state, by permission of the state, continuously from 1872 to 1882, the state imposed on it while there, in 1882, an unequal and unlawful burden; and that the New York act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania act of 1873 was passed, at which time the defendant had already been a year in the state. But we are unable to take that view of the case.

"In Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, at December term, 1868, a statute of Virginia required that every insurance company not incorporated by Virginia should as a condition of carrying on business in Virginia, deposit securities with the State Treasurer, and afterwards obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia without such license. A person having acted as such agent without a license, and been convicted and fined under the statute, this court held that there had been no violation of that clause of article 4, § 2, of the Constitution of the United States, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,' nor any violation of the clause in article 1, § 8, giving power to Congress 'to regulate commerce with foreign nations and among the several states.' The view announced was that corporations are not citizens within the clause first cited, on the ground that the privileges and immunities secured to the citizens of each state in the several states are those which are common to the citizens of the latter states, under their Constitutions and laws, by virtue of their being citizens, and that, as a corporation created by a state is a mere creation of local law, even the recognition of its existence by other states, and the enforcement of its contracts made therein, depend purely on the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is 'prejudicial to their interests or repugnant to their policy.' And the court, speaking by Mr. Justice Field, said: 'Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.' As to the power of Congress to regulate commerce among the several states, the court said that, while the power conferred included commerce carried on by corporations, as well as that carried on by individuals, 'issuing a policy of insurance is not a transaction of commerce.' This decision only followed the principles laid down in the earlier cases of Bank of Augusta v. Earle, 13 Pet. 519, 588, 10 L. Ed. 274, and Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451. The same rulings were followed in Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972, where it was said that the power of a state to discriminate between her own corporations and those of other states desirous of transacting business within her jurisdiction being clearly established, it belonged to the state to determine as to the nature or degree of discrimination, 'subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.' Other cases to the same effect are Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029, Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148, and Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

* * *

"This Pennsylvania corporation came into the state of New York to do business by the consent of the state, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. The state, having the power to exclude entirely, has the power to change the condition of admission at any time for the future, and to impose as a condition the payment of a new tax or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

In the Manchester Fire Insurance Case, supra, upon a state of facts not dissimilar to those of the case just considered, the court, after a full discussion of the law in many cases bearing upon this subject, at page 719 said: "An examination of the statutes of the state of Iowa shows that for years it has been incumbent upon all foreign insurance companies to obtain a renewal in each year of their license to continue in business in the state; and, unless such license in the

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form of a certificate was issued, the company had no right to continue the transaction of insurance within the state. The ground of complaint in the present instance is that the state has imposed certain conditions as a prerequisite to the issuance of a license enabling the companies to continue in business during the coming year, and these conditions are complained of as onerous, and as making a discrimination between the license tax exacted from corporations created under the laws of other nations, as compared with domestic or sister state corporations. In Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 126 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650, it is expressly held that 'the state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits'; and, if it be true—as it undoubtedly is—that the state may impose such conditions as it deems best upon the privilege of obtaining a license to do business in the state during the coming year, the courts cannot release the companies from the obligation to perform the conditions, if they wish to continue in business during the coming year. If the conditions imposed are onerous, discriminatory, or otherwise inexpedient, relief must come from the Legislature, and not from the courts. The argument for complainants is largely based upon the thought that, when foreign corporations are once admitted within the state, they are entitled, under the provisions of the state and federal Constitutions, to insist that they shall be subjected to the same burdens of taxation as may be imposed upon similar corporations engaged in the like business. If the license tax provided for in section 1333, Code Iowa, was a tax upon property, real or personal, owned by the companies within the state, there would be much force in the argument; but that is not the fact. This license tax is the condition imposed by the state upon the privilege of engaging or continuing in business within the state. It is optional with the companies whether they will subject themselves to the burden or not but they cannot enjoy the privilege of continuing in business in the state except upon compliance with the terms which the state has seen fit to impose as a condition to the exercise of the privilege. In the adoption of section 1333 the state was not exercising its right of taxation, in which event it would have been subject to the provisions of the state Constitution, requiring equality in the burdens imposed; but the state was exercising its undoubted right to prescribe the terms upon which foreign corporations may be allowed to continue in the business of insurance within the state, and, as the right to impose terms is possessed by the state, it is not for the courts to question the expediency or justice of the conditions enacted by the state."

In the McClung Case, 172 U. S. at page 260, 19 Sup. Ct. 173 (43 L. Ed. 432), the court said: "It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction' while those words are found in the succeeding clause relating to the equal protection of the laws."

As before stated, the Legislature may not only impose such conditions upon foreign corporations coming into the state as it may deem proper, but it may also exclude them entirely from the state. Daggs v. Orient Ins. Co., 136 Mo., loc. cit. 393, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; N. Y. L. Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 755.

In the Daggs Case, supra, this court (136 Mo., loc. cit. 390, 38 S. W. 86, 35 L. R. A. 227, 58 Am. St. Rep. 638) said: "The defendant assails this statute on the ground that it violates section 1 of the fourteenth amendment of the Constitution of the United States. As a predicate for this position defendant argues at length and cites authorities to show that 'a corporation' is 'a person,' within the meaning of the Constitution of the United States. Railroad v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Santa Clara Co. v. Railroad, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118. But granting that a corporation is a person, within the meaning of the Constitution, for certain purposes, surely no proposition is better settled than that the Constitution of the United States nowhere deprives this state of the power and right to prescribe the conditions upon which it will permit foreign corporations to do business within its boundaries. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148; Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274. Again and again it has been held that the whole matter of admitting foreign corporations to do business in the state rested absolutely in the discretion of the Legislature of the state. The terms it imposes may be reasonable or unreasonable.

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The comity ordinarily extended is accompanied by no legal sanction. The state, having extended it, may at any time revoke it. This is the doctrine steadily maintained alike by state and federal decisions. Doyle v. Wisconsin, 94 U. S. 50, 24 L. Ed. 64; Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Ducat v. Chicago, 10 Wall. 415, 19 L. Ed. 972; Id., 48 Ill. 172, 95 Am. Dec. 529; Insurance Co. v. French, 18 How. 404, 15 L. Ed. 451; Railroad v. Koontz, 104 U. S. 11, 26 L. Ed. 643; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Insurance Co. v. Davis, 29 Mich. 238; Noble v. Mitchell, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238; State ex rel. v. Root, 63 Wis. 667, 54 N. W. 33, 19 L. R. A. 271; Dugger v. Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796. * * * It was held by the Supreme Court that issuing policies of insurance is not a transaction of commerce. They are not interstate transactions, though the parties thereto are domiciled in different states. They are local transactions, and governed by local law. As to 'the privileges and immunities secured to citizens of each state in the several states' by the other clause relied upon, it was held they were 'those privileges and immunities which are common to the citizens in the latter states under their Constitution and laws by virtue of their being citizens.' 'It was not intended by the provision to give to the laws of one state any operation in other states.' Said Mr. Justice Field: 'Now a grant of corporate existence is a grant of special privileges to the corporations, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created.' As said by the court in Bank of Augusta v. Earle, 'it must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy."

In the Prewitt Case, supra, the court said, at page 257 of 202 U. S., page 623 of 26 Sup. Ct. (50 L. Ed. 1013): "As a state has power to refuse admission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason, or none, for a valid act is immaterial. * * * Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right after having been permitted once to enter, and that right may be exercised from good or bad motives."

And in the Doyle Case, supra, the court said, at page 540 of 94 U. S. (24 L. Ed. 148): "The cases of Bank of Augusta v. Earle, Ducat v. Chicago, Paul v. Virginia, and Lafayette Insurance Co. v. French, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named. The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable. Rector v. Philadelphia, 24 How. 300, 16 L. Ed. 602; People v. Roper, 35 N. Y. 629; People v. Commissioners, 47 N. Y. 501. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326; Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204. A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens, and its business belong to the state. If the state has the power to do an act, its intention, or the reason by which it is influenced in doing it, cannot be inquired into. Thus the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the state to the federal courts. If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself, or as to the reason for it. The state of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign state, possessing all the powers of the most absolute government in the world. The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the state is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law. * * * The effect of our decision in this respect is that

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the state may compel the foreign company to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the state, is infringed, and that is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court."

And in the case of Waters-Pierce Oil Company v. Texas, supra, at page 45 of 177 U. S., at page 524 of 20 Sup. Ct. (44 L. Ed. 657), the court said: "In Paul v. Virginia, 8 Wall. 168, 181, 19 L. Ed. 357, the dependent and derivative rights of corporations were again declared. Bank of Augusta v. Earle, was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of the sovereignty where created, and the recognition of its existence in other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states. Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. And it was also decided that a corporation did not have the right of its personal members, and could not invoke that provision of section 2, art. 4, of the Constitution of the United States which gave to the citizens of each state the privileges and immunities of citizens of the several states. See, also, Pembina Mining Co. v. Penn., 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972. And it has since been held in Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432, and in Orient Insurance Company v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, that the prohibitive words of the fourteenth amendment have no broader application in that respect. In Blake v. McClung, a Virginia corporation was denied the right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court."

In 1 Joyce on Insurance, § 328, the law on this subject is stated as follows: "The Legislature has power to prescribe the conditions upon which foreign insurance companies shall be permitted to transact business within its territory, and effect will be given such statutes in all the courts of the United States, and it may prohibit foreign companies from transacting business within its territory, and enforce its prohibition by penal enactments. It is held that the Legislature may restrict the business of such corporations to particular localities, and may require security for the performance of its contracts as shall be deemed for the best interests of its own citizens, since a foreign corporation has no absolute right of recognition in other states. A corporation is a mere creature of local law; it can have no legal existence beyond the limits of the state of its creation, and is entitled to no recognition in other states, except upon the principle of comity. It is not a citizen within those clauses of the federal Constitution which provide for citizens of each state all the privileges and immunities of citizens in the several states."

And in 3 Clark & Marshall on Private Corporations, § 844 (a), the law is stated as follows: "While a corporation may be recognized and permitted to exercise its powers in another state than that by which it was created, this, we have seen, is not a matter of absolute right, but depends upon the express or implied consent of the other state. It is a matter of comity. It is well settled, therefore, that a state may exclude a foreign corporation altogether from doing business or acquiring property within its limits, or it may impose any conditions or restrictions which it may see fit to impose, provided it does not thereby violate any provision of its own Constitution or of the Constitution of the United States. It was said, in substance, in a leading case in the Supreme Court of the United States: The recognition of a corporation's existence by other states, and the enforcement of its contracts made therein, depends purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

3. The contention of counsel for relator that, because of its investment of large sums of money in this state, relying upon the license heretofore granted it, under the statute

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in force when granted, constitutes an implied contract between it and the state, and that it cannot be violated by an amendment or repeal of the statute without contravening the Constitutions of the state and of the United States, is untenable, for two reasons: First. Because there is nothing in the statute indicating in the remotest degree that the State Insurance Commissioner was authorized by issuing the license to enter into an irrevocable contract with relator; but, upon the other hand, the statute in plain and express terms authorizes the Insurance Commissioner to issue a license, and not to enter into a contract with each of the various insurance companies of the country, whereby the state would surrender and barter away its sovereign power, right, and duty to regulate and control them for the protection and welfare of the public. Not only that, but the statute in question in express terms only authorizes the commissioner to issue the license for one year, thereby clearly indicating that it was not the intention of the Legislature to authorize the commissioner to enter into a contract with the various insurance companies every time he issued to one of them a license to do business in this state. The second reason why relator's contention is unsound is that, under the Constitution and laws of this state the Legislature, even though it had intended and attempted to so bind the state by contract, has no power to do so. The Legislature has no power or authority to contract away the police power of the state, which is inherent and inseparable from sovereignty itself, and which has no limitations whatever, except those written in the Constitutions of the state and of the United States. State ex rel. v. Sandard Oil Company (decided by this court in banc, not yet officially reported) 116 S. W. 902.

This same question came before the Court of Appeals of the state of Kentucky in the case of Prewitt, Commissioner, v. Security Mutual Life Ins. Co., 119 Ky. 321, 83 S. W. 611, 84 S. W. 527, 26 Ky. Law Rep. 1240, 1 L. R. A. (N. S.) 1019. It was there contended by the defendants, foreign life insurance companies, in opposition to the right asserted by the commissioner of insurance to revoke their licenses theretofore issued, granting them permission to transact business in that state, that they had, on the faith of the licenses, employed a large number of agents, established a large number of agencies throughout the state, expended large sums of money in advertising its business, and acquiring a large and profitable business in the state, and that by means thereof the companies had acquired rights in the state that would preclude the commissioner from legally revoking their licenses. The contention of the insurance companies was denied by the court, and on appeal the Supreme Court of the United States affirmed the judgment of the Court of Appeals of Kentucky. Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013.

4. In my judgment the act in question, as before stated, is but the lawful exercise by the Legislature of the police power of the state. Whether or not this particular act is wise or unwise does not concern the courts, without it is violative of the state or federal Constitution. It is contended that the Legislature of this state in the exercise of its police powers cannot control the internal affairs of foreign corporations by fixing the salaries they may or may not pay to their officers or agents for services rendered. I do not understand that the Attorney General makes any such contention; but, even if he does, it would be wholly immaterial, for the reason that the act under consideration does not in the remotest degree attempt to, or undertake to, fix what salaries foreign life insurance companies may pay their officers and agents, but simply provides that no company which pays any of its officers more than $50,000 shall do business in this state. All the act does is to prohibit all such companies from transacting business in this state—nothing more. It does not provide that such companies shall not pay any of its officers or agents more than $50,000. To illustrate: Suppose the act had provided that no foreign life insurance company could do business in this state whose president was not a citizen of this state and of the United States, would it be seriously contended that such an act would be an interference with the internal affairs of such company, and thereby violate its constitutional rights to contract with its officers and agents? I think not. While the act might be a foolish piece of legislation, yet I apprehend that such act would not be unconstitutional upon the ground that it was interfering with the election of the president of a foreign insurance company, or other internal affairs of the company. The directors could, and I dare say would, go ahead notwithstanding such act, and would elect whomsoever they pleased as president of the company, and the validity of such election would not be affected by the act, nor would the validity of the act be affected by the election. The two acts would have no relation whatever with each other; but, if the company should elect a citizen of England, and then apply for a license to do business in this state, then there can be no question but what the act would be valid, and would bar the company from the state. The reason for that is, as was before shown by all of the authorities, that the state may by statute exclude any and all foreign corporations from doing business in the state, with or without giving any reason whatever therefor; and, if the Legislature sees fit to give a reason for their exclusion, it may give a good or a bad excuse, wise or foolish one. That is a matter resting solely in the discretion of the Legislature, and over which the courts have no control.

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While I believe this particular act is unwise, because I believe some men are worth more than $50,000 a year to some of the great foreign life insurance companies, yet it cannot be successfully contended that such an act is wrong upon principle, for the reason that it is the duty of the Legislature, when it believes the public interest is in danger, to enact laws for the public protection. If it possessed information justifying the belief that the life insurance companies doing business in this state were uselessly extravagant and profligate in the expenditure of their assets in paying exorbitant salaries, or otherwise, and were thereby jeopardizing the interests of their policy holders, who have millions of dollars invested in their policies of insurance, then it would be the plain duty of the Legislature to enact proper laws to remedy such evils. To illustrate: Suppose a life insurance company of some foreign state or country, over which this state has no jurisdiction, should agree to pay its president $1,000,000 a year, and its other officers and agents in that proportion, which would exceed, say, the net profits of the company, and thereby necessitate their payment out of the beneficiary funds held for the policy holders, and thereby jeopardize their interests, would it be contended that such a company should not be excluded from doing business in this state? Certainly not. There would be no difference in principle between the two acts, yet the latter would be highly reasonable, while the former might be characterized as very unreasonable; but the reasonableness or unreasonableness of a law is something with which the courts have nothing to do; as before stated, that matter rests exclusively with the lawmakers.

All such institutions are organized for a twofold purpose: First, for private gain; and second, insurers of the public. The latter characterizes them as public institutions, and subjects them to the supervision and control of the state under the exercise of the police power. Under that power the Legislature may enact any and all laws which will safeguard and protect the interest of her policy holders; and, if necessary, it might enact a valid law prohibiting domestic life insurance companies from paying salaries and other running expenses of the company out of the funds held for the benefit of the policy holders; but, having no jurisdiction over foreign companies, the Legislature might and has with propriety required of them to voluntarily perform certain conditions before they shall be permitted to transact business in this state, and the Legislature possesses the unlimited power to impose any and all additional requirements that it may deem just and proper for the purpose of protecting the interest of the people of this state, even to the extent of excluding them altogether from the state. See authority cited under paragraph 3 hereof. The authorities cited and relied upon by counsel for relator are not in point, and do not support the propositions there contended for. The statutes involved in those cases applied to private parties and companies, and not to public institutions, like banks and insurance companies.

In our judgment the peremptory writ of mandamus should be denied, and it is so ordered.

VALLIANT, C. J., and BURGESS and GANTT, JJ., concur. GRAVES, J., dissents in separate opinion, in which FOX and LAMM, JJ., concur.

GRAVES, J. (dissenting). I do not concur in the majority opinion herein, for reasons which I will in due order state. First, however, I deem it advisable to eliminate from consideration several questions which I do not dispute, and which questions eliminate the greater portion of the opinion from consideration.

I do not claim, and have never claimed, that a mere license to a foreign corporation to do business in this state is an irrevocable contract between such corporation and the state, so that the state is precluded from changing the terms and conditions of its admission into the state by duly enacted laws which are not violative of constitutional provisions. I concede, and have always conceded, the right of the state by valid and constitutional provisions, both to absolutely exclude foreign corporations, and to regulate the business of such corporations in the state. To the contention of relator that there is an inviolable contract between itself and the state I do not now and never have given my assent, but there is nevertheless some force in the contention, and some authority to support it. The weight of authority is strongly the other way.

To my mind there are but two questions necessary to be discussed in this case, and they are: (1) Is this act of 1907 violative of either state or federal constitutional provisions; and (2) if so, then is relator in a position to raise the question of the constitutionality of the statute? Of these in inverse order.

1. The right of the relator to raise the question of the constitutionality of the act of 1907 seems to be conceded in the majority opinion, although not discussed. But at the threshold of this case the respondent, through the Attorney General, challenges the right of the relator to assert the unconstitutionality of the act of 1907, supra, and we feel that it merits consideration. The contention is that at the time this writ was sued out, March 12, 1908, the relator was not licensed to do business in the state, and hence was not within the jurisdiction of this state so as to entitle it to invoke the constitutional provisions of the federal Constitution or of the state Constitution. In other

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words, the respondent contends that relator was simply knocking at the door for admission, and, as a foreigner, cannot question the constitutionality of our laws. This requires a close study of our statutes. Statutes from other states lend but little light.

By section 7842, Rev. St. 1899 (Ann. St. 1906, p. 3726), it is provided: "It shall be the duty of the superintendent of the insurance department * * * to issue certificate of authority to transact insurance business in this state to any companies who have fully complied with the laws of this state. * * *" Section 7989 (page 3798) provides: "No company shall transact in this state any insurance business, unless it shall first procure from the Superintendent of the Insurance Department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with, authorizing it to do business, a copy of which certificate, certified by the superintendent, and issued only upon the request of the president or secretary, or other chief officer of the company, or of a general agent of the company for this state, notice of whose appointment has been filed in this department, shall be held by every agent or solicitor for such company doing business for such company within this state, and such copy shall, in some convenient and distinct manner, set forth the name of the person, agent or solicitor for whose use it is issued. Every such company shall be required to procure annually, for the use of its agents and solicitors, copies of the renewed certificate of authority, provided for by law."

It will be noticed that this section provides for the issuance of an original certificate of authority. But before getting the original certificate certain requirements are made of foreign insurance companies, and these we find in sections 7883, 7884, and 7885 (pages 3743, 3744), which read:

"No insurance company not incorporated by, or organized under the laws of this state shall transact any insurance business by an agent or agents in this state, unless it shall first file in the office of the superintendent of the insurance department a duly certified copy of its charter or act of incorporation, together with a statement, under the oath of the president and secretary of such company, showing the condition of the affairs of said company on the first day of January next preceding the date of such oath. The statement shall be in the same form, and shall set forth the same particulars as the annual statement required of companies organized under the laws of this state. Such company shall also file a copy of its last annual report, made in compliance with any law of the state or county by which said company was incorporated, if any such report shall have been made.

"It shall not be lawful for any such company organized or incorporated under the laws of the United States, or of any other state of the United States, to transact in this state any business mentioned in section 7852, unless one hundred thousand dollars of the capital or assets of such company be invested in treasury notes or bonds of the United States, or in bonds of the state of Missouri, or of the state under the laws of which such company is incorporated, or loaned on notes or bonds secured by mortgage or deeds of trust on unincumbered real estate, worth at least double the amount loaned thereon, nor unless securities of the kind or kinds aforesaid to the actual value of one hundred thousand dollars shall have been deposited for the security of its policy holders, with the superintendent or commissioner of insurance or chief financial officer of the state, and under and by the laws of the state, in which such company is incorporated, or, if such company is incorporated under the laws of the United States, with some financial officer of the United States, or with the superintendent of the insurance department of this state, or with the officer in charge of like insurance deposits in any other state of the United States: Provided, that any such company not having such deposit made in the state in which it is organized, or with some officer of the United States, may make such deposit in this state in the manner and subject to the provisions set forth in this article.

"It shall not be lawful for any such company mentioned in the preceding section, unless such company have made a deposit in this state, as in said section provided, to transact in this state any business mentioned in section 7852, until it shall have filed with the superintendent of the insurance department of this state the certificate of the commissioner or superintendent or chief financial officer aforesaid, under his hand and official seal, certifying that he holds in trust and on deposit, for the benefit of all policy holders of such company, the notes, bonds and securities before mentioned, and stating the kind of such notes, bonds and securities, and the amount of each, and that he is satisfied they are worth one hundred thousand dollars."

When these three sections have been complied with, then it becomes the duty of the superintendent of insurance to issue the original certificate of authority to do business in this state, and the company becomes a citizen of the state, with full right to challenge the constitutionality of laws thereafter passed during the time of its citizenship. By section 7880 (page 3740) both domestic and foreign companies doing business in this state are required to file in the office of the superintendent of insurance a certain detailed sworn report of their business, which report must be filed on January 1st, or within 60 days thereafter, for the year ending December 31st next preceding. In the case at bar relators had obtained the original cer-

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tificate under the requirements of sections 7883, 7884, and 7885, supra, which had been renewed from year to year up to and including the renewal of date March 1, 1907. These renewal certificates are specifically provided for by section 7888, which reads: "If the said annual statements mentioned in sections 7880 and 7887 shall have been made in conformity with the requirements of said section, and the superintendent, after deducting from said statement all worthless and doubtful assets, shall be satisfied as to the solvency or condition of the company filing the same, and its ability to meet all its engagements at maturity, he shall issue a renewed certificate of authority to such company to continue business; and no company, not incorporated under the laws of this state, shall continue to do business until a renewed certificate is issued."

It should be noted that the commissioner "shall issue a renewal certificate." The statute is mandatory. When once satisfied of the solvency, which is admitted in this case, the further act of issuing the license is purely ministerial. Section 7887 (page 3744), mentioned in the above section, refers to companies organized in foreign countries, and not to companies organized under the national laws or the laws of other states of the Union. So that up to the act of 1907, upon the filing of the report as required by section 7880, if the Superintendent of Insurance was satisfied with the solvency and condition of the company, then he was obliged to issue the renewal certificate. Going to the facts of the case at bar, it appears that prior to March 1, 1908, and during the life of the renewed certificate of date March 1, 1907, relator filed the report required by section 7880. Under the admitted facts the respondent in this case was satisfied with the report and the thorough solvency of relator. All this was done whilst relator was domiciled in the state, and at a time when it had a right to challenge the constitutionality of the act of 1907. It further appears from the admitted facts that the only reason for a refusal of the renewed certificate by respondent was this act of 1907, supra.

It will be observed that the right to this renewed certificate is made to depend solely upon the report required by section 7880. In this respect it differs materially from the original certificate. An entirely different showing is required for the original certificate, as will be seen by a reading of the statutes. This report was made during the life of the renewed certificate for 1907. With this report the respondent was fully satisfied. At that time the relator was legally domiciled in Missouri, if we be permitted to use that expression, and had full right to challenge this law on constitutional grounds. When relator filed this report under section 7880, prior to March 1, 1908, it amounted in law to an application for a renewal certificate, for such is the purpose of the report. The law makes no provision for another or different application for a renewed certificate. This application was at a time when relator had the right to question the constitutionality of a law passed subsequent to its entrance into the state. Then when it filed this petition, March 12, 1908, it simply sought to enforce rights held by it on the date of filing the report prior to March 1, 1908, and sought in this court to enforce such rights, and among others the right to challenge this act of 1907. If the act is void, it was the duty of respondent to have issued the renewed certificate, upon the application being made in the manner aforesaid. This petition for mandamus relates back to the time when relator was entitled to have its report passed upon and approved or rejected, at which time relator was legally domiciled in this state, although a foreign corporation. By this statement we mean that it was so domiciled in the state as to give it the right to challenge unconstitutional laws. It acquired that right by virtue of the original certificate, and the renewed certificate is but to the effect that it was still in good standing under the original certificate, which original gave to it admission to the state. Under the facts in this record we are of opinion that relator is in position to question the constitutionality of the law now under consideration. And in this we heartily concur in what we take to be an acquiescence in this position by the majority opinion.

2. Grant it to be true that the state by constitutional laws can wholly prohibit, or in any manner regulate, the business methods of foreign corporations by law, yet it does not follow that, after the corporation has been admitted, and is in fact doing business in the state, it can be precluded therefrom, or have its business regulated by an unconstitutional act. In Carroll v. Greenwich Insurance Co., 199 U. S., loc. cit. 409, 26 Sup. Ct. 67, 50 L. Ed. 246, Mr. Justice Holmes says: "A company lawfully doing business in the state is no more bound by a general unconstitutional enactment than a citizen of the state. W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619." And grant it further, for sake of argument only, that the state can even exclude by an unconstitutional law any or all foreign corporations from first coming into the state, and that such applicants for admission cannot challenge the law upon constitutional grounds, either state or federal, yet such rule does not apply to the facts of the case at bar. By certain sections of the law, fully quoted, supra, foreign insurance companies were required to do certain things before being admitted to do business in the state, among others to file copies of their articles of association, and either make a deposit of $100,000 in solvent securities here, or satisfy the Superintendent of Insurance that such deposit had been

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made elsewhere. Under the showing required by these sections relator procured the original certificate to do business in the state. This certificate has long been held by relator. This conferred the right to do business, and the renewed certificate provided for in section 7888 conferred the right "to continue business in the state."

It may be true (a question we do not decide, because unnecessary in this case) that a foreign corporation, not domiciled in the state, but simply applying for admission, cannot even question a law upon the statutes at the time of its proposed entry in the state, but yet that does not affect this case, because the act of 1907 was passed whilst relator was actually in the state doing business. We think, however, the rule is well stated in 3 Clark & Marshall on Private Corporations, § 844a, wherein it is said: "While a corporation may be recognized and permitted to exercise its powers in another state than that by which it was created, this we have seen is not a matter of absolute right, but is a matter of comity. It is well settled, therefore, that a state may exclude a foreign corporation altogether from doing business or acquiring property within its limits, or it may impose any conditions or restrictions which it may seem fit to impose, provided that it does not thereby violate any provisions of its own Constitution or of the Constitution of the United States."

3. Under the conceded right of the relator to challenge the constitutionality of this new law, as clearly indicated by the opinion of my Brothers, I proceed now to the real question in this case; i. e., the constitutionality of the law of 1907. This question my Brothers in the majority touch only slightly, but devote nine-tenths of their opinion to matters about which there is but little question in the books and decided cases, and no question in my mind. Now to the real question in the case. The act of 1907 must be considered from a double standpoint in determining its constitutionality: First, is the act one of exclusion as applied to foreign insurance companies, and, if so, is it impregnable as against constitutional darts? Second, is the act the mere exercise of the police power of the state, and, if so, is it valid? In this paragraph we take the first question, leaving the other for a succeeding paragraph.

It is urged by counsel that the act does not apply to foreign insurance companies at all. For the present at least, this question will be put aside.

Grant it that the body of the act, so far as foreign insurance companies are concerned, was intended as an exclusion statute, then it is urged that the act is invalid and void as violative of article 4, § 28, of our state Constitution, which, in so far as applicable to this discussion, reads: "No bill * * * shall contain more than one subject, which shall be clearly expressed in the title." The title of this act reads: "An act relating to the salaries and compensation of officers and agents of life insurance companies." One reading this title, without looking at the body of the bill, would hardly suppose that the bill had any reference to foreign companies, and this for the reason that the Legislature of this state have no concern with the internal workings of foreign corporations. Our laws cannot affect them except by way of absolutely excluding them, or regulating them whilst here under the general police power of the state. Had there been added to the title above quoted the words "and excluding from this state foreign insurance companies paying salaries in excess of those provided for in this act," then the title would have been clearly expressive of the meaning of the act itself as contended for by respondent. But if the act is an exclusion statute, and that is the sole subject of the act (for under the Constitution there can be but one subject), then is that subject clearly expressed in the title. We think not. Who, reading this title without seeing the body of the bill, would for a moment suppose that the bill was dealing with the exclusion of foreign insurance companies from the state? Yet that is the purpose of the constitutional limitation. If the idea of excluding foreign insurance companies is clearly expressed in this title to the act of 1907, then we confess we are, and for many years have been, in the dark as to the meaning of the words "clearly expressed." That the subject of a bill "shall be clearly expressed in its title" is just as mandatory as that "no bill * * * shall contain more than one subject." As said in State v. Burgdoerfer, 107 Mo., loc. cit. 30, 17 S. W. 654 (14 L. R. A. 846): "The title must express the subject of the act in such terms that the members of the General Assembly and the people may not be left in doubt as to what matter is treated of." In State v. Great Western Coffee & Tea Co., 171 Mo., loc. cit. 643, 71 S. W. 1013 (94 Am. St. Rep. 802), after quoting the above from the Burgdoerfer Case, it was said: "And it is elsewhere said very aptly 'that to be clearly expressed certainly does not mean something that is dubious, and therefore is not clearly expressed.'" In this case Fox, J., reviews many authorities from this and other jurisdictions. Among others the case of the City of Kansas v. Payne, 71 Mo., loc. cit. 162, wherein the following language from Judge Cooley is quoted with approval: "The Constitution has made the title the conclusive index to the legislative intent. It is no answer to say that the title might have been more comprehensive, if, in fact, the Legislature has not seen fit to so make it."

The act is not only void because the subject thereof is not clearly expressed in the title, but for the further reason that the bill itself deals with two subjects; i. e. (1) a regulation as to the management of the internal affairs of domestic insurance compa-

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nies; and (2) the exclusion of foreign insurance companies. That there are two subjects is made clearly manifest, when we consider the act and the applicable law. The Legislature had the power, within reasonable bounds, to regulate the internal management and affairs of domestic corporations. Whether this act is within reasonable bounds as to such corporations, we will not discuss here, because not in this case. But it is equally clear that the Legislature has no power or right to regulate the internal affairs of foreign companies. As to foreign corporations our laws extend to the state lines and no further. That we cannot regulate the internal management of foreign companies is axiomatic, and needs no citation of authority. As to them our Legislature can do but two things: (1) Pass laws to regulate the conduct and character of their business in this state, if they enter the state with the permission of the state; and (2) laws excluding them entirely. It is presumed that the Legislature knew the limitation of its powers, and in this act was not attempting to regulate the internal affairs of foreign insurance companies, but as to them intended the act as one of exclusion, and as to domestic companies as an act of regulation with reference to the internal management of such companies. Viewing it in this light there are two subjects covered by this act, and if so it is violative of the constitutional mandate, supra.

As said by Burgess, J., in Witzmann v. S. Ry. Co., 131 Mo., loc. cit. 618, 33 S. W. 182: "Adjudicated cases do not, as a general rule, afford as much assistance in passing upon questions of this character, other than in a general way, as each case must be adjudged according to its own peculiar facts and the directness or remoteness, as the case may be, of its provisions to matters in consonance with its title." And in the same case, and on the same page, in discussing an act of the Legislature pertaining to street railways, it was said: "By the title of the act in question its provisions are restricted to tickets, fares, taxes, and licenses as applicable to street railroads in the city of St. Louis, and subjects germane thereto, and by no rule of construction which can reasonably and fairly be given to it can it be held that the provisions of section 4 in regard to gates and guards on such cars are germane to the title of the act, which contains no intimation whatever that any such provisions are to be found in it. The very facts that the words 'tickets, fares, taxes, and licenses' are used in the title indicates that the act contains no provision with respect to guards and gates on the platforms of the cars, matters that are entirely foreign to the purpose and intention of the act as shown by its title. Hence the act relates to more than one subject, and is in conflict with the Constitution. Taking the title of the act as a guide to its provisions, no one would think of finding in it a provision pertaining to attachments or appurtenances to the cars." The above is cited with approval by Fox, J., in State v. Great Western Coffee & Tea Co., supra. So in this case when it is remembered that the Legislature can legislate as to the internal management of domestic corporations, and cannot so legislate as to foreign corporations, who by reading the title to this act would infer for a moment that the bill covered the subject of excluding foreign corporations from doing business in this state? Nor is the subject of excluding foreign corporations germane to the subject of regulating the internal government and management of domestic corporations. We are therefore of the opinion that, if the act in question was intended for an exclusion statute, it is violative of section 28, art. 4, of our state Constitution, and this for two reasons: (1) That the subject is not clearly expressed in the title; and (2) that the act itself deals with two separate and distinct subjects.

4. But treating the act as the exercise of the police powers of the state, and not as an exclusion statute, can it stand? We think not, and in so saying we are considering it from the standpoint of domestic corporations, as well as foreign corporations. The police powers of the state cannot reach the internal government and management of foreign corporations. The fixing of salaries for its agents and officers is a part of the internal management of the corporation. The foreign corporation has the right to manage its internal affairs as it sees fit under the laws of the state giving it birth. This state can exclude a foreign corporation by law, but it cannot regulate its internal management in the state of its creation. Laws in the exercise of police powers, like other laws, lose their force when the state lines are reached. That such laws apply to the foreign corporations in this state, and to its public business transacted in the state, there can be no question, provided that the law is the reasonable exercise of the police powers of the state. All such laws, to be valid, must be the reasonable exercise of the police powers. This law as a police regulation attempts to interfere with the rights of contract, and as such can it be upheld? It not only says to the foreign insurance company you shall be excluded if you make a private contract with an employé by which you agree to pay him more than $50,000 per year for his services, but it likewise says to the domestic corporation that you can't so contract. In 22 A. & E. Ency. of Law (2d Ed.) 938, 939, it is said: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare; and (2) that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof,

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and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property; neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes. * * * The police power must be so exercised as not to infringe arbitrarily or unreasonably upon personal or property rights."

An unreasonable exercise of this power has been held to be violative of the fourteenth amendment to the federal Constitution, and in our judgment is violative of the federal Constitution. Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436.

In the first case Mr. Justice Peckham says: "The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the fourteenth amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal Constitution as coming under the liberty of persons or of free contract. Therefore, when the state, by its Legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employé) it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the state. * * * We think the limit of the police power has been reached and passed in this case. There is in our judgment no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employé to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. * * * This interference on the part of the Legislature of the several states with the ordinary trades and occupations of the people seems to be on the increase. * * * It is impossible for us to shut our eyes to the fact that many laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears out the most remote relations of the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and, whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. * * * It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute, under which the indictment is found and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employé as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, sui juris) in a private business, not dangerous in any degree to morals, or in any real or substantial degree to the health of employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the federal Constitution."

And in the later case of Adair v. U. S., supra, the opinion of Mr. Justice Harlan is to the same effect. In the well-considered case of Brick Co. v. Perry, 69 Kan., loc. cit. 299, 301, 302, 76 Pac. 848, 849, it is said: "Besides, the Legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution, under the guise of a police regulation. It must also be remembered that the right which the plaintiff claims is violated did not originate in contract, but was purely statutory. Therefore the determination of the question whether he has any remedy depends entirely upon the validity of this statute. The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the Legislature without violating the letter and spirit of the Constitution." And further on of the same report, and in the same case, it was further said: "It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exer-

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cise of these rights. Within the past two decades there has been an epidemic of this class of legislation. New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Missouri, Wisconsin, Colorado, and California have similar statutory provisions, and in such states, where the constitutionality of these statutes has been before the courts, the law has been universally held to be a denial of the rights guaranteed by the provisions of the national and state Constitutions." In a review of the cases the Kansas court reviews and approves State v. Julow, 129 Mo. 163, 31 S. W. 793, 29 L. R. A. 257, 50 Am. St. Rep. 443.

Tiedeman in his work on Limitations of Police Powers, § 178, says: "Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments, are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass on private rights, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law, whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant except for the purpose of preventing frauds and trespasses."

It must throughout be borne in mind that the right to contract involved in this case is as to the private management of the corporation. No contract with the public is here involved. It may be granted that an insurance company is so much of a quasi public corporation as will justify and permit the lawmakers to impose certain conditions upon the contracts made with the general public, but that is not the question here. The contract here involved is the private contract between employer and employé. The law says to the domestic corporation, you shall not make a private contract of this character, no matter how valuable the services of the employé may be. If this law is valid a violation thereof would forfeit the charter. To the foreign corporation doing business in this state this law says: If you make or have made such a contract, we will exclude you. With such contract the state has nothing to do. We regulate contracts with public service corporations when the contracts are between the corporation and members of the general public, and pertain to public business, but it does not follow that the state can fix terms as to wages to be paid on the contract made by the corporation as an employer with those whom it, in its private capacity, employs to do the public service. If it can fix the price of wages to be paid, it can with equal propriety say that the right is in the state to say what price shall be paid for a horse, a house, or a vehicle, necessary for the private use of the corporation in the prosecution of its business.

Burgess, J., in State v. Tie & Timber Co., 181 Mo., loc. cit. 559, 80 S. W. 940 (65 L. R. A. 588, 103 Am. St. Rep. 614), after a review of many cases, reaches this conclusion: "The right to labor or employ labor, and make contracts with respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of the Constitution, which provides 'that no person shall be deprived of life, liberty or property without due process of law.' Section 30, art. 2, Const. Nor can such right to contract be arbitrarily interfered with, but may be subject to limitations growing out of duties which the individual owes to society, but such limitation must be upon some reasonable basis, and not arbitrarily. Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315." So that we say that, in so far as the insurance company makes contracts with the general public, the state, in the exercise of its police powers, can put reasonable restrictions upon the terms of the contract. It can even prescribe the form of the contract, and this for the reason that the unsuspecting public may be fully protected in dealings with the corporation. Contracts of insurance are oftentimes too intricate for general public understanding. So, too, the state in the exercise of its police powers may regulate other matters as between such corporations and the general public. However, the case before us is quite different. The contract involved is not one with the general public, but is the private contract between employer and employé.

In Godcharles & Co. v. Wigeman, 113 Pa., loc. cit. 437, 6 Atl. 356, the court says: "The * * * sections are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what in this country cannot be done; that is, prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the right of the employer and the employé." In discussing certain mining statutes of this state, which in effect limited the right of contract between employer and employé, Judge Black, in case of State v. Loomis, 115 Mo., loc. cit. 320, 22 S. W. 353 (21 L. R. A. 789), said: "The constitutional declaration that no person shall be deprived of life, liberty, or property without due process of law was designed to protect and preserve their existing rights against arbitrary legislation, as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of state paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law." Many other cases might be cited, but these will suffice to indicate our

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views. We are of opinion that this act, construed as a police regulation and as the exercise of the police power of the state, cannot stand, because violative of the right to make private contracts, a right guaranteed alike by the state and federal Constitutions.

But it has been suggested that the right to make private contracts is not involved in this case. This might be true if the statute is to be treated as an exclusion statute solely, and applied to foreign corporations only. If, however, it is a statute enacted under the police powers of the state, and applies to both domestic and foreign corporations, then the right of private contract is involved in this case. The state steps in and says to the domestic corporation, You cannot make a private contract, except you permit the state to dictate and prescribe the terms and price to be paid. We say the terms and price, because once conceded that the state in the exercise of its police power can say to two parties sui juris, You can contract as to employment, but the employer shall not pay the employé more than so much per day, per week, or per year for specified services; there is no end to the matter. If the state can fix a price beyond which the parties cannot go, it can fix a price below which they cannot go. There is no difference between the two, either in principle or law. If the state can fix a maximum or minimum, or both, which the majority opinion in effect holds, then by the same token it can fix the exact price to be paid by an insurance company to each of its employés. If the state can fix the terms of a contract as to price, why cannot it go further and fix other terms of the contract? Under the majority opinion no valid reason can be assigned.

One step further, if the state, in the exercise of that great but indefinable power called the police power, can regulate the private contracts between an insurance company organized under the laws of this state and its employés, then it can take every corporation which transacts a public business, and fix a schedule of rates for each class of employés. With the insurance companies the schedule would run from office boy to president. With the railroads it would run from section laborer to president. With the hotels, from bellboy to manager. Great indeed would be the powers of the Legislature, when the logical conclusions are legitimately drawn from the opinion of the majority. Seekers of employment would no longer go to those desiring to employ, with a view to agreeing upon a contract of employment, but they would flock to the Legislature, and have the terms of their respective contracts fixed, and the only thing for the employer to do would be to assent to the employé entering upon the contract thus made by the Legislature. If this law is a rightful exercise of the police powers of Missouri, as held by my Brothers, then the right of private contract, held to be a property right, has received its death knell in the state. That the question of the right to make private contracts is involved in this case is as certain as it is that the question whether or not this law is the proper exercise of the police power is involved. The majority opinion recognizes that the law is the product of this reserved power of the state, and, in holding the law valid, has held that the state can intermeddle with the private contracts of its citizens. You cannot say that the law involves the question as to whether or not there has been a proper exercise of the police power, without further saying that in determining that question is involved an investigation as to whether or not the right of contract has been infringed upon by the law.

5. The question of solvency is not in this case. It is admitted that relator is solvent and in financial shape to meet its obligation. The only reason assigned for refusing this license to relator is that said relator, in the exercise of a right guaranteed to it by the Constitution of this state, the Constitution of the government and every state in the Union, has seen fit to enter into a private contract with one of its employés, wherein it has agreed to pay one employé more than $50,000 per annum for services. It is not contended in the record that such services are not worth the price, nor that the relator had no need in its business for a man whose services were worth to it that price. In this connection it would be well to note that this law says not a word about solvency. The general public is interested in the solvency of insurance companies, but they are not interested in the price paid to employés unless it has some relation to the question of solvency. Had this act of 1907 precluded such insurance companies from doing business in this state, which were paying such salaries and expenses as would affect their solvency, and placed the regulation on that ground, then we might have a different proposition before us. But such is not the law before us, and we need not go further than to consider what is in fact before us.

There is, however, another question as to this law. As suggested, the law does not make solvency a basis of its classification of insurance companies, whether they be domestic or foreign. The law adopts as an arbitrary basis of classification of acceptable and nonacceptable companies, the salaries paid their officials. This is an arbitrary and unreasonable basis of classification. Darlington Lumber Company v. Missouri Pacific Ry. Co. (not yet officially reported) 116 S. W. 530. In the above case this court quoted with approval the following from the pen of Justice Brewer in Railroad v. Ellis, 165 U. S., loc. cit. 155, 17 Sup. Ct. 256 (41 L. Ed. 666): "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike

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with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; Railroad Company v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; Pacific Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; Columbus Southern Railway v. Wright, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238; Marchant v. Pennsylvania Railroad, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; St. Louis & San Francisco Railway v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In State v. Loomis, 115 Mo., loc. cit. 314, 22 S. W. 351 (21 L. R. A. 789), this court said: "But classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim the competency to contract can be made to depend upon the stature or color of the hair. Such a classification for such purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land." See the Darlington Case, supra, for a full list of authorities and a review thereof upon this question of an arbitrary basis for a classification.

This law selects the salaries paid to officials as a basis of classification. Under its terms our people may be precluded from the more reliable insurance, and have forced upon them the less reliable companies. But this is really beside the question. The law in our opinion is invalid in having an arbitrary and unreasonable basis for the classification of insurance companies.

Nor do we think there is anything in the question that the law only fixes these provisions in the nature of penalties as suggested in the majority opinion. There is not a line in the whole act from title to the last word therein indicating that it is a penal statute. To our mind this law is violative of both state and federal constitutional provisions, and relator is entitled to the peremptory writ of mandamus.

FOX and LAMM, JJ., concur in these views.

STATE ex rel. METROPOLITAN LIFE INS. CO. v. VANDIVER, Insurance Superintendent.†

(Supreme Court of Missouri. May 22, 1909.)

In Banc. Mandamus by the State, on relation of the Metropolitan Life Insurance Company, against William D. Vandiver, Superintendent of Insurance, to compel the renewal of its license to do an insurance business in Missouri. Writ denied.

WOODSON, J. This is another one of the three cases briefed, argued, and submitted together with the case of State of Missouri, on the relation of the Equitable Life Assurance Society of the United States, Relator, v. William D. Vandiver, Superintendent of Insurance of the State of Missouri, Respondent, 121 S. W. 45. The issues and legal propositions involved in this case are substantially the same as those involved in that, and the conclusions reached in that case are controlling in this. We are therefore of the opinion that a peremptory writ of mandamus should be denied, and it is so ordered.

VALLIANT, C. J., and BURGESS and GANTT, JJ., concur. GRAVES, J., dissents in separate opinion, in which FOX and LAMM, JJ., concur.

GRAVES, J. (dissenting). This case was argued and submitted with the case of State ex rel. Equitable Life Assurance Society of the United States v. Vandiver, Superintendent, 121 S. W. 45. Practically the same state of admitted facts are involved. The same questions of law are presented. I dissent from the majority opinion herein, for the reasons fully assigned in my dissenting opinion in the Equitable Case, supra.

FOX and LAMM, JJ., concur in this dissent.

STATE ex rel. PRUDENTIAL LIFE INS. CO. OF AMERICA v. VANDIVER, Insurance Superintendent.†

(Supreme Court of Missouri. May 22, 1909.)

In Banc. Mandamus by the State, on relation of the Prudential Life Insurance Company of America, against William D. Vandiver, Superintendent of Insurance, to compel defendant to renew relator's license to do business in Missouri. Denied.

WOODSON, J. This is one of the three cases briefed, argued, and submitted together with the case of State of Missouri on the relation of the Equitable Life Assurance Society of the United States, Relator, v. William D. Vandiver, Superintendent of Insurance of the State of Missouri, Respondent, 121 S. W. 45, The issues and legal propositions involved in

† Rehearing denied July 9, 1909.

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this case are substantially the same as those involved in that, and the conclusions reached in that case are controlling in this. We are therefore of the opinion that a peremptory writ of mandamus should be denied, and it is so ordered.

VALLIANT, C. J., and BURGESS and GANTT, JJ., concur. GRAVES, J., dissents in separate opinion, in which FOX and LAMM, JJ., concur.

GRAVES J. (dissenting). This is one of three cases briefed, argued, and submitted together, although separate upon our docket. I have fully covered both the law and the facts in a dissenting opinion in the case of State ex rel. Equitable Life Assurance Society of the United States v. Vandiver, Superintendent, 121 S. W. 45. Both law and facts are practically the same in all three cases. What was said in my dissenting opinion in the Equitable Case applies to the questions involved in this case. The peremptory writ of mandamus should be awarded.

FOX and LAMM, JJ., concur herein.

STATE ex rel. SIKES v. WILLIAMS.

(Supreme Court of Missouri. July 9, 1909.)

1. OFFICERS (§ 15*)—APPOINTMENT—CONFIRMATION BY SENATE.

Where the General Assembly meets in special session for legislative purposes pursuant to the call of the Governor, the Senate may confirm appointments made by the Governor.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 17; Dec. Dig. § 15.*]

2. OFFICERS (§§ 52, 53*)—TERM OF OFFICE—STATUTES.

Where the law creates an office and prescribes the length of term, with no date for the beginning or ending thereof, and designates the appointive power, the appointive power may fix not only the commencement of the term, but the end thereof, and it can say in the first instance that the term shall begin on a certain date, or it can say that the appointment is made under the law, with the understanding that it shall end on a certain day.

[Ed. Note.—For other cases, see Officers, Dec. Dig. §§ 52, 53.*]

3. OFFICERS (§ 53*)—"TERM OF OFFICE"—STATUTES—CONSTRUCTION.

Laws 1901, p. 197 (Ann. St. 1906, §§ 8145–4 to 8145–8), creating the office of factory inspector, and requiring the Governor within a specified time after the passage of the act, with the advice and consent of the Senate, to appoint a factory inspector, who shall hold office for four years, empowers the Governor to fix the commencement and ending of the term, and, where the Governor fixed the end of the term, the appointee's term expired on that date, in the absence of other provisions in the statute which will continue the term; "term of office" being a fixed and definite period of time.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 53.*

For other definitions, see Words and Phrases, vol. 8, pp. 6920, 6921.]

4. OFFICERS (§§ 55, 56*)—TERM OF OFFICE—STATUTES—CONSTRUCTION.

Laws 1901, p. 197 (Ann. St. 1906, §§ 8145–4 to 8145–8), creating the office of factory inspector, who shall hold his office for four years from the date of his appointment, or until his successor is appointed or qualified, recognizes the fact that there may be some delay in the appointment and qualification of a successor, and also recognizes the right of the Governor to appoint at any time after the term, and there is a vacancy in the office on the termination of the term of the incumbent.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 85; Dec. Dig. §§ 55, 56.*]

5. OFFICERS (§ 15*)—TERM OF OFFICE—STATUTES—CONSTRUCTION.

A statute creating an office to be filled by appointment made by the Governor, with the advice and consent of the Senate, which provides for the first appointment at a time when the Senate is not in session, contemplates that, on the expiration of the term of an incumbent, the Governor may make an appointment, and that the Senate will act thereon when the General Assembly meets in session, and the appointee holds the office until the senate passes adversely on the appointment.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 15.*]

6. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing a statute, will so interpret it as to conform with the intent of the Legislature, and it must be given a reasonable construction, keeping in view the purposes of, as well as the circumstances surrounding, its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

In banc. Quo warranto by the State, on the information of Elliott W. Major, Attorney General, at the relation of Jesse W. Sikes, against W. W. Williams. Writ of ouster denied, and proceedings dismissed.

This is a contest between Jesse W. Sikes and W. W. Williams as to who is entitled to the office of factory inspector of the state of Missouri.

It is not essential to reproduce the petition filed by the Attorney General, nor the return as made to the preliminary writ issued upon such petition. However, to fully appreciate the vital questions confronting us, it is essential that a brief statement of the facts be made. The office of factory inspector was created by an act of the General Assembly approved April 17, 1901 (Laws 1901, p. 197 [Ann. St. 1906, §§ 8145–4 to 8145–8]). There was an emergency clause to this act. Section 1 of this act, in so far as is material to this controversy, reads: "That within thirty days after the passage of this act * * * the Governor of the state, with the advice and consent of the senate, shall appoint a competent person to serve as factory inspector who shall hold office for four years from the date of his appointment or until his successor is appointed and qualified." On May 18, 1901, C. J. Nordmeyer was appointed to the office by the then Governor for a term ending May 13, 1905. Nordmeyer held the office until May 19, 1903. Nordmeyer's appointment was not confirmed by the Senate until the session in 1903. On May 19th, J. C. A. Hiller was appointed for a term ending May 13, 1909, which being after the adjournment of the General Assembly he could not have been confirmed until after January 2, 1907, at which term of the General Assembly his appointment was confirmed. After the ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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journment of the General Assembly for 1907, on May 11, 1907, Hiller resigned, which resignation was accepted by the Governor. March 20, 1907, the Governor issued a call for a special session of the Forty-Fourth General Assembly of Missouri, to meet on April 9, 1907. Among the purposes assigned in the call was the following: "Seventh. To consider any other subject that may be submitted by special message, during such session."

On May 6, 1907, the Governor sent to the Senate the following communication: "Office of the Governor. State of Missouri, City of Jefferson. May 6, 1907. To the Senate: I have the honor to advise that I have this day, by and with the advice and consent of the Senate, appointed Jesse W. Sikes, of the city of St. Louis, to the office of factory inspector, vice J. C. A. Hiller, resigned, for a term ending May 13, 1909. Respectfully, Jos. W. Folk, Governor." This appointment was confirmed by the Senate at such extra session. The commission was of date May 11, 1907, and Sikes qualified May 17, 1907. On November 16, 1907, the Governor sent the following: "Office of the Governor. State of Missouri, City of Jefferson. November 16, 1907. To the Secretary of State—Sir: I have the honor to advise that, by virtue of authority in me vested by section 1 of an act of the Forty-Fourth General Assembly of the State of Missouri approved May 9, 1907, I have this day, with the advice and consent of the Senate, appointed Jesse W. Sikes, of the city of St. Louis, to the office of factory inspector, to hold for a term of four years from August 11, 1907. Issue accordingly. Respectfully, Jos. W. Folk, Governor."

On November 18th a commission was issued to cover this appointment, which commission authorized Mr. Sikes to hold the office for four years from August 11, 1907. Under this commission Sikes again qualified. On January 6, 1909, this last appointment was sent to the state Senate for confirmation, and no action was taken thereon. On May 22, 1909, Gov. Hadley, as the successor of Gov. Folk, commissioned the respondent as factory inspector of the state of Missouri, for a "term of four years from May 13, 1909, effective June 1, 1909, vice J. W. Sikes," under which commission respondent in due time qualified, and is now claiming to be the duly appointed and qualified factory inspector of this state, and in pursuance of such claim is undertaking to discharge the duties of such office. This sufficiently indicates the facts concerning the controversy between these two claimants to the office of factory inspector to enable us to present our views upon the legal propositions involved.

Elliott W. Major, Atty. Gen., and Jamison & Thomas, for relator. Blevins & Jamison (Charles Mayer, of counsel), for respondent.

FOX, J. (after stating the facts as above). 1. At the very threshold of the consideration of the legal propositions confronting us, it is obvious that the relator, Mr. Sikes, does not base his claim to the office of factory inspector under and by virtue of the last commission issued to him for that office. While the act of 1907 amended in some minor particulars the act of 1901, it will not be seriously insisted that it so amended the original act as to create a new office, and thus necessitate a new appointment; but, even if this contention is made by the relator, the new appointment was never confirmed by the Senate. Hence in this controversy manifestly the relator is compelled to rely upon, and does rely upon, the first appointment as a justification for his claim to the office. But, aside from this, one of the contentions of learned counsel for relator is that by reason of the language employed in the act of 1901, and he receiving his appointment and commission under that act, there was no vacancy to be filled at the time the respondent, Mr. Williams, received his commission. This obviously is a practical concession on the part of relator that he had no rights under and by virtue of the second appointment. Hence it follows that whatever rights, if any, to which relator is entitled, must be sought under the first appointment. With this view we shall not undertake, in the presentation of our views upon the legal propositions confronting us, to discuss the question of the second appointment and commission for the term of four years.

It is insisted by respondent that the first appointment of the relator, Mr. Sikes, was not confirmed by the Senate. This insistence is doubtless predicated upon the theory that the Senate had no authority to confirm at a special session. We are unwilling to give our assent to this insistence. The confirmations by the Senate of appointments made by the Governor are not legislative acts, and in our opinion can be made as well at a special session as a regular session. Such acts by the Governor concerning appointments are merely administrative, and can be confirmed by the Senate whenever that body is in session, and it is immaterial for what purpose the legislative body may have been called in session. In other words, whenever the body is lawfully convened for legislative purposes, it has the right to act for administrative purposes, even without mention of such purpose in the call for a special session. We deem it unnecessary to further discuss this contention, for in our opinion the call by the Governor of the special session was broad enough to cover all emergencies, and fully authorized the Senate to confirm the merely administrative acts by the Governor.

2. This brings us to the consideration of the real question; that is, what was the status of relator respecting the office of fac-

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tory inspector under and by virtue of his first appointment to and commission by the Governor for that office? In other words, what was the force and effect of the appointment and commission?

By the commission the term of relator expired May 13, 1909, or as soon thereafter as his successor was appointed and qualified. This leads us to the inquiry of what is meant by the terms "appointment" and "qualified." The contentions of relator and respondent upon this proposition may thus be briefly stated: Relator insists that without the confirmation and acquiescence of the Senate there can be no legal appointment made by the Governor to the office of factory inspector. On the other hand, the respondent contends that when the term of factory inspector is at an end there was a vacancy, and the Governor had the right to fill it by appointment until such time as the Senate saw fit to confirm or reject the appointment. In other words, to emphasize the insistence of the relator, his contention is that it takes the joint act of the Governor and the state Senate to make the appointment, and without such there is no legal right in any person who has been appointed to the office of factory inspector, after the expiration of a term, to hold the office. This is the overshadowing proposition confronting us, the correct solution of which must be sought by a fair, reasonable, and impartial application of the law to the subject.

It will be observed that the act creating the office of factory inspector designates the length of the term, but does not undertake to fix the date of the beginning or ending thereof. It is important in the treatment of this question that we do not overlook that this is an appointive office, and not an elective one. This leads us to the inquiry as to when did the term of office of factory inspector begin, and when did it end? This question was directly in judgment before this court in State ex rel. v. Stonestreet, 99 Mo. 361, 12 S. W. 895. We there had under consideration a law which fixed the duration of the term, but did not designate the beginning of such term nor the expiration thereof; that is to say, no exact date was fixed for the beginning or ending of the term. It necessarily follows that the power which could fix the beginning of the term must of necessity have the power to designate the end of such term. In other words, if the lawmaking power designates the length of the term, but leaves it to another power to fix the beginning of such term, it necessarily gives the same power which designated the beginning the right to fix the end of such term. Where the law creates an office and prescribes the length of the term, with no date fixed for the beginning or ending of such term, and designates the power which is vested to fill such office by appointment, it necessarily follows that the appointive power has the right to fix not only the commencement of the term, but as well the end thereof. The power to fix one means a power to fix the other, and it is immaterial at which end of the term this power operates. It can say in the first instance that this term shall begin on a certain date and run so long, or it can say this appointment is made under the law, with the understanding that it shall end upon a certain date. In either case the power recognized as having the right to designate the beginning and ending of the term has acted.

In the case now in hand there seems to be some controversy between counsel as to the beginning or ending of the term of office now in dispute; one insisting that May 13th was the date fixed, and the other May the 18th. Obviously this dispute is immaterial, and for the purposes of this case we shall treat May 13th as the date fixed for the beginning and ending of the term of this office. When the General Assembly created the office of factory inspector, prescribing the length of the term, but failing to designate the commencement or ending of such term, and investing the Governor with the power of appointment to fill such office, that the Governor had the right to fix the commencement and ending of such term there certainly can be no dispute. In State ex rel. v. Stonestreet, 99 Mo. 361, 12 S. W. 895, heretofore referred to, this proposition is fully discussed, and the authorities exhaustively reviewed. It so fully presents the question, and, being in harmony with the conclusions we have reached upon this proposition, we trust the length of the quotation will be pardoned. Judge Sherwood, in that case, treating of this proposition, thus announced the rules of law applicable to it:

"Going to the standards of our language, we find that a 'term' means: 'The time for which anything lasts; any limited time; the term of life.' Webster's Dict. And turning to the authorities, they announce that: 'The expression "term of office" uniformly designates a fixed and definite period of time.' Anderson's Law Dict. 1023; People v. Brundage, 78 N. Y. 403, 407; Baker, Governor, v. Kirk, 33 Ind. 517. So that whether we take the phrase, 'term of office,' in its ordinary or popular sense, or in its technical import, it means one and the same thing: 'A fixed and definite period of time.' Of course, every such period of time, in order to be 'fixed and definite,' must have a point of beginning and a point of termination equally fixed and definite. Now, if it can be ascertained when the 'term of office' of the first appointee of the Governor under the revision of 1879 began, it would seem not difficult to reach a correct conclusion as to when the terms of office of the successive and subsequent appointees of the executive began and ended. The statute is silent on the point as to the beginning of

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the first appointee's term, and the reason for this is most obvious, since, the power of appointment being lodged in the executive, it belonged to him in fact, if not in law, to determine the time of the inception of the actual official term of such appointee. The duration of that term was already fixed by law. But if the Legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years. This must be true, or else the premises from which this conclusion is drawn, sustained as it is by authority, that a 'term of office uniformly designates a fixed and definite period of time,' must be false. As the Legislature did not fix the date when the official term of the first appointment under the new law was to begin, this date was necessarily left to be fixed by the appointing power; but, when fixed, the determination thus reached must have been as effectual in all its incidents and consequences as if previously made by the Legislature. This also must be true, or else it must be true that the executive was incapable of fixing such initial point, and that therefore it never was fixed, which is an impossibility, as well as an absurd supposition.

"This reasoning leads to this result: That the date of the appointment, first made by the Governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. Attorney General ex rel. v. Love, 39 N. J. Law, 476, 23 Am. Rep. 234, is decisive of this point. And the general rule is elsewhere recognized that when no time is mentioned in the law, from which the term shall commence, it must begin to run from the date of the election. State ex rel. v. Constable, 7 Ohio, 7, pt. 1; Marshall v. Harwood, 5 Md. 423; Hughes v. Buckingham, 5 Smedes & M. (Miss.) 632. These last, three election cases, furnish a strong analogous support to the view already expressed, showing, as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule; and the course in the office of the executive in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of the relator, fixing the beginning of such official term at June 18th, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous, as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient per se to settle the controversy on the point in hand adversely to relator.

"Under statutory provisions substantially identical with these under discussion, it has been held that the true rule was to construe the word 'term' as designating consecutive periods of six years, following each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. People ex rel. v. McClave, 99 N. Y. 83, 93, 1 N. E. 235. The statute there was like section 5838, Rev. St. 1879, providing that the appointee should hold for a certain number of years and until his successor should be appointed and qualified, and also like section 5832, providing that in case of vacancy an appointment should occur for the residue of the term. The ruling just mentioned is in entire conformity to the authorities and views heretofore cited and expressed as to the date of the commencement and the uniform duration of the successive terms of office of the different and successive appointees under the law now being discussed. And, upon the very face of section 5838 aforesaid, there appears a legislative command that the term of office of each appointee is to last two years 'from the date of his appointment'; but the Legislature was cognizant that appointments might fail to be made at the proper time, that deaths, resignations, failure to accept, qualify, etc., might occur, and so made provision for section 5838, that an appointee should hold office not only for his official term of two years, but until his successor should be duly appointed and qualified. And section 5852 exhibits the same marks of legislative solicitude that uniformity should prevail as to the duration of the official term of the inspector, for that section makes special provision, in case of vacancy, that the Governor, upon being informed thereof, 'shall appoint and commission his successor for the remainder of the term of office as therein provided.' What term of office? Evidently the term of two years mentioned in section 5838, beginning at the date of the original appointee's appointment."

Obviously there is little to be added to the discussion of the proposition involved in that case, which is equally applicable to the case at bar. Whatever other courts may say upon this proposition, the statute involved in the case last cited and quoted from, which in some of its features is similar to the statute now before us, has been interpreted by this court, and we see no valid, legal reason for departing from such interpretation. In the case at bar the act of 1901, as has been repeatedly stated, did not designate the date of

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the beginning or ending of the term; but the Governor, who was fully vested with appointing power to fill such office, did fix the date of the ending of the term of the relator. By the designation as made by the Governor of the ending of the term, it follows that relator's term expired on May 13, 1909, unless there are provisions in the statute which would longer continue such term.

3. This brings us to the consideration of the statute which would authorize the relator to hold and enjoy the office of factory inspector beyond the end of his term, May 13, 1909. The only provisions of law authorizing the relator to hold beyond the designated end of his term, May 13, 1909, are the terms employed in the statute providing that he shall hold "until his successor is appointed and qualified." While this language recognizes the fact that there might be some delay in the appointment and qualification of a successor, it equally and fully recognizes the right of the Governor to appoint at any time after the term. Upon this proposition it must not be overlooked that the cases treating of this subject recognize a distinction between appointive and elective officers, and, when the cases are fully considered and analyzed, it will be found that learned counsel for relator are in error when they say that our later cases are in conflict with State ex rel. v. Stonestreet, supra, and State ex rel. v. Thomas, 102 Mo. 85, 14 S. W. 108. For the purposes of appointment, there was a vacancy in this office May 13, 1909. The law does not contemplate that there is a new beginning and ending of the term by each appointment; but the term becomes fixed by the first appointment under the act.

4. It is next earnestly insisted by relator that the respondent has never been legally qualified, for the reason that the state Senate has not ratified his appointment. This insistence is predicated upon the provision of the statute which reads: "The Governor of the state, with the advice and consent of the Senate, shall appoint," etc. It is fundamental that, in the construction of statutes, the courts should so interpret them as to conform with the intent of the lawmaking power that enacted them. Applying this fundamental rule of construction to the contention of the relator upon this proposition, in our opinion, his insistence is not a fair construction of this law, and is directly in conflict with the manifest intention of the lawmaking power. The General Assembly provided for the first appointment to be made at a time when the Senate would not be in session. It must have known that the Senate would not be continuously in session, and would not likely be in session at the time when further appointments were made. The law contemplates that such appointments shall be made at the proper time, and that the Senate will act upon the appointment at the next session thereafter. The law does not contemplate that there can be no occupant of the office until both the Governor and Senate has acted. Were that true, in case of the death of an occupant at a time when the Senate was not in session, the business of the office would have to cease until the Senate met. Such was never in the minds of the members of the General Assembly. The very fact that the law itself provided for the first appointment to be made at a time when it was not contemplated that the General Assembly would be in session is strongly indicative of the legislative intent. We are unwilling to give the statute now under consideration an interpretation which would manifestly conflict with the clear intention of the lawmaking power and absolutely deprive the Governor of the power to discharge the administrative duties incumbent upon him by reason of such enactment. Laws must be given a reasonable construction, keeping in view the purposes of, as well as the circumstances surrounding, their enactment. Giving to this law such a construction, it must be held that the legislative intent was to authorize the Governor to make appointments to this office at such times as vacancies occurred therein, and that the consent of the Senate would be given or refused at the next succeeding meeting of that body. In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character.

The exact question here involved came before the Supreme Court of Florida, in the case of State ex rel. v. Murphy et al., 32 Fla. 138, 13 South. 705. The constitutional provisions there were much as they are here. After an exhaustive review of all the authorities, Raney, C. J., reached the same conclusion as herein indicated. In discussing the time for holding over by the old officer, the Texas Supreme Court, in State v. Cocke, 54 Tex., loc. cit. 485, aptly says: "The primary object of this provision, that the incumbent is entitled to hold the office until his successor is elected or qualified, is simply to prevent, on grounds of public necessity, a vacancy in fact in office until the newly elected or appointed officer can have a reasonable time within which to qualify. The right of the officer who thus holds over is by sufferance, rather than from any intrinsic title to the office." To the same effect is the case of Johnson v. Mann et al., 77 Va., loc. cit. 271, where it was said: "The provision of the Constitution mainly, if not solely, relied on by counsel for petitioner, is the twenty-fifth section of the sixth article. It simply provides for the holding over by the incumbent after the expiration of his term until his suc-

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cessor shall qualify. The plain unequivocal import of this section of the Constitution is that, when the regular term expires, the office becomes, in the eye of the Constitution, vacant, but with authority to the incumbent, already qualified, to continue by virtue of such previous qualification, made effective for the purpose by the Constitution, to discharge the functions of the office until he is succeeded in the way preferred by the people, as pointed out in the Constitution made by them and in the laws made in pursuance of that instrument." See, also, Prowell v. State, 142 Ala. 80, 39 South. 164; Kline v. McKelvey, 57 W. Va. 29, 49 S. W. 896; Fritts v. Kuhl, 51 N. J. Law, 191, 17 Atl. 102.

We have given expression to our views upon the legal propositions involved in this proceeding, which results in the conclusion that the respondent, W. W. Williams, is the legally qualified factory inspector of this state, and that the writ of ouster sought by this proceeding should be and is hereby denied, and the proceeding dismissed. All concur, except VALLIANT, C. J., who is absent.

HUBBARD et al. v. WHITEHEAD et al

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. DEEDS (§ 93*)—CONSTRUCTION—INTENT OF PARTIES.

Effect must be given to the intention of the parties to a deed, and, to that end, that must be considered certain which can be made certain.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

2. BOUNDARIES (§ 3*)—CONSTRUCTION—TWO DESCRIPTIONS.

Where there are two descriptions in a deed, one consistent with a reasonable hypothesis and the evident intention of the parties and the other rendering it absolutely inoperative, the false or incorrect call will be rejected, and the description applied in the light of the facts existing at the time.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 4; Dec. Dig. § 3.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITINGS—DEEDS.

Extrinsic evidence is admissible to explain the calls of a deed for the purpose of applying them to the subject-matter and giving effect to the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2116–2118, 2120; Dec. Dig. § 460.*]

4. DEEDS (§ 111*)—DESCRIPTION—SUFFICIENCY.

Though a deed must so describe the land sought to be conveyed that it can be identified, the court will put itself in the position of the parties as near as possible, and consider the circumstances and interpret the words used in the light thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309–315; Dec. Dig. § 111.*]

5. BOUNDARIES (§ 3*)—CONFLICTING DESCRIPTION.

The starting point in a description, where fixed, certain, and notorious, generally controls if there is a conflict between it and other calls; but where succeeding calls are as readily ascertained and as little liable to mistake, they are of equal dignity, and, where they all conflict with the starting point and agree with each other, they control.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 3.*]

6. DEEDS (§ 111*)—CONSTRUCTION—DESCRIPTION.

In determining whether a deed was intended to include lots, the court will take into consideration that immediately upon its delivery grantor gave grantee actual possession of the lots, and grantee fenced the entire tract, built a house and barn upon it, and resided thereon, and that neither grantor nor his heirs for a period of 46 years ever made any claim of ownership or paid any taxes.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 111.*]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Ejectment by Joseph R. Hubbard and another against Charles W. Whitehead and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. P. Gates and English & English, for appellants. McCune, Harding, Brown & Murphy and C. S. Palmer, for respondents.

GANTT, P. J. This is an action in ejectment. The petition is in the ordinary form, and the answer is a general denial. The land in dispute is the following: Lots 90 and 91, block 13, Hubbard's addition to the city of Kansas (now Kansas City), and consisting of about 85 feet at the southwest corner of Eighth and Wyandotte streets in Kansas City. A portion of lot No. 90, in fact all thereof except two feet and three inches, was condemned and taken as a part of Eighth street in 1880. The said portion is not in question in this suit. On March 8, 1834, the United States issued to Callise Montardeau a patent for the N. W. ¼ section 5, township 49, range 33, which includes the land sought to be recovered in this action. Chester Hubbard, the father of appellants Joseph R. Hubbard and Ellen R. Jeffries, is the common source of title. Chester Hubbard died in 1861. By their warranty deed dated August 9, 1856, Chester Hubbard and Mary R. Hubbard, his wife, conveyed to S. J. Platt land in Jackson county, Mo., described as follows: "Beginning at the north line on the east side of Wyandotte street in block 15 in Hubbard's addition to the city of Kansas, and the state aforesaid, running south by said Wyandotte street 122 feet, more or less, to land owned by Kersey Coates; thence east to land belonging to the estate of Elijah Jackson, deceased; thence north 122 feet, more or less, to land owned by Swope, being same formerly owned by James Gregory; thence west 127 feet to the place of beginning."

Plaintiff asserts that Chester Hubbard by his last will and testament devised his real

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estate to his wife, Mary, for life, with remainder to plaintiffs, his children. Defendants contend that the record fails to show that the will of Chester Hubbard was ever proven in accordance with the laws of Missouri, and it was therefore insufficient to pass title to said lands in this state. Mrs. Mary Hubbard died in 1900, and the plaintiffs claim that by her death the life estate fell in, and they as remaindermen became entitled to possession of the said lands. The respondent the Missouri Union Trust Company claims title to the tract in controversy through mesne conveyances from said Samuel J. Platt, and the sufficiency of these conveyances to vest in respondents whatever title Samuel J. Platt acquired by his deed from Chester Hubbard and wife is not now disputed by the plaintiffs. Hubbard in his lifetime platted a tract of land, which includes the lots in controversy, calling it "Hubbard's Addition," and this plat is referred to in all the deeds under which the defendants claim. This plat is copied in the record. The only question in this case is whether or not the deed from Hubbard and wife to Platt includes the land in controversy herein. It is the respondent's contention that the description in this deed conveys land in block 13 in Hubbard's addition, which lies three blocks south of block 15, and it is clear from the monuments and pointers referred to in the description that the point of beginning should be the northwest corner of block 13, instead of the northwest corner of block 15. At the date of the execution of this deed, Chester Hubbard owned all the lots in block 15 fronting on Wyandotte street, and also lots 90 and 91 in block 13 fronting on Wyandotte street, together with a portion of the frontage on said street between said blocks 13 and 15. The first course set out in the description is: "South by said Wyandotte street 122 feet more or less to land owned by Kersey Coates." At the date of this deed, the only lot owned by Kersey Coates in Hubbard's addition on the east side of Wyandotte street was lot 92 in block 13, and Kersey Coates owned no lot in block 15. The description in the deed fixes the western boundary as "land belonging to the estate of Elijah Jackson." The estate of Elijah Jackson owned no land adjoining lots in block 15 on the west, but did own land forming the western boundary of lots 90 and 91 in block 13. The description also fixes the northwestern boundary as the "land owned by Swope, being the same formerly owned by James Gregory." The land owned by Thomas H. Swope and conveyed to him by James Gregory and wife on February 20, 1856, joined block 13 on the north, while the northern boundary of block 15 belongs to John La Sarge. Again, the description calls for a lot 127 feet in depth. This is the exact depth of lots 90 and 91 as shown by the plat, while the lots in block 15 are only 70 feet in depth, and the land adjoining block 15 on the east was not owned by Hubbard. On September 8, 1856, and within one month after the execution of the deed in question, Chester Hubbard and wife conveyed to Hezekiah H. King lots 81 to 85, inclusive, in block 15, being the land at the northwest corner of block 15. The abstract of title admitted in evidence under the stipulation of counsel showed that Chester Hubbard never attempted to make any conveyances of lots 90 and 91 in block 13 other than by his deed to S. J. Platt. The land immediately joining lots 90 and 91, block 13, was known as Jackson estate land when this deed was executed. Neither Chester Hubbard, nor his wife or children, have ever been in possession of this property since this deed to Platt was executed in 1856, nor have they or any of them ever paid any taxes thereon since that time. A portion of this lot 90, as already said, was condemned in 1880 as a part of Eighth street, and only two feet and three inches of said lot remains unappropriated for street purposes. The land claimed by the defendant the Missouri Union Trust Company consists of all of lot 91, block 13, and the south two feet and three inches of lot 90. The land in question lies at the southeast corner of what is now Eighth street and Wyandotte street in Kansas City. It is a very valuable piece of property, the present defendant trust company having paid for it $55,000 in 1886.

Samuel Platt took possession of this land before the death of Chester Hubbard, and was living on it in 1857 and 1858 as his home. He occupied the premises until the war began in 1861 and 1862, when he returned to Kentucky. From the time of Platt's departure until 1866 the property was in the possession of tenants of Platt; then Jenkins, to whom Platt conveyed the north 72 feet of the tract, moved into the property, and he and his heirs owned the part the house was on until 1880. In 1880 J. C. Gates, one of the owners in defendant's chain of title, purchased the south 50 feet of lot 91, erected a two-story brick building thereon, and thereafter collected the rents and paid the taxes until he sold to Dobson and Douglas in 1886. The defendant the Missouri Union Trust Company took possession of the entire tract in January, 1886, and from that time until the present has collected the rents and paid the taxes and been in possession. When the company took possession in 1886, the property was inclosed within a fence. The defendant the Missouri Union Trust Company built a two-story brick building on the north side of the land in 1886, and then a year or two afterwards moved its office into the new building, and until this suit was brought has occupied part of said building as its office. During the 30 years prior to the bringing

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of this suit, the taxes have been paid by the defendant the Missouri Union Trust Company and the owners of said property under whom it claims title.

1. In this suit the plaintiffs are assailing the sufficiency of a deed executed by their father, Chester Hubbard, over 50 years ago. By virtue of that deed S. J. Platt, the grantee therein, took immediate possession of the property in controversy in this suit, and the respondent the Missouri Union Trust Company by mesne conveyances has acquired all the title which Platt obtained by that deed. Neither Chester Hubbard nor his widow nor his children have been in possession, nor have they paid any taxes on said lots since the delivery of the deed to Platt. Plaintiffs say that the only question in the case is whether or not the description in the deed from Chester Hubbard to S. J. Platt includes the lands in controversy. In Speed v. Terminal Railroad Co., 163 Mo. 111, 63 S. W. 393, it was said by this court: "When a deed is construed as a whole, as it should be, giving due consideration to every part and portion of it, there ought not to be any serious difficulty in arriving at the true intent and meaning of the grantor." It is manifest that this litigation is predicated upon the mistake made by Hubbard as to the beginning point in the description of the land he sold and conveyed to Platt in 1856. Common honesty and common sense equally require that this deed should not be held void for uncertainty if it can be given any other reasonable construction. The heirs or devisees of Hubbard should not be allowed to say that this solemn conveyance of their father for a valuable consideration meant nothing, and that the grantee, Platt, received nothing but a blank piece of paper, and that the possession of this land under that deed all these years with a full knowledge of Hubbard and his devisees was without any authority. In other words, effect must be given to the intention of the parties, and to that end that must be considered certain which can be made certain, and the grant shall not fail if this meaning can be spelled out. This court in Peter v. Byrne, 175 Mo. 233, 247, 75 S. W. 433, 437, 97 Am. St. Rep. 576, adopted the language of Roberts v. McIntire, 84 Me. 362, 24 Atl. 867: "But with respect to conveyances to real estate, courts in modern times have shown more consideration for the substance of contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and, whenever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect."

It seems to be one of the principal contentions of the plaintiffs that, by some kind of reasoning, the description in this deed would apply to a piece of ground owned by Hubbard at the time of the execution of the deed other than the lots now in dispute. They then deduce the rule that this brings about a patent ambiguity which renders the deed void. But we are of the opinion that this case is one in which the old maxim, "Falsa demonstratio non nocet," applies. In other words, that, where we have two descriptions, the one consistent with a reasonable hypothesis and the evident intention of the parties, and the other would result in the conveyance being absolutely inoperative, we reject the false or incorrect call, and then apply the description in the light of the facts existing at the time. So in this case, if we reject the first false call, to wit, the starting point, and then apply the known facts at that time, we think there is no doubt whatever that the deed in question was sufficient to convey these lots 90 and 91 in block 13. It is obvious, we think, that the beginning point should have been the northwest corner of block 13 instead of the northwest corner of block 15, a mistake very easily made. We have already indicated in the statement of the facts that the first call of 122 feet along Wyandotte street to the land owned by Kersey Coates fixed Coates' lot 92 as the south boundary of this tract conveyed to Platt. At that time Coates owned lot 92 in block 13, and owned no lot in block 15. This is not all; the deed just as effectually fixes the eastern boundary of the tract conveyed by the reference to "the land belonging to the estate of Elijah Jackson." At that time the estate of Jackson owned no land adjoining lots in block 15 on the east, but did own lands which formed the eastern boundary of these lots 90 and 91 in block 13. Equally certain was the northern boundary fixed as "land owned by Swope, being the same formerly owned by Gregory," and this land joined this block 13 on the north.

The decisions are numerous that the starting point in a description is not of more dignity or importance than other calls, if they are readily ascertainable, and if the starting point conflicts with the other calls the latter must control. Cannon v. Emmans, 44 Minn. 294, 46 N. W. 356. Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter and thus give effect to the deed. While it is true that a deed must so describe land sought to be conveyed thereby that it can be identified, that is certain which can be rendered certain, and, in construing a doubtful description in a grant, the court will put itself in the position of the contracting parties as near as possible and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances. And when this is done, in this case, all that is necessary to do is to reject the first false call, the starting point, and then, applying

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the description to the land in the light of the various calls for the boundary thereof, we have no doubt whatever that it was sufficient to convey the two lots 90 and 91 in block 13 of Hubbard's addition. In Walsh v. Hill, 38 Cal. 481, approved by this court in Speed v. Railway Com., 163 Mo. 111, 63 S. W. 393, it was said: "If the starting point is fixed, certain, and notorious, and, there is a conflict between it and other calls, the latter must generally give way to the former; but when succeeding calls are as readily ascertained and are as little liable to mistake, they are of equal dignity with the first, and, when they all conflict with the first and agree with each other, their united testimony must control." See, also, Scott v. Pettigrew, 72 Tex. 321, 12 S. W. 161. In Cooley v. Warren, 53 Mo. 166, it was said: "The first or starting point was surely a mistake, but all the rest of the description was by natural objects and fixed and permanent monuments, so as to leave no doubt whatever as to the true location. Strike out the first or inconsistent call, and still enough remains to designate the land with certainty. The rule is clearly established that, whenever natural or permanent objects are embraced in the calls of a survey or deed, they have absolute control, and that a call may be rejected for inconsistency or repugnancy where description enough remains to ascertain and describe land with certainty." Many other cases might be cited to establish these well-settled principles, but we deem it entirely unnecessary. We think the first, or the beginning point, should be rejected because it is utterly inconsistent with all the other calls in the deed; that, having rejected that, there is sufficient certainty in the other calls to describe these two lots 90 and 91 in block 13; and that the deed was amply sufficient to carry the title of Hubbard to Platt. And, in addition to that, we think a court of justice should, and we will, take notice, in arriving at the meaning of this deed to the facts, that, immediately upon the delivery of this deed to Platt, Hubbard gave him actual possession of these lots, and Platt fenced the entire tract, built a house and barn upon it and resided upon the premises, and neither Hubbard nor his heirs from that time until the filing of this suit, a period of 46 years, ever made any claim of ownership to this land, nor paid any taxes upon it. And that Hubbard did not consider that he had conveyed Platt any part of block 15, is, we think, clearly established by the fact that, in less than a month after he made the deed to Platt, Hubbard conveyed the property at the southeast corner of Fifth and Wyandotte, being the property at the northwest corner of block 15 in his addition, to Hezekiah King, clearly showing that he did not intend to convey to Platt the 122 feet of grant in the northwest corner of block 15, and Hubbard never did make any other conveyance of the land in controversy in this suit.

Having reached this conclusion, we deem it entirely unnecessary to pass upon the other propositions advanced by the respective counsel as to the statute of limitations and the tax title.

In our opinion, the circuit court properly ruled and held that the deed from Hubbard to Platt of date August 9, 1856, conveyed the land in controversy to said S. J. Platt, and, accordingly, the judgment is affirmed.

BURGESS and FOX, JJ., concur.

DODDRIDGE v. PATTERSON et al.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. APPEAL AND ERROR (§ 939*)—RECORD—ABSTRACT OF EVIDENCE—SUFFICIENCY.

Where the record on appeal apparently contains a full abstract of all the evidence, the court, in the absence of a showing to the contrary, must presume that counsel for appellant obeyed the statute, and a mere motion to dismiss the appeal because of the failure to file a complete abstract is not sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3804-3806; Dec. Dig. § 939.*]

2. APPEAL AND ERROR (§ 582*)—RECORD—ABSTRACT OF EVIDENCE—SUFFICIENCY.

The abstract may set out the evidence in a narrative form, except where the questions and answers are necessary to convey to the appellate court the meaning of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2582, 2583; Dec. Dig. § 582.*]

3. EVIDENCE (§ 84*)—PRESUMPTIONS.

In the absence of evidence that a township is a fractional township within Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), relating to the sale of school sections in congressional townships including fractional townships, the court must presume that a township is a full congressional township, 6 miles square, containing 36 sections.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 84.*]

4. PUBLIC LANDS (§ 54*)—SALE OF SCHOOL LANDS—STATUTES.

Under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), providing for the sale of school lands on a petition of a majority of the householders of a township having more than 15 householders, etc., the authority of the county court to order a sale of school lands depends on the fact that the township has at least 15 householders, and that a majority of the householders of the township petition for a sale.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 54.*]

5. PUBLIC LANDS (§ 54*)—SALE OF SCHOOL LANDS—STATUTES.

Proof that there were 15 names on the petition to the county court praying for the sale of school lands of a township under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), does not show that a majority of the householders of the township signed the petition, and does not show that the owners were householders, and does not give the court jurisdiction to order a sale.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 54.*]

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6. COURTS (§ 33*)—JURISDICTION OF INFERIOR COURTS.

The jurisdiction of courts of inferior jurisdiction and of courts not proceeding according to the course of the common law must affirmatively appear on the face of the proceedings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 135; Dec. Dig. § 33.*]

7. PUBLIC LANDS (§ 54*)—SALE OF SCHOOL LANDS—JURISDICTION.

The county court is a court of inferior jurisdiction, and a proceeding before it for a sale of school lands under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), is not according to the course of the common law, and the statutory directions must be observed before it can acquire jurisdiction.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 54.*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Mandamus by J. H. Doddridge against G. W. Patterson and others, composing the County Court of Stoddard County. From an order awarding a peremptory writ, defendants appeal. Reversed.

The relator filed his petition in the circuit court of Stoddard county, asking for an alternative writ of mandamus against the members of the county court of that county to compel them to make out and forward to the Secretary of State an abstract showing that the N. W. ¼ of the N. E. ¼, the N. E. ¼ of the N. E. ¼, and the S. E. ¼ of the N. E. ¼ of section 16, township 27, range 12 of the school land of said county, had been sold in the year 1891 to one O. C. Frisbee. The alternative writ issued, and, upon the filing of the return of the respondents, a trial was had, and the court found the facts for the relator, and ordered a peremptory writ to issue. After taking the proper preliminary steps therefor, the respondents appealed the cause to this court.

As no question is raised as to the sufficiency of the pleadings, they will not be set forth in the statement of the case. A statement of the substance of the evidence will sufficiently indicate the issues made by the pleading and the facts found by the trial court. The following is a substantial statement of the evidence, as it appears in respondents' statement of the case, which, after a careful reading of the abstract of the record, we find to be full and fair:

"On the trial of issues, relator introduced J. W. Buchanan, who testified that he was present and saw Mr. Barham sell the lands described in the writ to Frisbee at the time and place set out in said writ, saw Frisbee pay Barham the $150, and saw Barham give Frisbee a certificate of purchase or receipt for the money, and upon being shown the certified copy, afterwards introduced into evidence, stated that, in his opinion, it was an exact copy of the one given by Barham to Frisbee. Relator then introduced the deputy county clerk, who identified the county court records, later introduced, and who further testified: That he had made a careful search of the records, papers, and files in the county clerk's office, and that the entry in the minute book and record, afterwards introduced, constituted all the reference to the said sale of these lands; that he made diligent search and could not find a petition of householders asking for a sale of said lands; that he could not find any report filed or made by the sheriff of any such sale; and that the records did not show that any money was paid into the treasury on account of such a sale. Relator next offered an order entered in the minute book and also in the record of said court, of date November 17, 1890. Said order is the same in both the minute book and record, and is as follows: 'In the county court of Stoddard county, Missouri, Monday, November 17, 1890. It is ordered by the court that section No. 16 in township No. 27, range 12 east, be sold at not less than $1.25 per acre, at the March term, 1891, of circuit court. Terms of sale to be one-half cash and the balance in 12 months.'

"Relator next introduced Mr. Munger, one of his attorneys, who testified that he had been in possession of the certificate of purchase given by the sheriff to Frisbee, and also a copy of the Bloomfield Vindicator, showing the notice of said sale, and that the same were taken from him without his consent or knowledge, and that he did not know where they were, that the certified copy afterward introduced was an exact copy of said certificate of purchase, and that said sheriff's sale was regular and was regularly published, as appeared from said files of said paper. Relator then offered what has heretofore been referred to as the certified copy of the certificate of purchase given by the sheriff to Frisbee, which is as follows (formal parts omitted): 'This is to certify that I, sheriff of said county, have this day received from O. C. Frisbee one hundred and fifty dollars, being payment in full for the following described real estate, to wit: The N. ½ N. E. ¼ and the S. E. ¼ N. E. ¼, section No. 16, township No. 27, range No. 12 E., purchased by O. C. Frisbee at an order of sale of school land, held by me on the 6th day of March, 1891.'

"Relator then introduced W. F. Ford, the prosecuting attorney of the county at the time of the making of said order and sale, and also Isaac Magee, who was one of the county judges at that time. Both these witnesses testified that they had no recollection of any petition of householders having been filed, asking for the sale of said lands, and had no recollection whatever of the matter. The only evidence upon the issue of whether there was any petition of householders, asking for said sale of said land, is found in the deposition of O. C. Frisbee, and all that he stated upon this issue is contained

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in the following questions and answers: 'Q. State who assisted you in getting up the petition to the county court, asking for the sale of these lands. A. I could not say. Q. State, if you know, if there were 15 names on this petition? A. There certainly was.' The witness further testified that he paid the purchase price for the land to the sheriff, that he received from the sheriff a certificate of purchase, that he turned this certificate of purchase over to Mr. Doddridge, and that he afterwards sold and deeded the land to relator.

"On his own behalf, relator testified that he bought the land from Edward L. Hall in 1901, and has paid all the taxes on the land to the time of trial, including a lot of back taxes, that he had had the original certificate of purchase given by the sheriff, but had turned it over to Mr. Munger, who lost it, and that the certified copy introduced was an exact copy. Relator also introduced a warranty deed from O. C. Frisbee to Edward L. Hall of date January 30, 1894, conveying the lands in question, and a warranty deed from Edward L. Hall to relator of date March 28, 1901, and conveying same lands."

This was all of relator's evidence. Respondents introduced no evidence, but offered a demurrer to the relator's evidence, and, this being overruled, the court entered judgment that the alternative writ be made peremptory, and respondents appealed the case to this court.

Wammack & Welborn and N. A. Mozley, for appellants.

WOODSON, J. (after stating the facts as above). 1. The relator has filed a motion in this court to dismiss the appeal for the following reasons: "First, because appellants have failed to file in this cause in this court so much of the record and evidence made and adduced in the trial of same in the circuit court as is necessary to a full and complete understanding of all the questions presented to this court for decision. Second, because the abstract filed by appellants in this cause does not set forth a copy of so much of the record of the trial of this cause in the circuit court as is necessary to be consulted in the disposition of the errors assigned in their briefs."

Counsel for relator has not brought up a full copy of the evidence, nor a certificate of the clerk of the circuit court showing that appellants' abstract of the record does not contain all the evidence introduced at the trial, or any other evidence of that fact. The record before us, apparently, contains a full abstract of all the evidence introduced at the trial, and, in the absence of a proper showing to the contrary, we must presume counsel for appellants obeyed the statutes and the rules of this court governing that matter, since the allegations of the motion do not prove their own truthfulness. This alone would justify the court in overruling the motion; but, when we consider the oral contention of counsel made in the argument of this case before this court, we are satisfied therefrom that there is no merit in the motion in point of fact. It is not contended that the abstract does not contain a full and fair statement of all the testimony introduced at the trial; but the objection is made that it is stated in a narrative form, and that the questions and answers are not set out hæc verba as they were propounded to and answered by the witnesses upon the stand. The rules of this court do not require that, except where the questions and answers are absolutely necessary in order to convey to this court the intention and meaning of the witness, and where that object cannot be done by stating the testimony in narrative form, as was held in the case of Bradley v. Bradley, 119 Mo. 62, 24 S. W. 757, the questions and answers should be set out; but ordinarily the narrative form is preferable, for the reason that it greatly shortens the record, and generally eliminates all superfluous and immaterial matter therefrom. None of relator's rights have suffered from the presentation of the evidence in this case in the narrative form. We are therefore of the opinion that the motion should be overruled.

2. There are several legal propositions discussed in briefs, as well as were argued orally before the court; but, in the view we take of the case, it will not be necessary for us to consider but one of them, as it goes to the very marrow of relator's right to a recovery. Section 8161, Rev. St. 1899 (Ann. St. 1906, p. 3867), reads as follows: "In all congressional townships in this state in which there are fifteen householders, they shall have the right to sell their sixteenth sections, or such lands as have been or shall be selected in lieu thereof; and upon a petition of a majority of such householders, the county court shall make an order, a copy of which shall be furnished the sheriff, directing him to expose such lands to sale at the courthouse door, and while the circuit court of the county is in session, after giving twenty days' notice thereof: Provided, that in any fractional township in this state wherein less than fifteen householders now or shall hereafter reside, a majority of the householders of such fractional township may petition the county court for an order to sell the sixteenth section in such township, or other lands which have been or shall be selected in lieu thereof, in like manner as hereinbefore provided." This record contains no evidence that the township in which this land is situate is a fractional township, as referred to in the proviso of that section, so we must therefore presume it was an ordinary full congressional township. By reading that section it will be seen that the county court has no authority upon its own instigation to sell the school lands of the respective townships of the county, but that its authority and jurisdiction to order such lands to be sold in the

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ordinary townships depends upon two conditions, precedent or jurisdictional facts: First, that the township must have at least 15 householders; and, second, that a majority of them must petition the county court to make an order to sell the lands. The only evidence contained in this record bearing upon that question is the following: "Q. State who assisted you in getting up the petition to the county court, asking for the sale of these lands. A. I could not say. Q. State, if you know, if there were 15 names on this petition. A. There certainly was." This evidence fails to show the county court acquired jurisdiction to order the sale of these lands for two reasons: First, the statute requires a majority of the householders of such a township to petition the court for an order of sale, and this evidence does not show a majority of them signed the petition referred to by Frisbee. He testified that "there certainly were" 15 who signed it; but he does not pretend to state those 15 were a majority of the householders of that township. There may have been 50 or more. A congressional township is 6 miles square and contains 36 sections of land, and for this court to presume only 29 householders resided therein would be doing great violence to such facts regarding most congressional districts of this state; but, independent of that, in the absence of all evidence upon that question, we have no right to presume the 15 referred to by Frisbee in his testimony were a majority of those of that township. If the county court had found that 15 were a majority of them, then quite a different proposition would be here presented; but that court made no such finding. In fact, there is no evidence which even tends to show that the petition asking for the order of sale was ever filed or presented to the court for its consideration.

The second reason why the county court did not acquire jurisdiction to make the pretended order of sale was: The evidence totally fails to show that the 15 householders who signed the petition were residents of or lived in the township in which this land was located. While said section does not in express terms require the county court to find that they were residents of the township, yet it requires that they must be, and in the very nature of things no one else could make that finding for the court in the absence of an express statute to the contrary. We are therefore of the opinion that under this statute the county court had no jurisdiction to make the order of sale, and, consequently, no title passed, even though it be conceded the land was sold by the sheriff to Frisbee. McDonald v. Mangold, 61 Mo. App., loc. cit. 293; Eaton v. St. Charles, 76 Mo. 492. And as was said by this court in the case of Sutton v. Cole, 155 Mo., loc. cit. 213, 55 S. W. 1054: "It has long been settled law in Missouri that the jurisdiction of courts of inferior jurisdiction, and of courts that do not proceed according to the course of the common law, must affirmatively appear on the face of the proceedings"—citing State v. Metzger, 26 Mo. 65; Hansberger v. Railroad, 43 Mo. 196; Edmonson v. Kite, 43 Mo. 176; Schell v. Leland, 45 Mo. 289; Iba v. Railroad, 45 Mo. 469. The county court is not only a court of inferior jurisdiction, nor was it proceeding according to the course of the common law in the sale of these school lands, but it was acting under special statutory directions, which must have been observed before it could acquire jurisdiction of the subject-matter.

We are therefore of the opinion that the judgment should be reversed.

It is so ordered. All concur.

WALDERMEYER v. LOEBIG.

(Supreme Court of Missouri, Division No. 2. July 13, 1909.)

1. COVENANTS (§ 14*) — CONSTRUCTION — "GRANT, BARGAIN AND SELL."

The words "grant, bargain and sell," in a deed purporting to convey an estate in fee, have, under Rev. St. 1899, § 907 (Ann. St. 1906, p. 838), the effect of a covenant that the grantor is seised of an indefeasible estate in fee, but unless the deed purports to convey an absolute estate in fee the words mean only a transfer of the estate.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 11; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 4, pp. 3156–3158.]

2. DEEDS (§ 90*)—CONSTRUCTION—INTENTION OF PARTIES.

A deed must be construed as a whole to ascertain the intention of the grantor and effectuate it, unless a positive rule of law will be infringed thereby.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234–237; Dec. Dig. § 90.*]

3. DEEDS (§ 99*)—CONSTRUCTION—INTENTION OF PARTIES.

An instrument referred to in a deed is a part thereof, and the two become one in determining the intention of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 261–265; Dec. Dig. § 99.*]

4. COVENANTS (§ 27*)—PARTIES—CONSTRUCTION—WARRANTIES.

A deed of trust recited that the widow of decedent and the curator of his minor heirs, the curator acting under an order of the probate court authorizing him to borrow on the property of the minors, "granted, bargained and sold" land described, and stipulated that the grantors covenanted that they were seised of an indefeasible estate in fee. The order of the court was based on a petition averring that the minors owned the premises, and that the widow was willing to join in the deed, pledging her dower interest to secure the money borrowed. *Held*, that the widow merely released her dower interest, without warranting that she had an indefeasible estate in fee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 26; Dec. Dig. § 27.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Henry Waldermeyer against Theresia Loebig. From a judgment for defendant, plaintiff appeals. Affirmed.

Block & Sullivan, for appellant. Rassieur & Buder, for respondent.

GANTT, P. J. The learned counsel for the plaintiff very aptly denominates this cause as the aftermath of Waldermeyer v. Loebig, 183 Mo. 363, 81 S. W. 904. The petition in the present case filed December 19, 1904, declared for the breach of covenants of title alleged to have been contained in the deed of trust which was before the court upon other considerations in that case. The petition in substance alleges that the defendant, Mrs. Loebig, the widow of John Loebig, deceased, and one D. Ind. Neudorf, in February, 1897, in consideration of a loan of $7,000 then made by the plaintiff, and to secure the same, executed to William F. Woerner, as trustee, their deed of trust upon certain premises, to wit, the same real estate which was involved in Waldermeyer v. Loebig, 183 Mo. 363, 81 S. W. 904; that by said deed of trust Mrs. Loebig and Neudorf undertook to convey a fee-simple estate, and made use of the words, "grant, bargain and sell," to convey the same; that they thereby covenanted to and with the trustee, his successors in trust and assigns, and for and in behalf of the plaintiff as beneficiary in said deed of trust, that they were at the time seised of an indefeasible estate in fee simple in the premises; that the trustee sold the premises under the powers contained in the said deed of trust upon a default occurring thereunder, and, the plaintiff having become the purchaser at this sale for the full amount of his debt and interest, the trustee conveyed the said premises to him, and thereby assigned to the plaintiff the covenants in said deed of trust. It was also alleged that the trustee had subsequently assigned all rights of action on the covenants in the deed of trust to the plaintiff. The petition then averred that no title whatever passed by the deed of trust; that the plaintiff had sued defendant and others in ejectment for possession of the premises, under his purchase thereof; and that judgment had gone against him in the action. Also that he had instituted the action of Waldermeyer v. Loebig, 183 Mo. 363, 81 S. W. 904, seeking subrogation to mechanics' liens upon said premises which his loan had been used to discharge, and that as the final result of that action of this court it was adjudged that the deed of trust passed no title to the premises. It was then alleged that the premises had at all times been of the value in excess of $15,000, and that the plaintiff's loss was his debt of $7,000, interest thereon subsequent to February, 1899, and $2,000 expenses in the prosecution of the two actions pleaded. An abatement of $6,000 was admitted from the amount claimed because of the collection by the plaintiff of that sum from the estate of D. Ind. Neudorf upon the same covenants. The prayer of the petition was for a judgment for $5,100 and interest. The answer was a general denial with certain specific defenses: First, that defendant had no interest in the premises save as dowress, and that she only joined in the deed of trust to subject her dower thereto; that the money was loaned to Neudorf, the other party to the deed; and that the plaintiff at the time he made the loan knew all the foregoing facts. Second, that after a default in the deed of trust the trustee sold and conveyed the premises to the plaintiff thereunder in consideration of a sum bid by the plaintiff therefor in excess of his debt, which excess the plaintiff paid to the trustee; and that the notes held by the plaintiff for the loan were canceled, whereby the defendant deduced the conclusion that both the debt and the deed of trust were satisfied, and that no recovery could be had in consequence upon any covenant therein contained. Third, that in Waldermeyer v. Loebig, supra, it was adjudicated by the other division of this court that Mrs. Loebig was not bound by any covenant in the deed of trust. Fourth, that plaintiff had previously sued the executrix of D. Ind. Neudorf's estate on the same covenants, and that the parties to that action had agreed upon a judgment in plaintiff's behalf, fixing his damages at $6,000, and that such a judgment was entered in his behalf in that action and paid. The reply admitted the settlement pleaded with the executrix of Neudorf, and alleged that in making it the plaintiff had expressly reserved his right to prosecute his action against Mrs. Loebig for full satisfaction of all his damages sustained by the breach of the covenants. The jury was waived, and the cause tried to the court, which resulted in a finding for the defendant and judgment accordingly, from which the plaintiff appealed.

The undisputed facts in this case are fully stated by Judge Marshall, in so far as they existed at the time he wrote the opinion in 183 Mo. 363, 81 S. W. 904, but for an intelligent understanding of the present case it is deemed necessary to repeat some of the facts which appear in that report. John Loebig in his lifetime owned the premises in controversy, which are situated on South Broadway in the city of St. Louis. There was upon them in his lifetime a three-story brick building, the lower floor of which he used for business purposes, the second floor for a residence for his family, and the third floor he let out for other purposes. The St. Louis cyclone of 1896 damaged the premises quite materially, and Loebig died shortly after that time, leaving them in a damaged state. He left no will, and his surviving family consisted of the defendant, his widow, and three infant daughters. D. Ind. Neudorf became administrator of his estate and curator of his three minor children. Neudorf contracted

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for and made extensive repairs and improvements on these premises. He and the defendant, Mrs. Loebig, agreed with each other that preliminary to the settlement of the liabilities thereby incurred the parties holding the claims should prove the same against Loebig's estate in the probate court, and this was done. Neudorf thereupon, as curator for the three daughters, addressed his petition to the probate court for leave to borrow $7,000 by the execution of a deed of trust on the premises for the purpose of discharging these claims. In this petition he stated that the defendant was willing to join in the deed of trust in order to subject her dower interest in the premises thereto. The probate court granted the prayer of the curator, and authorized him to execute the deed of trust. Thereupon he and Mrs. Loebig executed the deed of trust, and the plaintiff loaned $7,000 on the faith of it for three years at 6 per cent. interest. As the liability of Mrs. Loebig depends in a large measure upon the terms of this deed of trust, it is deemed essential to copy the granting part thereof, omitting a description of the premises conveyed:

"This deed made and entered into this fifteenth day of February, eighteen hundred and ninety-seven, by and between Theresia Loebig, widow of John Loebig, deceased, and D. Independence Neudorf, curator, acting herein by virtue of and under an order of the St. Louis probate court, made at the December term, 1896, thereof authorizing said curator to borrow $7,000 on the property of said minors, of the city of St. Louis, and state of Missouri, parties of the first part, and William F. Woerner, of the same place, party of the second part, and Henry Waldermeyer, of the same place, party of the third part, witnesseth: That the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents, grant, bargain, and sell, convey and confirm unto the said party of the second part, forever, all the following described real estate, situated in the city of St. Louis and state of Missouri, and known and described as follows, to wit:" (Here follows a particular description of the premises.)

The habendum reads as follows:

"To have and to hold the same, together with the appurtenances, to the said party of the second part and to his successor hereinafter designated, and to the assigns of him and of his successor forever."

The deed of trust then recites a loan by the plaintiff to Neudorf of the sum of $7,000 for three years, to bear interest at 6 per cent. per annum, and contains the usual provision for the sale by the trustee in case of a default, and for conveying the premises to whomsoever shall purchase at said sale, and "upon such sale shall execute a deed in fee simple of the property sold to the purchaser thereof."

Mrs. Theresia Loebig, the defendant herein joined in the deed of trust as above indicated, and signed and acknowledged the same in proper form. Neudorf as curator receiver this $7,000 from the plaintiff, and used it to pay the claims which had been alleged against the estate of Mr. Loebig. Default was made in the payment of the fifth installment of interest, and thereupon the trustee foreclosed the deed of trust on April 25, 1900, and plaintiff became the purchaser of the property for $9,100, and received a trustee's deed therefor. Thereupon, as alleged in plaintiff's petition, he brought his action of ejectment for the premises, and was defeated in the circuit court, and no appeal was taken from that judgment. Following this, the plaintiff instituted his action in equity against Neudorf and Mrs. Loebig and two of the minor children, the other child having died in the meantime, and asked to be subrogated to the liens for the improvement of the premises. This case was defended by Mrs. Loebig, the defendant here and Neudorf, and this court in Waldermeyer v. Loebig, 183 Mo. 363, 81 S. W. 904, held that the said claims for the improvement of the building could not be made a charge upon said real estate and were not liens upon the land. Thereupon plaintiff brought this action on the covenants in the said deed of trust against the executrix of Neudorf, who had died in the meantime. A compromise was fixed between the plaintiff herein and Mrs. Neudorf, by the terms of which plaintiff received $6,000 and accepted the same in full satisfaction of all claims against the estate of Neudorf, but expressly reserved to himself any and all rights of action on said covenants for the purpose of securing additional and complete satisfaction of his damages thereunder against Theresia Loebig, co-covenantor in said deed of trust. And thereupon plaintiff brought this action against Mrs. Loebig on said covenants, which, as already said, resulted in a judgment in favor of the defendant. As indicating his views of the law of the case, the learned circuit judge at the instance of the plaintiff gave the following declarations of law:

(2) "Upon the foreclosure of said deed of trust, and the execution of the deed by the trustee therein to the plaintiff, which was read in evidence, and upon the execution of the assignment by said trustee to the plaintiff, which was read in evidence, the right of action on said covenant vested in the plaintiff."

(5) "The court declares the law to be that, since the plaintiff in compromising with the executrix of D. I. Neudorf expressly reserved his right of action for full recovery of the balance of his damages from this defendant, nothing which occurred with reference to

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said compromise prevents his recovery in this case against the defendant."

(6) "The court declares the law to be that the judgment of the circuit court in the equity case, and of the Supreme Court on appeal, is conclusive of the fact that the plaintiff took nothing by the deed of trust nor by the trustee's deed, notwithstanding it may appear that subsequent to the execution of said deed of trust the defendant inherited some interest in said premises by the death of one of her children."

And refused the following declarations of law requested by the plaintiff:

"The court declares that under the terms of the deed of trust read in evidence in this case the defendant herein and D. I. Neudorf, jointly and severally, covenanted with the trustee therein that they were seised of an indefeasible estate in fee simple in the property therein described, and this defendant is personally liable on said covenant."

(3) "The court finds from the evidence that the defendant's husband owned said property in fee, and died without a will, leaving surviving, the defendant, his widow, and three children; and the court declares the law to be that neither the defendant nor said D. I. Neudorf were seised of an indefeasible estate in fee simple in said premises, nor did they convey such estate by said deed of trust, and there has been a breach of said covenant in the deed of trust.

(4) "The judgment of the circuit court, room 1, in the ejectment suit, and the judgment of the circuit court, room 2, and of the Supreme Court on appeal, in equity case, conclusively established the proposition that the plaintiff acquired nothing by said deed of trust and trustee's deed, and that there has been a breach of the covenants in said deed of trust."

(7) "If the court finds that the plaintiff on said deed of trust loaned $7,000, and that interest was paid thereon to the 15th of February, 1899, and not thereafter, then the court declares the law to be that the plaintiff is entitled to recover in this action from the defendant $7,000, with 6 per cent. interest thereon from the 15th day of February, 1899, to the date of the receipt by him of the money from the executrix of D. I. Neudorf, less the sum of $6,000 credited at that time, and to which balance thus arrived at should be added interest at 6 per cent. per annum from the date of the receipt of the said $6,000 down to the date of the judgment."

The defendant asked the lower court nothing but a demurrer to the evidence, which was refused.

Several interesting legal propositions have arisen upon this record. The one which the circuit court regarded as controlling was whether this deed, properly construed, should be held to mean that Mrs. Loebig undertook to convey a fee-simple estate in the said premises to the trustee, Woerner, for the benefit of plaintiff. For, if she did, then the use of the words "grant, bargain and sell" contained in themselves the covenant that she was seised of an indefeasible estate in fee simple in the said premises conveyed by the deed of trust. Section 907, Rev. St. 1899 (Ann. St. 1906, p. 838). Unless the deed purports to convey an absolute estate in fee, the words "grant, bargain and sell" mean only a transfer of the estate.

Again and again it has been ruled by this court that a deed must be read as a whole—in a word, by its four corners—and that many of the old formulas were no longer invoked by the courts. All rules of construction rest upon the principle that they were designed to ascertain the intention of the grantor and effectuate it, unless some positive rule of law would be infringed by so doing. Thus, in the recent case of Stoepler v. Silberberg (Mo.) 119 S. W., loc. cit. 421, in discussing the effect of these statutory words in a deed, it was said: "But while these covenants are expressed in the deed, the instrument must be read and construed in the light of all its parts, and, when this is done, it is obvious that it does not attempt or purport to convey and warrant the lot itself, but only 'all such right, title and interest' that Frederick Stoepler had in and to said house and lot," etc. To the same effect is Butcher v. Rogers, 60 Mo. 138; Moore v. Harris, 91 Mo. 616, 4 S. W. 439. In Allen v. Holton, 20 Pick. (Mass.) 463, it was said: "Every deed is to be construed according to the intention of the parties as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed." It is familiar law that when one deed or instrument refers to another, the instrument or deed referred to becomes thereby part and parcel of the former instrument. To all intents the two become one when we seek to find their meaning and intention. Agan v. Shannon, 103 Mo. 661, 15 S. W. 757. In Bean v. Kenmuir, 36 Mo., loc. cit. 671, this court said: "But rules of interpretation, formerly adhered to with much strictness, have been changed, or modified, or abandoned, when, in their modern applications, they have been found hostile to the end the courts struggle to attain, which is to give effect to the grantor's intention, and to effect which they make it the paramount rule to read the whole instrument, and, if possible, give effect and meaning to all its language. The granting clause of the deed in question contains the words "grant, bargain and sell," which, in the absence of other clauses restricting, limiting, or modifying the same, would, under our statute, constitute a deed of warranty with full express covenants, and, as said by counsel, if the deed in question stopped here, it would, when

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duly signed and sealed, have conveyed the fee." To the same effect, see Utter v. Sidman, 170 Mo. 284, 70 S. W. 702, and cases there cited.

Now, keeping in view these principles of construction, it will be observed that this deed recites that "Theresia Loebig, widow of John Loebig, and D. I. Neudorf, curator of the estate of Barbara F., Mary K. and Theresia V. Loebig, minors, said D. I. Neudorf, curator, acting herein by virtue of and under an order of the St. Louis probate court made at the December term, 1896, thereof authorizing said curator to borrow $7,000.00 on the property of said minors," from which, it will be seen that the deed refers directly to the power of attorney to Neudorf to make said deed of trust, said power arising in the order of the probate court, and when we look to that order we find that the court had before it a petition which stated, among other things, "that the minors were the owners of said real estate as tenants in common, subject to the dower estate therein of their mother, the widow of John Loebig, deceased, as also her willingness to join in such mortgage pledging her dower interest in said property to secure the money so borrowed." It is perfectly apparent from these documents referred to in the deed of trust itself that the only purpose and intent of the defendant Mrs. Loebig, in joining in this deed of trust, was to convey her dower interest in the land. Directed by the recitals of the deed to the probate record, the plaintiff, who was party to the deed of trust, was put on notice that the widow intended and only intended to convey her dower interest in said lots, and it is obvious this was the intent of all the parties. Had it been the intention to bind the widow absolutely, plaintiff would have required her to execute the notes, which she did not. He was fully advised that this realty had descended to the minors subject to the dower of Mrs. Loebig, and that the guardian and curator had petitioned the probate court to permit him as guardian and curator to borrow $7,000 and mortgage these premises in order to obtain a fund with which to make the improvements, and had advised the court that Mrs. Loebig was willing to include her dower in the mortgage to secure the investor. Plaintiff was a party to that loan. He does not stand in the attitude of an innocent purchaser for value without notice. He was fully informed of the extent to which Mrs. Loebig was willing to go. There is everything to indicate that she never purposed to convey an indefeasible estate in fee simple to this lot. She had nothing but dower, and she agreed merely to release her dower rights. Under such circumstances, there can be no sort of doubt that, independent of the legal obligation assumed by the use of the words "grant, bargain and sell," all the parties to this deed of trust knew and understood that Mrs. Loebig was not undertaking, so far as she was concerned, to convey an indefeasible estate in fee simple. Is there enough on the face of the deed to restrain the full effect of the warranties contained in the words "grant, bargain and sell"? We think there is. The deed on its face shows that it was the understanding and agreement of all parties to the deed of trust that the minors owned the fee simple, and that the court had granted their guardian and curator the authority to mortgage that fee simple, the mother joining merely to release her dower. When the deed is executed, Mrs. Loebig's relation to the lot is further emphasized by denominating her as "widow"; that is to say, in that capacity she joins, which was in furtherance of her known and expressed agreement to bind herself so far and no further.

A construction now, that, in spite of all this, she intended and must be held to have intended to convey an indefeasible estate in fee simple, would nullify what we all know was her real intention, and to utterly repudiate the now prevalent doctrine that her intention and the intention of every other party to the transaction must control. If it be said that where apt and appropriate words, the very words which the statute has defined in advance, are used, there is no room for construction, the answer is that, in seeking for the intention, this court has often dealt with this proposition, and, notwithstanding the use of the statutory words, "grant, bargain and sell," has allowed other expressions no more definite to control. Thus, in Bean v. Kenmuir, 86 Mo. 666, notwithstanding the positive rule of law that the grant of a remainder after a fee simple is void, the court construed the plain grant to be a life estate only so as to save the remainder. In Davidson v. Manson, 146 Mo., loc. cit. 612, 48 S. W. 637, the granting words of the deeds were "give, grant, bargain and sell," and conveyed unto Charlotte B. Davidson and her heirs and assigns, and the habendum clause was "to have and hold the above granted and bargained premises with the appurtenances thereof to the said Charlotte B. Davidson, her heirs and assigns in fee simple, her natural life to her own proper use and behoof." It was ruled she only took a life estate. In that case not only the words "grant, bargain and sell" were used, but "in fee simple," but the words "natural life" restrained the other plain and definite words of the deed. But, as already indicated, the reference in the deed of trust to the order of the probate court incorporated those proceedings into the deed of trust for the purpose of ascertaining the intention of the parties to it, and when they are looked to we think the intention was that Mrs. Loebig should only release her dower right, the only interest she then had in said land, and that no party to said deed of trust looked upon her joining in the deed as an assertion and warranty that she had an inde-

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feasible estate in fee simple in said lot and intended to convey and warrant the same.

We think the circuit court correctly construed this deed of trust in so far as Mrs. Loebig is concerned, and its judgment is accordingly affirmed.

BURGESS and FOX, JJ., concur.

GORDON v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Missouri, Division No. 2. May 18, 1909. On Rehearing July 13, 1909.)

1. MASTER AND SERVANT (§§ 276, 278*)—INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a railway switchman from a defective handrail on a car, while the burden was upon plaintiff to prove that the defect existed at the time of the injury, that it was the cause of the injury, and that the railway company had either actual or constructive knowledge thereof long enough before the injury to have enabled it by the exercise of reasonable care to repair the defect, it was not necessary to prove those facts by direct testimony; it being sufficient to establish them by facts and circumstances.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 276, 278.*]

2. MASTER AND SERVANT (§ 111*)—SAFE INSTRUMENTALITIES—DUTY OF MASTER.

It is the duty of a railroad company to keep its cars, cabooses, and the handrails thereof in a reasonably safe condition for its employés who have to work with such instrumentalities.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 215; Dec. Dig. § 111.*]

3. TRIAL (§ 139*)—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

The weight of evidence is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332–341, 365; Dec. Dig. § 139.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for injuries to a switchman, evidence *held* sufficient to go to the jury on the question of defendant's negligence in failing to repair a defective handrail after knowledge of the defect, or after the defect had existed long enough for defendant to have discovered it by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

5. WITNESSES (§ 372*)—CROSS-EXAMINATION—HOSTILE WITNESS.

A liberal cross-examination of an adverse or unfriendly witness is permissible to ascertain his feelings or bias against the party against whom he is testifying, or for testing his memory of the facts to which he testifies, though not allowable on direct examination; and hence where a railroad car inspector had given important testimony against plaintiff in an action for injuries from a defective handrail on a car, predicated upon a record which he claimed to have made, it was permissible on cross-examination to test the accuracy of his record.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192–1199; Dec. Dig. § 372.*]

6. WITNESSES (§ 379*)—CONTRADICTION—INCONSISTENT STATEMENTS.

In an action for injuries to a railway switchman from a defective handrail on a car, where defendant's yard foreman had testified that he had examined the handrail an hour and a half after the accident, and that it was not defective, evidence that he had stated to the injured person's mother, about an hour after the injury, that the injury was caused by the switchman taking hold of an old loose handrail on the caboose, which he (the yard foreman) had been trying to have put in the shops for a month, was admissible to contradict his testimony; the rule that the statements of a railway company's employé with reference to a past event, upon which he was not authorized to speak for his employer, are not admissible as not being part of the res gestæ, not being applicable.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 379.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

A train causing an injury to a switchman was a "hurry-up" train partly loaded with perishable fruit, and the yard foreman advised the switchman working under his immediate direction that it should be got out without delay, and directed him to meet it at the end of the yards, cut off the caboose, and attach another caboose. The switchman met the train, and when the caboose came opposite him, moving at the rate of about 4 miles an hour, he took hold of the handrail to get on the steps, and was injured because of a defect in the handrail. It was the custom in the yards for the switchmen and employés to board trains in switching and handling cars when they were moving as rapidly as 12 miles an hour. Held, that the switchman was not negligent as matter of law in attempting to board the moving car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It being necessary to uncouple the caboose from the front end, the switchman was not negligent as matter of law in attempting to board it at the front end, instead of at the rear.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

9. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—NEGLIGENCE.

It being necessary for the switchman to get on the platform of the caboose to put on the brake and stop the caboose after uncoupling it, as he was required to do by the yard foreman, he was not negligent because he did not uncouple it with the lever at the side of the car, instead of attempting to do so by drawing out the coupling pin.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 240.*]

10. WITNESSES (§ 369*)—CROSS-EXAMINATION—BIAS.

Where a former conductor on defendant's railroad had given strong testimony against plaintiff in a personal injury action, it was permissible to show on his cross-examination, to affect his credibility, that he had been discharged by defendant for drunkenness and had an application in for reinstatement.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 369.*]

11. EVIDENCE (§ 588*)—WEIGHT AND SUFFICIENCY—CREDIBILITY OF WITNESS.

Fact that a witness manifests partiality for the party who calls him is a proper matter for consideration of the jury in weighing his testimony.

[Ed. Note.—For other cases, see Evidence, Dec Dig. § 588.*]

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12. JURY (§ 116*)—DISMISSAL OF PANEL—REMARKS OF JURY.

Fact that one of the regular panel of jurors, on examination as to his qualifications, stated that he had read about the case, and thought at the time he read about it that plaintiff ought to have damages, but that the matter had passed from his mind, and he had thought no more about it, was no ground for dismissal of the entire panel upon excusing the juror.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 116.*]

On Rehearing.

13. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVENESS.

A person prior to his injury was an able-bodied man, 29 years old, with several years' experience in the railroad business, and earning about $90 a month. His back and five of his ribs were broken, his pelvis and hip bones mashed, and he was bruised in his entire body. His injuries resulted in total paralysis from the middle of his back down, so that he had no control of that portion of his body. He could not sit up without being propped to hold his body in position and had no control of the functions of his body. *Held*, that a recovery of $35,000 was excessive, and would be reduced to $25,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372, 374, 378; Dec. Dig. § 132.*]

Appeal from Circuit Court, Vernon County; L. W. Shafer, Judge.

Action by W. F. Gordon, administrator of Harry L. Pangle, against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed on rehearing, on condition that a remittitur be made.

S. W. Moore, Cyrus Crane, and H. C. Clark, for appellant. Scott & Bowker, M. F. Harrington, and Arthur F. Mullen, for respondent.

BURGESS, J. This is an action for damages for personal injuries, in which Harry L. Pangle, now deceased, recovered a verdict for $50,000, but which was reduced by the trial court to $35,000, and judgment entered for that sum. Defendant's motions for a new trial and in arrest of judgment having been overruled, an appeal was taken to this court.

Harry L. Pangle was employed as switchman by the defendant company in its railroad yards in the city of Pittsburg, Kan. His duty as switchman required him to follow the switch engine and switch and uncouple cars, and to meet trains coming into the yards, and make such disposition of them as might be ordered by the yard foreman. Pittsburg was a division point on defendant's line, and engines, cabooses, and train crews were changed there. The defendant's switch yards extended some distance south of the station. South of the yards the defendant's line was crossed twice by the Frisco tracks, and further north was the Santa Fé Railroad crossing. Incoming trains from the south stopped at the first Frisco crossing, if the gate which was there for protection was turned against them, and always stopped before reaching the next Frisco crossing, further north, without any signals whatever. At the Santa Fé crossing the trains from the south also stopped, unless there was a yardman present to signal them to cross. Further north, and at a point where the defendant company's switches commence, was a box fixed on a post, in which box it was customary to put slips containing directions for the trainmen of the different trains as to what track they should take in coming into the yards.

On the 16th day of April, 1904, the day of the injury complained of, a freight train was due to arrive from the south, its destination being Kansas City, Mo., and at Pittsburg the train crew, engine, and caboose on this train had to be changed. This was known as a "hurry-up train," being largely composed of fruit cars, and was required to be operated quickly and sent on to Kansas City. Just before the time the train was bound to arrive, C. H. Manker, the yard foreman, ordered Pangle to take a caboose down to the south end of the yards to attach to this train, and also ordered him to take the slip out of the box in question containing directions for this train, and send the train up the main line, and to cut off the caboose and "clear the switch"; the yard foreman stating to him at the same time that he was in a hurry to get the train out. Pangle and his associate, Meeks, as directed by Manker, attached a caboose to an engine and placed this caboose which was to be attached to the train at a switch. He then took the slip out of the said box, and proceeded south to meet the train and execute the other orders of the foreman. After the train had crossed the last Frisco crossing, some distance south of the company's switches, Pangle gave a signal indicating that the train should keep to the main line, and as the engine passed slowly by him he told the engineer and the head brakeman, who was on the engine, to pull up on the main line, and he then went south to meet and get on the caboose and uncouple it. The train was then moving at a speed of about four miles an hour. In order to cut off the caboose and clear the switch, it was necessary to get up on the forward end of the caboose and turn the angle cock to let out the air and pull out the pin that coupled the caboose to the next car. As the caboose came by him, he reached out and took hold of an upright iron handrail on the forward end of the car, which handrail was used by any one attempting to get on the steps. This handrail, however, was very loose, and, as Pangle grasped it in attempting to get on, it swayed or wobbled backwards some 7 or 8 inches, causing his foot to miss the step. He then got his left knee on the bottom step, his right foot being dragged on the ground, and as he attempted to pull himself up the handrail

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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flopped forward 10 or 12 inches, causing him to lose his hold and to fall between the steps of the caboose and the forward car. He was caught by the truck frame or brake beam of the caboose, doubled up, and rolled over, and received injuries of the most serious and painful character. His back was broken, as were several of his ribs, and he was bruised and maimed in his entire body. He was taken to a Kansas City hospital, and later to a hospital at Chicago, where he was operated upon by Dr. Senn, an eminent surgeon. He became totally paralyzed from the dorsal region down, needed assistance all the time in the performance of the functions of his body, and at the time of the trial his body had to be propped up and supported on the witness chair. According to counsel, Pangle died of his injuries about a year after the trial.

The testimony on the part of plaintiff showed that the defendant company maintained a repair shop at Pittsburg, and that when a car needed repairing it was placed on the tracks leading to the repair shop and marked with a red tag, indicating that it was in "bad order." Pangle testified that, about two or three weeks prior to the date of the injury, he and one Meeks took this same caboose, the number of which was 531, and placed it on the track leading to the repair shop, and that it was then marked with a "bad order" tag. He noticed at the time that the handrail referred to was loose and shaky, and saw Mark Ditto, an employé of the company, examine and shake said handrail, and as he shook it its movements would loosen on the ratchet that held the brake on the end of the caboose. Pangle further testified that, after a car which was in bad condition was marked with a "bad order" tag and placed on the tracks leading to the repair shop, the general rule was that when the car again came out it was in good order, and that on the 16th day of April, 1904, when he attempted to board the caboose in question, he did not know its actual condition, nor the condition of the handrail; but he "believed it to be all right." He had not seen this caboose from the time he saw it placed on the repair track until he attempted to mount it on this day. It was further shown by the evidence that, during all the time Pangle worked for the defendant company, it was the custom in the Pittsburg yards to couple and uncouple cars while the train was in motion, as well as while standing still, and that cars were coupled and uncoupled while moving at a speed of "six and eight and ten miles, and as high as twelve miles an hour." There was no evidence that said caboose received any repairs from the time Pangle saw it on the repair track, in bad condition, until the time he attempted to board it and received the injuries complained of; but there was evidence that it was repaired some time after the 16th day of April, 1904.

Several witnesses, employés of the defendant, testified on defendant's behalf that they inspected the handrail in question on the day of the injury and found it in good condition. Among these witnesses was O. H. Manker, the yard foreman, who testified that he examined the handrails on this caboose about an hour and a half after the accident, and that he "didn't find any loose or shaky." It appears from the testimony, however, that shortly after the accident Manker was at Pangle's home, and that while there Mrs. Mary J. Pangle, mother of the injured man, asked him how the accident occurred, whereupon Manker replied: "Oh, Harry got hold of that old loose handrail of the caboose, and fell. I have been trying to get them to put that caboose in the shops for a month, and I guess they will put it in now."

At the time Pangle was injured he was 29 years of age, and married, and was earning $3.08 per day, or about $90 per month. He had worked for other railroads as brakeman and switchman for about six years, and had been working for the defendant some six months.

The first question presented for our consideration upon this appeal is whether there was sufficient evidence of negligence on the part of the defendant to take the case to the jury. Defendant insists there was not. We assume that the burden was upon the plaintiff to prove: First, that the defect in the handrail existed at the time of the injury, and that such defect was the cause of the injury; and, second, knowledge on the part of the defendant, either actual or constructive, for a sufficient length of time prior to the injury to have enabled it, by the exercise of reasonable care, to repair the defect. But it was not necessary to prove these by direct and positive testimony, but might be established by facts and circumstances, if sufficient. To hold that there was no evidence of negligence on the part of the defendant would be to ignore the testimony of the plaintiff himself—something we have no right to do. According to his testimony, the handrail of the caboose of which he took hold in order to get upon the car was loose, shaky, and wabbly, and that it would move backwards and forwards some eight or nine inches, that it was then in exactly the same condition as when he saw it some two weeks before, when the caboose was on the track leading to the defendant's repair shop. It was the duty of the defendant to keep its cars, cabooses, and the handrails thereof in a reasonably safe condition for its employés who had to work with such instrumentalities, and there was evidence to show that it had not done so in this instance; the weight of such evidence being for the jury. So, with respect to defendant's knowledge of the dangerous condition of the handrail of the caboose, the evidence showed that the defect in the handrail had existed for a sufficient time prior to the injury for

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the plaintiff to have known it, or by the exercise of reasonable care and diligence to have discovered said defect, and repaired the same before the injury occurred. Both these issues were submitted to the jury by proper instructions, and the issues found in favor of the plaintiff.

It is next insisted that the court admitted testimony of repairs made upon said caboose after the injury occurred, and in so doing committed error. We have been unable to find in the record any evidence of such repairs subsequent to the injury, except such as was brought out by defendant's counsel in the redirect examination of defendant's witness A. F. Marsh, as follows: "Q. Some time afterwards it (the caboose) was painted and fixed up, wasn't it? A. Yes, sir. Q. Do you remember when that was? A. No, I don't."

Defendant also complains of the action of the court in permitting the cross-examination of defendant's witness J. A. Murphy, the car inspector. This witness testified to facts with reference to the condition of the caboose on the day of the injury, and for a month prior thereto. His testimony was based upon entries made in a record in which, as he testified, he kept the number of said car and a record of the repairs made thereon. Part of his testimony, on direct examination, was as follows: "Q. Have you got here, Mr. Murphy, the book, your inspection book, that you used that day? A. Yes, sir; I have. Q. Let's see, I believe you said the date was the 16th of April, 1904? A. 16th of April or March. Q. The 16th of April was the date of this accident? A. Here is the record of that train coming in on that day. Q. This book, this little memorandum that you have handed me, you say this was the book that you used in making your inspection as you went along the train? A. Yes, sir; that is the book. Q. Now, where did you put the number of the caboose that was on the train? A. Well, if it was not sent to the shop, I would put it up in the top corner, in the upper left-hand corner of the book. Q. Now, if there was anything wrong about the caboose, 531, that developed on inspection, how did you indicate it on this book? A. It would be put down here in this column, and a circle around the number, and over here on this page you would put what was found, or what was defective about it, opposite the number, all on this side of the page. Q. Were you working there, Mr. Murphy, * * * in April, before the 16th, as inspector? A. Yes, sir. Q. Now, I wish you would look, I wish you would state, first, whether or not you have examined the memorandam books of the inspection, as you took it at the time, for the purpose of refreshing your recollection so as to tell whether or not, from the 1st of March, 1904, you found on inspection of that caboose, 531, any defect in connection with the handrails or this upright—what do you call it? A. Railing post. You say you want me to state if I have looked up these books and refreshed my memory? Q. Yes, sir. A. Well, I glanced over them, yes, sir, for about a month, along about that time previous to this. I have looked over my books, yes, sir, some little. Q. Do you find that there was any defect with the rail or upright post? A. No defect of that nature whatever."

The authorities all hold that a liberal cross-examination of an adverse or unfriendly witness is permissible, for the purpose of ascertaining his feelings or bias against the party against whom he is testifying, or for testing his memory respecting the facts to which he testifies, although this is not allowable on direct examination. This cross-examination of witness Murphy was for the purpose of testing his memory and the accuracy of his memoranda as to the condition of the caboose on April 16, 1904, and the court in an instruction told the jury that it should not be considered for any other purpose. The witness had given very important testimony against Pangle, predicated upon the record which he testified he had kept, and upon the plainest principle of justice, as well as by the rules of evidence, it was permissible to test the accuracy of his memoranda. If this car was sent to the repair shop after the accident, and his record, which he testified would show it, did not do so, it would certainly tend strongly to show the jury that he was mistaken when he stated that his record before the accident showed any and all defects found by him on his inspection of the car. On cross-examination this witness testified that his record showed that the caboose was in the same condition on the 18th day of April as on the 16th of April, when he inspected it. He then testified that the 18th was the last day that his record showed any inspection of this car. He further testified that the car was sent to the repair shop some time after the day of the injury, but that his record did not show it, and he could not tell when. In Bank v. Richards, 119 Mo. App. 24, 95 S. W. 292, it is said: "Great liberality should be allowed in the cross-examination of an adverse party, where, as in this case, his evidence is a flat and unequivocal contradiction of the evidence of the opposite party in respect to the principal issue in the case. His conscience may be searched as with a lighted candle, and, so long as his cross-examination is confined to the purpose of eliciting the truth relative to the issues in the case, a free hand should be given." So in the case of Mefford v. Railroad, 121 Mo. App. 647, 97 S. W. 602, it is said: "The cross-examination of the witness was largely in the discretion of the trial court." The same rule is announced in State v. Boyd, 178 Mo. 2, 76 S. W. 979, State v. Nelson, 101 Mo. 464, 14 S. W. 712, and State v. Smith, 190 Mo.

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706, 90 S. W. 440. Indeed, the authorities are all one way upon this question; none of those cited by the defendant being to the contrary, as we understand them.

Defendant also claims that the court erred in the admission of the statement made by C. H. Manker, the yard foreman, to Mary J. Pangle, mother of the injured man, about an hour after the injury occurred. With reference to the injury to her son, she asked Manker how it happened, and he said: "Harry took hold of that old loose handrail of the caboose, and fell. I have been trying to get them to put that caboose in the shops for a month, and I guess they will put it in now." It appears from the record that this testimony was not offered in chief, or for the purpose of proving negligence on the part of the railroad company, but for the sole purpose of contradicting witness Manker on a material matter upon which he had testified for the defendant. It is well settled that the statements or admissions of an employe of a railway company with reference to a past event, upon which he was not authorized to speak for his employer, are not admissible in evidence, as not being part of the res gestæ. Koenig v. Union Depot Ry. Co., 173 Mo. 698, 73 S. W. 637, and authorities cited. But that rule has no application here, where the object of the testimony was the impeachment of a witness. Manker had testified for the defendant that about an hour and a half after the accident he examined the handrails on this caboose, that he found them in good condition, and that they were not loose or shaky. This testimony tended to prove that the handrails were in good condition at the time of the accident, and it was, of course, offered for that and no other purpose. For the purpose of impeaching this witness he was asked, on cross-examination, if he did not, while at the house of Harry B. Pangle, on the 16th day of April, 1904, shortly after the accident, make the statement quoted above to Mrs. Pangle. He denied having done so. Thereupon Mrs. Pangle was called, and being asked if Manker did not make said statement to her, at the time and place mentioned, she answered that he did. According to the testimony, this statement by witness Manker was made to Mrs. Pangle about an hour after the injury occurred, or half an hour before the time Manker, as he testified, examined the handrails and found them in good condition. Defendant, however, argues that the witness had not seen the handrail at the time he was supposed to have made the statement to Mrs. Pangle, and that, if made, it must have been upon mere hearsay. In answer to this it need only be said that the record does not show that he told Mrs. Pangle that his statement as to the condition of the handrail was based upon anything that he had heard, but that he made it as if of his own personal knowledge and as a fact. As we have already intimated, this narration by Manker to Mrs. Pangle of a past event, and the conditions causing the injury, not being part of the res gestæ, would not be admissible in evidence against the defendant, and the only question is: Was it admissible for the purpose of contradicting or impeaching witness Manker?

In Spohn v. Railroad, 101 Mo. 417, 14 S. W. 880, it was held: "That an agent who testifies to facts material to the issue may be contradicted by evidence of statements and declarations made by him inconsistent with his testimony, notwithstanding such inconsistent statements were made after the accident in issue and as a mere narrative of it." The court further said: "But where such statements or declarations relate to facts material to the issue on trial concerning which the agent has testified, he may be contradicted by evidence of them the same as any other witness; the proper foundation having first been laid for introducing them." In the case of Hamilton v. Railroad, 108 Mo. 365, 18 S. W. 977, it was held: "That where the defendant's superintendent, on being examined as a witness for defendant, testified that he never gave the plaintiff the order to couple cars, he may on cross-examination, for the purpose of laying foundation for impeaching his testimony, be asked whether he had not after the accident stated to plaintiff that he gave the order." In Kenner v. Railroad, 69 Mo. App. 312, the court said: "The conductor testified that the cow came upon the track from behind a pile of cordwood, and when she came upon it she was so near the engine that it was impossible to prevent the collision. He was asked on cross-examination if he had not stated that the killing of the cow was a piece of carelessness on the part of the engineer. The time, place, and persons to whom the statement was alleged to have been made were embodied in the question. The objection to the question is without merit. It was asked with a view of contradicting the previous testimony of the witness, which is a matter of common practice." Witness Manker had testified to facts material to the issue, and there was, we think, no error in admitting evidence of a statement made by him inconsistent with his said testimony; the proper foundation for the introduction of such evidence having first been laid.

It is insisted by defendant that Pangle was guilty of negligence as a matter of law, and that the court therefore committed error in allowing the case to go to the jury. Pangle's negligence, as defendant states, consisted in his attempting to uncouple the car while the train was in motion, and in attempting to board the car at the front end, instead of at the rear end; the latter being the safer and better way of getting on the car. The train in question was what was called a "hurry-up" train, many of the cars being loaded with perishable fruit, and the yard foreman, Manker, was in a hurry to get it out, and so advised Pangle, who was working under his

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immediate direction. Manker had directed him to go down to the south end of the yards and meet this incoming train, send it up the main line, and cut off the caboose and clear the switch, and then to attach the other caboose to the train. At the time Mr. Manker gave those directions, he also said to Pangle, "This is a fruit train, and we want to get it out of here in a hurry." Pangle, obedient to the order, met the train, signaled it up the main line, as directed, and, when the caboose came along opposite to him, the train being then moving at a speed of about four miles an hour, he took hold of this handrail on the caboose and attempted to get on the steps of the car, and was injured in the manner described. The testimony showed that it was the custom in the defendant's yards at Pittsburg for its switchmen and employes to board moving trains in switching, coupling, and handling the cars. Upon this subject Pangle testified as a witness in his own behalf as follows: "Well, they were both coupled standing still and in motion. In switching a train we never stopped the train to couple on a car, for if we did we never get a train switched. We had to switch a train to keep the cars moving. Q. State what rate of speed was the custom, if there was such there, at what rate of speed were cars going, and cabooses going, when men were operating them and doing work on them? A. Six, eight, and ten miles, and as high as twelve miles an hour. Q. Was that the custom in the yards of the defendant at Pittsburg, Kan., during all the time you worked there? A. It was the custom all the time I worked."

In the case of Brady v. Railroad, 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195, the plaintiff therein testified: "It is customary in the C. & A. yards, and in every yard, to go in on the brake beam to cut off cars where the lever don't work. Ruggles, the general yard master, was often down there while the men were going in between moving cars to cut them off." The plaintiff in that case was a switchman, and went in between the cars for the purpose of making a coupling, while the train was moving at a speed of five miles an hour, and was injured. The court held that the question of whether the plaintiff, under the circumstances, was guilty of contributory negligence, was for the jury. In Brunke v. Telephone Co., 115 Mo. App. 36, 90 S. W. 753, it was held that: "Evidence of a custom in doing a certain thing has probative force bearing upon negligence, since custom arises from its adoption by many prudent men, and the law recognizes the value of arriving at the nature or tendency of the given act by considering its effect upon the conduct of others as shown by a general custom"—citing O'Mellia v. Railroad, 115 Mo. 205, 21 S. W. 503, White v. Railroad, 84 Mo. App. 411, and other Missouri cases. When we consider the custom which prevailed in the defendant's yards at Pittsburg in the matter of coupling and handling cars while in motion, as also the directions given Pangle by the yard foreman in connection with this "hurry-up" train, and which he was endeavoring to carry out, we are unable to see wherein he was guilty of contributory negligence as a matter of law. Indeed, in our view there was scarcely sufficient evidence of contributory negligence in his conduct to entitle the defendant to have the question submitted to the jury.

The defendant further insists that Pangle should have gone to the rear end of the caboose to have gotten on; this being the safer way. Pangle states in his testimony that the cabooses were generally locked as they came into the station, but that he did not know whether this caboose was locked at the time. He further stated that he did not have time to get on the rear end, go through the caboose, and uncouple it before the train reached the switch. The service which Pangle was called upon to render was to be performed on the front end of the car, at which end he attempted to board it. There was nothing in the conduct of the plaintiff which would justify our holding that he was guilty of contributory negligence as a matter of law. At most, it was only a question for the jury. Edington v. Railroad, 204 Mo. 61, 102 S. W. 491; Charlton v. Railroad, 200 Mo. 413, 98 S. W. 529; Murphy v. Railroad, 115 Mo. 111, 21 S. W. 862; Brady v. Railroad, supra. Nor was Pangle guilty of contributory negligence in not uncoupling the car by means of the lever at the side of the car, as it was necessary for him to get on the platform of the car in order to put on the brake and stop it, which he was required to do under the directions of the yard foreman.

The point is made that the court erroneously permitted plaintiff's counsel, upon the cross-examination of witness A. F. Marsh, to show that the latter had been discharged by the defendant for drunkenness. This witness was conductor on the freight train in question, and was afterwards discharged for the reason stated, and at the time he was testifying against the plaintiff he had an application in with the defendant company for reinstatement. The question as to his having been discharged for being drunk was not asked for the purpose of establishing the fact of his having been drunk, but as incidental to the more important questions of his discharge and his application for reinstatement. This witness had given very strong testimony against the plaintiff, and it was not improper, for the purpose of affecting his credibility as a witness, to bring out any facts on cross-examination which tended to show any bias in favor of the party whose witness he was or his interest, if any, in the suit. "The fact that a witness manifests a bias or partiality for the party who calls him is a proper matter for the consideration of the jury in estimating the value of his testimony, and it is a general rule that on cross-examination any fact may be elicited which tends

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to show such bias or partiality." 30 Am. & Eng. Ency. of Law (2d Ed.) p. 1088, and authorities cited. We concede that evidence showing that a witness was drunk at a certain time, or was in the habit of getting drunk, would, for the purpose of impeaching him, be inadmissible, as the authorities called to our attention by the defendant abundantly show. This witness had been discharged from a responsible position, and the inquiry as to the cause naturally followed. His answer to such question could in no way affect his credibility as a witness or have any tendency to show a bias in favor of the defendant, and the question was only as a preliminary to the more important question as to his relations with the defendant and his having an application in with the company for reinstatement at the time he was testifying. In any event, we do not think the judgment should be reversed simply on account of the cross-examination of this witness, the admissibility of whose evidence was largely in the discretion of the trial court, and which we think was nonprejudicial.

It is also contended by defendant that the court erred in not dismissing the jury after the statement made by Juror Lovelace, one of the regular panel. On being examined as to his qualifications as a juror, he stated, in effect, that he had read about the case in the newspapers, and thought at the time he read it that the plaintiff ought to have damages, but that the matter passed out of his mind after reading about it, and he had thought no more about it. Mr. Lovelace was excused from service on the jury that tried the case; but the defendant insists that the court should have dismissed the entire panel. It is unnecessary to say more with respect to this contention than that there is no merit in it.

There are some other alleged errors of a like character with the preceding one which defendant complains of, and, being without merit, we will not discuss them.

The final contention is that the verdict is excessive, and the result of passion and prejudice. That the verdict was a large one is manifest; but the injuries sustained by the plaintiff were dreadful, and rarely if ever surpassed in point of severity, and his suffering during his life thereafter was intense—worse than death. Prior to his injury he was an able-bodied young man, 29 years of age, with several years' experience in the railroad service, and earning about $90 per month. His back and five of his ribs were broken, his pelvis and hip bones mashed, and he was bruised in his entire body. His injuries resulted in total paralysis from the middle of his back down, so that he had no control whatever of that portion of his body. He could not sit up without being propped with pillows or something to hold his body in position, nor did he have any control of the functions of his body. Personal injury cases, as a rule, furnish no guide as to the amount of damages an injured party is entitled to receive in a case of this kind. The jury rendered a verdict in favor of plaintiff assessing his damages at $50,000. Of this verdict the trial court required a remittitur of $15,000, and entered up judgment in favor of plaintiff for $35,000. That court had a better appreciation of the facts as developed at the trial than we can have, and was better qualified to judge as to the size and fairness of the verdict. The court ordered the remittitur and overruled the motion for a new trial, and under the circumstances, we are not disposed to interfere. In the recent case of Mrs. Partello v. Missouri Pacific Ry. Co. (not yet officially reported) 117 S. W. 1138, for damages for personal injuries, she recovered a verdict for $30,000. The trial court required a remittitur of $10,000, and let the verdict stand for $20,000. Upon appeal to this court, the judgment was reversed, and the cause remanded on the ground that the verdict was excessive and the result of passion and prejudice; but there was no comparison between the injuries in the two cases, those received by the plaintiff in this case being far more severe than those sustained by the plaintiff in the other case.

The judgment is affirmed. All concur.

On Rehearing.

Upon motion for rehearing it is considered and adjudged that the opinion and judgment herein rendered on May 18, 1909, be and the same is hereby modified, so that the said judgment shall be affirmed for the sum of $25,000 as of the date of the rendition of said verdict and judgment, and to bear interest from that date, if plaintiff shall within 10 days from this date remit the further sum of $10,000 as of the date of the said verdict; otherwise said judgment shall be reversed and remanded for new trial.

MANN v. DOERR et al. (two cases).

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. JUDGMENT (§ 203*) — MORE THAN ONE JUDGMENT IN SAME CASE.

Under Rev. St. 1899, § 694 (Ann. St. 1906, p. 703), providing that the judgment on each separate finding shall await the trial of all the issues, etc., there can only be one final judgment, though the petition contains several counts, some at law and some in equity, and though separate trials are had thereon at the same or different terms of court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 361; Dec. Dig. § 203.*]

2. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—ENTRY OF JUDGMENT.

A plaintiff procuring the entry of a judgment final in form, granting relief as prayed for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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in the first count of the petition, stating a cause of action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), cannot on appeal urge that the judgment is premature because entered before the trial of the second count alleging an action in ejectment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3607; Dec. Dig. § 882.*]

3. QUIETING TITLE (§ 1*)—SCOPE OF REMEDY.

An action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), lies irrespective of the possession of plaintiff or defendant, and the section does not contemplate a judgment for possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. TRIAL (§ 3*)—SEPARATE TRIALS—DIFFERENT CAUSES OF ACTION.

Where, to avoid a multiplicity of suits, the petition as authorized by Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), unites a count to quiet title under section 650 with a count in ejectment, the court may grant separate trials.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.*]

5. QUIETING TITLE (§ 30*)—PARTIES.

A tenant in possession under a written lease is a proper party defendant in an action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), brought against the landlord claiming title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 65; Dec. Dig. § 30.*]

6. ACTION (§ 50*)—JOINDER OF CAUSES OF ACTION—STATUTES.

Under Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), permitting the joinder of causes of action affecting all the parties to the action, there must be interests in common in the subject-matter of the litigation before a petition can unite parties as defendants.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 524; Dec. Dig. § 50.*]

7. PARTIES (§ 92*)—MISJOINDER OF PARTIES.

Where the petition, which states in one count a cause of action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), and in another a cause of action in ejectment, did not show that the defendant in possession was the tenant of the other defendant, the misjoinder of parties was properly pleaded in the answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 150; Dec. Dig. § 92.*]

8. EJECTMENT (§ 1*)—NATURE OF ACTION.

Under Rev. St. 1899, §§ 3056, 3058, 3060 (Ann. St. 1906, pp. 1756, 1758, 1759), providing that ejectment shall be brought against the person in possession, etc., ejectment is a possessory action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 1; Dec. Dig. § 1.*]

9. EJECTMENT (§ 45*)—PARTIES—DEFENDANTS.

Rev. St. 1899, § 3057 (Ann. St. 1906, p. 1757), providing that in ejectment the person through whom defendant claims title may on motion be made a codefendant, is but declaratory of the common law, and extends to a landlord the option to come in and defend ejectment against his tenant; but the landlord whose tenant is in possession is not a necessary or proper party at the instance of plaintiff.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 139; Dec. Dig. § 45.*]

10. APPEAL AND ERROR (§ 1027*)—IMMATERIAL ERRORS.

Under Rev. St. 1899, §§ 659, 865 (Ann. St. 1906, pp. 679, 812), requiring the court to disregard errors not affecting the substantial rights of the party, etc., an error, to be reversible, must originally affect the merits, and it must not have been waived or cured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

11. EJECTMENT (§ 49*)—PARTIES—LANDLORD OF TENANT IN POSSESSION.

A landlord, who purposely takes on himself the burden of supporting his tenant's possession, attacked by ejectment, thereby makes that possession his own and makes himself responsible if the possession is adjudged wrongful.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 144; Dec. Dig. § 49.*]

12. APPEAL AND ERROR (§ 1036*)—HARMLESS ERROR—MISJOINDER OF PARTIES.

A petition stated in one count a cause of action to quiet title and in another count a cause of action in ejectment. Defendants were the tenant in possession and his landlord. The landlord answered to the merits and sought to defend the possession of the tenant. *Held*, that the misjoinder of parties defendant in the action because the landlord was not a proper or necessary party to the action of ejectment was not ground for reversal of the judgment granting plaintiff relief in both causes of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4070; Dec. Dig. § 1036.*]

13. APPEAL AND ERROR (§ 437*)—EFFECT—JUDGMENT AS EVIDENCE.

A judgment adjudging title in plaintiff, rendered under the first count of his petition, stating a cause of action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), is admissible in evidence on the trial of the second count of the petition stating a cause of action in ejectment, though an appeal from the judgment was pending, and though the judgment was suspended by a supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2193; Dec. Dig. § 437.*]

14. EJECTMENT (§ 148*)—IMPROVEMENTS BY DEFENDANT—RECOVERY.

Rev. St. 1899, § 3072 et seq. (Ann. St. 1906, p. 1766), authorizing an unsuccessful defendant in ejectment to recover compensation for the improvements, contemplate a new proceeding to be commenced by defendant before ouster by writ of possession, and an unsuccessful defendant is not entitled, as a matter of law, to have improvements considered in the ejectment suit proper, unless he held possession or occupancy by a claim of title through plaintiff.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 509; Dec. Dig. § 148.*]

Appeal from Circuit Court, Jackson County; Herman Brumback, Judge.

Action by Helen M. Mann against Christian Doerr and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Chase and Paul J. Byrd, for appellants. Meservey & German, for appellee.

LAMM, P. J. Two cases were brought here with above title, each an appeal by defendants from a judgment in favor of plaintiff, one from a judgment on the first count of a petition, the other on a second. The first count is under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667). In that plaintiff charges she is the owner of 10 acres of land described by metes and bounds lying in Jackson county (the description is complicated and is omitted); that defendants and each

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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of them are claiming some title, interest, and estate in the property, etc. Wherefore plaintiff prayed the court to ascertain, determine, and adjudge title, etc., as provided in section 650. The second count is in common form in ejectment, laying ouster as of October 1, 1902, and putting monthly rents at $25, and damages at $675.

To this petition defendant Doerr filed separate answers by counts. To the first count he answered, in substance: That one Morris Mann was the owner of the property; that while such owner on a certain date in January, 1896, he was heavily indebted and unable to pay his debts; that for the sole purpose of defrauding his then creditors he executed a warranty deed conveying the property to plaintiff, then his wife, who was a party to the fraud; that the deed was at once put of record, was without consideration in fact, and expressed a consideration many times the value of the property; that, as part of the fraudulent scheme, plaintiff and her husband, Morris, at once executed a sham deed of trust to a trustee for defendant Christian Doerr, beneficiary, pretending to secure a pretended note due Doerr for $3,000; that there was no consideration for said note or deed of trust; that the latter was also put of record, and defendant Doerr had no knowledge of the execution or record of said sham security or simulated note; that plaintiff, without the knowledge of her husband, subsequently possessed herself of said note and now has the same; that in 1901 a suit was commenced against Morris Mann by one Fish, who was a creditor of his prior to the execution of the warranty deed to Helen; that such proceedings were taken in that case as resulted in a judgment in favor of Fish, in July, 1902, in the Jackson circuit court; that an execution was issued on the Fish judgment and levied upon the property in dispute as to that of Morris Mann; that defendant Doerr purchased at the execution sale on the 6th day of September, 1902, in good faith for a valuable consideration of $600, with no knowledge of the warranty deed from Morris to Helen or of the sham trust deed in his own favor; that at that time, and at all times subsequent to said fraudulent conveyance, Morris Mann was in possession through tenants and receiving rent; that presently, after the land was knocked down to him at sheriff's sale on the Fish execution and judgment and a sheriff's deed executed, the defendant took possession, and has since received the rents and is now the owner and entitled to possession; that there is a misjoinder of parties defendant, in that defendant Kahl is merely a tenant in possession, claims no title or right other than as tenant, and is not a necessary party. This answer was sworn to by Christian Doerr.

In his separate answer to the second count, defendant repleads the averments of his answer to the first count. He then avers that, while he is the owner of the title, he is not in possession of the premises, but that his codefendant, Kahl, is in actual possession, and therefore there is a misjoinder of parties defendant. He next avers that he was a purchaser in good faith and for a valuable consideration at the execution sale under the Fish judgment, and that since his purchase he had made valuable improvements, viz., set out a young orchard of 150 fruit trees, improved and repaired the house and barn inside and out, constructed a cistern and sunk a well, built chicken houses, etc., to the value of $400, and he prays that, if plaintiff recover possession, then that he may recover the cost of his improvements and the purchase price by him expended. The answer to the second count is also sworn to by him. The defendant Kahl disavows any interest in the real estate by his answer to the first count, and all knowledge as to the merits of the controversy, says he is a mere tenant of Doerr, and pleads a misjoinder of parties defendant as to that count. As to the second, he denies each and every allegation, except he admits actual possession as the tenant of Doerr. He alleges, in effect, that he has no claim or interest in the title to the real estate otherwise than as tenant, that as to the second count there is a misjoinder of parties defendant, for that Doerr has title, but is not in possession of the land and is not a necessary party. In reply plaintiff denied all allegations of the answers relating to new matter, and then makes averments by way of defense to such matter not sustained by the proof and hence immaterial.

At the trial, on motion of plaintiff's attorneys, a severance of the two counts was granted, and the trial proceeded on the first. The severance was over the objection of defendants and exception saved. The gist of the objection was: That both counts, under the pleadings, were in equity; that the subject-matter of each was the same, to wit, title; that the parties were the same, and it was unfair to require either party to go to the trouble and expense of two trials. On a trial of the merits on the first count, the decree, as said, went in favor of plaintiff, and defendants appealed. In their motion for a new trial on that count, they alleged error in granting a separate trial; but they did not complain of a judgment on the first count without awaiting a trial on the second. There was motion in arrest filed; but there was no ground in that motion that the decree be arrested as premature, or that no decree could go until after a trial on the second count—in other words, raising the point that there could be only one final judgment, and that should go only after a trial and finding on each count, and cover both. Subsequently a trial on the ejectment count was had, and judgment went in favor of plaintiff for possession, for $217.15 damages, and finding the

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monthly rental value of the premises at $7.50. From that judgment defendants also appealed here. At the trial on the second count there was no objection made to the effect that by taking a final judgment on the first count the second was abandoned. There was an objection lodged to proceeding on the second count, put upon the ground that there was a judgment on the first count appealed from by giving a supersedeas bond, and the appeal was pending in the Supreme Court and undetermined, i. e., that there was another action pending covering the same cause of action between the same parties; the objection also covering the point made originally against a separate trial on each count, viz., that both counts covered the same issues. Counsel also objected because there was a misjoinder of parties. It furthermore appears from the record that the case on the second count was set down as a law case, but was changed to the equity side of the docket at the request of defendants, acquiesced in by plaintiff. In their motion for a new trial on the second count, no error is claimed because the second count was abandoned by taking a prior final judgment on the first, nor is any such contention made in this court. When these appeals reached this court and came on for hearing, they were set down on our trial docket separately. Thereupon defendants filed a motion to consolidate them into one case; this on the grounds that the separate judgments really constitute but one, and the two appeals one appeal. Plaintiffs filed suggestions in opposition; this on the theory that, while the cases are between the same parties and on separate counts of the same petition, yet they were tried separately, and defendants took separate appeals, that the motion to consolidate is but an ingenious attempt to escape the effect of two appeals, from the fact that the appeal from the judgment on the first count was premature. Defendants' motion to consolidate was sustained. Any further matter material to the determination of errors assigned will appear in the opinion.

1. Whatever the rule elsewhere, in Missouri our Code of Civil Procedure contemplates only one final judgment, although the petition may contain several counts, some at law and some in equity, and although separate trials be had therein at the same or different terms of court. By Rev. St. 1899, § 694 (Ann. St. 1906, p. 703), it is provided that: "The judgment upon each separate finding shall await the trial of all the issues." See, further, section 773 (page 750). Plaintiff's counsel contend that defendants cannot be heard on their appeal from the judgment on the first count because the appeal is premature; but plaintiff may not say that she procured the judgment to be entered. It was final in form. It was self-executing and adjudged the title to be in her, and either she had a final judgment destroying defendants' title, or else she had no judgment at all, and, on the latter theory, the cause is still pending below on the first count. If the judgment below was erroneously entered, there is reason in defendants' appeal, viz., that they be eased of it. If it was not erroneously entered, then the appeal cannot be premature. Either way, we rule the point against plaintiff.

2. Of the assignment of error in granting separate trials: The argument of learned counsel for defendants in that behalf proceeds on a misapprehension. The causes of action stated in the first and second counts were not the same, as they argue. Though title was in issue on the second count as in the first, the second count was in ejectment, and the object sought was possession. Not so in the first. That count was under section 650. An action under that section lies in favor of one in or out of possession and against one in or out. The object to be attained is "to ascertain and determine the estate, title and interest of said parties respectively in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property." Obviously section 650 does not contemplate a judgment for possession, and that a writ of ouster go. This for the very good reason that under that section one in possession may sue one out. The precise point has been ruled and is no longer open (Bedford v. Sykes, 168 Mo. 8, 67 S. W. 569). So that, broad and flexible as the section is in terms, it does not take the place of ejectment. Since our Code permits the uniting of different causes of action in the same petition (Rev. St. § 593 [Ann. St. 1906, p. 619]) to avoid multiplicity of suits, the practice has been to unite a count under section 650 with a count in ejectment; the latter to carry into effect the judgment entered on the former. So, under warrant of the Code, the practice has been to permit separate trials where there is sensible reason for that course, for example, where one count may be triable to a jury and the other to a chancellor. There was no error in granting separate trials.

3. Of misjoinder of parties defendant: Defendants assign error on this behalf, separating itself logically into two branches. The one reckons with the first count, the other with the second. We will consider them in that order.

(a) As to the first count: The answers allege, and the proof shows, that Kahl held under a written lease as tenant of Doerr, and that he was in possession under such lease when the suit began. He certainly claimed an "interest" in the property. Section 650 contemplates that all persons having or claiming to have any title, estate, or interest may be made parties defendant. The point is ruled against defendants.

(b) Of the second count: The question on the second count is more difficult. In join-

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ing causes of action in one petition, the statute prescribes that causes so joined "must affect all the parties to the action." Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), supra. The reason underlying this provision is apparent. There must be interests in common in the subject-matter of the litigation before a petition can unite parties as defendants and subject them to common burdens in defense. Confusion would enter through any other door. Doubtless on this theory plaintiff joined Doerr and Kahl in the second count, since it would have been improper joinder of causes of action if the second count had been leveled alone against Kahl, the tenant. The second count says nothing about tenancy. The fact of Kahl's tenancy appears for the first time in the answer. Therefore a demurrer would not lie for misjoinder, and the fact of misjoinder was properly pleaded in the answer. Ejectment being a possessory action, a petition would be bad, absent an allegation that defendants are the persons in possession of the locus in quo. Accordingly, our statutes provide, as did the common law, that ejectment should be brought against those persons in possession, and that the proof should establish the fact. Rev. St. 1899, §§ 3056, 3058, 3060 (Ann. St. 1906, pp. 1756, 1758, and 1759); Llewellyn v. Llewellyn, 201 Mo., loc. cit, 306 et seq., 100 S. W. 40; Hunter v. Wethington, 205 Mo. 284, 103 S. W. 543. Under Rev. St. 1899, § 3057 (Ann. St. 1906, p. 1757), the landlord "may, on motion, be made a codefendant." That statutory provision, it seems, is but declarative of the common law. Sutton v. Casseleggi, 77 Mo., loc. cit. 408. But section 3057 is in the nature of an option extended to the landlord. The option is his, not plaintiff's. He can come in or stay out. If he use his option to come in, plaintiff cannot dismiss him from the suit. Hayden v. Stewart, 27 Mo. 286. There is a fixed gulf between the proposition that a landlord may come in if he chose, and the other proposition, that he may be brought in, willy nilly, if plaintiff chose. The Hayden Case recognizes that gulf of difference. Its ruling that the landlord may not be dismissed out of the case by plaintiff takes him out of the class of ordinary defendants joined on the initiative of plaintiff, to which the general doctrine applies that a plaintiff may enter a dismissal as to one or another.

Morris v. Beebe, 54 Ala. 300, is a soundly reasoned case. The statute in Alabama is substantially the same as our section 3057. After full consideration, it was there well ruled that: "Such statutes do not authorize the plaintiff to make him an original defendant, in commencing suit, nor dispense with the necessity of making the tenant a party defendant. They simply confer on the landlord a right to intervene in the suit, which he may waive or exercise at his option. If he has title extending beyond the term he has created in the tenant, which can be affected by the suit, it will be his interest to intervene, and the title and the right of possession will generally be quieted by the judgment. If he has no such title, there is no reason to justify his intervention, or for making him a party defendant. The statute evidently contemplates that the action shall be brought only against the party in actual possession, and not against a party having a reversionary title to the possession. * * * The statute contemplates the party defendant shall have an actual possession, on which the judgment may operate. This, the landlord, who has for a term divested himself of possession, has not, and he is not a proper party defendant."

We think the doctrine of the Alabama Case is right on principle, and that the decisions of this court on kindred phases of the question are in line with it. In most of the cases where the question has been approached, the landlord was the sole defendant. In such cases it was uniformly held that plaintiff could not recover. In other cases (of which Phillips v. Phillips, 107 Mo. 360, 17 S. W. 974, and Kunze v. Evans, 129 Mo. 1, 31 S. W. 114, are samples), it was ruled that actual occupancy of or residence upon the locus is not a necessary element of possession. Those cases, however, did not deal with the relation of landlord and tenant. They were cases where the defendant resided elsewhere, but farmed the land or held possession through agents, servants, etc., and where the possession was held sufficient to support ejectment, or where no one was in actual occupancy, and possession was held to follow the true title and be in the owner. Certainly the right doctrine is that the landlord whose tenant is in possession is not a necessary party defendant, and it may be safely ruled that he is not a proper party defendant at the instance of plaintiff. There is language used in Hunter v. Wethington, supra, to the effect that in a case of landlord and tenant, where the tenant is in actual possession, "the action may be brought against both." 205 Mo., loc. cit. 291, 103 S. W. 543. That ruling was somewhat obiter, and the language used is too broad as a general rule of adjective law. The facts in the Hunter Case were not dissimilar to those dealt with in the Phillips and Kunze Cases, supra, and what we intended to rule was that actual occupancy by residence was not necessary to support ejectment. We did not intend to rule that it was correct practice for a plaintiff to join the landlord out of possession with his tenant in possession in the first instance. In the Hunter Case the landowner, although not living on the place, was in fact farming the greater portion of it. The house and an undescribed garden tract were in possession of a tenant who was not sued.

(c) But under the facts of this record, although Doerr was neither a necessary or a proper party defendant in the second count,

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yet it does not follow that the judgment on the second count must be reversed because of such irregularity. Reversible error is described in the written law as error "materially affecting the merits of the action." Rev. St. 1899, § 865 (Ann. St. 1906, p. 812). So tender was the lawmaker on that point, and so sedulous was he to establish a mandatory legislative policy that other sections of the written law are leveled at the mischief of reversing cases for errors not affecting the merits. For instance, section 659 (page 679) reads: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Not only must the error originally affect the merits, but the error must not be waived or cured. On either view we cannot agree that the irregularity in misjoinder of parties defendant on the second count affects the merits. This, because:

(1) In Sutton v. Casseleggi, supra, two tenants each holding a part of the locus in quo under a separate lease from a common landlord were joined with their landlord as defendants in ejectment. In that case recovery of possession was allowed to stand because no substantial injustice accrued to defendants by reason of the error in the proceeding. Page 409, of 77 Mo. The trouble in that case arose over the damages, and it was held in effect that a judgment for general damages against the two tenants and the landlord could not stand, since there was no mutuality between the tenants in liability. There is no such trouble in the case at bar. It is plainly not against natural justice to hold Doerr, who received the rents from Kahl and had them in pocket, responsible with him in making plaintiff whole, in case plaintiff was the owner and entitled to possession. We are unable to see in what way, then, the irregularity affects the merits of the case.

(2) But we need not let our ruling stand on that foot alone. In this case Doerr, the landlord, did not stand upon his allegation of misjoinder of parties defendant. To the contrary by his answer to the second count he put himself precisely in the attitude he would have been if he had become a party through his own motion; that is, he took the burden of the defense on his own shoulders. He interposed his title and his equities as a bulwark between plaintiff on one side, and his tenant Kahl on the other; this in order to protect the latter and to establish his own right. Not only so, but he pleaded affirmative matter and asked individual relief by way of judgment for improvements and for his outlay in purchase price. He introduced testimony tending to support his affirmative allegations. Under such circumstances he must be held to waive the misjoinder and to have healed any error in that respect.

If the misjoinder had been apparent on the face of the petition, and he had demurred for that cause (as he must in order to raise the point), certainly he would have waived it by pleading over to the merits after an adverse ruling on the demurrer. We can see no substantial difference in his present position. That a landlord, who purposely takes upon himself the burden of supporting his tenant's possession, thereby makes that possession his own and unites his fortunes with his tenant as joint tort-feasors, and thus makes himself responsible if the possession is adjudged wrongful, is supported by authority. Abeel v. Van Gelder, 36 N. Y. 513. The point is ruled against defendants.

4. At the trial of the ejectment count the decree adjudging title in plaintiff under the first count was put in evidence by plaintiff, supplemented by oral testimony. Defendants assign error in the admission of that decree. They argue that the decree was suspended by a supersedeas bond, and that the cause of action on that count was pending and undetermined in this court; but we need not open up and go into the comedy of errors below arising from irregularities in entering two separate judgments, taking two separate appeals, etc. For some of those errors defendants are responsible, for others plaintiff must stand sponsor. If defendants had filed a motion in arrest on the first count, calling the court's attention to the fact that the judgment was premature and should be arrested until the second count was tried, that would have given the lower court a chance to correct the irregularity. If, when the second count was tried, defendants had objected to going to trial for the reason that a final judgment on the first count either exhausted the jurisdiction of the court or was tantamount to an abandonment of the second count, the court would have been given a chance to straighten out the tangle; but defendants did nothing of the sort. They appealed both judgments, and (what is more) in this court they asked us to consolidate the cases on the theory the two records constituted but one case, one judgment and one appeal. This court took that view of it, whether rightly or not, and defendants may not be allowed to now insist on any objection to evidence based on the theory that one cause was pending here undetermined at the time the other was tried below. As defendants procured a rule here that the judgments were one judgment, in effect, they must stand on that theory. In Stone v. Perkins (not yet officially reported), 117 S. W. 717, two judgments, one under section 650, the other in trespass for damages, entered on separate trials at separate days on separate counts of a petition, were treated as one final judgment. But there is no merit in the objection to introducing the finding on the first count as evidence at the trial on the second. That finding and decree were self-executing. The supersedeas bond could have no effect except to stay execution for costs. The pen-

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dency of the appeal did not destroy the efficacy of the decree as evidence. Ritter v. Dem. Press Co., 68 Mo., loc. cit. 461; State ex rel. v. Dillon, 96 Mo., loc. cit. 61, 8 S. W. 781; State v. Barnett, 111 Mo. App., loc. cit. 557 et seq., 86 S. W. 460. The point is ruled against defendants.

5. It is suggested that under Rev. St. 1899, § 3072 (Ann. St. 1906, p. 1766), Doerr was entitled to recovery for betterments made by him in good faith on the land. By answer he set up certain disbursements made for improvements and asked reimbursement; but section 3072 and succeeding sections of the chapter on ejectment dealing with improvements contemplate a new proceeding, independent in character, to be commenced by the unsuccessful defendant in an ejectment suit before ouster by writ of possession, to recover for improvements. Section 3073 (page 1767) prescribes the allegations of a petition in that behalf. Section 3074 (page 1767) ordains that such petitioner may have an injunction in aid of his suit to stay ouster under the ejectment judgment until the value of the improvements be ascertained. Other sections provide for procedure in certain contingencies. However, it has been held that the statutory scheme for recovery for improvements is not preclusive in a certain state of facts; that in a certain class of cases the recovery may be had or a set-off allowed in the ejectment suit itself. That class of cases is aptly defined in Henderson v. Langley, 76 Mo., loc. cit. 228, to include cases where the defendant in ejectment had purchased the land from the plaintiff or in administration proceedings or a sale under mortgage and had paid the purchase money, entered into possession, and made improvements in good faith, but failed to obtain the legal title intended to be sold and could not have specific performance. In that class of cases the owner of such legal title or his grantee having notice of such fact will not be permitted to eject such purchaser without accounting for the purchase money and paying for the improvements made. Evidently this case does not fall in that class of cases. In Tice v. Fleming, 173 Mo., loc. cit. 56, 57, 72 S. W. 689, 96 Am. St. Rep. 479, Fox, J., construed the Henderson Case, supra, to decide that a defendant in ejectment, in order to have the value of his improvements considered by way of set-off or recoupment in the ejectment proper, must hold possession or occupancy by a claim of title through the plaintiff; otherwise his action for improvement must be an independent one under the statute. See Bristol v. Thompson, 204 Mo. 366, 102 S. W. 991. It is insisted by plaintiff that the claim for improvements was taken into consideration by the court by way of abatement to the damages assessed. Whether that be true or not, we rule the point against defendants, for, if the improvements were considered and offset against the damages, that is the end of it. On the other hand, defendant was not entitled as a matter of law to have improvements considered in the ejectment suit proper, but must be relegated to his statutory proceeding, if they were not adjusted as claimed by plaintiff.

6. This brings us to the merits of the first count. The law of the case, we think, was well settled in Welch v. Mann, 193 Mo. 304, 92 S. W. 98, on a state of facts so similar in vital particulars as to make that case in point, and it should be taken with this. We have compared the record here with the record there in which one Welch, a purchaser of other property of plaintiff at the same execution sale under the same execution, sued her for title. In the present case there is more positive evidence tending to show the fraudulent design of plaintiff's former husband in executing the conveyance to plaintiff; but this evidence chiefly fell from the lips of plaintiff's husband, who came from a distant city and went upon the stand to destroy his wife's title by an expose of his own moral turpitude. It appears sufficiently that this exhusband has joined hands with defendant Doerr. They are shown to be ancient cronies and (literally) hobnobbing friends. Doerr purchased at the execution sale under an execution levied on Mann's alleged interest several years after Mann's conveyance to his wife, here assailed, was executed and put of record, and we think the chancellor would have been justified in believing that he bought at the request or suggestion of Mann himself in a speculative venture depending for ultimate success on the defeat of Mrs. Mann's title. That Mrs. Mann did not know of, consent to, or participate in this fraudulent scheme, if fraudulent it was, is sufficiently shown. As appears in the Welch Case, so here, she took title in pursuance of an executed antenuptial contract based on a consideration of marriage. Her good faith, however closely the facts are considered, is not successfully impeached. There was some evidence tending to show that the value of Mann's real and personal property remaining in his hands after the conveyance to Mrs. Mann was not of so great value as shown in the Welch Case, and some that Mann was indebted to a greater extent than appeared in the Welch Case; but the differences in both instances depend on the credit to be given to the evidence of Mann himself, who testified at both trials and is the chief witness now, as then, to show his debts and assets. It is apparent that he shaded his testimony given at the first trial, to aid Doerr and injure his former wife at the second trial. When confronted by this change in his testimony, his explanation is not satisfactory. The chancellor heard and saw. We neither see nor hear. We defer to him. The curious may find the substantial facts set forth in Welch v. Mann, supra (q. v.), and no useful purpose can be subserved by restat-

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ing them. On re-examination we are satisfied with the conclusions reached in the Welch Case. We are of opinion the principles of law there declared are applicable here. Hence, as we ruled then, we rule now.

Let the judgment be affirmed.

It is so ordered. All concur.

BRANCH v. PUBLISHERS: GEORGE KNAPP & CO.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. LIBEL AND SLANDER (§ 75*) — ACTIONS — VENUE.

An action for libel based on an article in a newspaper published by a corporation in one county and circulated in another county may be brought in the latter county.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 180; Dec. Dig. § 75.*]

2. LIBEL AND SLANDER (§ 123*)—MEANING OF LIBELOUS PUBLICATION—QUESTION FOR JURY.

Where the words in a publication charged to be libelous are ambiguous, or where, under the circumstances, they are susceptible of a double meaning, the question in what sense they were used is for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356–359; Dec. Dig. § 123.*]

3. LIBEL AND SLANDER (§ 105*)—MEANING OF LIBELOUS PUBLICATION — EXTRINSIC EVIDENCE.

Where the words in a publication charged to be libelous are ambiguous, or where, under the circumstances, they are susceptible of a double meaning, evidence as to the particular conditions giving the words a libelous meaning is competent, and a witness may testify as to his understanding of the words when he heard or read them; but where the words are not ambiguous, or where their meaning is plain, and, according to their natural and ordinary significance in the circumstances attending their publication, are not libelous, witnesses cannot testify as to their understanding.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 282, 283, 292–294; Dec. Dig. § 105.*]

4. LIBEL AND SLANDER (§ 10*) — LIBELOUS NEWSPAPER ARTICLE.

A newspaper article averring that a member of the General Assembly had been induced by the hospitable attentions of a candidate for United States Senator to declare himself as a supporter of the candidate, and had announced that he would vote for him, though the public had previously been informed that he could not reconcile his conscience to vote for him, does not charge the member with bribery and is not libelous, in view of the evidence of the candidate's campaign for the office of Senator and the member's position towards the different candidates.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 92; Dec. Dig. § 10.*]

5. LIBEL AND SLANDER (§ 123*)—ACTIONS—POWER OF COURT—CONSTITUTIONAL PROVISIONS.

Notwithstanding the constitutional provision as to actions for libel, the court must determine matters of law in an action for libel, and must exclude incompetent evidence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356–359; Dec. Dig. § 123.*]

6. LIBEL AND SLANDER (§ 123*)—ACTIONS—POWER OF COURT.

Where, in an action for libel, the court determined that the article did not charge bribery, it was error to permit witnesses to testify that they understood the article to charge bribery.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356–359; Dec. Dig. § 123.*]

7. LIBEL AND SLANDER (§ 105*)—LIBELOUS ARTICLE.

In determining whether an article reflecting on the conduct of a public officer is libelous, it is proper to consider the circumstances surrounding the officer and the publisher of the article at the time of the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 282, 283, 292–294; Dec. Dig. § 105.*]

8. LIBEL AND SLANDER (§§ 10, 48*)—CRITICISM OF PUBLIC OFFICER.

It is not libelous to point out a seeming inconsistency in a public officer, and his acts are fairly open to criticism and comment.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91–96, 144–147; Dec. Dig. §§ 10, 48.*]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Glover C. Branch against the Publishers: George Knapp & Co. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Chiles and Lehmann & Lehmann, for appellant. Reed, Yates, Mastin & Harvey and Horace F. Blackwell, for respondent.

GANTT, P. J. This is a suit for libel. The petition states:

That the plaintiff is a citizen of Missouri, and a resident of Lafayette county. The defendant is a corporation of Missouri engaged in publishing a daily newspaper known as the "St. Louis Republic," which has a large daily circulation throughout the state of Missouri and other states of the Union and in foreign countries. That at the regular November election held in November, 1904, plaintiff was elected representative of Lafayette county to the General Assembly of Missouri on the Republican ticket, and that he has since duly qualified and taken and now holds said office. That one of the matters to come before the General Assembly at its said session to be held in the month of January, 1905, was the election of a United States Senator to succeed Senator Cockrell. That prior to the publication of the article complained of a number of men, among whom was Richard O. Kerens, were publicly aspiring to said office and were seeking to secure the support therefor of the Republican members-elect to said General Assembly. That prior to the publication of the article complained of it had been charged in various newspapers that efforts were being made by the use of money and by other improper means to influence the choice for United States Senator of said members of the

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Legislature elect. That until the publication of the article herein complained of plaintiff possessed a large number of personal friends and acquaintances in said county of Lafayette and throughout the state of Missouri, and was generally esteemed as a good citizen and as an honest man, and that plaintiff bore and had always borne a good reputation in the matters aforesaid. That defendant, well knowing the facts aforesaid, and intending and contriving wickedly and maliciously to injure plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and among his neighbors and other good and worthy citizens, and with the general public of the state of Missouri, and to cause it to be suspected and believed that he, the said plaintiff, was a member-elect of the Legislature of the state of Missouri, and that as such he had accepted and received gifts, considerations, gratuities, and rewards under an agreement that his vote, opinion, judgment, and decision should be given in favor of the said Richard C. Kerens for United States Senator in the election for United States Senator to be held by the General Assembly, and that because of said gifts and rewards he, the said plaintiff, had agreed to vote for the said Richard C. Kerens for the office of United States Senator at said election so to be holden; and, further, to cause it to be suspected and believed that he, the said plaintiff, had disregarded his conscience and intended to vote against his conscience because of favors received and improper and illegal considerations given and granted in favor of the said Kerens; and, further, to cause it to be suspected and believed that plaintiff had bartered away his honor, and that he was a man without honor, and that he was a man who was not guided by his conscience or controlled by his duty as a public officer, and that he had disregarded his duty as a public officer, and that he had accepted favors of an improper character from said Kerens, and caused it to be believed that plaintiff was dishonest and corrupt and a venal public officer and that he committed a crime in the manner aforesaid of accepting bribes, and was liable to imprisonment in the penitentiary for a term not to exceed seven years, well knowing that the said charges were untrue; and did on Wednesday, December 14, 1904, falsely, wickedly, and maliciously compose, print, publish, and procure to be published in its newspaper, the St. Louis Republic, in and through Lafayette county and all the other counties of this of the Union, and through foreign countries, the following false, malicious, defamatory, and libelous article, to wit:

"Branch Eases Conscience.

"The publication of letters from Representative-elect Branch and Cook of Howell and the announcement that Brown of Grundy would vote for Kerens especially serves for many explanations.

"Branch of Lafayette has made two visits to St. Louis since the election. The first time he was presented to Senator Elkins of West Virginia who, it is said, asked him very solicitously for his vote. Mr. Kerens himself, previously, according to the story which he told to his friends, had opened proceedings by asking him if he could use any transportation or whether he wanted an office. Mr. Branch did not.

"Branch did not see the light at that visit. Last Friday he returned. The next morning he called at the Kerens headquarters, 'Glad to see you, Mr. Branch,' said Mr. Kerens to him, in a most charming manner. 'I want to talk to you about this senatorship, but I am very busy today and can't you stay over until tomorrow? I have a vacant room here and you might just as well sleep here tonight. It won't cost you a cent.'

"Branch demurred. He had told some of his friends just before going to the Planters that he 'didn't see how he could reconcile his conscience to vote for Kerens.' But the representative-elect of Lafayette county 'bit.' He stayed over night. Even the next day Kerens was too busy to talk to him. Another night at the Planters and the theatre. It was easy living. Then Colonel Kerens talked. And to make a long story short, Branch of Lafayette 'reconciled his conscience' to the extent of signing a letter pledging his support to Kerens. He then went home"

—meaning thereby and intending to mean, and the readers of said newspaper would understand said article to mean, that plaintiff was a member-elect of the Legislature and a public officer, and that he had declared that he did not see how he could reconcile his conscience to vote for Richard C. Kerens for the United States Senate, but that he had visited the said Richard C. Kerens at the Planters' Hotel in St. Louis, and that there he had been entertained at the expense of the said Richard C. Kerens; that he had visited the theater at his expense while at said hotel, and that he, the said plaintiff, had stayed at said hotel for two days and accepted the gifts, considerations, and gratuities from the said Richard C. Kerens, and that in consideration thereof had promised and agreed to give his vote, as a member of the General Assembly, in favor of the said Richard C. Kerens for United States Senator; and further meaning and intending to mean, and the readers of the newspaper article would understand it to mean, that plaintiff had accepted and received bribes, and that he had laid aside his conscience, and had willfully and corruptly, because of said bribes, gratuities, and gifts, agreed to cast his vote in favor of the said Richard C. Kerens for United States Senator from the state of Missouri; and further meaning and intending to mean, and the readers of said newspaper article

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would understand it to mean, that plaintiff had been guilty of the crime of accepting bribes, and was liable to be imprisoned in the penitentiary for a term not to exceed seven years; and further meaning and intending to mean, and the readers of said newspaper article would understand it to mean, that plaintiff was a man without honor, and that he had bartered away his conscience; that he had agreed for a corrupt and improper consideration to cast his vote in favor of a man for United States Senator whom he knew it was against good conscience to vote for; and further meaning and intending to mean, and the readers of the said newspaper article would understand it to mean, that plaintiff was not guided by duty, but that he was controlled by corrupt means, and that he was a purchasable man and a man who could not be trusted as a public officer, and that he had betrayed his trust as a member of the Legislature.

Plaintiff says that said article was untrue, and that each allegation thereof was untrue, and that the defendant well knew at the time of the publication thereof that the same was untrue, and that said article was maliciously and wickedly contrived for the purpose of injuring the plaintiff in his good name and reputation, and to vex, oppress, destroy, and impoverish him, the said plaintiff. The damages were laid at $25,000 actual damages, and $25,000 exemplary or punitive damages. On April 3, 1905, defendant filed a motion to dismiss the cause for want of jurisdiction, which motion was overruled June 7, 1905, and defendant filed its bill of exceptions. The defendant then filed an answer, the first count of which was a plea in abatement to the jurisdiction of the circuit court of Lafayette county, and by the second defense it admitted that it published its said newspaper on December 14, 1904, in the city of St. Louis, but denied each and every other allegation in the petition contained. And, for a further defense to said petition, the defendant alleged: That at the time complained of there was pending in the state of Missouri the matter of the election of a United States Senator to succeed the Honorable Francis M. Cockrell, whose term was about to expire. That one R. C. Kerens was a candidate for said office. That there was being maintained by or for the said Kerens, as such candidate, a lavish hospitality at the Planters' House, a hotel in the city of St. Louis. That the plaintiff, being a member-elect of the General Assembly of the state of Missouri, came to the city of St. Louis and did pay several visits to the rooms of the said Kerens in the said Planters' House. That the plaintiff had stated to divers persons that he could not vote for the said Kerens. That after visiting the said Kerens' rooms or quarters, and enjoying his hospitality, the plaintiff announced himself as a supporter of said Kerens, and the defendant made the publication complained of as a publication of these facts and as legitimate comment thereon, being a matter of public interest which it was its right and duty to discuss and to present to the public, who were entitled to know all the acts and doings of the candidates for the office of Senator, and of the members of the Legislature who were charged with the duty of electing such senator.

For further defense to said petition, the defendant alleges that, upon and prior to his first coming to the city of St. Louis in connection with said senatorial candidacy, the plaintiff announced to various persons, and in unqualified terms, that he could not bring himself to support the said Kerens for the office of United States Senator, and his position and statements in this respect were matters of common report in the said city of St. Louis. That said Kerens was a man who had long participated in politics of Missouri and was well known to the public men of the state, and the matter of his qualifications for the office of Senator was and long had been well understood by them. That after several visits to the headquarters of the Kerens, the said plaintiff changed his attitude and announced himself as a supporter of the said Kerens, and thereby caused it to be believed, and defendant did believe, that the attentions and hospitalities of the said Kerens and his supporters had caused such change of attitude on the part of said plaintiff, and, so believing, the defendant published the said article as aforesaid, without malice, and as a matter of news of great public interest and importance.

Wherefore, having fully answered, defendant prays to be hence dismissed with its costs.

To this answer the plaintiff filed a reply in the nature of a general denial of the allegations of the answer.

The evidence of the plaintiff was to the effect that the capital stock of the defendant company is $500,000, and is worth more than par. The circulation of the paper in December, 1904, was approximately 100,000 daily, and extended to the various counties of this state and other states. Sixty or seventy copies were circulated in the town of Lexington. Various residents of Lafayette county testified that they had read the article complained of. These same persons, over the objections of the defendant, testified as to their understanding of the meaning of the article; some to the effect that the article charged Mr. Branch with having received a bribe, and others that it charged him with having been influenced by Mr. Kerens' hospitality. Plaintiff testified that in November, and again in the early part of December, 1904, he was in St. Louis, and was at the Kerens and Niedringhaus headquarters at different times. His stopping place was at the Laclede Hotel, and he paid his bills there. In this he was corroborated by Mr. Pritchett, the clerk of the hotel. At this time he accepted a dinner invitation from

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Alex. Niedringhaus, the brother of Thomas K. Niedringhaus, the latter being a candidate for United States Senator, but he accepted no hospitality at the hands of Mr. Kerens nor from any person for him. He did not tell Mr. Alex Niedringhaus that Kerens had offered him transportation, or that he could not reconcile his conscience to vote for Kerens. He did not think that he had any knowledge of telling Mr. Madison or Mr. Van Trump that Mr. Kerens had told Mr. Elkins that he, Branch, was a man after his own heart and would vote for him without any solicitation, and that he, Branch, told Kerens that he was running too fast; not to push him along, or words to that effect. During his canvass for the office of Representative he was not committed to any one for United States Senator. His mind was not made up. He so told Mr. Madison on the way to St. Louis in the latter part of November. In fact, he had made up his mind. He was asked by a great many who his preference was for Senator, and he told them that he had not made up his mind whom he would support. He was going by Mr. Welborn's instructions. Mr. Welborn was his Congressman, and had asked him not to commit himself openly. He told the Kerens people privately that he was with them, but not ready to commit himself openly. On his visits to St. Louis he told Mr. Akins and others who opposed Kerens that he was not ready to commit himself. Immediately on his return from St. Louis in December, he wrote the letter committing himself to Kerens. This letter was published on December 13th, and on the 14th appeared the article which is the foundation of this suit. After this article was published, it was generally shoved at him wherever he went, and they did not accept him as a boarder in Jefferson City until they had investigated his character. Some people would stop him and say they understood that he had sold out, and say, "I guess you will buy lots of farms and get into a big business." His banker, Mr. Walter Waddell, and his neighbors Mr. Gratz and Mr. Carter, said they believed the piece. An editorial published in the Republic of December 5, 1904, entitled "Reprehensible Campaigning," was admitted in evidence over the objection of the defendant. That article did not name any senatorial candidate, but condemned as a reprehensible business the procuring of editorial indorsements for a money or any other consideration.

On the part of the defendant the evidence tended to show that T. K. Niedringhaus was a candidate for United States Senator in 1904. His brother, Alex Niedringhaus, testified that Branch came to see him about Thanksgiving, 1904, told him he had not made up his mind on the question of Senator, but that he had met Kerens and Elkins a short time before, and that Kerens had introduced Branch to Elkins, and told him that Branch was a man after his own heart, and was going to vote for him for Senator. Branch said he had not said that; he told Kerens that he was going too fast; not to shove. He saw Branch also the same day, and asked him who he would support for Senator, and Branch said he did not know, but his conscience would not permit him to vote for Kerens. He also said he was afraid to go back to Kerens headquarters, because Kerens had made it so attractive for him there.

Van Trump testified that he heard part of the conversation between Branch and Madison, and heard Branch say he told Kerens he was going too fast.

C. C. Madison testified he met Branch by appointment, and they went together to the Niedringhaus headquarters. Here Branch detailed his conversation with Kerens at the time he was introduced to Senator Elkins. When Kerens told Elkins that Branch had come out for him, Branch told him he was going too fast.

Akins testified that Branch came to see him in November, 1904, and he tried to get him to support Parker, but Branch would not commit himself—said he was looking over the ground.

E. L. Morse was one of the Kerens managers at the Planters' House. They had from 6 to 8 rooms at the top floor of the Planters', and a part of the time 15 or 20. He saw Branch there about Thanksgiving, and again about the 10th of December. Branch did not take dinner there then. Later, about the 13th or 14th, after he had come out for Kerens, Branch was there for several days. Some 20 or 25 members of the Legislature were guests of Kerens.

Thomas Marks was another Kerens manager, and was at the Planters'. At times there were 15 or 20 guests sleeping at headquarters. Col. Kerens was "a hospitable sort of chap"; he was hospitable to every one. He would ask them to stay to dinner, and they had cigars for everybody and made up theater parties. "We were doing the best we could to advance the colonel's interest in any proper way. Kerens paid the bills."

P. E. Burton testified that he is now an editor in Joplin; was formerly a reporter of the Republic, and was on the Republic in December, 1904; he wrote the article complained of. The part of the article referring to Branch appeared only in the fast mail edition of the Republic. It was crowded out of the city edition. Witness learned from other reporters and Alex Niedringhaus that Kerens took members of the Legislature to theater parties, and entertained them in other ways. Alex Niedringhaus and Van Trump told witness Branch had said he could not reconcile his conscience to vote for Kerens. Swanger had tried to get Burton to go into partnership with him and buy the Springfield Republican; Kerens said he could get the newspaper for him, Swanger, if he would support him (Kerens) for the Senate.

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Swanger refused the proposition. A. P. Murphy told Burton of efforts of Kerens to get Murphy to support him for the Senate. Offered Murphy $1,000 for several days' expenses if Murphy would support him; Murphy declined the offer. Burton was not moved by malice or ill will. He wrote the article in question as a matter of political news. It was not his purpose to charge bribery. The expression "seeing the light" is used with regard to any one who changes his opinion. The witness is a Republican in politics, and is now the editor of a newspaper at Joplin. The Republican was for General Cockrell for Senator. As between the Republican candidates they favored no one, but were opposed to Kerens. Burton saw Branch about the Planters' several times prior to the publication in question.

Van Trump, recalled for cross-examination, said Branch did not state in any conversation with him and Alex Niedringhaus that his conscience would not permit him to vote for Kerens, and he did not tell Burton that Branch had so stated.

Plaintiff testified in rebuttal that he did not tell either Alex Niedringhaus or Van Trump that he could not reconcile his conscience to vote for Kerens, and he did not tell Niedringhaus that he was afraid to go back to Kerens because they made it so attractive to him.

The jury returned a verdict for the plaintiff for $12,500. The defendant in due time filed its motions for new trial and in arrest of judgment, which were overruled, and thereupon an appeal was taken by the defendant to this court.

1. The first assignment of error is that the circuit court of Lafayette county was without jurisdiction of this case, because, as it is alleged, the defendant did not publish the alleged libel in Lafayette county, and did not have an office or place of business for the transaction of any business in said county. The learned counsel for the defendant concede that this point was decided adversely to their contention in Julian v. Kansas City Star Company, 209 Mo. 35, 107 S. W. 496, but they reserve the point in this case, for the reason that the Julian Case has not yet been decided by the Supreme Court of the United States, to which it was appealed. We are entirely satisfied with the conclusion reached in the Julian Case by the court in banc, and hence this point is ruled against the defendant upon the authority of that case.

2. By far the most serious point raised on this appeal is as to the admissibility of the testimony of the witnesses on behalf of the plaintiff as to the meaning of the alleged libelous article which forms the basis of this case. In Julian's Case it was said by this court in banc: "On the question of the admissibility of evidence of that kind, the authorities are not entirely uniform. They all agree to this extent, viz.: If the words are ambiguous, or if, under the conditions and circumstances in which they are used, they are susceptible of a double meaning, the question as to whether they were used in one sense or the other is a question for the jury. And the authorities also agree that testimony showing the particular conditions and circumstances which are thought to give the peculiar meaning is competent, but whether or not, after those conditions and circumstances are shown, a witness should be allowed to testify as to what he understood the words to mean when he heard or read them, there is a difference of opinion." In that case it was held that the expression, "Julian is remembered here as a member of the Legislature who did well in a legislative way, but also as Stone's chief of police, of whom a Democratic senate committee said, 'He is not the proper man for the position,'" was sufficiently ambiguous in its meaning to justify the circuit court in submitting such testimony to the jury for interpretation. If this evidence in this case was admissible at all, it must have been upon the ground that the language of the article published by the defendant was ambiguous, and such is the contention of the counsel for plaintiff. It is insisted by the plaintiff that while the article does not in express terms charge the plaintiff with agreeing to vote for Mr. Kerens for a cash consideration, it did nevertheless convey the idea or impression that plaintiff had agreed to vote for Mr. Kerens for some reason other than one which ought to have actuated a member of the Legislature who was honestly and conscientiously trying to discharge the duty he owed himself and his people. The words which seem to the plaintiff to impute to him a sinister motive were the headlines "Ease His Conscience;" "Did not See the Light;" "Bit;" and "Reconciled His Conscience."

The circuit court directed the jury that this article did not charge the plaintiff with having accepted a money bribe from R. C. Kerens for his support of the said Kerens for the Senate, and that, in determining whether or not the publication was libelous, the jury were not to consider it as making a charge of bribery. In so doing, we think the court correctly interpreted the article. There was no hint of money being used to obtain the vote of plaintiff anywhere in the article. There was no charge of bribery, directly or indirectly, and no ground for construction or interpretation of the article upon that theory. When this evidence was first offered as to how this article was understood by the witnesses who read it, the court sustained the objection to the testimony, but, later on, permitted witnesses to give their understanding of the testimony. Thus, Judge Chinn testified that he understood the article to mean that plaintiff had been offered and had accepted a valuable consideration from Mr. Kerens, by reason of which he changed his vote from Niedringhaus to Kerens. On cross-examination he stated that he under-

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stood the article to be that plaintiff had gotten boodle or corrupt money. Mr. W. B. Ming testified that he considered the article a reflection upon Mr. Branch's political integrity, that he had changed his vote, and that for a consideration; he would not say for a money consideration, but a consideration of pecuniary value. Other witnesses testified to practically the same effect.

The contention of the defendant is that the language is perfectly plain and unambiguous, and that there was no ground for admitting this testimony of these witnesses as to their understanding of what the article meant. This court has settled that the constitutional provision respecting libel suits does not divest the judge of his duty to determine matters of law arising in the case, just as in any other case. In Heller v. Pulitzer Publishing Company, 153 Mo. 205, 54 S. W. 457, this court said: "Thus in the first instance, upon demurrer or plea interposed by the defendant, the court decides the question of libel or no libel. If the decision is for the defendant, the matter ends as to that court; but if it is against the defendant, the case must go to the jury upon the question of libel or no libel, the court directing the jury as to the general principles of law touching libel; but the jury are at liberty to follow their directions or not, and, if the jury find for the defendant, the case ends there as to that court; but if the jury find against the defendant, a motion in arrest by the defendant will lie in the same manner it would have done before the passage of the act." Ukman v. Daily Record, 189 Mo. 391, 392, 88 S. W. 60. So that, if this evidence was incompetent, it was under our decisions the duty of the court to exclude it just as if it were incompetent evidence in any other case. As we understand the opinion in the Julian Case, if the words of an article are not ambiguous, if their meaning is plain, and according to their natural and ordinary significance in the circumstances attending their publication they do not charge a libel, then the testimony of witnesses as to their understanding of the meaning of such article is not admissible. In the Julian Case the testimony was received on the ground that the language of the publication was ambiguous or double in its significance, and that view was strenuously combated by the minority of the court. Adhering, as we do, to the majority opinion in that case, the question still recurs, was the article upon which this action for libel is predicated so ambiguous or double in its meaning that it was competent to admit the testimony of witnesses as to their understanding of its meaning?

Before proceeding to a critical examination of the article itself, we may premise that the admission of this evidence has produced a most anomalous condition of affairs from a legal standpoint, to wit, the circuit court authoritatively instructing and advising the jury that the said publication complained of does not charge the plaintiff with having received a money bribe from R. C. Kerens for his support for the office of United States Senator, and in determining whether or not the publication was libelous the jury were not to consider it as making a charge of bribery, and yet the court permitted Judge Chinn and other witnesses to testify to the jury that he understood it to mean that plaintiff had gotten boodle or corrupt money to change his vote from Niedringhaus to Kerens, and thus the jury, who were to determine whether this was libel or not, were left to prefer the interpretation of this article by these witnesses who read it to the construction which the court itself put upon it. It is obvious, we think, that any system of judicial investigation which leads to such a conclusion as the above is contrary to all of our conceptions of the prerogative of the judge in directing a jury on all questions of law. If we are right in holding that previous decisions of this court in Heller v. Pulitzer Publishing Company, 153 Mo. 205, 54 S. W. 457, and Ukman v. Daily Record, 189 Mo. 378, 88 S. W. 60, uphold the power of a judge in a libel case to determine all matters of law arising in the case in an action for libel as well as in any other case, then unquestionably it was the duty of the circuit court, if he was of the opinion that the article in question did not charge the plaintiff with bribery, to so instruct the jury, and he erred in receiving the testimony of witnesses which directly contradicted the instructions which he gave to the jury. As said by this court in Julian v. Kansas City Star Co., 209 Mo., loc. cit. 79, 107 S. W. 503: "It will be noticed that the authorities above quoted consider the subject of the interpretation of the alleged defamatory words under three heads: First, words that are not ambiguous or double in their meaning; second, words on their face susceptible of more than one meaning; third, words innocent in themselves, but which derive an offensive meaning because of certain conditions and circumstances under which they were uttered. In the first there is no question for the jury (at least in the sense of its being a question of fact)." So that the circuit court having determined in its own mind that the language of this article was not susceptible of a charge of bribery, the court in our opinion erred in permitting the witnesses to state their understanding of the article to be that it did charge the plaintiff with having received boodle or corrupt money to change his vote from Niedringhaus to Kerens.

The learned counsel for the plaintiff in their brief say: "No one can read the article here sued on without being convinced that, while the writer did not in express terms charge the plaintiff with agreeing to vote for R. C. Kerens for Senator for a cash consideration, he did nevertheless seek to convey the idea or impression that the plaintiff had agreed to vote for Kerens for some reason

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other than a reason which ought to actuate a member of the Legislature who was honestly and conscientiously trying to discharge a duty he owed to himself and to his people."

Having reached the same conclusion that the circuit court did, that the article did not charge bribery of the plaintiff, was it libelous notwithstanding it did not charge him with having received a money bribe? The court instructed the jury that the publication did not charge plaintiff with having received a money bribe from Kansas City for his support of Kerens for United States Senator, but charged in substance that the plaintiff was by the hospitality, attentions, and solicitations of said Kerens induced to give him his support, although plaintiff had previously said he could not reconcile his conscience to vote for Kerens; and if the jury believed that the defendant's reporter who wrote the article was induced by the conduct of plaintiff to believe that the publication was true in substance, and that the conduct of plaintiff was fairly and reasonably calculated to induce such belief, and, so believing, the reporter wrote and published said article without malice and as a proper piece of information for the public, the verdict should be for the defendant. In determining whether the article was libelous, it is fair and proper to take into consideration the circumstances surrounding the plaintiff and the defendant at the time of the said publication. Now, as disclosed by the record, there was a general election in Missouri in the early days of November, 1904, at which members of the General Assembly were elected, who were to elect a United States Senator. The Republicans had a majority on joint ballot in the Legislature. By Thanksgiving day Mr. Kerens had opened headquarters in St. Louis from which to promote his candidacy for United States Senator. He had several managers, among whom were James E. Goodrich, E. L. Morse, and Thomas R. Marks. He had five rooms regularly assigned to him at the Planters' House in St. Louis, and more when wanted. He kept what might be termed "open house" at the Planters', and visitors from all parts of the state were generously entertained and looked after. Fifteen or twenty people at a time ate there and were furnished rooms and cigars at the expense of Mr. Kerens. In the evening, it seems there were theater parties, and this was kept up until the Legislature convened at the capital. The plaintiff was a member-elect of the General Assembly and a Republican in politics. According to his testimony, even before his election, he had determined, if elected, to vote for Mr. Kerens. "I knew I would vote for Kerens if I was elected." And yet, when he was asked, as he admits, by various persons, including members of his own political party, whom he would vote for, he answered always that he was not committed to any one, and that he had not decided what he would do. He was pursuing this course, he says, under directions from Mr. Welborn, the Republican Congressman from plaintiff's congressional district. After his election he visited St. Louis on two occasions, first in November, and again in the early part of December. He stopped at the Laclede Hotel, and paid his bills there. He testified that he was at the Kerens and Niedringhaus headquarters at different times. He accepted a dinner invitation from Alex Niedringhaus, the brother of Thomas K. Niedringhaus, one of the candidates for the Senate, but accepted no hospitality at the hands of Kerens. He says he told Mr. Niedringhaus he would not commit himself at all at that time, but told Mr. Kerens that while he was personally for him he would not commit himself to him at that time, because he wanted to see if public sentiment at home would back him. He did not want to go against his constituents. He told Mr. Madison that it was none of his business what he was going to do, and he told Mr. Akins, the National committeeman, that he was not ready to commit himself. Indeed, he was evasive to everybody except Mr. Kerens and the Kerens managers. By the public generally, it was understood that he had not made up his mind as to whom he would support for the Senate. When he came to St. Louis he was often at the Planters' House, mingling with the guests at Mr. Kerens' headquarters. He was fully advised as to the nature of the campaign which Mr. Kerens was conducting. On this subject he says: "I saw what they were trying to do; when I got down and saw what they were trying to do, I made up my mind to come out for him (Kerens) publicly."

The defendant newspaper could only know what plaintiff announced for the public ear, and that was that he had not made up his mind, and wished to consult with his constituents. Kerens and his hospitality (and to what extent he shared it, the public could not know) were the only things apparently that could intervene between a mind that was not made up, and one that had become absolutely fixed. These appearances were created by the plaintiff himself. Obviously, if the plaintiff had been as frank with the public as he was with Kerens and his managers, he would not have invited the criticism contained in the article. On the surface of things, the impression created by his own assertions, the public generally were given to understand that he had not been able to make up his mind as to how he would vote for United States Senator. In this apparent state of mind he had gone to St. Louis, and, while he said he did not accept any pecuniary hospitality from Mr. Kerens or his managers, he did mingle frequently with Mr. Kerens' friends at the Planters' House, but, as defendant had been informed, had stated that he could not reconcile his conscience to vote for Kerens. In a short time, or in a

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few days at least, after having met Mr. Kerens and mingled with his managers at the headquarters at the Planters' House, he came out in an open letter pledging his support to Mr. Kerens, so that the defendant and its correspondent and others, who were watching the political situation, drew the conclusion that plaintiff had made up his mind in St. Louis, to support Mr. Kerens, and that he had been induced to do so by Mr. Kerens' solicitations and hospitality; and the conduct of the plaintiff was fairly and reasonably calculated to induce this belief, and this is the whole purport of the article on which this libel is based.

Read in the light of the circumstances surrounding the parties, and in view of the political contest at that time going on for United States Senator, in view of the letter which had just been published the day before, in which plaintiff pledged himself to support Kerens, we are unable to discover anything in this article further than an attempt to explain when, and where, and how plaintiff became converted from his indecision as to his vote to an absolute purpose to vote for Kerens.

We are unable to find any charge of corruption of plaintiff by Mr. Kerens, or anything smacking of a bribe; on the contrary, a fair summing up of the whole article amounts to nothing more than that, that plaintiff by the hospitable attentions and solicitations of Mr. Kerens had been induced to declare himself as one of his adherents, and to announce that he would vote for him, although the public had previously been informed that he had said he could not reconcile his conscience to vote for Kerens.

In our opinion, there was nothing in this article that was libelous within the meaning of our law as to what constitutes a libel. While the plaintiff contends that notwithstanding this article does not charge that he was induced to agree to vote for Mr. Kerens for a cash consideration, yet he contends that the article sought to create the impression that plaintiff had agreed to do so, for some other reason, one which ought not to have actuated a member of the Legislature, who was trying to discharge the duty he owed himself as well as to his people; but what that reason was is not stated in any concrete form, so that we may be able to determine that it would be libelous to ascribe it to the plaintiff.

The plaintiff was a public officer. The article related to his action as such, to wit, his vote for United States Senator, and as such was subject to a fair criticism by the newspaper press. It is not libelous merely to point out a seeming inconsistency in a public officer, and, while our laws rigidly protect the private character of the citizen, the acts of a public officer are fairly open to criticism and comment. No honest officer has any right to complain of just and fair criticism, and, when the article in question is read in the light of the then surrounding circumstances, it is nothing more than a comment upon the conduct of plaintiff in making a change of position in the senatorship from what the public had been led to believe it had been up to the time his letter indorsing Mr. Kerens was published. While there are certain slang words used, there is no pretense that they imported any corrupt conduct on his part. Indeed, but for the incompetent testimony as to the meaning of the article, we cannot conceive of the jury rendering the verdict they did in this case. In our opinion, the article did not charge bribery; it was not ambiguous, but was merely a statement of the circumstances attending plaintiff's announcement of his intention to support Mr. Kerens, and a change from his announced position on the senatorial question prior to that time, and, in our opinion, was the subject of fair and just criticism of official conduct, and did not amount to a libel.

Having come to this conclusion, it is unnecessary to discuss other propositions advanced for a reversal of the judgment.

The judgment is reversed.

BURGESS and FOX, JJ., concur.

HOLMES v. ROYAL FRATERNAL UNION.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. LIBEL AND SLANDER (§ 45*)—PRIVILEGED COMMUNICATIONS—QUALIFIED PRIVILEGE.

A qualified privilege in the law of libel extends to all communications made bona fide on any subject-matter in which the person making them has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty of a moral or social character of imperfect obligation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138-140; Dec. Dig. § 45.*]

2. LIBEL AND SLANDER (§ 51*)—"PRIVILEGED COMMUNICATIONS"—QUALIFIED PRIVILEGE.

A privileged communication is one made under such an occasion as rebuts the inference arising prima facie from a statement therein prejudicial to the character of another, and the latter must prove the existence of express malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 150; Dec. Dig. § 51.*

For other definitions, see Words and Phrases, vol. 6, pp. 5592-5598; vol. 8, p. 7764.]

3. LIBEL AND SLANDER (§ 45*)—PRIVILEGED COMMUNICATIONS—WHAT ARE.

In determining whether a communication is privileged, the court must consider the exigencies of the situation of the party making the communication as to whether they warranted the charges made for the protection of the interest such party had under his control, or whether the language, under the circumstances,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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was warranted or was of such a nature and character as to indicate an abuse of privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138–140; Dec. Dig. § 45.*]

4. LIBEL AND SLANDER (§ 45*)—"PRIVILEGED COMMUNICATIONS."

Communications, otherwise actionable, are privileged where made by a voluntary society in the course of an investigation of the conduct or character of an officer or member, since the member by accepting membership voluntarily submits himself to the jurisdiction of the society so long as it acts within its authority.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138–140; Dec. Dig. § 45.*]

5. LIBEL AND SLANDER (§ 45*)—PRIVILEGED COMMUNICATIONS.

An agent of a fraternal beneficiary association employed to solicit business, take applications, and collect money, collected money which he failed to remit to the association as required by the contract of employment. The agent threatened to sue the association, and to take, on leaving the employment, a large number of the members thereof. Thereafter the association notified members that the agent had been discharged and that he had collected money which he had not remitted, and advising the members to remit to a person named or to the association. The association had examined into the affairs of the agent. *Held*, that the communication was a qualified privileged one.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138–140; Dec. Dig. § 45.*]

6. LIBEL AND SLANDER (§ 123*)—PRIVILEGED COMMUNICATION—QUESTION FOR COURT.

Where a libelous communication is alleged to be privileged, the court must determine the question of privilege in the first instance.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. § 123.*]

7. LIBEL AND SLANDER (§ 101*)—PRIVILEGED COMMUNICATIONS—BURDEN OF PROOF.

A defendant in libel has the burden of proving the privileged character of the communication complained of.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 279; Dec. Dig. § 101.*]

8. LIBEL AND SLANDER (§ 101*)—PRIVILEGED COMMUNICATIONS—BURDEN OF PROOF.

Where the court determines that the communication complained of as libelous is a privileged one, the burden of proof shifts to plaintiff to show express malice, and where there is no substantial evidence of such malice the court must sustain a demurrer to the evidence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 279; Dec. Dig. § 101.*]

9. LIBEL AND SLANDER (§ 112*)—PRIVILEGED COMMUNICATIONS—EXPRESS MALICE — EVIDENCE.

In an action for libel based on a qualified privileged communication, evidence *held* not to show the existence of express malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 341; Dec. Dig. § 112.*]

10. LIBEL AND SLANDER (§ 112*)—PRIVILEGED COMMUNICATIONS—EVIDENCE—SUFFICIENCY.

In an action for libel based on a qualified privileged communication, evidence *held* to show that the statements in the communication were substantially true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 332–340; Dec. Dig. § 112.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by R. A. Holmes against the Royal Fraternal Union. From a judgment for plaintiff, defendant appeals. Reversed.

This cause is here by appeal from a judgment of the Buchanan county circuit court in favor of the plaintiff.

This is an action for libel, and is based upon a letter written by the appellant at St. Louis, Mo., addressed to one Clint Hull at St. Joseph, Mo., dated December 22, 1904, containing, as alleged in the petition, several false, scandalous, malicious, and defamatory matters of and concerning the respondent in his business. It is also alleged in the petition that appellant on the same date wrote and mailed the same letter to a number of other persons at St. Joseph, Mo., containing, as alleged, the same libelous matter. The petition charges libel in the usual form, based upon the publication of said letter by the parties therein named opening and reading same.

The answer of appellant admitted that the letter charged was written and mailed to Clint Hull, as well as other members of the Royal Fraternal Union at St. Joseph, and alleges that it was not mailed to any one else or otherwise published. It is denied that the letter was libelous, and the innuendoes of the petition are denied. In defense, the truth of the letter is pleaded, and appellant further pleaded that it was a privileged communication. Appellant alleged its good faith in writing and publishing the letter.

The appellant is a fraternal beneficiary association incorporated under the laws of this state with headquarters at St. Louis. Holmes was a member of the association, and for two years prior to the publication of the alleged libelous letter was employed by the association in soliciting members, organizing subordinate councils, and taking applications for beneficiary certificates or policies.

The letter written by the association to Clint Hull, C. B. Peasley, and others, at St. Joseph, Mo., of and concerning respondent as its agent, dated December 22, 1904, is as follows:

"Dear Sir and Brother: You are hereby notified that we have canceled the authority of our former representative at St. Joe, Mo., Mr. R. A. Holmes, to represent this order in any manner whatever. He is not authorized to take applications or to collect or to receipt for dues. Mr. Holmes has not remitted to this office any of the collections that he has made at St. Joe for the last two months; while he has reported to us the names and amounts collected he has failed to remit the money he has collected, due the Order, so you are advised not to make any more payment of dues to Mr. Holmes, as he has no authority to collect dues or receipt

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for payments made to him. As we had advised you to make your payments to Mr. Holmes, we have credited you and the other members at St. Joe with all the payments they made to him and stood the loss ourselves.

"We have arranged with the firm of Hull & Chittenden at No. 610 Edmond street, St. Joe, Mo., to take care of the collections until some other arrangements can be made. They have the collection list in their office and are authorized to receipt for monthly dues. If it is more convenient for you to remit your dues direct to the home office than to pay to them you are at liberty to do so, but in either event the payment must be made on or before the last day of the month. Please call at their office and make your payment to them at your earliest convenience. Kindly keep in mind that it will be necessary for you to go to the office of the above firm (Hull & Chittenden) to make your payments—they will not send a collector to your home. We regret exceedingly that it has become necessary to cancel Mr. Holmes' authority and we hope you and the other members at St. Joe will appreciate the situation and retain your membership in the Order. We will endeavor to secure an active agent at St. Joe as soon as possible.

"With best wishes, I remain,

"Fraternally yours,

"F. H. Pickrell, President."

In December, 1902, respondent was employed by the association by a written contract to act as its agent, with territory in the state of Kansas. Under the provisions of this contract he was to receive, as full commission for all services rendered, all the first payments collected at the time of taking applications, and, in addition thereto, the third, fifth, seventh, tenth, and twelfth assessments received at the home office on business written by Holmes, or agents appointed by him. Respondent soon became dissatisfied with the commissions received under this contract when the association offered him another, which was rejected. Again in July, 1903, the association undertook to satisfy him by a new contract, and invited him to come to St. Louis, the association agreeing to pay one-half the expenses. This was also rejected, and at the same time respondent, in a letter to the association, threatened suit if matters were not adjusted to his satisfaction. On November 2, 1903, a new contract was entered into between respondent and the association. This new contract covered nine counties in the state of Kansas and four counties in Northwest Missouri, including St. Joseph. The powers given by the new contract to respondent were similar to those embraced in the first contract, but set out more in detail. Under this new contract respondent, for all services rendered by him, or any subagent he might appoint, was to receive upon the health and accident business all the policy fee collected by the agents, 40 per cent. of the first twelve monthly dues, and 20 per cent. of subsequent monthly dues, as well as some contingent commissions which are not necessary to be noticed in this statement. The dues on policies under this last contract were to be remitted monthly by respondent to the association on or before the 3d day of the month to which the dues applied. The association was to report and remit to respondent his commissions on the 25th of the same month. The new contract superseded the old contract. The respondent, after entering into the new contract, was still entitled under the old to commissions on dues paid by members obtained during its life, up to and including the twelfth monthly payment. The alternate payments to which respondent was entitled under the old contract were called "skip" payments, and one of his contentions with the association was that he was to receive these "skip" payments after the end of the first year. This contention was found by the circuit court to be in the face of the contract, and it so instructed the jury. Under the first contract the association revised and sent to respondent a monthly list showing new members and old members who had defaulted. This list was to be returned by him, and was returned until he finally kept it, as he wrote the association, for the purpose of placing it in the hands of his attorney.

Respondent also claimed that in addition to the commissions provided in each, the first and second contracts, he was further entitled to 10 per cent. for collecting. In the early part of 1904 he began to retain 10 per cent., in addition to the 40 per cent. allowed under the contract, on all collections. This act the association demurred to, and wrote him that he was not entitled to the extra 10 per cent.; but he continued to deduct it from his collections, and also deducted at least one "skip" payment to which he was not entitled. The last remittance made by respondent of his collections to the association was in November, 1904. From that remittance he not only deducted 40 per cent. under the contract, but deducted 30 per cent. as well, claiming that there was 10 per cent. due him for the months of September, October, and November. The association complained of this extra deduction, and undertook to point out to respondent that he was not entitled to it, he maintaining that he was. Respondent also made collections for December amounting to $64.89, none of which was remitted to the association. He took the stand that he was entitled to the money in his hands, and that he did not propose to remit any more until the association recognized his claim. Respondent testified that the association owed him $125 or $150, but he did not make any showing in detail as to how the association owed him any such amount. His claim for 10 per cent. extra commission was also determined against him

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by the circuit court by an instruction to that effect.

The evidence demonstrates clearly that respondent failed to remit to the association a great portion of the collections for November made at St. Joseph, and all of the collections made at the same place for the month of December. The association's book in evidence disclosed that he was indebted to it in the sum of $127.99, and while respondent testified that the association was indebted to him in about that sum, yet his testimony was a mere assertion, and is not based upon any tangible figures or facts. The association wrote him a number of letters relative to the November and December collections, all of which are couched in courteous and reasonable language, requesting him to remit the amounts he had collected. On November 11th the association wrote him and gave notice under the terms of the second contract of its cancellation, to be effective 10 days from date. On the 14th day of November the association again wrote him, urging him to make settlement under the terms of his contract, making it clear that the observance of its terms would be required, and also proposing to negotiate a new contract with him. Respondent did not write the association again until he reported his collections for December, when he reported the sum of $64.89, and retained the whole amount. He again claimed 10 per cent. extra commission, and intimated plainly in this last letter that he was holding the money then in his hands until his demands were acceded to by the association. The association then had a complete examination made of all the business of respondent, allowing him commissions he was entitled to under both contracts, and found that he was indebted in the sum of $127.99 to the association. The supreme president of the order then ordered Mr. Chittenden, one of the clerks in the office in St. Louis, to notify respondent of the termination of his contract and cancellation of his authority, and to notify members at St. Joseph who had been paying dues to him not to make any further payments to him. Accordingly, Chittenden notified respondent of the cancellation of his contract, and on December 22, 1904, the letter which is the basis of this action was written and mailed to the members of the association at St. Joseph. Prior to this, in a number of letters, respondent had threatened suit against the association, and had also threatened that, if the association did not accede to his demands for further commissions, he would leave the order and take two-thirds of the St. Joseph members with him.

This sufficiently indicates the nature and character of the testimony upon which this cause was submitted to the jury.

At the close of the evidence the court instructed the jury in accordance with its views, upon the facts as developed upon the trial, and, the cause being submitted to them, they returned their verdict, finding the issues for the plaintiff, and assessing his damages at the sum of $5,000. Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Judgment was entered in accordance with the finding of the jury, and from this judgment defendant prosecuted its appeal, and the record is now before us for consideration.

Edwin S. Puller and Rusk & Stringfellow, for appellant. J. W. Sullinger and Thompson & Thompson, for respondent.

FOX, J. (after stating the facts as above). The record discloses that during the progress of the trial the defendant preserved numerous exceptions to the action of the court in the admission and rejection of testimony, as well as to the refusal and giving of instructions.

The legal propositions confronting us, which are disclosed by the record, may thus be briefly stated: First. Was the letter upon which this action is predicated, and which is fully indicated in the statement of this cause, upon the trial, a qualified privileged communication? Second. If said letter was a qualified privileged communication, then should the circuit court have so declared as a matter of law, or should the questions of privilege and malice have been submitted to the jury? Third. Were the statements as made in the letter substantially true, as shown by a large preponderance of the evidence?

1. Manifestly, the circuit court reached the conclusion from an inspection of the letter, which forms the basis of this suit, in conjunction with testimony offered, that it was not a privileged communication, either qualified or otherwise; hence the court refused to submit to the jury the question of privilege, or the facts constituting a privileged communication, as well as the question of express malice.

Upon the disclosures of the record the first insistence of appellant is that the letter was a privileged communication, and that the evidence absolutely fails to show any express malice; hence it was the duty of the court to sustain the demurrer to the evidence. Upon this insistence the first question which confronts us is as to whether or not the letter in question was a privileged communication, and, if so, whether or not it was the duty of the trial court, as a question of law in the first instance, to so determine.

In order to intelligently discuss this proposition, it is necessary to briefly refer to the facts as developed upon the trial. The testimony discloses that Holmes had been the agent of appellant for the purpose of soliciting business, taking applications, and

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establishing agencies for the space of about two years before their business relations came to an end by the writing of the letter in question. The correspondence introduced by both parties, much of which on the part of appellant was excluded, and improperly so if the said letter is to be treated as a qualified privileged communication, shows that shortly after respondent began working for appellant he became dissatisfied and fault finding, and wrote to it claiming more commissions than were allowed by his contract. The letters of appellant show that it was at all times very patient with and courteous to the plaintiff, and manifested a desire to please him and come to an amicable understanding. The second contract entered into was more liberal in its terms than the first; and, other contracts were offered by appellant to respondent, which he rejected. No letter written by appellant to respondent prior to the one in question was in the least exceptional. Prior to the writing of that letter respondent had threatened to put claims in the hands of his attorney and to bring suit against the association, and had also threatened that if he left the employ of appellant he would take two-thirds of its members at St. Joseph with him. His contracts required him to collect and remit every month the dues for that month, and on or before the third day. A remittance was made by him for November, 1904, but no remittance was made for December of the same year, although he reported that for December he had collected something over $64. He retained that money, and stated that he would not send it to the association until a settlement was reached. Even after this information came to appellant from respondent it endeavored to adjust matters with him, and offered him a new contract. Then the president of appellant put on foot a careful investigation and had the books of the association examined, in order to determine the standing of the account between it and the respondent. The testimony tends strongly to show that respondent was then indebted to appellant in the sum of $127.09. The letter in question was then written by the clerk in the St. Louis office of appellant, at the instigation of its president, to members of the order at St. Joseph. This letter, it will be observed, informed the member that the authority of Mr. R. A. Holmes, as their agent at St. Joe, had been canceled, and that he was not authorized to take applications or receipt for money. Then the member was informed that he had not remitted for collections made at St. Joe for two months, and that, while he had reported to the association the names and amounts collected, he had not remitted. The member was advised not to make any more payments to Holmes, and his authority had ceased. The member was further advised that all payments previously made to respondent were properly credited to the members. They were then advised to whom to make future payments. Regrets were expressed that it had become necessary to cancel Holmes' authority, and the association hoped that the members at St. Joe would continue their membership in the order. This letter seems to have had in view the fact that respondent had failed to remit certain dues. This failure may not have been for two months, but he had failed to remit at least a portion of the dues collected by him. It also appears to have been written with a view to preventing, if possible, the threats previously made by respondent, to take away from the order two-thirds of the St. Joe members.

The rules of law applicable to qualified privileged communications are well settled in this state. In Finley v. Steele et al., 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852, the rule as applicable to this subject was very clearly stated. It was there said: "A qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation." And again: "The proper meaning of a privileged communication is said to be this: That the occasion on which it was made rebuts the inference arising, prima facie, from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made. But when the paper published is a privileged communication, an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice."

It will be observed that the defendants in that case were members of a school board. The action against them emanated from a written charge made by the school board and filed with the school commissioner, which contained words of a defamatory character, and would have been otherwise libelous had it not been, as held by the court, a privileged communication, and there was no proof offered by the plaintiff of express malice.

In Wagner v. Scott, 164 Mo. 289, 63 S. W. 1107, the plaintiff, Wagner, was chief engineer of a number of electric light companies. The president of one company wrote the president of another company, making charges against plaintiff's personal and professional standing. It was ruled in that case that the letter was defamatory and libelous, but that it was a privileged communication. It was further held that the evidence justified submitting to the jury the question of express malice, which, if it

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existed, would overcome the qualified privilege, and that therefore the court erred in nonsuiting the plaintiff. In the discussion of the law applicable to that case, the court announced the legal principle that whether in a particular case a publication is deemed to be privileged—that is, whether the situation of the party making it and the circumstances attending it were such as to rebut the legal inference of malice—is a question of law to be determined by the court in the first instance, and, applying the principle of law stated to the plaintiff's evidence as it appeared in the record in the cause then under consideration, it was held to have made a prima facie case of express malice. The court said: "The publication contained very grave charges against the plaintiff affecting his personal, professional, and official standing and character, made in a quarter calculated to do him serious injury. His evidence tended to prove that the charges were false; that the defendant either knew or had the means of knowing that they were untrue; that the exigencies of the situation did not call for such charge for the protection of the interests the defendant had in charge, or warrant the language in which they were made, and that, while the occasion was privileged, the publication was an abuse of the privilege. Hence the case ought to have gone to the jury."

A careful analysis of the discussion by the court in the case last cited of the legal principles applicable to privileged communications makes it plainly manifest that the nature and character of the charges contained in the publication are in a large measure controlling, when the point is reached for the determination as to whether the situation of the parties making the charge and the circumstances attending it were such as to rebut the legal inference of malice. In other words, in the determination of that question, as was ruled in the case of Wagner v. Scott, supra, the exigencies of the situation are to be taken into consideration as to whether or not they warranted the charges made in the publication for the protection of the interests the defendant may have had under his control, or whether or not the language used in such publication under the circumstances was warranted, and was the language employed in such publication of such a nature and character as to indicate an abuse of such privilege.

It has been held in other jurisdictions that a statement by a stockholder to an officer of a corporation that a certain employé was a perjurer and a blackmailer, and had assisted in fraudulently obtaining money from the corporation, if made without malice, is privileged. See notes to case of Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627, Am. & Eng. Annotated Cases, vol. 10, p. 272.

Communications which would otherwise be actionable would be privileged, if made in the course of an investigation of the conduct or character of one of its officers or members of a quasi judicial body, such as a voluntary society, since a member by accepting a membership voluntarily submits himself to the jurisdiction of the association so long as it acts within the scope of its authority. Am. & Eng. Ency. of Law (2d Ed.) vol. 18, p. 1035. This rule has been applied to a lodge of Odd Fellows, as well as a medical society.

Learned counsel for respondent very fairly as well as clearly and correctly stated in their brief the requirements of the law applicable to this subject. They say: "To give the words complained of the character of a qualified privilege, it must appear that they were written by the defendant association in the discharge of some duty, public or private, legal or moral, and with the end or purpose in view, or in the conduct of some matter involving its interest, and that they were written for the protection of that interest, and that they were relevant and proper in that connection. It must also appear that they were uttered in good faith, and made on a proper occasion, from a proper motive, based upon a probable cause, and in the honest belief that such statements were true." In our opinion this is a fair and full statement of the requirements of the law, and, if the evidence disclosed by the record meets these requirements, it logically follows that the letter in question was a privileged communication.

This confronts us with the inquiry as to whether the letter written by the association was in the discharge of some duty, and did the subject and matter upon which the letter written was predicated affect the interests of the fraternal association? Manifestly the association had the right, and it was its duty, to communicate with its members. It clearly had the right, and it was also its duty, to investigate the conduct of its agents, and demand of them proper reports. There was no impropriety, and it unquestionably had the right to notify its members at St. Joseph that the authority of respondent as agent had been canceled there, and not to pay him any more money. It must not be overlooked that in some of the correspondence by the respondent he had threatened suit against the association, and had also proclaimed that when he left the association he would take two-thirds of its members with him. These disclosures of the record clearly indicated that the interests of the association were involved, and the officials who were administering the affairs of such association doubtless became aroused concerning the threatened injury to their body, and in order to protect the interests of such association, in our opinion, appellant had the undoubted right to endeavor by all proper and appropriate methods to retain its membership, and to this end had the unquestioned right to communicate with the members of the association at St. Joseph

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guarding them against any efforts that might be made on the part of the respondent to disorganize the membership of the association at that place. The evidence as disclosed by the record strongly tends to prove that the respondent had not remitted his collections for December, and was still owing a part of the collections made by him in November. The record before us further discloses that, prior to the writing of the letter upon which this action is predicated, the president of the fraternal association, in a businesslike way, had a thorough examination of the books made, which disclosed that respondent was indebted to the association in the sum of $127.99; hence it follows, if we are looking for a reason why this letter was written, such reason is furnished by pointing to the fact that it was written both for the purpose of preventing members paying respondent more money, and to keep such members from leaving the fraternal association. Upon this state of the record it will certainly not be seriously contended that the association did not have reasonable cause to act, and that it did not act in good faith. The disclosures of the entire record clearly indicate that the association was acting in good faith from proper and legitimate motives, based upon the showing from an examination of the books of the indebtedness of respondent to the association, as well as upon the admissions of the respondent that he had in his hands certain moneys collected for the association, but which he would retain until there was a settlement with him. Under these circumstances the president and others in the chief office of the association had the data before them which was calculated to inspire the honest belief that the statements in the letter complained of were true, at least in substance.

After a most careful consideration of all the evidence and the showing made of the extremely courteous and kind treatment awarded respondent by the association throughout all their business relations, we see no escape from the conclusion that the letter complained of, and upon which this action is based, was a qualified privileged communication; and, in the absence of a showing of at least some sort of express malice, the trial court should have sustained appellant's demurrer to the evidence.

2. Having reached the conclusion, as herein indicated, that the letter which is the basis of this action was a qualified privileged communication, and should have been so treated by the trial court, then under the well-settled rules of law as applicable to the proposition now under discussion, before the plaintiff was entitled to recover upon such privileged communication, it was absolutely essential that it appear in the letter itself that the exigencies of the situation did not call for the use of the language used for the protection of the interests the defendant had in charge, or, in other words, while the communication was privileged, the nature and character of the language used should show an abuse of such privilege, or the plaintiff must assume the burden cast upon him and prove to the satisfaction of the jury that such communication was actuated by express or actual malice. "A privileged communication is an exception to the rule that every defamatory publication implies malice. A qualified privilege is extended to a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty; and the burden of proving the existence of malice is cast upon the person claiming to have been defamed." Newell on Slander and Libel (2d Ed.) p. 391, § 6; Finley v. Steele, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; Sullivan v. Com. Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859.

In Finley v. Steele, supra, this court referred to and quoted approvingly from Byam v. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726, and Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360. The rules of law as applicable to the subject now under discussion were very clearly and tersely stated in those cases. It was said: "A libelous communication is regarded as privileged, if made bona fide, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. In speaking of the proper meaning of privileged communications in Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360, it is said: 'The proper meaning of a privileged communication is said to be this: That the occasion on which it is made rebuts the inference arising, prima facie, from a statement prejudicial to the character of the plaintiff; and it puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made.' But when the paper published is a privileged communication, an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice."

In Massachusetts it was held that "the question whether in a particular case a publication is to be deemed privileged—that is, whether the situation of the party making it and the circumstances attending it were such as to rebut the legal inference of malice—is a question of law to be determined by the court in the first instance." Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L. R.

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A. (N. S.) 1051; Am. & Eng. Ann. Cas. vol. 10, p. 1153.

In Wagner v. Scott, 164 Mo. 289, 63 S. W. 1107, this court, speaking through Judge Brace, quotes the rule as announced by the Massachusetts court, and following such quotation says: "The sole duty of the court, therefore, in such cases, is to determine whether the occasion, in the absence of actual malice, would justify the publication. If so, then it is incumbent upon the plaintiff to prove the existence of malice in order to sustain his action; and this must be shown to the satisfaction of the jury."

Our attention is directed to the case of Sullivan v. Com. Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859, where it was held by this court that the circuit court erred in holding that the communication complained of was privileged, and that the occasion did not justify the terms employed. But it must not be overlooked that the terms employed in the communication forming the basis of the action in the Sullivan Case were entirely unlike the language used in the case at bar. It will also be observed that the court in passing upon it determined nothing more than that there was evidence justifying the submission of the question of malice to the jury. In fact, it was there announced that "it was a question of law for the court whether the letter was a privileged communication, but malice was a question of fact for the jury, if there was any evidence whatever of malice."

After a thorough examination and consideration of the authorities applicable to the propositions involved in this case, we find that the weight of authority holds that, where a libelous communication or writing is alleged to be privileged, it is incumbent upon the court to determine this question in the first instance. The burden of showing the privileged character of such communication rests with the defendant. If in the judgment of the court the communication is a privileged one, then the burden of proof shifts to the plaintiff, and, in order to entitle him to recover, it is essential that he show actual or express malice, and if upon such showing there is no substantial evidence of the existence of actual or express malice, then it is the duty of the court to sustain the demurrer to the evidence.

We have indicated the controlling legal principles applicable to cases of this character, and the next question which confronts us is as to whether or not the evidence as disclosed by the record substantially tended to show the existence of actual or express malice. We have read in detail all the evidence developed upon the trial of this cause, and in our opinion, considering in detail all of the testimony disclosed by the record, it absolutely fails in any sort of a substantial way to show malice upon the part of the fraternal association in the writing of the communication upon which this action is based. On the other hand, the record, when examined in its entirety, clearly negatives the existence of any malice whatever in the writing of that communication. The language in the letter in the case at bar must not be confounded with the language used in a number of other cases to which reference has been made. In this letter there was an entire absence of any abusive language or any grave charges made against the plaintiff, and we are unable to see, under the conditions surrounding the fraternal association, how a communication could have used less pointed terms in order to effect the purpose of protecting the interests of the association. The officers administering the affairs of the defendant association had always treated plaintiff courteously, and in fact made efforts to amicably settle the dispute that had arisen about the collection of dues under the contracts with the plaintiff. Prior to the writing of the letter the president and other officers in the chief office made a thorough investigation of the account of the respondent, and the books disclosed that he was indebted to the association in the sum of $127.99. The plaintiff refused to remit certain moneys collected for December, 1904, and part of the money collected for November, 1904; this is practically conceded. Again, it must not be overlooked that the record discloses that the plaintiff had threatened to bring suit against the association and take two-thirds of the St. Joseph membership from it when he left. The record also discloses that this fraternal association proceeded in an orderly and businesslike way, in perfect accord with the contract between it and the plaintiff, to cancel the authority of respondent's agency. The letter complained of was sent exclusively to the members of the order at St. Joseph, and informed them of the cancellation of plaintiff's agency, with the additional information that he had failed to remit for the last two months, which the testimony strongly indicates was substantially true. There was, in the many letters written by the association to respondent, an entire absence of anything to indicate any spite, ill will, or malice toward him by the association or by any of the officers of the association. The trial court seems to have treated the letter upon which this action is predicated as libelous per se, and in accordance with such views so instructed the jury. This, in our opinion, was a misconception of the nature and character of such letter. Under all the facts and circumstances disclosed by the record we are of the opinion that the causes which induced the association to write the letter complained of were reasonably sufficient to inspire the honest belief on the part of the officers administering the affairs of such association that it was essential to write the communication, embracing therein the statements made for the purpose of protecting the interest of the association. Considering the entire record, in our opinion, this letter was

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written without malice and in good faith, based upon a reasonable cause, and the trial court should, at the close of the case, have sustained the demurrer to the evidence which was interposed by the defendant.

3. The conclusions reached upon the first and second propositions, as herein indicated, render it unnecessary to discuss at any length the third proposition, predicated upon the allegations in the answer that the statements embraced in the communication were true. As heretofore stated, the evidence in this case is almost conclusive of the fact that respondent was indebted to the appellant; in fact, it is practically conceded that he did not remit to the association the collections made by him for the month of December, 1904, amounting to $64 and some cents. The principal discrepancy between the statements of the letter and the proof is, the letter alleges that the plaintiff had not remitted any of his collections for the last two months, and it is earnestly contended that this statement had reference to September and October, or October and November. However, it is obvious that the letter had reference to November and December. One other discrepancy is that the letter states that the collections had not been remitted for two months, when the testimony shows that this was not literally true; that a part of the collections for November had been remitted, and it was only the collections for the month of December that the plaintiff had wholly neglected to remit. But aside from all this, when all of the evidence is considered it does appear that, when the letter in question was written, respondent had not remitted any of his collections for the month of December, and had failed to remit part of his collections for the month of November, and was indebted to the appellant association for collections made and not remitted to appellant for these two months. The plaintiff having failed to remit moneys which belonged to the appellant, it was clearly proper and appropriate, considering the relationship of the association to its members, to inform them of the cancellation of the agency of the plaintiff, and also inform them that the agent having had authority to collect dues, the respective members of the association would receive proper credit. Plaintiff largely based his right to retain these collections upon claims which he made for further "skip" payments, as they were termed, and for an additional 10 per cent. commission on collections. Both of these claims were rejected by the circuit court, and we think properly so, for the reason that they were directly in conflict with the provisions of both contracts entered into between the plaintiff and the association.

We see no necessity for discussing this proposition further. It is sufficient to say that the evidence, when considered in its entirety, shows that, at least in substance, what was stated in the letter was true. That the defendant did not intend, by this communication, to charge the plaintiff with the commission of any crime, and that it was written by the defendant association without malice, we have no doubt. The defendant was a member of the association, and doubtless the respective members of the fraternal order to whom this letter was addressed were fully aware as to the dispute between the plaintiff and defendant concerning the collection of dues, and in our opinion any injury to the standing, reputation, or character of the plaintiff, under the facts of this case, is more imaginary than real.

We have given expression to our views upon the legal propositions disclosed by the record, which results in the conclusion that the judgment of the trial court should be reversed. All concur.

SPENCER et ux. v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. STREET RAILROADS (§ 117*)—ACTION FOR KILLING CHILD—QUESTIONS FOR JURY.

In an action for the death of a child killed by a street car, evidence *held* sufficient to warrant the submission of the case to the jury on the view that, after she was struck by the car, she was dragged to her death by the motorman's failure to stop it quicker, and that the car could have been stopped sooner than it was.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 243; Dec. Dig. § 117.*]

2. TRIAL (§ 143*) — CONFLICTING PROOF — QUESTION FOR JURY.

A conflict in the proof becomes a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

3. STREET RAILROADS (§ 118*)—ACTION FOR KILLING CHILD—INSTRUCTIONS.

In an action by parents for the death of a child killed by a street car, the court charged that the motorman was bound to keep a vigilant watch for all persons on foot, and especially children, either on or moving toward the track, and on the first appearance of danger to stop the car as quickly as practicable with safety to passengers, and failure to do so was negligence on the part of defendant, and if the child's death was caused thereby the jury should find for plaintiffs, unless they found that plaintiffs, or one of them, or the child, was guilty of negligence directly contributing to her death, and that the burden of proving such negligence rested on defendant, and unless they proved the same by a preponderance of evidence they could not find for defendant on that ground. *Held*, that the instruction was not faulty as against an objection that it submitted a question of law, and was misleading; the first part reciting defendant's duty under the vigilant watch ordinance in evidence, and then declaring any failure to perform it was negligence, and, if the child's death was the result thereof, plaintiffs were entitled to recover if they were not guilty of negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 265; Dec. Dig. § 118.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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4. STREET RAILROADS (§ 75*)—DUTIES OF MOTORMEN — VIGILANT WATCH ORDINANCE AS REASONABLE EXERCISE OF POLICE POWER.

An ordinance requiring motormen to keep a vigilant watch for all persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to stop the car as quickly as consistent with safety of passengers, is a reasonable exercise of police power.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 155; Dec. Dig. § 75.*]

5. STREET RAILROADS (§ 94*)—NEGLIGENCE OF MOTORMEN—VIOLATION OF VIGILANT WATCH ORDINANCE.

The violation of an ordinance requiring motormen to keep a vigilant watch for persons on foot, either on the track or moving toward it, is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 201; Dec. Dig. § 94.*]

6. STREET RAILROADS (§ 118*)—ACTION FOR KILLING CHILD—INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.

In an action for the death of a five year old child killed by a street car, the court instructed that, if the jury found that the mother took the same degree of care of it on the occasion in question, as a reasonably prudent person ordinarily would under the same or similar circumstances, she would not be guilty of contributory negligence defeating the action, and if she did not exercise reasonable care, in that the child escaped from her grasp and ran across the track, it would not defeat recovery, if the motorman, after seeing it either on or moving toward the track, on the first appearance of danger to it, failed to stop as quickly as consistent with the safety of passengers, and such failure occasioned its death. *Held*, that there was no error in this instruction, which reiterated the humanitarian rule recognized by defendant in one of its own instructions given by the court.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268; Dec. Dig. § 118.*]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Robert C. Spencer and another against the St. Louis Transit Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Boyle & Priest and Glendy B. Arnold, for appellant. S. N. & S. C. Taylor, for respondents.

GRAVES, J. Plaintiffs, husband and wife, sue for the alleged negligent killing of their infant daughter, Olive L. Spencer, by defendant. Olive L. was five years of age, and met her death by being struck and dragged by one of defendant's street cars near the junction of Sidney street, Gravois avenue, and Jefferson avenue, in the city of St. Louis, on October 18, 1904. Jefferson avenue runs north and south, Sidney street runs east and west, and Gravois avenue crosses both Sidney street and Jefferson avenue in a diagonal course. On both Jefferson avenue and Gravois avenue defendant maintained double street car tracks. The car striking the child was one going in a northeasterly direction on the south one of the two tracks on Gravois avenue. As acts of negligence, the petition charges: "That the car which struck, knocked down, and dragged said Olive L. Spencer was being operated as a street car by a motorman in the employ of the St. Louis Transit company, and that said motorman saw, or by the exercise of reasonable care might have seen, said child approaching said track, and in danger of being struck by said car, a sufficient length of time before the collision, as by the exercise of reasonable care and with the appliances on hand to have so operated the car as to have avoided striking said child, and to have so operated said car as to avoid, after striking her, dragging her a distance of 40 or 50 feet, thereby causing her death; but said motorman negligently failed to so operate said car after he saw, or by the exercise of reasonable care might have seen, her, so as to avoid said collision, but, on the contrary, negligently allowed said car to collide with said child, and then negligently allowed said car to drag said child 40 or 50 feet, causing her death, as aforesaid." In addition to the above, the defendant was charged with having run its car at an excessive rate of speed, to wit, 15 miles per hour, in violation of a general ordinance which limited the speed to eight miles per hour. The vigilant watch ordinance was also pleaded. It is also charged that a city ordinance relating to fenders on street cars had been violated, and further that the defendant failed to stop its car 20 feet to the west of the crossing on Jefferson avenue, in violation of another ordinance. Answer was a general denial, to which was coupled a plea that the negligence of the mother, Laura E. Spencer, caused the injury and death of the child. Reply denied the new matter in the answer. Judgment went for plaintiffs in the sum of $5,000, from which, after all necessary steps were taken, the defendant duly appealed.

From the evidence of the plaintiff Mrs. Spencer, it appears: That the father of deceased was an employé of defendant. That the mother had read the book of rules and was familiar with the rules of the company, which reads: "Motormen will bring their cars to a full stop twenty feet from all street railroad intersections." That plaintiffs lived on the east side of Jefferson street within less than a block of Sidney street and to the south of Sidney street. That on the afternoon in question, which was a clear, bright afternoon, Mrs. Spencer took the child, Olive, to a store on the northwest corner of Sidney and Jefferson streets to make some small purchases for birthday presents; little Olive being five years of age upon that day. That, after the purchases were made, the mother and child went east across Jefferson avenue to the corner of Jefferson and Gravois avenues, being then north of the tracks on Gravois avenue. At this point there was a

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crossing on the east side of Jefferson avenue which led down to their home. When Mrs. Spencer in coming east from the store reached this crossing at the point above named, she says she looked both to the east and the west, and, seeing no cars, she took the little girl by the hand and started across; but, after taking a few steps, the little girl jerked away from her and ran on ahead. That she looked up and saw a car approaching from the west on Gravois avenue, at about the intersection of the street car tracks on Jefferson and Gravois avenues. That she hollered at the child and ran after it, and in trying to get to the child was herself struck by the car. That the last she saw of the child she was in the middle of the south tracks, and when the car was stopped she ran around the rear thereof to see if the child had gotten across, and started then to the front, when some parties took her into a nearby drug store. She also testified that there were no wagons or other obstructions.

By other testimony it is shown: That the child was struck whilst on the crossing on the east side of Jefferson avenue; that Jefferson avenue is about 65 feet in width, with double street car tracks therein; that the car ran from one to two car lengths after striking the child; that it was going about 15 miles per hour at the time; that it had not stopped on the west side of Jefferson avenue before crossing the tracks therein; that there was no sound indicating the application of the reverse prior to striking the child; that the accident occurred about 5 o'clock in the afternoon, at a time when there was considerable travel at this junction; that, had the car been running at 8 miles an hour, it could have been stopped by the use of all the appliances therein within 10 to 12 feet as given by one witness, and within 10 feet to 15 feet as given by another witness; that the car was being operated by the defendant company. The best detailed description of the accident is thus given by one witness: "Q. What did you see occur then? A. Why, by the time that I got across the tracks, about middleway between the curb and the car tracks, I heard Mrs. Spencer scream, and I looked in the direction it came from, and I see a little child about 5 or 6 feet in front of the car, and Mrs. Spencer making an attempt to run in after it to catch it, and about the time the car struck the little child it also struck Mrs. Spencer and knocked her down and knocked the little girl down and picked her up on the back fender; that is, when the back fender struck her, it picked her up on it. And the car run about, I should judge, 35 or 40 feet, and the little girl rolled off of the back fender down in front of the fender, and it just rolled her along right in front of the fender for about 8 or 10 feet, and she rolled right in under the fender, and the car ran about 6 feet while she was rolling in under the fender to where it stopped. When the car stopped the little girl was right in front of the front wheel." Plaintiff also introduced a part of section 1760, article 6 of the St. Louis Municipal Code, which reads: "No car shall be drawn at a greater speed than eight miles per hour." They also introduced the vigilant watch ordinance, so often quoted and mentioned in our cases.

The evidence of one witness for the defendant tended to show: That there was a high wagon passing toward the southwest; that the little girl checked up until the wagon passed, and then ran behind the wagon across to and upon the street car tracks, where she was struck and killed. The motorman testified: That he met such a wagon there; that the little girl came from behind it, and ran as fast as she could upon the track whereon the car was running; that he used the appliances and stopped the car as soon as he could, which was within 8 or 10 of the point where he struck the child; that he saw the child some 15 or 20 feet before she reached the track, and saw that she was running toward the track, and at once began to stop the car; that his car was only running 7 to 8 miles per hour; that he stopped his car within the space of 25 feet, on that occasion, and had stopped it at that rate within that space on previous occasions; that the wheel of the car did not run over the child. By two experts the defendant shows that such a car going 8 miles per hour could not be stopped with due regard to the safety of passengers within less than 70 to 80 feet. All the evidence shows that the car was going on a slight upgrade. Defendant's evidence also tended to show: That the fender was so constructed that, if an object got onto it, it could not roll off; that the car was stopped west of Jefferson avenue to await the passage of a car on the Jefferson avenue line and started up and ran across the Jefferson avenue track with the power off. Defendant also introduced an amended ordinance by which it was shown that the speed limit was 10 miles an hour, instead of 8 miles, as by the old ordinance prescribed. In rebuttal the plaintiffs showed: That there was no wagon there at the time and nothing to obstruct the view of the motorman; that there were no stops west of Jefferson avenue. This sufficiently states the facts shown. Points made will be noted in the course of the opinion.

1. Instruction No. 1 given for the plaintiff reads: "If the jury find from the evidence that on the 18th day of October, 1904, the defendant, St. Louis Transit Company, was a carrier of passengers by street railroads propelled by electricity, and that it used the railway and car mentioned in the evidence for such purpose, and if the jury further find from the evidence that on that day Robert C. Spencer and Laura E. Spencer were the father and mother of Olive L. Spencer, a minor, aged five years, and that the latter was born in lawful wedlock of plaintiffs,

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and if the jury find from the evidence that said Olive L. Spencer on the 18th day of October, 1904, while crossing the double street car tracks of defendant, on Gravois avenue, was struck and knocked down by the electric street car mentioned in the evidence, at the eastern crossing of Jefferson avenue, in the city of St. Louis, and that, after being so knocked down, she was dragged by such car about 50 feet, thereby causing her death, and if the jury further find from the evidence that said Olive L. Spencer was unmarried and left no child surviving her, and if the jury further find from the evidence that on said occasion a motorman in the employ of the St. Louis Transit Company was operating said car for said St. Louis Transit Company, and if the jury further find from the evidence that such motorman so operating said car saw, or by the exercise of reasonable care would have seen, said child approaching the track, and in a dangerous situation, a sufficient length of time before she was struck by said car, as that, by the exercise of reasonable care, with the appliances at hand, and with due regard to the safety of passengers, he could and would have so operated said car, as that after she was struck he would have averted the dragging of her such distance as resulted in her death, if the jury find she was so dragged, and that such dragging caused her death, then the jury should find for the plaintiffs and against the defendant, St. Louis Transit Company, unless they further find that there was negligence on the part of such child or of plaintiffs directly contributing to the death of said child." This instruction is challenged for two reasons, as speaks defendant's brief: "First, because the jury was authorized to return a verdict for plaintiffs if they believed that after deceased was struck by the car she was dragged to her death by the motorman's failure to stop the car quicker, while the evidence fails to show that the dragging contributed in any degree to her death. Second, because, even though she was dragged to death, yet there is no evidence that it could have been stopped any sooner than it was stopped."

We cannot concur in the defendant's first assignment of error as to this instruction. The evidence tends to disclose that the child was struck and picked up by the fender, that the car ran a distance of 40 to 50 feet on a slight upgrade thereafter, and that during such time the child fell from the fender, and when found was under the car with her head upon the rail, with the wheel of the car up against her neck, but not upon it. It is not shown that she was mutilated, but was dead when removed, and from the evidence the jury might have well found that she was not actually killed by the impact of the first blow to her little body, but received the death dealing wounds after she fell beneath the fender and was being dragged along thereunder, or it might have as readily found that the first blow was sufficient to produce death. There were sufficient circumstances in evidence upon which to submit this view to the jury. Nor do we think the language used in the Masterson Case, 204 Mo., loc. cit. 520, 521, 103 S. W. 48, is fatal to this instruction under the facts of this case. What was there said was in the light of the facts of that case, and the discussion considers other matters not apparent in this record.

Nor do we think the second contention is tenable. The defendant's motorman says his car was going only 7 or 8 miles per hour, and he says that he saw this child 15 or 20 feet from the track and running toward it, and that he then began to stop. He says he stopped within 25 feet, although other witnesses for defendant say the car could not be stopped in less than 70 or 80 feet. Plaintiffs' witnesses say that the car could have been stopped within 10 to 15 feet. The question therefore becomes one for the jury to determine from this conflicting proof. It is evident that he had much more than 15 feet within which to stop, if the child had to run even 15 feet to the point of collision from the point where he first saw her. A little five year old tot would not travel this 15 feet within the time that a street car would go the same distance going at a rate of 7 or 8 miles per hour. Even grant it that, by reason of the angle of the tracks at that point the child would be running in going south, somewhat toward the car which was coming northeast, yet there are ample circumstances in the record tending to show that the motorman had much more than 15 feet within which to stop his car after he says he saw the child running to the danger point. To our mind the instruction was well enough under the facts of the case.

2. Instruction No. 2. for the plaintiffs reads thus: "The jury are instructed that, at the time when and the place where said Olive L. Spencer was struck by the car and dragged and killed, the law imposed upon the motorman, while running said motor car, the duty to keep a vigilant watch for all persons on foot, and especially children, either on the track or moving toward it, and, on the first appearance of danger to such child, to stop the car within the shortest time and space practicable, consistent with the safety of passengers. And if the jury find from the evidence that the motorman operating said car failed to perform such duty, then such failure was negligence on the part of the St. Louis Transit Company; and, if the jury believe from the evidence that in consequence of such negligence above specified the death of said child was caused, your finding should be for the plaintiffs, unless you find from the evidence that plaintiffs, or one of them, or said child, was guilty of negligence which directly contributed to the death of said child; and the burden of proving contribu-

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tory negligence on the part of said child or plaintiffs rests on defendant, and, unless defendant has proven such contributory negligence by a preponderance of evidence, you cannot find for the defendant on that ground." It is urged that this instruction "is erroneous because it submits a question of law to the jury and is misleading."

The instruction is not faulty. The first part recites the duty of defendant under the vigilant watch ordinance in evidence, and then declares any failure to perform that duty was negligence, and that, if the child's death was the result of such negligence, the plaintiffs were entitled to recover if they themselves had not been guilty of negligence. The only questionable thing we see in this instruction is in that part which submits to the jury this contributory negligence of a five year old child. An instruction of this character was approved in Weller v. Railway Co., 164 Mo., loc. cit. 192, 205, 64 S. W. 141, 86 Am. St. Rep. 592. Neither is such an instruction misleading. The ordinance itself is a reasonable exercise of the police power, and its violation negligence per se. This contention is ruled against defendant.

3. Plaintiffs' instruction No. 6 is criticised by the defendant. This instruction reads: "If the jury find from the evidence that Mrs. Spencer took the same degree of care of the child on the occasion in question as a reasonably prudent person ordinarily would under the same or similar circumstances, then she was not guilty of such contributory negligence as would defeat this action; and even if the jury should believe that she did not exercise reasonable care, in that the child escaped from her grasp and ran across the railroad track as shown in the evidence, yet this would not defeat plaintiff's recovery, if you believe that the motorman after seeing the child either on the track or moving toward it, and on the first appearance of danger to such child, failed to stop the car within the shortest time and space practicable consistent with the safety of the passengers on board the car, and that such failure by said motorman occasioned the death of said child."

We see no error in this instruction. It reiterates the well-recognized humanitarian rule. Besides, the defendant recognizes in the latter clause of its instruction No. 2, given by the court, the same doctrine.

Nor was there error in refusing defendant's demurrer to the evidence in this case. There was ample evidence upon which to submit the case to the jury. We have gone through the numerous instructions given and refused, and are of opinion that the case was fairly submitted, and well tried throughout. Further details will serve no good purpose.

The judgment should be, and is, affirmed. All concur.

FLANAGAN MILLING CO. v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1. July 1, 1909. Rehearing Denied July 12, 1909.)

1. APPEAL AND ERROR (§ 586*)—ABSTRACT OF RECORD—SUFFICIENCY.

An abstract of record is fatally defective, where it nowhere appears at what term of the court, if any, the motion for a new trial was filed or overruled, or the affidavit for an appeal was filed and the appeal granted, or at what term an order was entered granting leave to file a bill of exceptions, or whether those things were done in term time at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2595; Dec. Dig. § 586.*]

2. EXCEPTIONS, BILL OF (§ 6*)—FUNCTION OF BILL—RECORD ENTRIES.

Record entries, as such, cannot be preserved in a bill of exceptions, as that is not its function.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 8–12; Dec. Dig. § 6.*]

3. APPEAL AND ERROR (§ 631*)—ABSTRACTS—PRINTING.

The Supreme Court will not go to a manuscript full transcript for those things essential to perfect an appeal and giving jurisdiction, nor for matter essential to an understanding of the points to be decided; but under the rules they must be abstracted in "print."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2767; Dec. Dig. § 631.*]

4. APPEAL AND ERROR (§ 586*)—ABSTRACTS—REQUISITES AND SUFFICIENCY.

In condensed form, an abstract should still preserve and evidence essential facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2595; Dec. Dig. § 586.*]

Appeal from Circuit Court, St. Charles County; Jas. D. Barnett, Judge.

Action by the Flanagan Milling Company against the City of St. Louis. Judgment for defendant, and plaintiff appeals. Affirmed.

Alfred A. Paxson, Hamilton Grover, and T. F. McDearmon, for appellant. Charles W. Bates and Charles P. Williams, for respondent.

LAMM, P. J. Plaintiff corporation was "tenant and owner" of certain lots and a certain hominy mill and elevator situate thereon in St. Louis. Close by was a public sewer in Geyer avenue constructed in 1854. Plaintiff's basement was connected with this sewer by drain pipes. In that basement were sundry sorts of milling machinery, also grains and manufactured "white corn goods," meal, etc. On July 24, 1899, as the result of a heavy rainfall, the backwater from the Geyer avenue sewer flooded said basement, damaging its contents and the mill building. Grounding its action on negligence in enlarging the area drained by the Geyer avenue sewer district beyond the capacity of the sewer and in allowing the sewer to become obstructed by dirt and débris, whereby sewerage and flood water were dammed back into the basement, plaintiff sued for $25,000

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damages. Defendant answered: First, by way of a general denial; second, by way of a plea of contributory negligence, in that defendant had charter power to regulate the use of sewers by ordinance and had passed certain ordinances by virtue of such power requiring owners of premises to put in self-acting valves in all cases where a back flow from main sewers may be apprehended, coupled with an allegation that such safety valve would have been a complete barrier to the back flow complained of in the petition; that there was in existence a self-acting valve known as a "back trap" or "backwater trap" effective to stop sewer back flow, a simple device of small cost and installed with little trouble; and that plaintiff negligently violated said ordinance and negligently failed to install such device to prevent back flow and injury therefrom. Unsuccessful below, plaintiff brings the case here.

The abstract sets forth the petition, answer, and reply in full; next, that the cause went on a change of venue to the St. Charles circuit court; next, follows certain proceedings which the abstract states "are preserved in the bill of exceptions." An abstract of the bill of exceptions next follows covering 55 pages, and winding up with the signature of the trial judge and the file marks of the clerk. Following said abstract of the bill of exceptions in matter which we present totidem verbis, reading: "Record Entries, March 10, 1905, verdict and judgment for defendant. March 13, 1905, motion for new trial filed. March 24, 1905, motion for new trial overruled. March 24, 1905, affidavit and motion for appeal. March 24, 1905, appeal granted to Supreme Court of Missouri. March 24, 1905, time to second Monday of September, 1905, granted plaintiff to file bill of exceptions. September 4, 1905, bill of exceptions presented, allowed, signed, sealed, filed and made part of the record by order duly entered, within the time given by the court. Affidavit for Appeal. A. A. Paxson, agent for the plaintiff in the above-entitled cause, being sworn, upon his oath says that the appeal prayed for by him for the plaintiff is not made for vexation or delay, but because he considers the plaintiff aggrieved by the judgment and decision of the court. A. A. Paxson, agent for plaintiff. Subscribed and sworn to before me, this 24th day of March, 1905. Wm. F. Wolter, Circuit Clerk." The defendant filed a supplemental abstract, to wit, a complete copy of the bill of exceptions and no more.

Under our interpretation of the statutes and our rules, the foregoing abstract is fatally defective, in that it nowhere appears at what term of court, if any, the motion for a new trial was filed or overruled, or the affidavit for an appeal was filed and the appeal granted, or at what term an order was entered granting plaintiff leave to file a bill of exceptions, or whether these things were done in term time at all. Some of these things do appear at large in the bill of exceptions.

In order to save an intelligent exception to the overruling of a motion for a new trial, there should appear in the bill some notation that such motion was filed and overruled; but record entries, as such, cannot be preserved in a bill of exceptions for appellate purposes, because the function of such bill is not to preserve such record entries. Therefore, if they appear in the bill, and nowhere else, it is the same as if they did not appear at all. Our statutes contemplate that a motion for a new trial should be filed at the judgment term and within four days after the judgment, that an appeal should be taken at the term at which the motion for a new trial is overruled, and that the bill of exceptions should be filed at such term, or that leave be then granted giving time. Therefore the data should be abstracted from which we can see that the statutory steps have been taken to perfect an appeal. This, because an appeal is a creature of the statutes.

Appellant brought this case up by a manuscript full transcript. We may know nothing of its contents, because, if there is one thing more firmly settled than another, it is that, absent conflicting abstracts, we will not go to that transcript to spy out those things essential to perfecting an appeal and giving us jurisdiction of a concrete case, nor for matter essential to an understanding of points to be decided. These things, under our rules, must be abstracted in print. Now, an "abstract" is what its name imports. If a full record is printed, our rules provide that such full record may be taken for an abstract; but that is not the best method to aid an appellate court, since it is expensive and cumbersome, and can only be considered an abstract by grace. On the other hand, an abstract must be something more than a mere analytical index shorn of paging. In condensed form, it should still preserve and evidence essential facts. It is a marvel that excellent counsel will not heed the interpretation given of our rules and warnings judicially iterated and reiterated. We do not interpret our rules otherwise than equitably. For instance, by an implication from data furnished in the abstract, other data might be aided and rounded by supplying an element omitted; but there is nothing in this abstract from which we can see that the entries referred to were made at the judgment term of the circuit court of St. Charles county, or at any term at all.

We therefore affirm the judgment, and put affirmance on a line of case, of which a few are: Harding v. Bedoll, 202 Mo. 625, 100 S. W. 638; Groves v. Terry (not yet officially reported) 117 S. W. 1167; Shemwell v. McKinney, 214 Mo. 692, 114 S. W. 1083; Stark v. Zohnder, 204 Mo. 442, 102 S. W. 992; Walser v. Wear, 128 Mo. 652, 31 S. W. 37; Pen-

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nowfsky v. Coerver, 205 Mo. 135, 103 S. W. 542; Coleman v. Roberts, 214 Mo. 634, 114 S. W. 89. All concur.

WESTERVELT et al. v. ST. LOUIS TRANSIT CO. et al.

(Supreme Court of Missouri, Division No. 1. July 1, 1909. On Rehearing, July 12, 1909.)

1. CARRIERS (§ 306*)—COMPANIES LIABLE FOR INJURIES TO PASSENGERS—LEASE—EFFECT.

Where by an agreement between two street railroads one of them as lessee took possession of the tracks, cars, plant, and former business of the other, and continued to operate the road, the lessor company was thereby relieved of liability for the negligence of the servants and employés of the lessee resulting in injuries to passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1249; Dec. Dig. § 306.*]

2. APPEAL AND ERROR (§ 1173*)—JUDGMENT—REVERSAL—PARTIES.

Where a judgment was rendered in favor of a passenger in an action for injuries against both a lessor and lessee street railroad company, reversal as to the lessor company did not necessarily necessitate a reversal as to the essee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562, 4566; Dec. Dig. § 1173.*]

3. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Complainant when injured by the premature starting of a street car was about 50 years of age. While she had been ailing at spells, and some years before had been frightened by a runaway accident, and a year before had suffered a minor operation on her womb, her general health had been reasonably good, and she had been well able to perform her social duties and as a housewife, and had been reasonably free from pain. Her injury consisted of a wrench or strain affecting her spine in the small of her back and left hip, after which her health was broken, and she became an invalid, unable to perform any household work, and was cared for by nurses and physicians. The muscles on the left side of her back below the belt were weakened and diminished, producing an apparent curvature of the spine, and the left hip was atrophied and her left leg was also smaller and shorter than the other, and she walked with a cane. Her sleep and spirits were broken, and she was afflicted with nervous disorders of a serious character. *Held*, that a judgment for $6,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 374; Dec. Dig. § 132.*]

4. TRIAL (§ 252*)—INJURIES—EVIDENCE WARRANTING.

In an action for injuries to a passenger by the premature starting of a car as she was endeavoring to alight, the court was not required to charge that the jury must find that a reasonable time to alight was not afforded plaintiff in order to entitle her to recover, where there was no evidence showing the length of time the car stopped, or that the time was reasonable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 601–603; Dec. Dig. § 252.*]

5. CARRIERS (§ 303*)—INJURIES TO PASSENGER—PREMATURE START—TIME TO ALIGHT.

A passenger is entitled to a reasonable time in which to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228, 1228½; Dec. Dig. § 303.*]

6. CARRIERS (§ 321*)—INJURIES TO PASSENGER—PREMATURE START—REASONABLE OPPORTUNITY TO ALIGHT—INSTRUCTIONS.

In an action for injuries to a passenger by the premature starting of a street car as she was in the act of alighting, the court charged that plaintiff could recover if the jury found that defendant's servant in starting the car neglected to observe the degree of care defined in a prior instruction as the care devolving on a carrier of passengers, but that the burden was on plaintiff to show that while she was in the act of alighting, but before she had reasonable opportunity to do so, it was suddenly started, etc. *Held*, that the court sufficiently charged on the issue whether plaintiff had been given a reasonable opportunity to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332; Dec. Dig. § 321.*]

7. CARRIERS (§ 303*)—PREMATURE START—INJURIES TO PASSENGER—TIME TO ALIGHT—KNOWLEDGE OF CONDUCTOR.

Where a street car stopped to permit a passenger to alight, and she attempted to do so in the presence of the conductor, he was bound to know that she was in the act of alighting, and to operate the car accordingly.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228, 1228½; Dec. Dig. § 303.*]

8. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS—INJURIES TO PASSENGER—PREMATURE START.

Where a street car passenger was injured by a premature starting of the car as she was endeavoring to alight in the immediate presence of the conductor, the court was justified in assuming as a matter of law that the conductor "had reason to suspect" that she was in the act of alighting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428–430; Dec. Dig. § 191*; Carriers, Cent. Dig. § 1499.]

9. TRIAL (§ 191*)—INSTRUCTIONS—EVIDENCE.

In an action for injuries to a passenger by the premature starting of a street car as she was in the act of alighting, evidence *held* to support a clause in an instruction permitting the jury to find that the car started with a "sudden movement."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 428–430; Dec. Dig. § 191.*]

10. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for injuries, the court charged that, if the jury found for plaintiffs, they should assess the damages at such a sum as would be reasonable compensation for any one or more of the following items of damage, if any, and the jury found the feme plaintiff had sustained or was reasonably certain to sustain in the future, as a direct result of defendant's act complained of, viz., pain of body or mind, injury to her nervous system, and permanent lameness or crippled physical condition, if any, resulting from the accident. Another instruction charged that if the feme plaintiff sustained an injury to her nervous system as a direct consequence of defendant's act, and that these had caused to her a hysterical condition which produced sensations of pain and suffering to her, then she could recover as part of her damages for her pain of mind reasonable compensation for such pain and suffering, if any, the jury found she already suffered, as well as for any suffering or pain which the jury found from the evidence she was reasonably certain to endure in the future. *Held* not objectionable as authorizing double damages for the same pain of body or mind and the same injury, and as allowing dam-

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ages for mental distress disconnected from any injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. § 216.*]

Appeal from St. Louis Circuit Court; C. Orrick Bishop, Judge.

Action by Sarah J. Westervelt and another against the St. Louis Transit Company and United Railways Company of St. Louis. Judgment for plaintiffs, and defendants appeal. Reversed as to the United Railways Company of St. Louis, and affirmed as to the St. Louis Transit Company.

Boyle & Priest and T. E. Francis, for appellants. Richard F. Ralph and Barclay & Fauntleroy, for respondents.

LAMM, P. J. Plaintiffs, Sarah J. and Peter D., are husband and wife. Defendants are common carriers of passengers for hire in St. Louis as street railway corporations. On December 19, 1899, after dark, Sarah rode as a pay passenger on a south-bound car on Virginia avenue. Claiming injuries through negligence of defendants while she was alighting from her car at the intersection of Virginia with Bowen street, she (uniting her husband) sued both companies counting on negligence and laying her damages at $30,000. Her petition states that "defendants" operated a line of cars running on Virginia avenue; that she was a passenger on "one of defendants' cars"; that "defendants agreed" to use care to carry her safely and to allow her to alight in safety at her destination. It is then alleged as follows: "Plaintiffs further state that whilst the said Sarah was in the act of alighting from defendant's said car at or near the intersection of Virginia avenue aforesaid and Bowen street, in said city, where said car had stopped to permit said Sarah to alight, said defendants carelessly and negligently caused the said car to start forward with a sudden movement, so that the said Sarah, while in the act of alighting from said car, was turned and jerked about and wrenched so as to produce the injuries to her to be mentioned presently. The direct effects of said negligence of defendants were," etc. (Here a grievous list of resulting ills and hurts are charged.) Defendants answered separately by general denial. The trial was to a jury. A verdict came in for $6,000. Unsuccessful motions for a new trial and in arrest were filed, and from a judgment rendered against both they appeal. Sufficient of the facts will appear in connection with points ruled. At the close of the plaintiffs' evidence in chief, defendants interposed separate demurrers, which were overruled and exceptions saved. At the close of the whole case, defendants renewed their separate demurrers, and saved exceptions to the second disallowance of them. Contentions made by the United Railways Company are distinct from those of the transit company, and separate briefs are filed by both sides in that regard. It will be convenient to preserve that line of cleavage in this opinion. On behalf of the United Railways Company error is assigned in refusing to direct a verdict and in giving an instruction (No. 6) on behalf of plaintiff to the effect that under the lease, ordinance, and other documentary evidence those operating the car in question "are to be considered as agents of both the defendant companies." On behalf of the transit company errors are assigned in giving instructions Nos. 1, 4, and 5. Further, it is insisted that the verdict is excessive.

1. Of the United Railways' appeal. There was testimony showing that the transit company was, in fact, running the car on which Mrs. Westervelt was a passenger. There is no proof that the United Railways Company had lot, part, or parcel in running it unless a certain agreement (introduced by plaintiffs) between that company, and the transit company, when judicially construed and interpreted, had the effect of making them joint operators of the car at that immediate time. But we have ruled on full argument and deliberation that the agreement could not be given that legal effect. Moorshead v. United Railways Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611; Chlanda v. St. Louis Transit Co., 213 Mo. 344, 112 S. W. 249. In neither of those cases were there allegations resting on equitable doctrines or relating to fraud in the concoction or purpose of the lease, and none such are here. In those cases we construed the agreement whereby the transit company took possession of the tracks, cars, plant, and former business of the United Railways Company as a lease constituting the transit company the lessee and the United Railways Company the lessor; and we ruled that the relation of lessor and lessee relieved the lessor from liability for the negligence of the servants and employés of the lessee. In the Chlanda Case it was ruled that, when plaintiff introduced the lease, she vouched for the document as a live, valid, operative lease, if the court put that interpretation on the paper, and could not be heard to discredit it as a lease by contending (without proof one way or the other) that antecedent steps provided by law had not been affirmatively shown to have been taken. It was pointed out that if defendant had introduced the lease, and plaintiff, absent proof of compliance with conditions precedent, had objected to its introduction, a different question might arise. Learned counsel for plaintiffs in the case at bar did not have the benefit of our holding in the Moorshead and Chlanda Cases at the time of the trial in this case. They do not now argue that the doctrines promulgated in those cases are unsound; but seek to differentiate and distinguish the case at bar by insisting that certain documentary evidence introduced by them,

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to wit, a certificate of the incorporation of the Central Traction Company of St. Louis in 1898, a certificate of the change of name of "Central Traction Company" to "United Railways Company of St. Louis" in 1899, and a certificate of the incorporation of the St. Louis Transit Company in 1899, throws new and controlling light upon the legal propositions. They also insist that certain ordinances put in evidence by defendant leading up to the lease show that acceptance of and assent to the provisions of the ordinances were essential conditions precedent to the validity of the lease as a lease. But each and every of these positions was held in judgment in either the Moorshead or the Chlanda Cases directly or by necessary inference. Here the assents and acceptances are created by ordinances. There they were created by the Constitution or statutes. Here, as well as there, there is no pretense that actual assent was not given, and actual acceptance was not made. Here respondent argues as there respondent argued that it devolved upon appellant to show affirmatively that such conditions were complied with. We disallowed this argument because of the fact that plaintiff introduced the lease to establish the working arrangement between the transit company and the United Railways Company, and upon which working agreement she predicated her right of recovery. If we had held that the agreement did not constitute a lease, but showed a present joint arrangement to run and operate the street railways as partners, or under some relation of principal and agent, then the liability of the United Railways would naturally flow from such construction; but this court took the other view of it, and ruled that the relation of lessor and lessee was created. From that ruling the conclusion follows that the lessor was no more liable for the torts of the lessee than any other landlord would be for the torts of his tenant in the use of leased property. We have been unable to bring ourselves to the belief that it would subserve any good purpose to restate, re-examine, or redetermine the propositions discussed and doctrines announced in those cases. Let settled points be undisturbed, as the maxim saith. Accordingly, we rule it was error to refuse to direct a verdict in favor of the United Railways Company. But this ruling in and of itself does not require the reversal of the judgment as to the transit company. Stotler v. Railroad, 200 Mo., loc. cit. 149, 98 S. W. 509 et seq. Therefore assignments of error singular to that defendant must be determined.

2. Of the appeal of the transit company.

(a) It is argued the verdict is excessive. We think otherwise. Plaintiff's testimony was delivered by unimpeached lay witnesses, neighbors and acquaintances, by physicians of learning and skillful experience attending her professionally and who testified from actual observations and as experts, and by physicians who examined her from time to time, and who gave to the jury the results of their examination with their professional opinion. On defendant's part the bulk of the testimony was from experts who had examined her, supplemented by that of some lay witnesses who knew her or had observed her movements. At the last trial the case had been pending several years. It was tried four times, and the experience and observations of alert counsel on both sides were rounded out and enlightened by the incidents of this long, running legal fight. Appellant transit company does not pointedly contend there was no case for the jury on the facts. Neither does it contend that Mrs. Westervelt is simulating. Absent such contentions we need not give or analyze the testimony in detail. On her part it tended to show that at the time of her injury she was about 50 years of age; that while she had been ailing at spells, after the way of women, and had once been frightened by a runaway accident some years before, and while a year or more before December 19, 1899, she had been in a hospital for some minor operation on her womb, yet that up to the time she was hurt on said date her nerves had been reasonably well strung and steady, her general health reasonably good, her ability to well do her duties as a housewife unquestioned. She enjoyed society, attended church, worked her flower garden, raised a family, and managed her household affairs, reasonably free from aches and pains and blessed with good spirits and sprightliness. There was some testimony on behalf of appellant that the picture drawn by her witnesses as to the soundness of her health before her hurts was false or too rosy, or in too free outline. They testified she seemed full of ailments and often gave voice to misery from bad health. But we will not meddle with that conflict in testimony. The genius of our law has wisely and quite relieved an appellate court from that burden at least. We neither hunger nor thirst after, nor assume, power to disturb the finding of 12 men in the box sanctioned by one on the bench on a question of fact on which the testimony ran pro and con. Theirs (not ours) was the duty to sift and winnow out the true from the false, to believe or disbelieve.

There is substantial evidence that on the evening of December 19, 1899, she was riding on one of defendant's cars. The platform and way out of this car were narrow and old-fashioned. She rang the bell to signal a stop at the intersection of Virginia and Bowen. In obedience to that signal, the car, running by the usual stopping place for eight or ten feet, stopped to let her off. The conductor was standing on the rear platform near by the exit. She went there to alight. The step down was made longer than usual by a small depression or slope in the ground, and was a long step. As she was alighting a woman undertook to enter. A bit of confusion

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arose from her offer to get up and in as Mrs. Westervelt offered to get down and out. As one of her feet was on the last step, and she was about to put her other on the ground, the car signal was given, and the car suddenly started, giving her a violent twist, as she instinctively sought to recover herself, wrenching her back. She was saved from falling prone by the woman, an acquaintance. The evidence tends to show that the wrench or strain affected her vertebral column in the small of her back and left hip. It tended to show that her health was broken by that wrench; that from a woman in fair health she became and continued a miserable one, long suffering from convulsions and pain of body and distress of mind. She became and continued an invalid, and unable to perform her household duties, and was put in the care of nurses and physicians. The muscles on the left side of her back below the belt line are weakened and diminished in size, producing an apparent curvature of the spine. Her left hip is atrophied. Her left leg is smaller and shorter than the other. She walks with a limp and carries a cane. Her sleep is broken, her spirits are broken, and she is afflicted with nervous disorders of a serious character, described in medical terminology in words of length and sound. All this train of attendant ills, permanent if her physicians are believed, was attributed by them to the wrench, shock, and sprain she received by the sudden movement of the car. There appeared physical discoloration on her back the next day after the injury and a black-and-blue spot upon her hip. The learned and wise men, defendant's experts, stoutly testified that her trouble could not be attributed to a sprain or wrench of the back, and that she was the victim of psychological phenomena, having no visible or physical basis, in the nature of hallucinations, etc., resulting in mere hysteria accentuated by worry and solicitude over her litigation. The jury had the help of most scholarly disquisitions on subtle phases of nervous disorders peculiar to women, whether resulting from fright or shock in a nerve center, through some injury, or the "change in life." They saw, listened, heard, weighed, and then decided to believe the testimony of plaintiff and her witnesses. Why not? They had their choice under the law, and took it. There is no such large verdict as would invoke anxious judicial solicitude, or cause judicial fear that the jury were hurried beyond justice and reason into an unseemly verdict through passion, prejudice, or overwrought sympathy for a suffering woman. The point is ruled against defendant.

(b) Defendant excepted to the giving of all plaintiff's instructions. That complaint is confined here to the giving of three of them, viz.:

"(1) The court instructs the jury that if they believe from the evidence that plaintiffs were husband and wife at the time of Mrs. Westervelt's alleged injury, and that plaintiffs are now husband and wife, and that on December 19, 1899, Mrs. Westervelt, one of said plaintiffs, was being carried as a passenger on a street car, and that said car was then and there being operated by the St. Louis Transit Company on Virginia avenue in the city of St. Louis, Mo., for the transportation of passengers, and that she had paid to the conductor of said car her fare as a passenger, and that thereafter, on said date, December 19, 1899, said car stopped to permit said Mrs. Westervelt to alight at or near the intersection of Virginia avenue and Bowen street, and that while plaintiff Mrs. Westervelt was attempting to alight, and was in the act of alighting from said car, then and there the agents and servants managing and controlling the movements of said car at the time caused the said car to start forward with a sudden movement, and that the said plaintiff was thereby turned, jerked about, and wrenched, and that as a direct consequence of said starting of said car said plaintiff sustained any of the injuries mentioned in the instructions Nos. 4 and 5 (touching plaintiff's damages), and that during all of said events plaintiff was exercising ordinary care on her part in the circumstances, and if you further find from the evidence that in so starting said car the agents and operatives in charge of said car neglected and failed to observe the degree of care defined in the second instruction as the care devolving upon a carrier of passengers, and that, as a direct consequence of said failure or omission to exercise such care, said plaintiff Mrs. Westervelt was injured—then your verdict should be for the plaintiffs."

"(4) The court instructs the jury that, if under the evidence and the law as declared in the other instructions of the court you decide to find a verdict in favor of plaintiffs, you should assess the damages in your verdict at such a sum as you believe from the evidence to be a reasonable compensation for any one or more of the following items of damage, if any, which you find and believe from the evidence Mrs. Westervelt had already sustained (or is reasonably certain to sustain in the future) as a direct result of the acts of defendant complained of in this action, namely: (1) For any pain of body or mind; (2) for any injury to her nervous system; (3) for any permanent lameness or crippled physical condition, if you find from the evidence that any such injury directly resulted to her. But the total award of damages in your verdict is limited to the amount claimed in the petition, namely, to $30,000.

"(5) The court further instructs the jury that if under the evidence and the law as declared in the other instructions of the court you decide to find a verdict in favor of plaintiffs, and if you further find from the evidence that Mrs. Westervelt sustained an injury to her nervous system as a direct consequence of the facts recited in the first in-

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struction of the court (if you find from the evidence the facts to be as therein recited), and that there has been thereby directly caused to Mrs. Westervelt a hysterical condition which produces sensations and impressions of pain and suffering to her, then she is entitled to recover as part of the damages for her pain of mind reasonable compensation for the kind of pain and suffering last above described (if any) which you may find she has already endured as a direct result of said injury, as well as for such pain and suffering of that nature, if any, as you may find from the evidence she is reasonably certain to endure hereafter."

One of defendant's instructions was modified and one was refused. Complaint was made of this modification and refusal, but it is abandoned.

The court gave for defendant the following instructions, pertinent to criticisms now made by it against plaintiff's instructions hereinbefore set forth, viz.:

"(2) If from all the evidence in the case the jury are unable to determine whether the injury of which plaintiff complains is due to the negligence of the servants of the defendant St. Louis Transit Company in suddenly starting its car while plaintiff was in the act of alighting therefrom or from some other cause, then plaintiff cannot recover and your verdict will be for defendant.

"(3) The jury are instructed that you cannot infer negligence against the defendant in this case from the mere fact, if you find it from the evidence to be a fact, that plaintiff was injured while attempting to alight from defendant's car. The burden is upon the plaintiff to prove to the jury by the greater weight of all the credible evidence in the case that the car on which she was riding came to a stop in order to discharge her, and that while she was in the act of alighting, but before she had reasonable opportunity to leave said car, it was suddenly started with a jerk, thereby turning plaintiff around and causing her bodily injury.

"(4) If the jury believe from the evidence that the car had passed the usual station or stopping place for the discharge of passengers and stopped at a place where there was a depression in the ground, and that, by reason of such depression, it was a long step from the platform or step of the car to the ground, and that plaintiff in attempting to leave said car at said point staggered, or was turned, and injured as the result of the condition of the ground where she attempted to alight [and without any such want of care on the part of the operative of the car (as defined in other instructions herein)] then the plaintiff cannot recover in this action, and your verdict will be for the defendants."

Note: The part in brackets was inserted by the court and is the modification complained of and which complaint is abandoned, as stated.

"(5) The jury are instructed that, before plaintiff is entitled to recover in this case, she must have proved to the satisfaction of the jury and by the greater weight of the evidence; first, that she was a passenger on one of defendant's cars, that the car stopped in obedience to her signal to permit her to alight, and that while in the act of alighting, and before she had reasonable opportunity to fully alight, the car was suddenly started with a jerk, thereby precipitating plaintiff onto the ground; and second, that the injuries for which she seeks to recover damages are the direct result of her being so thrown or precipitated from said car. And, if plaintiff has failed to make such proof to the reasonable satisfaction of the jury, then she cannot recover in this action, and your verdict will be for defendant.

"(6) If the jury find and believe from the evidence that plaintiff's alleged injuries were not due to any negligence on the part of defendant, but were the result of a mere accident or misadventure, then plaintiff cannot recover, and your verdict must be for defendant.

"(7) The jury are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony, and, in determining such credibility, weight, and value, you will take into consideration the witness' manner on the stand, his or her interest, if any, in the result of the trial, the probability or improbability of his or her statements, and if from all the facts and circumstances detailed in evidence you believe that any witness has willfully—that is, intentionally—sworn falsely to any material fact in issue, then you are at liberty to disregard the whole or any part of such witness' testimony."

(w) Counsel argue that plaintiff's instruction No. 1 was erroneous, in that it did not require the jury to find that plaintiff had not been given reasonable time in which to alight. But that is an invalid criticism because there was no evidence tending to show the time was reasonable, nor did any witnesses testify as to the time of the stop. The transaction was simple, single, prompt and under the eye of the conductor, or at least in his presence. The car was stopped to permit her to alight and started when she was in the act of alighting. The operatives of the car did not testify, and the facts in that regard are undisputed. Reasonable time under such circumstances was time enough to alight, and nothing less would do. That time, under the undisputed proof, she did not have. Furthermore, the general language of the instruction was sufficient in the first instance. It states: "And if you further find from the evidence that in so starting said car the agents and operatives in charge of said car neglected and failed to observe the degree of care defined in the second instruction as the care devolving upon a carrier of passengers," etc. The second instruction is not complained of as an

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improper definition of a carrier's care. In this condition of things, if defendant wanted more explicit instructions, it should have asked them. It did ask them, and they were allowed to it. In its third instruction the jury were told that the burden was upon plaintiff to show that while she was in the act of alighting, "but before she had reasonable opportunity to leave said car, it was suddenly started," etc. The same proposition is put to the jury in defendant's fifth instruction given. There is no substantial merit in the point.

(x) The instruction is criticised from another side, viz., that it did not put it to the jury to find that "the operatives of the car actually knew she was alighting." There might be circumstances under which that element should be injected into an instruction. If she had undertaken to get off the car at an unusual place or under unusual or confused circumstances there would be good sense in requiring the jury to find actual knowledge on the part of the conductor, but this car stopped for the specific purpose of letting her off. She arose and went to the exit. The conductor stood at the exit. He was bound to know she was in the act of alighting. That was what the stop was for, and it was his business and duty to know. The Clotworthy Case, 80 Mo. 220, is not in point. The instruction there criticised related to a steam railway train stopping according to schedule at a station. The facts are not fully disclosed. The court ruled that the defendant was not liable unless the conductor had reason to suspect that plaintiff was in the act of alighting. We think the right doctrine relating to street cars is that when the uncontradicted testimony shows the car stopped in obedience to a signal to let a passenger off, and such passenger, in the immediate presence of the conductor, is proceeding to alight, then the court may assume as a matter of law that the conductor (being presumably a man of reason) "had reason to suspect" that plaintiff is in the act of alighting. In the absence of any unreasonable delay, as here, it is his duty to see her clear of the car.

(y) It is next argued that the instruction is erroneous because there was no evidence supporting that clause of it which put it to the jury to find that the car started with a "sudden movement." We do not read the record that way. One witness testified the cars on that line always started suddenly. This car started so suddenly and with such force as to wrench plaintiff's back—so suddenly that plaintiff could not safely alight, and the passenger to get on was left standing alone in the dark. We have no call to require a great amount of suddenness upon which to predicate liability in starting a car with a woman passenger poised or resting on one foot on the step and the other in the air about to reach the ground. The point is disallowed.

(z) Instructions 4 and 5 are criticised on the ground that they allow double damages for the same pain of body or mind and the same injury, and because they allow damages for mental distress disconnected from any injury. The point need not be developed. Learned counsel inadvertently argue illy in that behalf. The instructions speak for themselves, and the criticisms spring, we think, somewhat from exuberance of versatility in overrefinement, calculated to please and divert, but not instruct or persuade, the judicial mind. We find no fault with either of them.

The premises considered, the judgment is reversed as to the United Railways Company, and is affirmed as to the St. Louis Transit Company. All concur.

On Rehearing.

PER CURIAM. We construed appellant's brief to abandon the contention that the court improperly modified its instruction No. 4. The language of the brief seemed to be directed to submitting a theory of negligence not counted on by the petition. As we did not see how the modification had that effect, we construed the point as abandoned. Counsel say we erred in that construction, and, assuming so much, how does the interpolation submit a theory of negligence not pleaded? All of the instruction but the interpolation was appellant's own language, the interpolation in substance referred the jury to the other instructions (which set forth the very acts of negligence complained of), and told the jury that if appellant was not guilty of the negligence there defined and which led up to Mrs. Westervelt's injury, but if she was injured solely by reason of the condition of the ground, then she could not recover. The modification was proper; because, if A. does a negligent act which contributed to the injury of B., A. is responsible so long as B. does no negligent act contributing to his own injury. If other things or conditions contribute to the injury, that does not relieve A. So that the mere depression in the ground was no defense unless the transit company was free from negligence contributing to the injury of the woman in alighting from the car. The interpolation gave voice to that principle. The motion for a rehearing is overruled.

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HUFFT v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 1. July 1, 1909. Rehearing Denied July 12, 1909.)

1. RAILROADS (§ 358*)—INJURIES TO PERSONS ON TRACK — FAILURE TO BLOCK SWITCH FROGS.

Under Rev. St. 1899, § 1123 (Ann. St. 1906, p. 970), requiring railroad companies to block all switch frogs and guard gates on their roads in all yards, divisional and terminal stations, and where trains are made up, a railroad company is not liable to a person crossing the company's switchyard who was injured by having his feet caught in an unblocked frog as he was but a bare licensee, and the company owes no duty to trespassers and bare licensees to block its frogs, either under the statute or common law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1236; Dec. Dig. § 358.*]

2. NEGLIGENCE (§ 2*)—NATURE AND ELEMENTS OF NEGLIGFNCE—DUTY.

There can be no negligence in the absence of any duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

3. RAILROADS (§ 357*)—INJURIES TO PERSONS ON TRACKS—NEGLIGENCE.

If a person injured on a railroad track is at a place where the company has no right to expect a clear track, the duty would be upon its servants to look out for persons upon the track, and, if a person injured might have been seen in a perilous position in time to have prevented the injury by the exercise of ordinary care upon the part of the defendant, its agents and employés, then defendant is liable, whether such employés actually saw him or not, but, if the person is where the company is entitled to expect a clear track, before liability for his injury can be shown, he must show that he was actually seen in a position of peril by defendant's servant in time to have prevented the injury by the exercise of reasonable care and caution after such perilous position was seen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1235; Dec. Dig. § 357.*]

4. TRIAL (§ 251*)—INSTRUCTIONS — APPLICABILITY TO CASE.

Instructions must not only be within the scope of the evidence, but they must be within the scope of the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

5. RAILROADS (§ 401*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—INSTRUCTIONS.

Plaintiff's foot was caught in an unblocked frog while attempting to cross defendant's yards at a point where there was no public crossing, and a train was backed down upon him by an engineer who at the same time was watching for a train which was approaching on the main track. The court instructed that the engineer did not owe plaintiff the sole duty of keeping a lookout for the stop signals when he was backing his engine and cars, and that, if the jury believed that another train was approaching his train on the same track, it was his duty to look out for it, and that if they believed that the engineer was exercising ordinary care to discharge both the said duties in backing his train, and while exercising both duties with ordinary care he stopped his engine and cars as he saw the stop signals given by the brakeman who saw plaintiff's peril, then the verdict must be for defendant. *Held*, that the instruction was erroneous as, if the place of injury was where the engineer had the right to expect a clear track, his failure to promptly heed the stop signals would not be negligence, as such signals would not contemplate plaintiff's presence at that point; plaintiff being but a bare licensee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1382; Dec. Dig. § 401.*]

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by Opal Hufft, by next friend, John Hufft, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. F. Evans and Woodruff & Mann, for appellant. Mayfield, Vernon, Curry & Mayfield, for respondent.

GRAVES, J. This is an action for personal injuries brought by Opal Hufft, a minor 15 years old at date of accident, by his next friend, John Hufft, to recover of the defendant the sum of $20,000 for injuries alleged to have been received through the negligence of the defendant. The petition is in two counts. On the night of June 23, 1905, at about 9 o'clock p. m., plaintiff, in company with another boy, was crossing the switchyards of the defendant in the city of Lebanon, Mo., and caught his right foot in the frog of a switch, and while he was so fastened a backing train, then switching in said yards, ran over plaintiff in such a way as to make it necessary to amputate his said right foot and leg. In the first count of the petition plaintiff alleges as negligence against the defendant a failure under section 1123, Rev. St. 1899 (page 970, Ann. St. 1906), to block or fill the switches, frogs, and guard rails in its said switchyard with the best known appliances to prevent the feet of persons from being caught therein. By the second count, which plaintiff denominates as his "common-law action," he charges as negligence a violation of the said section 1123 in the first count suggested. Then he further charges that after plaintiff's foot was caught and fastened in said switch, and while he was in this perilous situation, "the defendant's agents and servants there and then in charge of said engine and cars, as above described, could and should have by the exercise of reasonable care and caution on their part prevented said injury, in that they could and should have discovered this plaintiff in this perilous position in time to have avoided same, and could and should have by the exercise of reasonable care and caution stopped said engine and cars in time to have avoided injuring the plaintiff." Such failure was negligence upon the part of defendant. As a third ground of negligence, it is charged that defendant operated said engine and cars at the time—i. e., 9 o'clock p. m.—without having a flagman, brakeman, or other person on the rear end of said car which was so pushed over the foot and leg of plaintiff. It is averred in the second count

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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of the petition that at the time plaintiff's foot was caught he was traveling along said railroad in said switchyards in a path which for many years had been used as a roadway and footpath by travelers by the forbearance and tacit consent of the defendant. Defendant's answer to the first count was (1) a general denial; (2) plea of contributory negligence. The answer to the second count was of the same character. Reply in the nature of a general denial. Before going to the jury, plaintiff elected to stand on the second count of his petition, and dismissed the first count thereof. By a verdict of the jury he was awarded damages in the sum of $5,000, upon which judgment was rendered against the defendant, and from which defendant after unsuccessful motions for new trial and in arrest of judgment has appealed to this court.

The necessary facts in this case may be stated briefly as follows: Defendant's railway passes through the city of Lebanon, running east and west. One of its freight trains came in from the east and going west reached Lebanon at about 8:10 in the evening of the date of the accident. This train pulled in on what is known as the "passing track," which was the track north of the main track. The conductor thereof went to the station, and there obtained information as to what switching was to be done. It also appears that at about that time there was due a regular freight train from Springfield, Mo., going east. The defendant company maintained at Lebanon a switchyard in which there were eight or ten or more tracks. On the south side of the main track were two tracks—one known as a "tank track" and the other as a "stock track." The tank track left the main line at the switch which was farthest west in this switchyard. From this tank track the stock track branched off. Upon the evening in question the crew in charge of this special freight train, being desirous of taking into this train a certain car of beer, cut loose its engine, thus leaving its cars standing on the passing track, and ran the engine down from the passing track to the main track, and then back through the switch to the tank track, and from the tank track to the stock track to get its car. To so do it became necessary to couple onto the engine five cars, and, when this was done, the engine and cars pulled west from the stock track to the tank track, and thence to the main track and out onto the main track. Such was the action of the train in question. Now as to the action of the plaintiff. As we take it from the evidence, the plaintiff and his companion, Jesse Easley, had been on the north side of the railroad tracks, and were desirous to go to a point where they were drilling a well south of the railroad tracks and in the vicinity of the switch frog, whereat plaintiff was afterwards injured, and with this end in view crossed defendant's railroad tracks and went to said well. At the time they knew that switching was being done by this train in the yards. Plaintiff also knew that switching was continuously being done in these yards in the making up of sundry trains therein. After remaining at the well a short time, plaintiff and his companion concluded to return home. They had observed the engine and cars passing down to the west. To the west of them, as we gather from the meager testimony before us, there was a regular street crossing, but plaintiff and his companion started across the tracks from the well without going to the public crossing. Easley was somewhat in advance of plaintiff, and got across the track, when he heard a distressed call from plaintiff. He came back and discovered the plaintiff's foot was fastened in the switch frog, and, according to his testimony, he notified a brakeman. The car had stopped about 43 feet from the frog, but was moving backwards at the time. He says the brakeman immediately gave a stop signal to the engineer and ran to the plaintiff; that he undertook to get plaintiff's foot out of the frog, and, finding himself unable, he loosed plaintiff for a moment and gave a second stop signal to the engineer; that, seeing the train still approaching, the brakeman came back to plaintiff, took hold of him, and removed him from the track as far as possible, and while he was thus holding him one wheel of the rear car passed over plaintiff's leg, severing the foot. Plaintiff's individual testimony is substantially to the same effect as that of Easley. These two witnesses were both of the opinion that the car which run over the plaintiff was a loose car, and one not attached to the engine. Plaintiff says the loose car was standing on the track when the train went down, but this is shown to have been an impossibility by all the testimony in the case, and this because the switch frog whereat plaintiff was injured was the last one to the west in this switchyard, and the engine in going to the west with its cars had to pass over this switch frog. Easley was of the impression that the car was one of the number of cars drawn out by the engine from the stock track and cut off from the train after reaching the main track, thus leaving it unattached to the train. Plaintiff's witnesses show that there was a brakeman with a lantern on the rear car as the engine and cars passed down the track just before the injury.

For defendant it is shown that this train crew had been advised to keep a lookout for train No. 32, the regular freight train from the west; that the conductor had gone toward the west for the purpose of selecting the cars he had to switch, and also to keep a lookout for the east-bound train. Members of the train crew say that they saw nobody around the tracks as they moved these cars down to and upon the main track.

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One of the brakemen, Blackburn by name, got off the train to open the switch, and signaled the engineer to back. He says that he heard a boy hollow, and gave a stop signal and ran to him; that he tried to get his foot out, but could not, and gave another stop signal, and then held the boy in such position as he would be injured the least possible. The other brakeman testified that he heard Blackburn call "Stop" in a distressed tone, and that he gave the stop signal from the top of his car, and then jumped therefrom to go to Blackburn, thinking that Blackburn himself was in trouble; that he called to Blackburn to look out, whereupon Blackburn stepped to one side, and he for the first time saw the boy. By the engineer it was shown that, after he received the signal to back up and started to back his train in on the stock track, he was at the same time keeping a lookout for the approaching train from the west, and that, to protect his train from said approaching train, he lit a fusee and threw it out as a signal to train No. 32; that this took but a few seconds; and that thereafter, upon looking to the rear, he saw a violent stop signal and stopped his train within four or five feet after receivng such signal. Plaintiff claims that the train was not moving when he got his foot caught, and moved slowly at all times. All the evidence shows that it was quite dark, and that the plaintiff did not or could not see the engineer or the engineer him. It is quite clear from the evidence that the engineer at no time knew of the danger of plaintiff or anybody else until he received the stop signal. Nor did he know of plaintiff's perilous position until after the injury. Plaintiff offered several witnesses, the purpose of whose testimony was to show continuous user by pedestrians of the railroad track as a passageway or footpath. This testimony tends to show that there was considerable travel at different points for a considerable distance, but the evidence is not very definite as to any particular pathway, nor does it disclose clearly whether or not the place where plaintiff was injured was at or about the alleged pathway claimed to have been used by the public. This sufficiently states the testimony.

The court of its own motion gave on behalf of the plaintiff the following instructions:

"(1) The court instructs the jury that under the evidence and law in this case that the plaintiff cannot recover on the ground of any defect in the frog in which the plaintiff's foot was caught. If, however, you find from the evidence that after plaintiff's foot was caught in the frog the brakeman of the train in question discovered the fact that his foot was fast in the frog, and signaled the engineer to stop the train, and if, by the exercise of reasonable care, the engineer could have seen such signal and stopped the train in time to avert the injury complained of, and did not do so, then you shall find the issues for the plaintiff.

"(2) The court instructs the jury that by ordinary care as used in these instructions is meant such care as an ordinary, careful, and prudent person would exercise under the same and similar circumstances.

"(3) The court instructs the jury that if you find the issues for the plaintiff, Opal Hufft, you may, in assessing the damage, take into consideration his age at the time of his injury, if any, the extent of said injury, if any, together with the humiliation he has or may suffer by or on account of the loss of his said limb, if any, together with all the other facts and circumstances in evidence, not to exceed the sum of $20,000."

The court of its own motion gave the following instruction for the defendant. "(1) The court instructs the jury that the defendant's engineer did not owe plaintiff the sole duty of keeping a lookout for the stop signals when he was backing his engine and cars; but, if you find and believe from the evidence that another train was approaching his train on the same track, then it was also his duty to look out for it, and if you find and believe from the evidence that the engineer was exercising ordinary care to discharge both of said duties when backing his said train, and while in exercising both of said duties with ordinary care he stopped his engine and cars as he saw said stop signals given by the brakeman, or either of them, then your verdict must be for the defendant."

The court refused to give instructions Nos. 2 and 3, asked by the defendant, which read as follows:

"(2) The court instructs the jury that as to the plaintiff, Opal Hufft, the engineer in charge of defendant's engine that backed the cars over said plaintiff's foot was not required to be on the lookout for stop signals, and was not required to stop his engine until he actually saw said signals; and, if you believe and find from the evidence that as soon as said engineer saw said stop signals he did all he could to stop his engine and cars, and stopped them, your verdict must be for the defendant.

"(3) The court instructs the jury that in backing his train towards the spot where Opal Hufft was caught it was not the absolute duty of defendant's engineer to see the stop signal given by the brakemen, or either of them; that said engineer was only required to use ordinary care under all the facts and circumstances detailed in evidence to see said stop signals, and then to use such ordinary care after he saw said stop signals to stop his engine and cars. You are further instructed that, if said engineer while so backing his engine and cars on the main line saw another train approaching him on the main line, then it was his duty to look out for and to use proper care under the circumstances, and the rules of the company, to

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stop the approaching train, and, although you may believe from the evidence that said engineer did not see said stop signals when first given, yet if you believe that the only reason that he did not see them was because his attention during that time was called towards the approaching train, and that as soon as he could withdraw his attention from said approaching train, with safety to said trains, he looked and saw said stop signals and stopped his engine and cars, your verdict must be for the defendant."

The court refused to give several instructions asked for the plaintiff which are not necessary to set out herein. Points made will be noted in the course of the opinion.

1. The plaintiff attempts to plead three grounds of negligence in the second count of his petition. The first is the violation of section 1123, which statute requires the blocking of switch frogs, and this for the purpose in the language of the statute "to prevent as far as possible the feet of employés or other persons from being caught therein." This question we would not discuss here, inasmuch as the court nisi did not submit it, but for the reason that it is well to discuss it to get at the real situation of the case. Plaintiff urges that the verdict was for the right party, and this will further justify the mention of the question here. The place of the accident was not a public crossing, but in the private switchyards of defendant. Under no circumstances in evidence could plaintiff be more than a bare licensee. To trespassers and bare licensees the defendant owes no duty to block frogs, either under the statute or at common law. If there be no duty, there can be no negligence. In 23 Am. & Eng. Ency. of Law (2d Ed.) p. 733, the rule is thus stated: "A statute requiring railroad companies to block the frogs and switches in their tracks is intended for the protection of employés, and an omission of this duty is not such negligence in respect to a trespasser as to render a railroad company liable for his death from being run over by a train while his foot was held by an unblocked frog." To like effect is Elliott on Railroads, § 1258, whereat the author says: "No duty rests upon a railroad company in favor of trespassers or bare licensees, who use its track as a footway to keep its switches blocked in its private yard in order to prevent injury to such persons." In Minnesota there is a statute in all respects like ours. The relevant portion reads: "In order to guard against accidental injuries to employés and others, every railroad company shall properly adjust, fill, block, and guard all its frogs, switches and guard rails." Rev. Laws Minn. 1905, § 1993. In Akers v. Railway Co., 58 Minn. 540, 60 N. W. 669, the question before us was before that court. This statute like ours originated in the year 1887, although ours was at first invalid and only became valid by re-enactment in 1891. Well v. Railroad, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; Brannock v. Railway Co., 200 Mo., loc. cit. 567, 98 S. W. 604, 118 Am. St. Rep. 695. In the Akers Case user of the railroad track was shown, and Erling, the deceased, lost his life by reason of getting his foot caught in an unblocked frog. The court held that there could be no recovery because no duty was owing to the deceased from the company. The same ruling was made by the Texas court in Railway Co. v. Lee (Tex. Civ. App.) 34 S. W., loc. cit. 161. The court there says: "Since the evidence shows without contradiction that the switch was in the private yard of the appellant, it was under no obligation to the deceased or other persons using the track as a footway to construct the track with a view to prevent injury to them. Appellant owed this duty to his employés, but not to those using its track as a footway, although its servants and agents knew of such use." In Carr v. Mo. Pac., 195 Mo., loc. cit. 225, 92 S. W., loc. cit. 877, this court said: "The courts make a distinction between a person who comes upon a railroad's premises at the invitation of the railroad company, or for some purpose connected with its business, and a person who goes upon such premises for his own convenience or pleasure. In the one case there is a duty to protect the person thus going upon the property of another from injury while on his premises, while as to the other there is no such duty." See, also, exhaustive opinion by Elliott, J., in Railway Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155. We are of the opinion that the plaintiff in the case at bar did not fall within the classes entitled to the protection prescribed by the statute. In our judgment this statute can only be invoked by employés or such other persons who are necessarily upon the railway tracks by reason of business with the company, or at the express invitation or direction of the company. Plaintiff falls within neither of the classes, and, as to him, the defendant owed him no duty in this regard, and its failure as to him was not negligence.

2. We reach now the second ground of negligence, and this we quote in full from the petition, for herein lies several close questions in the case. The language of the petition is: "Defendant was further negligent in that after plaintiff's foot was caught and fastened, as above set forth, and while in this perilous condition and imminent danger, defendant's agents and servants then and there in charge of said engine and cars, as above described, could and should have, by the exercise of reasonable care and caution on their part, prevented said injury, in that they could and should have discovered this plaintiff in this perilous condition in time to have avoided the same and could and should have by the exercise of reasonable care and caution, stopped said engine and cars in time to avoid injuring the plain-

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tiff." It must be borne in mind that the plaintiff had previously pleaded long and continuous user of this portion of the track by pedestrians, and was therefore attempting in this charge of negligence to bring himself within the humanitarian rule. This rule is one well recognized in this state, but is one hard to outline in precise terms. We take it, however, that we have squarely fixed at least two classes of cases thereunder and the governing law therein. Hall v. Mo. Pac. Ry. Co. (not yet officially reported) 118 S. W. 56; Eppstein v. Mo. Pac. Ry. Co., 197 Mo., loc. cit. 733, 94 S. W. 967; Frye v. Railroad, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069.

(a) In the first place, if the person injured is at a place whereat the defendant is entitled to expect a clear track, and for that reason is not required to be on the lookout for persons on the track, then, before there can be liability, the plaintiff must show that the injured person was seen in a position of peril by defendant's servants in time for them to have prevented the injury by the exercise of reasonable care and caution after such perilous position was seen and known.

(b) But, if the person injured was at a place where defendant had no right to expect a clear track, and therefore there was upon its servants the incumbent duty to be on the lookout for persons upon the track, then, if the injured person might have been seen in a perilous position in time to have prevented the injury by the exercise of ordinary care and caution upon the part of defendant, its agents and employés, then the defendant is liable whether such employés actually saw him or not. And this because it was their duty to have been on the lookout for him and to have seen him. The plaintiff brings his suit on the theory that he was in a position of peril and at a place whereat the defendant was not entitled to expect a clear track by reason of long and continuous user of the track at that place by pedestrians. No other theory can be gathered from the wording of this petition. This theory was never submitted to the jury. By instruction No. 1, given by the court, the question as to whether or not the track at the point of injury had been so long and continuously used by the public as a footpath as to indicate knowledge and acquiescence therein by the railway company, is not presented at all. Under the evidence in this record, the court could not declare as a matter of law that there had been such user. We must not overlook the fact that we have distinguished even between a day and night user. Frye v. Railway Co., 200 Mo., loc. cit. 401, 98 S. W. 566, 8 L. R. A. (N. S.) 1069. It appears thus from the instructions given by the learned trial judge that he was of the impression that user of the track at the point of accident had not been sufficiently shown to entitle the plaintiff to have that question submitted to the jury. There is no plat of the locus in quo in evidence, and the description given by the witnesses as to the portion used by the public is so meager that we are unable to say whether there was sufficient evidence to submit the question or not. A more unsatisfactory record upon the question could not have been designedly prepared. If there was no sufficient user shown, then the plaintiff was a pure trespasser, and at a place where the agents in charge of defendant's train had a right to expect a clear track, and were under no obligation to be on the lookout for the plaintiff. And further, if there was no such user shown, the plaintiff has been permitted to recover upon a theory not pleaded in his petition. He does not charge that defendant's negligence consisted in knowing that he was in a perilous position and after such knowledge failed to use ordinary care to prevent his injury, but he contents himself with saying that he was at a place where the duty devolved upon the defendant to be on the lookout for him, and that, by the exercise of ordinary care and caution, they could have seen him and his peril in time to have prevented an injury. It has long been the rule of this court that the instructions should not only be within the scope of the evidence, but within the scope of the petition as well. For a collation of the authorities, see separate concurring opinion in Black v. Metropolitan Street Ry. Co. (Mo.) 117 S. W., loc. cit. 1146. This instruction No. 1 does not present the case pleaded and presented by the petition unless it be said that the trial judge meant to declare as a matter of law that the evidence disclosed such long and continuous user as indicated both knowledge of and acquiescence therein by defendant. There may be cases where courts will so declare, but this is not one. To our minds the proper rule for guidance is well outlined in Eppstein v. Railway Co., 197 Mo., loc. cit. 734, 94 S. W. 967.

3. But going a step further, and conceding that the court nisi was of opinion that there was no sufficient evidence to authorize the submission of the question to the jury, and that the court did not mean by instruction No. 1 for the plaintiff to declare as a matter of law that there had been such user, then how stand the instructions in this case? Grant it to be true that a prompt response to the stop signal would have saved the plaintiff, yet, if the plaintiff was at a place where the engineer in charge of the engine had no right to expect persons other than employés to be, his failure would not be negligence as to the plaintiff. In other words, if the engineer was at a place where he was entitled to expect a clear track, his duties as to looking out for stop signals are quite different to what they would be if he was running his train at a place where he was not entitled to expect a clear track. If the place of injury was where the engineer had the right to expect a clear track, then, as said before, his failure to immediately

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heed the same would not be negligence toward plaintiff, because such signals at such a place would not be given for his benefit. In other words, stop signals at such a place would not contemplate plaintiff's presence there, and a failure to heed might be negligence as to some parties, but not as to him. On the theory that there had been no sufficient user shown, then defendant's instruction No. 2, refused by the court, properly declares the law. So that, it matters not which notion was entertained by the trial court, there was error in instruction No. 1, for plaintiff. That is to say, if the trial court meant to declare as a matter of law that such user had been shown then there was error for that reason, and, on the other hand, if the court meant to declare that there was no user, and that the place was one where defendant was entitled to a clear track, then the instruction is erroneous, because it imposes the duty to observe the stop signals for the benefit of plaintiff, who to the engineer was an unknown and unseen trespasser. To such a person the engineer only owed the duty of obeying the stop signal after he saw it. He was not guilty of negligence toward the plaintiff until he did see it, any more than he would have been of failing to stop in that class of cases wherein he has a right to expect a clear track and fails to discover a person on the track in time to avert the injury. The evidence in this case does not show that the engineer had knowledge of plaintiff's peril. He obeyed the signal to back up, and, when he started his train backward, he had the right to expect a clear track, unless the proper user is shown. So that, in our opinion, the plaintiff in this case has no cause of action unless he can show such a user of the tracks at the point of injury as to establish both knowledge of and acquiescence in the same by defendant, and thereby impose the duty on defendant's engineer to be on the lookout not only for pedestrians, but to carefully watch for all stop signals, to the end that he might protect such expected pedestrians. We are not at all satisfied with the evidence upon the question of user. It is not definite enough in the present record to determine the portion of the track to which the user attaches, if to any. On any theory of the case we think there is error in instruction No. 1, and error in permitting a recovery upon a theory not contained in the plaintiff's petition, but we likewise feel that upon a retrial of the cause the necessary facts may be shown. The Hall, Eppstein and Frye Cases so thoroughly go over the requisites as to the quantum and character of proof required to show user that a mere reference thereto will be sufficient here.

Judgment is reversed and cause remanded. All concur, except WOODSON, J., who concurs in all that is said, except that he does not concur as to what is said as to notice to the brakeman. He holds that notice to the brakeman was notice to the company.

NEWLIN v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 1. July 1, 1909. Rehearing Denied July 12, 1909.)

1. DEATH (§ 35*)—JURISDICTION—ACTION UNDER LAWS OF OTHER STATE.

Under Rev. St. 1899, § 547 (Laws 1905, p. 95; Ann. St. 1906, p. 586), providing that an action under or by virtue of the laws of another state may be brought in the courts of this state by the person or persons entitled to the proceeds of the cause of action, and authorized to sue by the laws of the state where the cause of action accrued, an action may be brought in this state for causing the death of a railroad employé in another state, the right being one granted by comity, and is a privilege not of right, but of good will or by courtesy, and no action can be brought if there is no cause under the lex loci, and in administering the laws of the state where the accident occurred they are to be administered in a manner similar to that employed by the courts of that state.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

2. MASTER AND SERVANT (§ 112*)—LIABILITY FOR INJURIES — APPLIANCES — RAILROAD SWITCHES.

In Kansas the failure to block a railroad switch is not negligence per se, and, in order to recover because of the construction of a split switch, plaintiff must show that it was not of a proper or approved kind or was of improper or faulty construction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 221; Dec. Dig. § 112.*]

3. NEGLIGENCE (§ 119*) — ACTIONS — ISSUES AND PROOF.

Where a cause of action is based on negligence, the specification pleaded or some one out of the several specifications of negligence pleaded constituting a cause of action must be substantially proved as alleged in order to recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 203; Dec. Dig. § 119.*]

4. MASTER AND SERVANT (§ 264*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action against a railroad company for the death of a switchman, the complaint charged that the death "was directly occasioned by wrongful acts and omissions on the part of defendant, its servants, agents, and officers, in that the blocking of its tracks between the main rail and the switch rail at the place aforesaid had become rotten, defective, and worn out and had wholly disappeared, and defendant failed, omitted, and neglected to block or fill said interval and repair said defect, so that there was no protection against the entrapping of a foot in the space between said main rail and said switch rail," and that at the time defendant knew, or by the exercise of ordinary care could have known, that said blocking had rotted out and disappeared, and there was no blocking or filling there and no protection against the entrapping of a foot therein, but utterly failed, neglected, and refused to repair said blocking and permitted the same to remain in such dangerous condition. *Held*, that it was incumbent on plaintiff to prove that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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specific switch where decedent was killed had once been blocked, that the blocking was allowed to decay and disappear, and that defendant had sufficient notice of such decay and disappearance to repair the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 862; Dec. Dig. § 264.*]

5. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence in an action against a railroad company for causing the death of a switchman *held* not to sustain the allegations that the switch at which decedent was killed had been blocked, that the blocking was allowed to decay and disappear, and that defendant had sufficient notice of such decay and disappearance to repair the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 963; Dec. Dig. § 278.*]

6. EVIDENCE (§ 6*)—JUDICIAL NOTICE—PHENOMENA OF VEGETABLE LIFE—ROTTENING OF WOOD.

The court will take notice that wood rots, but it will not infer that wood used in blocking a switch on a railroad track will rot between October and the 15th of the following August.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 5; Dec. Dig. § 6.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Tinnie Newlin, for herself and as trustee for Earl and Ruby Newlin, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

W. F. Evans, Dana, Cowherd & Ingraham, and Hunt C. Moore, for appellant. John M. Cleary, for respondent.

LAMM, P. J. Leroy Newlin was the husband of Tinnie Newlin on August 15, 1905, and for eight months had been in defendant's employ as a switchman in its yards in Rosedale, Kan. Earl and Ruby are minors, and the only children born of the marriage. Leroy was killed while in the line of duty switching in said yards in trying to uncouple two moving freight cars; his foot being caught and held in an unblocked space between the main rail and a switch rail. The widow sued in Jackson county, Mo., charging negligence as follows: "The death of said Leroy Newlin was directly occasioned by wrongful acts and omissions on the part of defendant, its servants, agents, and officers, in that the blocking in its tracks between the main rail and the switch rail at the place aforesaid had become rotten, defective, and worn out, and had wholly disappeared, and defendant failed, omitted, and neglected to block or fill said interval and repair said defect so that there was no protection against the entrapping of a foot in the space between said main rail and said switch rail. That at the said time defendant knew, or by the exercise of ordinary care might have known, that said blocking or filling had decayed, rotted out, and had entirely disappeared, and that there was at said time no blocking or filling in said interval between said main rail and switch rail, and that there was no protection at said place against the entrapping of a foot therein, but utterly failed, neglected, and refused to repair or replace said blocking or filling and permitted the same to remain in said defective and dangerous condition, but said Leroy Newlin was wholly ignorant thereof."

The right of plaintiffs to recover for the wrongful death of Leroy Newlin arises on two Kansas statutes, viz., section 4871, par. 422, and section 4872, par. 422a, art. 18, c. 80, Gen. St. Kan. 1901. These are the same statutes on which plaintiffs relied in Lee v. Railroad, 195 Mo., loc. cit. 419, 92 S. W. 614, and Charlton v. Railroad, 200 Mo., loc. cit. 419, 98 S. W. 529, and are found there in full (q. v.). They will not be reproduced unless in the evolution of the case such course becomes necessary. Defendant answered in (1) a general denial; (2) a plea of contributory negligence of decedent; (3) an allegation that, if decedent was injured by the negligence of any one other than himself, it was that of persons who were fellow servants under the laws of the state of Kansas and such risk was assumed; (4) that under the laws of the state of Kansas (chapter 341, p. 566, Laws Kan. 1905) defendant was entitled to a notice in writing from plaintiff within eight months after the injury, stating the time and place thereof, and that no such notice had been given (the statute is pleaded, but need not be set forth here); (5) for a further defense defendant pleaded a general assumption of risk; and (6) for still another alleged that defendant's liability, if any, depended upon and is to be determined by the law in force at the time in Kansas, and, under such law, defendant is not liable. Plaintiffs replied as follows: "Now comes plaintiffs, and, for reply to defendant's amended answer herein, deny each and every allegation in said amended answer contained. For further reply to defendant's amended answer herein plaintiffs state that chapter 341, p. 566, Laws Kan. 1905, is not fully set forth in defendant's amended answer; that said chapter is not applicable to this cause or to the facts as set forth in the petition herein, and does not read as alleged in the amended answer; that said chapter has no force or effect in this action or in this state and is amendatory of the co-employés law of the state of Kansas, and the right of action in the plaintiffs herein is not governed by said act; that in any event the plaintiffs in this action have fully complied with said chapter, wherefore," etc. From a judgment entered on a verdict in favor of plaintiffs for $5,000, defendant appeals.

A group of questions are briefed and argued. For example: Whether the statute

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pleaded in the fourth paragraph of the answer and in the reply relates to liability under the fellow-servant law of Kansas alone, or covers the case stated in the petition for negligence of the master in not providing a reasonably safe field of operations. Again, defendant, to show nonliability, introduced sections of the Kansas Code of Civil Procedure prescribing in what counties venue should be laid, and where suits should be brought against railway corporations for personal injuries, and counsel argue these statutes are part of the substantive law, and hence this suit was brought in Missouri in violation of those statutes. Contra, plaintiff's counsel argues that those statutes have no extraterritorial force or effect, that they cover mere adjective law and relate solely to procedure in suits in the state of Kansas—not elsewhere—and, if construed otherwise, would strike down a settled legislative policy of comity. Again, certain paper rules of defendant were put in evidence, and it was shown that decedent received them on entering its employ and contracted to observe them. These rules recognize and remark upon the dangers incident to switching and especially in uncoupling cars. One of them provides that switchmen "must be particular to notice the speed of the cars while moving, and, if at a dangerous rate, no attempt must be made to couple by going between them." It then (in a somewhat double way) goes on to state that it is dangerous to uncouple or to attempt to place links, pins, or knuckles while cars are in motion, "and is positively forbidden." To avoid this rule, plaintiffs rely upon a proved custom or usage in the Rosedale yards, long in vogue, whereby when trains were proceeding at slow speed (as was this) and, when the lift rod of an automatic car coupler would not work the pin (as did this), a switchman under the eye of his foreman, and following his example, went between the cars to pull the pin by hand precisely as decedent did. Testimony tending to show such custom was objected to, error is assigned in its admission, and that question is here.

Again, errors are assigned on instructions; but until it be first determined that plaintiffs were entitled to go to the jury on the case made—that is, that they put in evidence tending to prove the specific negligence alleged—we need not consider them. Error is assigned in that behalf, in that an instruction should have been given in the nature of a demurrer directing a verdict for defendant. Defendant saved an exception to the refusal of such demurrer. To that assignment we pass in limine. There is no dispute about salient facts. The statutes of Kansas pleaded in the petition, answer, and reply were put in evidence. On the 15th day of August, 1905, Leroy Newlin, a good husband, in good health, then 28 years of age, was, with three other switchmen, under one Flanagan as foreman, switching in defendant's yards in Rosedale, a little west of the state line. During the afternoon of that day one of defendant's engines run by Dean, engineer, was pushing north five loaded freight cars, head on, for the purpose of switching three of them on another track. It was Newlin's duty to cut off the three north cars by uncoupling them from the two south ones. The switch in hand is known as "a split switch." While the train was moving at about four miles per hour in the performance of duty he signaled Dean to "kick" the cars when the switch was reached. He then seized a grab-iron on the third car from the engine, an appliance put on the end of the cars for use in uncoupling them and intended to steady and support the switchman in his work, and, moving with the train, tried to manipulate the lift rod on the north end of the second car from the engine to pull the coupling pin. The gearing of this lift rod was stiff and out of order. Failing to uncouple the car by use of that automatic appliance, and the lift rod of the third car being on the other side of the train, he went in between the cars, and in trying to pull the pin by hand his left heel caught in the split switch, and he was thrown down and so crushed by a car wheel that he presently died. For present purposes we will omit all of the evidence pertinent to assignment of errors on custom, notice, contributory negligence, assumption of risk, and to exceptions saved, and confine this statement to the testimony on the specific charge of negligence on which liability is predicated.

Plaintiffs put Flanagan on the stand. He had been foreman in the yards for the rise of four years before the accident, and testified that he at no time noticed any blocking in that switch; that to his knowledge he never observed any decayed pieces of lumber in the switch, and never looked for that; that he never observed and could not say whether any of the switch points, frogs, and yard rails of that yard were blocked. At a certain time (10 days after Newlin's death) counsel for plaintiffs was on the ground, and caused some photographs to be taken. He then met Flanagan, and the latter showed him the split switch. On being inquired of, he testified there was no blocking at all in that switch at that time to his knowledge. Shown a photograph, he testified it did not represent any blocking, and reiterated his testimony that at the time he did not see any and did not look for any. On cross-examination he reiterated his testimony in chief that, if there was any blocking in that switch, he never saw it, and had no recollection of seeing any in the yards. On redirect examination, asked this question, "Do you remember on the day I was down there and taking these photographs of my calling your attention to some pieces of decayed wood still spiked to the ties on this frog?" he re-

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plied: "Yes, sir; you called my attention to it." Further along he testified that the word "frog" does not apply to a split switch.

Mays, of the switch crew, put on by plaintiff, was asked whether he noticed any blocking in the switch out of which he took decedent's shoe. His reply was: "No; there was no blocking in that place." Asked if he noticed any blocking "around there," he answered: "Well there was some blocking around there, but I couldn't state exactly what tracks were blocked." Pressed on the blocking in the switch, he again asserted he did not observe any, and added he did not look for any. Again inquired of generally if any of the frogs, guard rails, or switches were blocked in the Frisco yards in Rosedale, he answered: "Some were." He estimated that 25 or 30 per cent. of them were blocked. It seems he had worked in those yards for 20 days, viz., between August 10 and 30, 1905. On cross-examination his knowledge was sifted on blocking in the yards, and he could name no particular switch that was blocked, although the switch in question was known as the "scale track switch," and some other switches had names. He was "pretty sure" there was a block in the switch on the other side of the scale switch and another one he thought had blocking. Asked if he did not know there was no block in the scale switch at the time and no sign of one, he replied: "Well, there is a few nails in there, but no sign of a block in there." He was then confronted with his deposition taken by plaintiffs shortly after Newlin's death, in which he testified that the switch was not blocked. He admitted so testifying, and said it was correct. In that deposition he was asked this question: "Was there any evidence of its ever having been blocked before?" He answered he did not notice it, that it could have been blocked and he not notice it, and then added: "But at the same time there was nothing there that made it look as if it ever had been blocked." He admitted saying that, but now qualified it by saying that he overlooked "this rubbish," referring to the nails, but that there was "no wood or blocking."

The stepfather of Mrs. Newlin, Mr. Melton, testified he went to the yards on the 25th of August (10 days after the accident); that Flanagan pointed out the place Newlin was killed; that he examined that switch at that time. The record shows as follows: "A. Well, there was some blocking there where they said his foot was caught. * * * Q. Just state what was in that switch when you came there? A. Well, there was some pieces of wood—splintered wood—I would think about 14 or 16 inches long, and two or more boat or bridge spikes that was holding these pieces of wood in there. Q. Did you examine the switch right across from that? A. Yes, sir. Q. The one right across to the west? A. Yes, sir; it was similar to the other. Q. What did you find there? A. I think there is a block, in there, of wood." Continuing, he testified he saw other frogs, switch rails, and guard rails blocked in the Rosedale yards, estimating the number at one-quarter of the total. On cross-examination he testified that some of the switch points in the yards were blocked—several of them. On re-examination he identified the shape and size of the blocking used in the yards as that of a piece of wood exhibited to him by Mr. Cleary while on the stand.

A switchman, Graham, testified he worked in those yards off and on in 1901–02–03–04, and from July, 1905, to September, 1905. The record shows as follows: "Q. Please state to the jury whether or not there were any switches, frogs, or guard rails in the Frisco yards at Rosedale blocked? * * * A. Yes, sir; there are. Q. Could you state how many were blocked? * * * A. Well, sir, I would say that when I first went there —I would say that they were all blocked. Q. Well, now, how many were blocked in July, 1905, when you worked there? A. Well, they had from wear and tear, and, of course, going over them, they had become worn a great deal; but I would say that over half of them were in good condition. Q. And were the switches blocked? A. Well, the switch points? Q. Yes. A. Well, sir, they have a large wooden block that goes about from where the switch point is connected to the rail—the stationary rail, I should say—between 2½ or 3 feet long that sits between the switch point and the spiked rail—the rail that is stationary." He also identified the block used as an object lesson as did Mr. Melton. On cross-examination he testified: "Q. Now, what tracks do you say that the switches have blocks in the Rosedale yards? A. Well, I would say all the tracks and every frog and guard rail and switch point on the east side of Rosedale main line No. 2 has them all blocked. Q. The east side? A. The east side of the main line No. 2. Q. And you say that was true in 1905, between July and September? A. I say it was true; yes, sir, since — Q. (interrupting): Don't get mad. You say that is true that they have them blocked? A. I say to the best of my knowledge, sir. Q. To the best of your knowledge? A. Yes, sir. Q. Now, then, did you know this switch where this accident happened? A. I do, sir. Q. Was that blocked? A. Yes, sir, they are blocked. Whether they are now or not I don't know. Q. Well, was it blocked? A. It was blocked; yes, sir. * * * Q. Well, was it blocked before that—both of them? A. Yes, sir; they were. Q. And you saw it blocked? A. Yes, sir."

A switchman, Hall, testified: He worked in the Rosedale yards in July and August, 1905. His evidence on the point in hand follows: "Q. State to the jury, Mr. Hall, whether or not the switches, frogs, and guard rails in the Frisco yard in Rosedale were

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blocked? * * * Q. During the time you worked there in July and August, 1905, and prior to August 15, 1905? * * * A. Yes, sir; there was points, guard rails, and some of them were blocked and some of them were not. Q. What per cent. of them would you say was blocked? * * * A. Oh, I should say half—any way half of them. Perhaps more than half."

Dietch, a switchman, testified: Prior to October, 1904, he had worked in the Rosedale yards two or three months. The record shows as follows: "Q. Please state whether or not any of the guard rails or frogs in that yard were blocked at that time? * * * A. Yes, sir; they were blocked. Q. Now, state how the switch points were blocked? A. Why, at the heel of the switch point there was a block similar to that block Mr. Cleary had [referring to Exhibit 14] shoved in, and it don't leave a place over an inch after the block is put in to the heel of the switch point. * * * Q. Now, Mr. Dietch, would you state about what per cent. of guard rails and frogs were blocked in that yard? A. Yes, sir. * * * Q. State, if you can, what per cent. of the guard rails, switch rails, and frogs of the Frisco yards in Rosedale were blocked prior to October, 1904? * * * A. Sixty per cent." Continuing, he said he made a special examination of the yards for a particular purpose (which he explained) on the 18th day of October, 1904. He saw at that time the switch in question, and said it was blocked with a block similar to that exhibited to him now. Being asked: "What condition was the block in at that time?" he answered: "Why, it was in good condition at that time." On cross-examination he testified that all the switches were blocked on October 18, 1904, and that he made a special study of them. Mr. Flanagan was recalled for further cross-examination by defendant's counsel, and testified, in substance, that he had no knowledge of talking to Mr. Cleary about any blocking being in the switch on August 25th, when the photographs were taken.

The foregoing is all the testimony worth while on behalf of plaintiffs as to the blocking of the identical switch and condition of it prior to August 15, 1905. Defendant put in a mass of testimony from its yardmaster, roadmaster, track walkers, and switch inspectors, all tending to show that the switch was never blocked at all. It seems defendant acquired the then Rosedale yards from the Ft. Scott & Memphis Railway Company about four or five years before the accident; that at that time they were blocked. Defendant at once adopted the policy of not blocking its yards in Kansas. It seems this was done after a federal act was passed compelling the use of automatic couplers on cars engaged in interstate commerce. When defendant took charge, it reconstructed a part of the Rosedale yards. This reconstructed work is called the "new yards" as distinguished from that part not reconstructed called the "old Memphis" or "old Scott yards." There was undisputed testimony that the switch was on what is called the "scale track" which connected with a yard track known as the "main lead," and was in the reconstructed part of the yards. There was undisputed testimony that the scale track was put in in 1902 by defendant company after it took charge.

Defendant put Mr. Bowen on the stand, who took plaintiffs' photographs on August 25, 1905. There being a question whether these photographs showed any blocking at the point of the accident, Mr. Bowen produced the negatives from which the prints were made, and testified that the eye could see whether these negatives showed any blocking. On being asked whether they showed any, he testified they did not, but that there was a piece of iron shown with three holes in it.

The roadmaster, Coughlan, having charge of the Rosedale yards for 14 years, testified he was present when the scale track switch was put in in 1902 as new work by defendant, and that there was no blocking put in it nor was there any blocking on either side, and that the discarding of blocking was a settled policy of defendant ever since it took charge; that he was familiar with the switch and saw it as much as twice a month ever since it was in, and it never had any blocking, nor was any attempt made to block it. On cross-examination he testified that in some parts of the yards blocks were put in before defendant's instructions to discontinue blocking, that this blocking was in frogs and guard rails, but not in switch points, and none of it existed in the remodeled parts of the yards where the scale track was.

Malone, track foreman for 30 years, testified he himself put in the scale track switch under the orders of Mr. Coughlan, roadmaster, in June, 1902; that he put no blocking in it; that there never had been any there to his knowledge; and that no one had authority to change the switch except by orders passed through his hands. His cross-examination elicited no contradictory testimony. On redirect examination he said that he put blocks in the old Memphis yards when defendant's predecessor had charge.

Mr. Ford, who worked in the yards for two years and a half, and who knew the scale track and the switch, being over it every day, testified that up to the 3d day of August, 1905, there was no block in it; that he was track walker, and his duty was to watch switches. On cross-examination he testified that he worked around that switch on the 3d day of August, 1905, and walked the track that morning.

Buckner, working under Malone in cleaning up the Rosedale yards for several years prior to the trial and in contact with the

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switch every day, testified there was no blocking there at any time, and that he had scratched the dirt out there many times. On cross-examination he testified he was close by the switch when Newlin was killed, and looked at it that evening and generally cleaned it out in the evening; that there was some blocking on the "main line," but none in the switch points in the yards; that there was blocking in the old work in the guard rails; that in blocking up car wheels little pieces of wood would get in the switches, and witness would clean them out. On re-examination, he explained that the blocks on the main line were not for foot guards, but were for use in the block signal system on the road, and that by "main line" was meant the main passenger track, and had no reference to the yards. Smith another track walker, testified as did Buckner. There was testimony which we do not find disputed that the split switch was the latest and most approved device known in switches.

1. On this record it is well, first, by a process of elimination, to get at the questions rightly here; second, to sharply define them.

(a) In the first place, there is no cause of action stated or attempted to be stated for negligence on the part of the engineer in running his train or neglecting signals, nor on the part of the foreman for failure to give or negligently giving signals, or in negligently giving orders, nor because the lift rod and its appurtenant gear were out of order, nor is it charged that there is any statute in Kansas requiring switch frogs, switch points, split switches, or guard rails to be blocked, nor is there any allegation or proof that this particular defendant ever adopted a policy of blocking split switches in the Rosedale yards or elsewhere on its system in Kansas. The proof is, as already said, that this particular defendant acquired yards in Rosedale blocked under the management of the then owner of the road, the Ft. Scott & Memphis Railroad Company, and on acquiring the property defendant, long before the accident, discarded that system and put in no new blocking.

(b) Again, this is an action strictly on the laws of the state of Kansas for damages for death by a wrongful act which statutes under our own liberal laws are enforceable in this state on the foot of comity. Rev. St. 1899, § 547 (Laws 1905, p. 95; Ann. St. 1906, p. 586); Lee v. Railroad, 195 Mo. 400, 92 S. W. 614; McGinnis v. Foundry Co., 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553; Root v. Railroad, 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212. In this connection we observe: Our statutes (section 547, Laws 1905, p. 95, supra), opening the doors of our courts to causes of action accruing under laws of our sister states, are legislative declarations of comity. Comity, in a legal sense, is complaisance, courtesy, the granting of a privilege not of right, but of good will. Black's L. Dict. tit. "Comity." Now, in reason, courtesy in that behalf has its useful limitations. It may not run riot; it goes circumspectly. It must be courtesy in fact as well as name. Some such limitations are: (1) No case under the lex loci, then no case under the lex fori; and the supplement, viz., a case under the lex loci then one under the lex fori (possibly barring actions on statutes strictly penal); (2) in administering the substantive laws of a sister state we administer them, not our own; and (3) we should not administer them either more or less blandly than do our sister's courts. This in order, on the one hand, to not refuse jurisdiction by a too sour or cold complexion or to repel it by corroding our sister's law; or, on the other hand, to not toll, entice, and coax jurisdiction from our sister's courts, thereby (under a mask of courtesy) draining jurisdiction away from them by an enlarged and alluring interpretation in our own.

(c) In this state we have statutes requiring railroad companies to block switches (Rev. St. 1899, §§ 1123, 1124, 1125 [Ann. St. 1906, pp. 970, 971]), thus indicating our own legislative policy. Adopted at an extra session in 1887 those statutes were held unconstitutional; the subject thereof not having been designated by the Governor in his call. Wells v. Railroad, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847. They were incorporated in the Revised Statutes of 1889, but that incorporation did not validate them. Bowen v. Railroad, 118 Mo. 541, 24 S. W. 436. Two sections of the original act were re-enacted in 1891, but one (now Rev. St. 1899, § 1125) was not. Therefore sections 1123 and 1124, requiring switches to be blocked and making it a misdemeanor to not block them, and requiring judges of courts having criminal jurisdiction to especially charge grand juries to make inquiry as to violations, are valid laws. But section 1125, providing for procedure in suits under the statute, is still ill with its natal sickness of unconstitutionality. Brannock v. Railroad, 200 Mo., loc. cit. 567, 98 S. W. 604, 118 Am. St. Rep. 695; Hufft v. Railroad (just handed down and not yet officially reported) 121 S. W. 120.

(d) But Kansas has no statute requiring the use of blocks in switches. The court so told the jury in instruction No. 21 given for defendant, reading: "The court instructs the jury that under the law of that state defendant was not required to block its switches in the Rosedale yards." In Lane v. Railroad Co., 64 Kan. 755, 68 Pac. 626, decided so late as the year 1902, it was ruled that the failure to block a railroad switch was not negligence per se in Kansas, and that, in order to recover because of the construction of a split switch, plaintiff must show it was not of a proper or approved kind or was of improper or faulty construction.

(e) Where negligence is specified in a petition as a cause of action, it has always been ruled by appellate courts in Missouri, that the pleaded specifications must be substan-

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tially proved as alleged, or that some one out of several specifications of negligence constitutive of a cause of action must be proved as alleged in order to recover. This is the general law and obtains in Kansas. Brown v. Railroad, 59 Kan. 70, 52 Pac. 65; Telle v. Railroad, 50 Kan. 455, 31 Pac. 1076.

2. Keeping in view the propositions announced, it is apparent that plaintiffs in this case pleaded and must prove, first, that the specific split switch on the scale track in the Rosedale yards in which the unfortunate Newlin's heel was caught had been once blocked; second, that the blocking was allowed to decay and become rotten and so disappear; and that, third, defendant had sufficient notice of such decay, rotten condition, and disappearance to repair. Such is the gravamen of the charge, and to that charge the proof must be responsive and sufficient. Was there any substantial evidence to sustain the charge? We think not. This, because: Admitting that, in accordance with just rules of law, plaintiffs on demurrer are entitled to have all their testimony, whether contradicted or uncontradicted, taken as essentially true, and are to have allowed to them every reasonable inference to be fairly drawn from their testimony, then they are entitled to have us assume for appellate purposes that this particular split switch was once blocked, although the great weight of the testimony is the other way, and, if the jury had found the other way, the trial court would not have been justified in disturbing their verdict on that score. But there is an entire absence of testimony proving or tending to prove that said blocking became rotten and decayed, and disappeared in that way, or that defendant had knowledge of that fact, or that such condition existed for such length of time that notice would be imputed. Plaintiffs' testimony tended to show that the block in this switch was in good condition so late as some months before, and no witness testified to any decayed or rotten condition, nor to anything from which it could be inferred that through rottenness and decay the blocking had disappeared for such a length of time before August 15, 1905, as would bring notice home to defendant so that it might be charged with negligence in not repairing. The "splinters" seen by Melton 10 days after the accident do not indicate rottenness or decay. Under such circumstances, we are compelled to hold that plaintiffs made no case on their petition. We know wood rots, but we may not infer it rots from October, 1904, to August 15, 1905. We know the block was gone; but when did it go before the accident? Plaintiffs rely on Lee v. Railroad, supra, and evidently labored to plead and try this under the doctrine of that case; but the facts essentially differ. In the Lee Case, in the absence of a statute requiring blocking of frogs and switches, we ruled, in effect, that defendant railway by adopting a system of blocking in its yards made a law unto itself and was liable to a servant who in reliance on that self-made rule was damaged by a violation of it. We stand by that ruling. But the facts of this case are not that way. Here it was shown that the predecessor of defendant adopted the blocking system, but the proof is that this defendant on taking charge at once discarded it, and there is no testimony that this particular defendant put blocks in its yards or adopted that plan on its system.

We are forced to consider only the narrow specifications of the pleading and the scanty proof which failed to sustain those allegations. The demurrer should have been given.

The judgment is reversed. All concur.

STATE v. MYERS.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. WITNESSES (§ 277*)—CROSS-EXAMINATION.

Where, on a trial for murder, defendant explained his possession of a pistol on the evening of the difficulty by stating that his wife had said to him that she thought there was somebody in the back yard, and that he had better see who it was, and that she advised him to take a pistol for his defense, there was no impropriety in permitting the prosecuting attorney, on cross-examination, to ask defendant whether he was in fact married.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923, 979–984; Dec. Dig. § 277.*]

2. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Cross-examination is not confined to a mere categorical review of the matters stated in direct examination, but is a proper effort to test the truth thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

3. HOMICIDE (§ 308*)—INSTRUCTIONS—"MURDER IN THE SECOND DEGREE"—"WILLFULLY"—"PREMEDITATEDLY"—"MALICE"—"MALICE AFORETHOUGHT."

An instruction defining "murder in the second degree" as the killing of a human being "willfully, premeditatedly and with malice aforethought," and then defining "willfully" to mean intentionally, not by accident, "premeditatedly" to mean thought of beforehand for any length of time, however short, and stating that "malice" did not mean mere hatred or dislike, but that condition of mind which prompted a person to intentionally take the life of another, and that "malice aforethought" meant malice with premeditation, properly defined "murder in the second degree."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642, 643; Dec. Dig. § 308.*

For other definitions, see Words and Phrases, vol. 5, pp. 4298–4306; vol. 8, pp. 7712–7714; vol. 5, pp. 4641, 4642; vol. 8, p. 7727; vol. 6, p. 5509; vol. 8, pp. 7468–7481, 7835, 7836.]

4. HOMICIDE (§ 309*)—INSTRUCTIONS—GRADE OF OFFENSE—MANSLAUGHTER.

On a trial for murder, defendant stated that he shot decedent to protect his own life. Defendant testified that he met decedent in a saloon, where decedent was bartender, and that decedent asked him if he had his key, and that he said that he had and would give it to dece-

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dent when he got ready, and that at that decedent said that, if defendant was looking for trouble, he would get all he wanted, and that decedent stepped forward, leaning under the bar, and told defendant to travel, applying a vile epithet, and that as he said that decedent shot him. Defendant admitted that he had previously testified that, when decedent was reaching under the bar, just before the shooting, and as he (defendant) pulled his revolver, decedent "ducked" behind the bar and was out of sight when defendant reached over and fired. *Held*, that the evidence furnished no sufficient basis for an instruction on manslaughter in the fourth degree, but made out a case either of murder in the second degree or self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649–656; Dec. Dig. § 309.*]

5. CRIMINAL LAW (§ 747*)—CONFLICTING EVIDENCE—QUESTIONS FOR JURY.

It is the exclusive province of the jury to pass upon conflicting evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. § 747.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Frank Myers was convicted of murder in the second degree, and he appeals. Affirmed.

The defendant has brought this cause to this court by appeal from a judgment of the circuit court of the city of St. Louis, convicting him of murder in the second degree.

On the 6th day of November, 1907, there was filed in the circuit court of the city of St. Louis an information for murder in the second degree, duly verified by the assistant circuit attorney, charging the defendant, Frank Myers, with having killed Garrell Burroughs. This offense was charged to have been committed on October 5, 1907. Defendant was arraigned upon the charge and entered his plea of not guilty January 13, 1908. A jury was duly impaneled and sworn, and the trial upon the evidence was then proceeded with.

The testimony developed upon the trial tends substantially to show the following state of facts: That the defendant had been for some years engaged in conducting what was known as the "Western Hotel" on Third and Carr streets, in St. Louis, Mo. That deceased, Garrell Burroughs, had roomed at defendant's hotel "off and on probably for two years," and had roomed there during the months immediately preceding his death until the evening before that event occurred. On that evening he left defendant's place; but the evidence gives no reason for his removal. Burroughs had been a waiter in a restaurant at 1111 North Third street in St. Louis until about a month before the shooting. During that month he had been working as barkeeper in the saloon conducted by Louis Fisher at the corner of Broadway and Washington, in St. Louis, and was on duty at that place on the night of Saturday, October 5, 1907. According to the evidence there had been no previous ill feeling between deceased and defendant, unless it is to be inferred from the fact that defendant had retained the key of Burroughs' trunk when the latter removed from the Western Hotel, and the fact that the conversation immediately preceding the firing of the fatal shot is a little hard to explain, unless on the theory of a previous misunderstanding. At the time of the shooting, there was in the saloon Myers, the defendant, Burroughs, the deceased, Clyde Spear, another barkeeper, P. J. Tillman, George King, Michael Brennan, William Knox, and two unidentified men. The two last and King did not testify. At about 7:30 p. m. on the day mentioned, Tillman, Brennan, and King were in the saloon where the killing took place, and were engaged in disposing of their second round of drinks, when the defendant, Myers, entered the place. The latter invited the three to drink with him. Spear was serving the drinks, and Burroughs, the deceased, until this juncture, had been seated behind and near the north end of the bar. Knox entered the saloon about this time by the side door, and defendant amended his invitation to drink so as to include Knox. At this time, or a moment previous, according to witness Tillman's version, deceased approached the center of the bar where defendant was standing, the bar being between the two, and said to defendant, "Have you got my keys?" Defendant answered, "Yes," and deceased said, "Let me have them," to which defendant rejoined, "If you want them, come and get them." Burroughs then said something in an angry, mumbling tone, which witness did not understand, threw off his apron, and reached down under the bar, leaning over or stooping so that his whole body was below the level of the bar rail. Defendant instantly drew his pistol, stepped up to the bar, reached over it, and fired one shot downward. Spear's account of the tragedy was: That Myers and Burroughs were talking in a low voice, and the only portion of the conversation he heard was Myer's remark that "the only way you can get it is to take it"; that he, the witness, turned to draw some beer and then heard the shot. The tone used in the conversation did not seem angry, according to this witness. Michael Brennan's version is that Burroughs said to defendant, "You have got my key." "So Myers said he had it, or something to that effect, and I turned around, speaking to my friend. Q. What did you say Myers said? A. Myers said he had the key. So Garrell Burroughs asked him for it, and he said he wouldn't give it to him. Q. He wouldn't? A. Yes, sir; that is all I heard. I turned around to speak to my friend, and so they had some argument between the two of them. There was some altercation between them, which made hot words. Whatever they were, I couldn't understand, and Garrell Burroughs, the deceas-

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ed, said something in a threatening attitude and went down, apparently reaching for something behind the bar, and just as I turned around Frank Myers pulled his revolver out of his pocket and shot the man behind the bar." In explaining Burroughs' "threatening attitude," the witness declared that "he [Burroughs] appeared 'sore,'" and "didn't have a pleasing face on him." This witness also testified that, just after Burroughs "went under the bar," defendant stepped up, leaned over the bar, and shot him.

The deceased had no weapon on his person when he was killed, and neither he nor defendant made any other demonstration than detailed above. Only one shot was fired, and it proved almost instantly fatal; Burroughs never having regained consciousness, dying in the hallway to which he had been removed immediately after the shooting. The post mortem developed that the bullet entered the body of deceased at the lower angle of the right shoulder blade, pierced both lungs and the aorta, and lodged on the left side of the body between the fifth and sixth ribs, ranging slightly upward and forward. The deceased was a young man about 23 or 24 years old. After shooting Burroughs, defendant left the saloon and returned to the Western Hotel, where he was arrested soon thereafter. The defendant had concealed the pistol with which Burroughs was shot under some steps in the alley back of the hotel. On being asked by the officers where the weapon was, he accompanied them to the alley, secured and delivered it to them. Defendant's counsel was at some pains to lay a foundation for showing discrepancies between the testimony of witness Tillman on the trial in the circuit court, and that given by him in the court of general sessions on the preliminary; but the proof of the testimony given by this witness in the last-mentioned proceeding was not made.

On behalf of defendant, William Knox testified: That he had resided at Myer's hotel nearly three years, and was residing there at the time of the trial; that he and Burroughs had been roommates; that he was in the saloon at Broadway and Wash streets at the time Burroughs was shot on the evening of Saturday, October 5, 1907; that on entering he said to defendant, who was at the bar with others, "Myers, who is doing this?" The witness then gave this description of the occurrence: "And he asked me what I was going to have, I said, 'Beer,' and I walked towards the bar. As I did, Burroughs came forward where the cash register was, towards Myers, and he said: 'God damn you, have you got anything coming to you? If you came looking for trouble, you are going to get what is coming to you.' And then I turned around. The other man put the beer on the bar, and as I turned my shoulder that way (indicating) to lift the beer with my left hand, Burroughs had turned the other way. He half turned, and he said to Myers, he said, 'God damn you, you are going to get what is coming to you,' and, as I turned to take my beer, the shot was fired; but I could see it just as it passed my shoulder. I saw the glance of the gun as he stepped back. Mr. Myers stepped back from the bar, and I stepped on the rail and looked over, and he was lying on his face then." On cross-examination Knox said that he could not see Myers when the shot was fired, but saw Burroughs turn, and then the shot "passed his left shoulder." He heard Burroughs say nothing, except as detailed on his direct examination. Knox admitted that at the coroner's inquest he testified that what he heard Burroughs say to Myers was, "If you come here looking for anything, you can get it," but declared he then omitted the oaths out of regard for the mother, wife, and sister of deceased.

Mrs. John Hill, for defendant, testified: That she lived at the defendant's hotel; that the state's witness Tillman was also living there in October, 1907; and that on the night Burroughs was killed she met Tillman on the stairway in the hotel, and he told her that during the altercation, which resulted in Burroughs' death, the latter said to defendant, "If you are looking for trouble, you can get all you want of it, you son of a bitch," and that deceased then stopped and put his hands under the bar and said, "Travel, you son of a bitch, travel!" and then Myers shot.

Lottie Noels, defendant's sister, testified that, on the morning of the coroner's inquest held to investigate the killing of Burroughs, state's witness Tillman had told her, in the presence of Mr. Morris, the then attorney of defendant, that, immediately before he was shot, Burroughs had said to defendant Myers, "God damn you, you are here looking for trouble, and you will get it." And that Burroughs then stooped or reached under the bar, saying, "Now, travel, you son of a bitch, travel!" and that then defendant fired.

John Hill testified: That he lived at defendant's hotel and was living there on October 5, 1907, the date of the tragedy; that about 7 p. m. on that day defendant's wife came to defendant's room and told him she had been frightened by some one "walking around there," and asked defendant to go out and look into the matter; and that she suggested he would better take his pistol, which defendant then took from the mantel and went upon his mission of investigation.

Defendant testified in his own behalf to the effect: That for over three years he had been conducting the Western Hotel, 1035 North Third street; that deceased had lived at the hotel probably two years prior to his death, but had left the place the day before his death; that deceased carried a pistol habitually; and that he (defendant) had often seen it, and Burroughs had on three occasions left it with him for safe-keeping. He explained his taking his pistol to Fisher's

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saloon on the night of the tragedy there by saying that he put it in his pocket at his wife's instance to investigate the doings of some prowler who had frightened her, and on his return from that errand had not thought of the pistol further, but had left it remaining in his pocket. He declared he had no intention of visiting the Fisher saloon when he left the house that evening, but that after he was out on the street it occurred to him that Speer, one of the bartenders at the saloon, owed him a small bill, and he then went down to collect it. Defendant's account of the occurrences immediately preceding the firing of the fatal shot is in these words: "I walked in the saloon, walked up to the center of the bar, and four men were in there that I knew, or three in there that I knew, and two that I didn't know, and I said, 'Boys, what are you going to have?' And they ordered their drinks, and I paid for the three of them, and Mr. Speer asked me what he owed me, and I told him, and he settled what he owed me. And Knox came in the side door, and he said, 'Who is doing this?' and I said, 'I am, what are you going to have?' He said, 'Give me a glass of beer.' And then Burroughs came walking down from the north end of the counter where he had been sitting. He got up and walked down, and he said, 'Have you got that key of mine with you?' and I said, 'Yes,' and he said, 'Well, I want it,' and I said, 'I will give it to you when I get ready.' At that he stepped back, jerked off his apron, threw it to one side, and he said, 'If that is what you came over here for, looking for trouble, you will get all you want of it,' and he stepped forward, leaned under the bar, and he said, 'Now, travel, you son of a bitch, travel!' and as he said that I pulled my revolver and fired at him." Defendant declared: That when he fired he did so because he believed he was in danger of great personal harm at the hands of Burroughs; that he had no intention of having a difficulty with deceased, and made no demonstration toward him until he "saw him start to reach under the bar, and when he did that I thought he was going after something, and I reached with my revolver and fired." On cross-examination defendant said: That he and the deceased had never had any previous difficulty, but were friends; that the only trouble between himself and deceased was that which occurred in the saloon at the time Burroughs was killed. Defendant admitted that in the court of general sessions he had testified, in substance, that at the time defendant was reaching under the bar just before the shooting, deceased was stooping, and as he (defendant) pulled his revolver deceased suddenly "went down, ducked out of sight behind the bar," and was out of sight, down behind the bar, when defendant reached over and fired downward, just as the deceased disappeared.

Defendant was corroborated as to the habit of deceased in carrying a pistol by both the witnesses for the state and the defense; but the evidence shows deceased had no weapon the night he was killed, either on his person or elsewhere in the saloon. Defendant offered several witnesses who gave testimony tending to establish his good reputation for peace and quiet, both in the neighborhood of the Western Hotel, and also in the district in the vicinity of Fifteenth street and Washington avenue.

At the close of the testimony, the court fully instructed the jury upon every subject connected with the commission of this offense to which the testimony had any application. We deem it unnecessary to reproduce the instructions given and those refused, but will give them such attention in the course of the opinion as their importance may require. The cause was submitted to the jury upon the testimony as indicated and the instructions of the court, and they returned a verdict finding the defendant guilty of murder in the second degree as charged in the information and assessed his punishment at imprisonment in the penitentiary for a term of 10 years. Timely motions for new trial and in arrest of judgment were duly filed and by the court taken up and overruled. Sentence and judgment then followed in accordance with the verdict returned, and from this judgment defendant prosecuted his appeal to this court, and the record is now before us for consideration.

Frank H. Farris, for appellant. Elliott W. Major, Atty. Gen., and James T. Blair, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). The assignment of errors, as disclosed by the record now before us, may thus be briefly stated: First, that the court erroneously permitted the prosecuting attorney to cross-examine the defendant upon matters to which he made no reference in his direct examination, and upon subjects and in a manner prejudicial to defendant's rights. Second, that the court erroneously defined in its instructions "murder in the second degree" and the elements thereof. Third, that the instructions given to the jury by the court upon self-defense did not fully cover all the elements of that subject. Fourth, that the court committed error in failing to give proper instructions upon all the law applicable to the case as made out by the evidence. Fifth, that the court erroneously and improperly refused to give the instructions as requested by the defendant. We will give the complaints urged by learned counsel for appellant such consideration as the importance of the propositions requires.

1. Directing our attention to the cross-examination of the defendant, of which counsel for appellant complains, it is sufficient to say that we have read in detail the disclosures of the record as applicable to that prop-

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osition. We find that the defendant in his examination in chief referred to his wife, and urged as a reason why he carried the pistol on the evening of the fatal difficulty that his wife had said to him that she thought there was somebody out in the back yard where the hydrant is, and that he had better go out there and see who it was, and that she advised him to take something with him for his defense, and, in compliance with the suggestions by his wife, he walked over to the mantelpiece, where there were two revolvers lying, and put one in his side coat pocket and went out there. This clearly was at least a suggestion on the part of the defendant that he had this pistol at the instance of his wife and for the protection of his home against those who were improperly prowling about the premises. The cross-examination of the defendant was a mere inquiry, having referred to the fact that his wife suggested that he take something for his defense, as to whether or not he was in fact married. We are of the opinion that, the defendant having in the manner as indicated referred to his wife, there was no impropriety on the part of the prosecuting attorney in cross-examining him on a matter to which he had directly referred in his examination in chief, for the purpose of ascertaining whether in fact he was married. It has been repeatedly and uniformly held by this court that cross-examination is not confined to a mere categorical review of the matters stated in the direct examination. It is simply a proper effort to test the truth of the evidence given in such direct examination. State v. Miller, 156 Mo., loc. cit. 85, 86, 56 S. W. 907; State v. Fisher, 162 Mo., loc. cit. 173, 62 S. W. 690. This court, in discussing the statute which provides for the cross-examination of a defendant as to any matter referred to in his examination in chief, very properly said: "When the statute says 'a defendant may be cross-examined as to any matter referred to in his examination in chief and may be contradicted and impeached as any other witness in the case,' it does not mean that the defendant can take the stand, and, in answer to one or two well-prepared interrogatories, sweep away the whole structure of the state's case, and then remain immune from a cross-examination on the issue thus tendered. Cross-examination from time immemorial has been the great test of credibility of any witness." State v. Miller, 190 Mo., loc. cit. 463, 89 S. W. 377; State v. McKinzie, 102 Mo., loc. cit. 632, 15 S. W. 149; State v. Barrington, 198 Mo., loc. cit. 81, 95 S. W. 235; State v. Cunningham, 154 Mo., loc. cit. 174, 55 S. W. 282. After a most careful consideration of the disclosures of the record as applicable to this cross-examination, we have reached the conclusion that it did not constitute any error which would authorize this court to reverse the judgment, and upon the contention of appellant upon this proposition the ruling must be adverse to the insistence of appellant.

2. It is insisted by appellant in his assignment of errors that the court in its instructions to the jury improperly defined "murder in the second degree." We have most carefully analyzed instruction No. 1, which defines this offense. It is as follows: "First. Murder in the second degree is the killing of a human being willfully, premeditatedly, and with malice aforethought. 'Willfully,' as used in these instructions, means intentionally; not by accident. 'Premeditatedly' means thought of beforehand for any length of time, however short. 'Malice,' in its legal sense, and as used in these instructions, does not mean mere spite, ill will, hatred, or dislike, as it is ordinarily understood; but it means that condition of the mind which prompts a person to intentionally take the life of another without just cause, justification, or excuse. 'Malice aforethought' means malice with premeditation. The court instructs the jury that if, bearing in mind these definitions, you believe and find from the evidence that the defendant, Frank Myers, at the city of St. Louis and state of Missouri, did on or about the 5th day of October, 1907, or at any time before the finding of the information herein, willfully, premeditatedly, and with malice aforethought, shoot and mortally wound, with a pistol loaded with gunpowder and leaden ball, one Garrell Burroughs, and further find from the evidence that within a year and a day after such shooting and wounding, to wit, on or about the 5th day of October, 1907, the said Garrell Burroughs died from the effects of such shooting and wounding done by the defendant aforesaid, you will find the defendant guilty of murder in the second degree, and unless you so find the facts you will acquit him of murder in the second degree. If you find the defendant guilty of murder in the second degree, you will assess his punishment at imprisonment in the penitentiary for such length of time as you deem proper, not less than 10 years. Second. The court further instructs you that if you find from the evidence that the defendant, Frank Myers, intentionally killed the deceased, Garrell Burroughs, by shooting him and wounding him with a pistol loaded as aforesaid in the manner set forth in the foregoing instructions, and that such pistol, loaded as aforesaid, was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to meet or repel that presumption, unless such presumption is met or repelled by the evidence introduced on behalf of the state."

We are unable to agree with learned counsel for appellant that there was any error in this instruction. It is one that has repeatedly met the approval of this court. It informed the jury that "murder in the second degree" is the killing of a human being will-

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fully, premeditatedly, and with malice aforethought. Then follows the definition of the terms "willfully," "premeditatedly," "malice," and "malice aforethought" in a manner that has repeatedly met the approval of this court. There are numerous cases by this court wherein it was held that the definitions of those terms, as indicated, were entirely proper. The definition of "murder in the second degree," as embraced in the instruction, the correctness of which is challenged, finds full support in the repeated and uniform decisions of this court. State v. Curtis, 70 Mo., loc. cit. 600; State v. Talbot, 73 Mo., loc. cit. 350; State v. Fitzgerald, 130 Mo., loc. cit. 420, 32 S. W. 1113. Those cases clearly point out the distinction between murder in the first and second degrees, and the instruction as given upon the offense of murder in the second degree is in entire harmony with the rule announced in those cases.

3. This leads us to the consideration of the earnest insistence on the part of appellant that the court failed in its instructions to cover all the subjects to which the testimony was applicable. This contention is principally directed to the failure of the court to give an instruction upon manslaughter in the fourth degree. The consideration of this proposition renders it essential to briefly review the testimony developed at the trial.

We have carefully read in detail all the evidence as disclosed by the record in this cause, and in our opinion, giving to the testimony of the defendant, as well as any other witnesses he may have introduced, full credence, it furnishes no sufficient basis for an instruction on manslaughter in the fourth degree. The defendant makes no pretense that he was laboring under any excitement or passion at the time he shot the deceased, but expressly states that he shot him in order to protect his own life. There is no evidence of any personal violence inflicted by the deceased upon the defendant before the fatal shot was fired. The defendant, in relating this occurrence, substantially stated that he met the deceased in the saloon, and that he got up and walked down, and he said, " 'Have you got that key of mine with you?' and I said, 'Yes,' and he said, 'Well, I want it,' and I said, 'I will give it to you when I get ready.' At that he stepped back, jerked off his apron, threw it to one side, and he said, 'If that is what you came over here for, looking for trouble, you will get all you want of it.' And he stepped forward, leaned under the bar, and he said, 'Now travel, you son of a bitch, travel!' and as he said that I pulled my revolver and fired at him." Defendant admitted that he had previously testified, in substance, that, at the time the deceased was reaching under the bar just before the shooting, deceased was stooping, and, as he (defendant) pulled his revolver, deceased suddenly "went down, ducked out of sight behind the bar," and was out of sight down behind the bar when defendant reached over and fired downward, just as the deceased disappeared. We repeat, giving to the defendant's testimony its full weight, it simply makes out a case of self-defense or murder in the second degree.

In the comparatively recent case of State v. Goldsby, 215 Mo. 48, 114 S. W. 500, wherein the facts in some of the essential features were similar to the facts in the case at bar, it was held that the court would not have been warranted in giving an instruction for manslaughter in the fourth degree. So it may be said, in the case at bar, that the facts as developed upon the trial did not authorize the court to give an instruction upon that grade of the offense.

In State v. McKenzie, 177 Mo. 699, 76 S. W. 1015, this court pointed out the distinction between "murder in the first and murder in the second degrees" and "manslaughter in the fourth degree," and then expressly approved the definition of "manslaughter in the fourth degree" as announced in State v. Hermann, 117 Mo. 637, 23 S. W. 1073, where it was said: " 'Manslaughter in the fourth degree,' under the statutes of this state, has often been defined by this court to be the intentional killing of a human being in a heat of passion on a reasonable provocation without malice, and without premeditation, and under circumstances that will not render the killing justifiable or excusable homicide."

In State v. Bulling, 105 Mo., loc. cit. 225, 15 S. W. 373, 16 S. W. 830, it was expressly ruled by this court that the heat of passion contemplated by the statute, which would reduce a killing from murder in the first or second degree to manslaughter in the fourth degree, "is that heat of passion which is produced by a 'lawful provocation' as that term was understood at common law," and it was held in that case that the terms "legal," "lawful," "adequate," and "reasonable," when used as adjectives qualifying "provocation," are synonymous terms, and then announced the general rule that, with very few exceptions, it takes an assault or personal violence to constitute the provocation as contemplated by the use of those terms.

In State v. Starr, 38 Mo. 277, it was ruled by this court that: "Where there is lawful provocation, the law, out of indulgence to human frailty, will reduce the killing from the crime of murder to manslaughter; but neither words of reproach, howsoever grievous, nor indecent provoking actions or gestures, however much calculated to excite indignation or arouse the passions, are sufficient to free the party killing from the guilt of murder. To have the effect to reduce the guilt of killing to the lower grade, the provocation must consist of personal violence. * * * There must be an assault upon the person, as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway, * * * or other direct and

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actual battery." See, also, State v. Branstetter, 65 Mo. 149.

The same rule as announced in the case last cited was strictly adhered to in the comparatively recent case of State v. Gieseke, 209 Mo. 331, 108 S. W. 525. While the court in that case criticised an instruction given respecting the subject of manslaughter in the fourth degree, for the use of the terms "just cause," instead of "reasonable" or "lawful," yet it approved the direction to the jury that no words of abuse or vile names were sufficient to reduce the crime of killing to a lower degree than murder, and, in order to reduce the crime of killing to manslaughter, the provocation must have consisted of personal violence to the defendant, or the danger of such personal violence must have been so apparent and imminent, or must have appeared to the defendant to be apparent and imminent at the time of the killing, before they could find him guilty of manslaughter.

The testimony in this case does not indicate that the deceased had any weapon in his hand at the time he and the defendant first began the conversation about the key; but, according to the defendant's own testimony, the deceased simply threw off his apron and then "ducked" down beyond the bar, using the vile epithet, "You damn son of a bitch," whereupon the defendant reached over the bar and fired the fatal shot, and says in his testimony expressly that he fired at him simply to preserve his own life.

In State v. Gieseke, supra, the case of State v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, which is chiefly relied upon by appellant in this cause, was distinguished, and it was expressly stated in the Gieseke Case that: "What was said in State v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, applied to the peculiar facts of that case, as since explained by this court, and is in no manner to be construed as overruling the long and unbroken line of authority in this state to the effect that mere words of reproach, however degrading, will not of themselves constitute such a lawful provocation as to reduce a killing from murder to manslaughter."

In State v. Gartrell, 171 Mo. 489, 71 S. W. 1045, according to the testimony of the defendant, Gartrell, the deceased, at the time he was killed, was exhibiting a wrench, and, in addition thereto, applied to the defendant opprobrious words and epithets. It was said in that case that: "If the jury found the defendant had reasonable cause to apprehend the deceased was about to kill him, or do him great bodily harm, and the danger was about to fall, he had the right to kill him, and was guilty of no crime, not even manslaughter." In that case State v. Garrison, 147 Mo. 548, 49 S. W. 508, and State v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, heretofore referred to, were distinguished. It was said that the facts of the Gartrell Case distinguish it from State v. Garrison, in that, in that case the threat was accompanied by the throwing of a hatchet at defendant by deceased, which constitutes an actual assault. In distinguishing the Gartrell Case from the case of State v. Grugin, supra, it was said: "While there is language in State v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, which, in the absence of an understanding of all the facts, tends to support the contention of defendant that words of opprobrium alone are sufficient provocation, it is obvious that the learned judge who wrote that opinion, confined his remarks to the exceptional facts of that case. He nowhere expressed any intention of overruling the long line of cases in this state to the contrary. He was dealing with the provocation suffered by a father over the outrage of his daughter, and the heartless and insolent confession, in effect, by the deceased, coupled with a threatened assault." The final conclusion then was announced in the Gartrell Case that: "While doubtless there are many cases in which the facts justify not only an instruction on self-defense, but one for manslaughter in the fourth degree, we do not think this case required an instruction on any grade lower than murder in the second degree."

In State v. Gordon, 191 Mo., loc. cit. 125, 89 S. W. 1025, 1028, 109 Am. St. Rep. 790, the rule as applicable to this subject was thus announced: "At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder; nor were contemptuous or insulting actions or gestures an assault upon the person; nor was any trespassing against lands or goods to have the effect to reduce the guilt of killing to a grade of manslaughter. The provocation must consist of personal violence. East's Pleas of the Crown, 233; 4 Blackstone, Com. 201; State v. Wieners, 66 Mo. 13. And the common-law rule in this respect is firmly established in this state by a long line of decisions. State v. Starr, 38 Mo. 271; State v. Branstetter, 65 Mo. 149; State v. Hill, 69 Mo. 451; State v. Elliott, 98 Mo. 150, 11 S. W. 566; State v. Gartrell, 171 Mo. 516, 519, 71 S. W. 1045."

We have thus given expression to our views upon this proposition, and, if the long and unbroken line of cases which announce the rule respecting the nature and character of the provocation essential to reduce the killing from murder to manslaughter are to be longer followed, we see no escape from the conclusion that this case was not one which warranted the court in giving an instruction for manslaughter in the fourth degree. Repeating partly some of the evidence upon which it is sought to base an instruction for manslaughter, it will be observed that the deceased was ex-

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hibiting no weapon at the time the conversation began about the key, and the defendant had made no demonstration toward the deceased until he saw him start to reach under the bar, and, when he did that, presumably the defendant must have thought he was going after something, and reached with his revolver and fired. According to the defendant's testimony, the deceased was "leaning" or "ducking" or "stooping," and, "as he started to reach under the counter, I drew my revolver and he immediately seemed to duck." It appears from the testimony that the defendant and the deceased were on opposite sides of the bar. As deceased ducked defendant reached over the bar and fired; just fired down where he thought he might be; fired just as he disappeared. Deceased was unarmed, had on no coat, only his bartender's jacket. Under this state of facts, in view of the uniform expressions of this court as to the rules of law applicable to such state of facts, we are unable to reach any other conclusion than that the court's action in refusing the instruction for manslaughter in the fourth degree was entirely proper.

4. This brings us to the consideration of the insistence on the part of learned counsel for appellant that the action of the court in refusing the instructions requested by the defendant constitute error. We shall not undertake to reproduce the instructions requested. It is sufficient to say upon that proposition that we have carefully analyzed in detail the instructions requested and refused. Instruction No. 1 embraced an instruction for manslaughter in the fourth degree, as well as No. 3. That question has been fully discussed in the consideration of the third proposition. Instruction No. 2 is a brief instruction upon justifiable homicide, which is fully covered by the instructions given by the court. Nos. 4 and 5 are both instructions on manslaughter in the fourth degree. No. 6 is an instruction covering the subject of the weight to be attached to the testimony of witnesses. That subject is fully covered by the instructions of the court. Instructions Nos. 7 and 8 are directed to the subject of justifiable homicide. As before stated, the subject was fully treated of in the instructions as given by the court. No. 9 is another instruction embracing the subject of manslaughter in the fourth degree. As before stated, that subject has been fully treated of in the consideration of the third proposition as stated in the opinion. Hence there is no necessity for repeating what was said concerning that subject.

5. We have herein given expression to our views upon the legal propositions as disclosed by the record. The testimony as developed upon the trial was somewhat in conflict. It was the exclusive province of the jury to pass upon the evidence. The facts as testified to both by the witnesses for the state and the defendant presented a case either of murder in the second degree or justifiable homicide on the ground of necessary self-defense. The court submitted the issue as presented fairly to the jury, and fully covered every subject to which the testimony was applicable. In fact, the instructions as given presented the case in a most favorable view for the defendant. The jury was required to find every essential element necessary to constitute the offense of which the defendant was convicted, and the law upon the subject of self-defense was fully and extremely favorably declared for the defendant.

Entertaining the views as herein indicated, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

GILKESON v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. DEATH (§ 31*)—ACTION—RIGHT TO SUE.

At common law no action lies for an injury resulting in death, and an administrator is not entitled to sue therefor under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), giving a right of action to the husband or wife of the deceased or his minor child or children.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38; Dec. Dig. § 31.*]

2. DEATH (§ 29*)—SURVIVAL OF CAUSE OF ACTION.

Rev. St. 1899, § 96 (Ann. St. 1906, p. 369), provides that for all wrongs done to property, rights, or interests of another for which an action might be maintained against the wrongdoer such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, the same in all respects as actions founded on contract, and section 97 (Ann. St. 1906, p. 370) provides that the preceding section shall not extend to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. *Held*, that these sections were intended to provide for the survival by and against personal representatives of actions for wrongs to property rights and interests only, and not for actions based on the death of a human being, and that the right of a minor to care, support, and maintenance was not a property right, and the minor was not deprived of such a right, but of a personal right by the wrongful killing of the parent, the cause of action created by sections 2864 and 2865 (Ann. St. 1906, pp. 1637, 1644), and, where the minor dies before the damages are collected, his cause of action does not survive under sections 96 and 97 in favor of his executor or administrator.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 33; Dec. Dig. § 29.*]

3. CONSTITUTIONAL LAW (§ 38*)—CONSTRUCTION IN CONFLICT WITH CONSTITUTION.

The construction of a state statute which brings it in conflict with the Constitution will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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nullify it as effectually as if it had in the first instance been enacted in conflict therewith.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*]

4. STATUTES (§ 225*) — CONSTRUCTION — CONFLICTING PROVISIONS.

Where there are two statutes, and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and they thus conflict with each other, the former act must be taken as constituting an exception, if not a repeal of the latter or general statute; and especially is this true where the special statute was enacted subsequent to the passage of the general statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.*]

Appeal from Circuit Court, Johnson County; N. M. Bradley, Judge.

Action by George G. Gilkeson, administrator of Clifford Ragel, deceased, against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This suit was brought in the circuit court of Johnson county by the administrator of the estates of Joseph A. and Clifford Ragel, deceased, against the defendant to recover the sum of $10,000 for each for the wrongful killing of their father and mother, Philip and Rose E. Ragel, on October 10, 1904, by a negligent head-end collision of two of its passenger trains near Warrensburg, Mo. The petition was in three counts, and in the court below the plaintiff dismissed the case as to each count as administrator of the estate of Joseph A. Ragel, and elected to proceed upon the first and second counts as administrator of the estate of Clifford Ragel, and also dismissed the cause stated in the third count of the petition.

The first count of the petition states: That said Gilkeson is the duly qualified administrator of the estate of Clifford Ragel, an unmarried minor, of the age of 14 years. That he was a child of Philip and Rose Emma Ragel, deceased, and that he and his brother Joseph A. Ragel, deceased, an unmarried brother, of the age of 20 years, were the only minor children and heirs at law of said parents. That said Philip and Rose Emma Ragel were both killed on the 10th day of October, 1904, on the same day and at the same time in a collision without having sued defendant or any one for damages for his death, and that since her death her personal representative has not brought suit for damages for his death against any one. That defendant was a corporation duly organized under the laws of Missouri, and was operating a line of railway through the counties of Cowley, Chautauqua, Montgomery, Labette, and other counties in the state of Kansas to and through Johnson county to St. Louis, Mo., and was at said dates a common carrier of passengers and freight. That on the ——— day of October, 1904, said Philip Ragel, the father of said minors, purchased from defendant at Edna, Kan., a ticket which entitled him to ride on defendant's train from there to St. Louis, Mo., as a passenger. That he paid to said defendant the regular passenger fare from Edna to St. Louis, Mo., and took passage on defendant's train as such passenger on said date to St. Louis, Mo. That while he was a passenger on defendant's train aforesaid, on October 10, 1904, about 1½ miles east of Warrensburg, in Johnson county, Mo., through the negligence of defendant the train on which said Philip Ragel was riding collided with another train on said road, traveling in the opposite direction, thereby wrecking said Ragel's train and killing him. That his said death was caused solely by the negligence of defendant as aforesaid, to the damage of said Clifford Ragel in the sum of $5,000. That said minors survived said Philip Ragel, and this plaintiff has been duly appointed administrator of their estate as aforesaid. Wherefore he prays judgment for $5,000 and costs.

The second count of the petition after the dismissals aforesaid is in substance the same as count one, supra, except that plaintiff asked judgment in the second count for $5,000 as administrator of the estate of Clifford Ragel, deceased, by reason of the damages which it is claimed he sustained on account of the death of said Rose Emma Ragel. The answer contains a general denial as to each of the above counts of petition.

A trial was had upon the following agreed statement of facts: "It is agreed by the parties to this cause that the facts herein are as follows: (1) The plaintiff, Gilkeson, is the administrator of the estates of Clifford Ragel and Joseph A. Ragel, deceased, having been duly appointed as such by the probate court of Pettis and Johnson counties, Mo., respectively, in which counties said deceased died. (2) Clifford Ragel died in Pettis county, Mo., on the 14th day of October, 1904, age 14 years, unmarried, having been injured in the wreck hereinafter described, and dying of said injuries. Joseph A. Ragel died on the 10th day of October, 1904, in Johnson county, Mo., age 20 years, unmarried, having been killed with his father and mother in the collision hereinafter referred to. Susan Cooper, wife of Joseph Cooper, also a daughter of Philip Ragel and Rose Emma Ragel, 23 years of age, was also killed in the same wreck and at the same time with her said father and mother. Clifford Ragel and Joseph A. Ragel were the only minor children of Philip Ragel and Rose Emma Ragel, deceased. The said Clifford Ragel survived his said mother and father four days, from October 10 to October 14, 1904, and said Joseph A. Ragel did not survive either of them, but was killed at the same time they were killed. (3) Philip Ragel and Rose Emma Ragel, his wife, fa-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ther and mother of Clifford Ragel and Joseph A. Ragel, purchased tickets from defendant at Edna, Kan., entitling them to passage on defendant's passenger trains from that point to St. Louis, and were passengers on one of defendant's passenger trains on its railroad on the morning of October 10, 1904, going eastward, when at a point about 1½ miles east of Warrensburg, Mo., in Johnson county, by reason of the negligence of the defendant, its agents, servants, and employés, whilst running, conducting, and managing defendant's locomotives and trains of cars, the train on which the said Philip Ragel and Rose Emma Ragel were traveling as passengers collided with another train of the defendant operated by defendant, its agents, servants, and employés, going westward on the same track, while both of said trains were running at a high rate of speed, and said tracks ran into each other, causing a head-end collision and wreck, demolishing the car in which said Philip Ragel and Rose Emma Ragel were riding, thereby killing said Philip Ragel and Rose Emma Ragel on the said 10th day of October, 1904. (4) Neither Philip Ragel or Rose Emma Ragel nor any one representing them has brought suit against any one for the death of either, nor has any one so brought suit for the said Susan Cooper for the death of either. (5) Philip Ragel and Rose Emma Ragel, deceased, left surviving them as their only minor child said Clifford Ragel. (6) The petition of this cause was filed on the 7th day of October, 1905, and summons was issued the same day and duly served on defendant on the 7th of October, 1905." In addition to the agreed statement of facts, it is further agreed between counsel for plaintiff and defendant that Clifford Ragel, Joseph A. Ragel, and Susan Cooper mentioned in said agreed statement of facts were the only children of Philip and Rose Emma Ragel. Counsel for defendant objected to the introduction in evidence of the agreed statement of facts, for the reason that the petition did not state facts sufficient to constitute a cause of action against the defendant, which was by the court overruled. To the ruling of the court the defendant duly excepted. Thereupon the court found for the plaintiff in each count of the petition for the sum of $5,000, and judgment was rendered therein accordingly. After taking the proper preliminary steps for that purpose, the defendant appealed the cause to this court.

Martin L. Clardy and R. T. Railey & Son, for appellant. Jackson & Noble and Chas. E. Morrow, for respondent.

WOODSON, J. (after stating the facts as above). 1. Counsel for appellant insist that the petition does not state facts sufficient to constitute a cause of action against it, and for that reason the court erred in overruling their objection to the introduction of any testimony. That ruling of the trial court is here presented for review. The specific objection urged against each count of the petition is that neither of them state a cause of action, for the reason that an administrator, under section 2864, Rev. St. 1899 (Ann. St. 1906, p. 1637), as it existed at the date of this injury, could not maintain an action for damages in a death case based upon personal injuries. That precise question came before this court in the case of Gibbs v. City of Hannibal, 82 Mo. 143. In that case George L. Crosby, while driving with his wife and two infant children in a vehicle, crossing a bridge over a stream in the city of Hannibal, was precipitated into the stream by the fall of the bridge, alleged to have been caused by the negligence of the city. By reason of the casualty all of them perished. It was alleged that Mrs. Crosby survived her husband and two children, and that while so surviving a cause of action accrued to her for the death of each of them. The plaintiff therein was appointed the administrator of her estate, and on December 24, 1877, he instituted that suit in the Hannibal court of common pleas. The petition consisted of three counts: the first asking $5,000 for the death of her husband, and $5,000 for the death of each of her two children. To that petition a general demurrer was filed, which was sustained. On appeal this court in discussing the propriety of that ruling used this language: "The petition, we take it, by any fair construction, is based upon sections 2121, 2122, and 2123 of the Revision of 1879, or, as it is popularly called, the 'Damage Act.' The two leading questions presented by the demurrer are, first, the right of the plaintiff to maintain the action; second, the right in this action to recover for damages to property alleged to have been occasioned by the falling of the bridge and the death of the husband consequent thereon. In the case of Proctor v. H. & St. J. R. R. Co., 64 Mo. 119, 120, this court speaking of sections 2, 3, and 4 as then numbered in the damage act (1 Wag. St. pp. 519, 520, c. 43) and which correspond with sections 2121, 2122, and 2123 of the Revision of 1879, uses this language: 'It is conceded by all that the third section of the act was only designed to transmit a right of action which but for the section would have ceased to exist, or would have died with the person; in other words, that under section 3, whenever a person dies from such wrongful act of another as would have entitled the person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action, but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed,

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and the amount of damages to be recovered. Section 4 provides that all damages accruing under section 3 shall be recovered by the same parties and in the same manner as is provided in section 2, and in every such action the jury may give damages not exceeding $5,000. This section in connection with section 2 designates the parties to whom this right is transmitted, and also the time within which it is to be exercised.' In McNamara v. Slavens, 76 Mo. 330, 331, this court, treating of the same subject, uses this language: 'Neither the husband nor wife nor children had at common law an action for the death of the husband, or wife, or parent, under the circumstances mentioned in sections 2121, 2122. It is a cause of action created by the statute, and no one can sue unless he bring himself within its terms.' Section 2123 provides that all damages accruing under section 2122 shall be sued for and recovered by the parties named in section 2121; that is, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. These are the only beneficiaries who can maintain such an action. If in any case there be no such person, no suit can be brought by any other person. By the statute the action survives only to the parties named. They alone are the beneficiaries of the statute, and it was never intended that such action would survive to the executor or administrator of any one of the beneficiaries named. It is a right personal to the beneficiary, and does not survive to his personal representatives. In the case at bar all the beneficiaries within the purview of the statute perished together in one common disaster, and there was no person left to whom the action could survive. It follows that this action cannot be maintained by the present plaintiff who is the administrator of the wife. Under the statute he has no standing in the court."

Section 2121, Rev. St. 1879, under consideration in that case, outside of certain amendments made in 1885 (Laws 1885, p. 153). which do not relate to the question now under discussion, reads exactly as did section 2864, Rev. St. 1899, on October 10, 1899, when this casualty occurred. By an inspection of the record in that case, it will be seen that the accident mentioned therein occurred on June 27, 1877, which was prior to the Revision of 1879, while section 2, c. 147, Gen. St. 1865, was in force, which was the same as said section 2121, Rev. St. 1879, referred to in that opinion, which has been brought down through all of the subsequent revisions without amendment, except as mentioned in 1885. So it appears that neither the intermediate sessions nor any of the revising sessions of the Legislature prior to 1905 have ever at any time amended the law so as to allow an administrator to sue in cases of this character, notwithstanding this court had years before held he could not do so. By an act of 1905 the Legislature for the first time attempted to confer the right to sue in cases like this upon executors and administrators (Acts 1905, pp. 135, 136 [Ann. St. 1906, p. 1637]) thereby recognizing the fact that they had no such authority prior thereto as was held by this court in the case of Gibbs v. Hannibal, supra. In brief, that case was based upon the theory that at common law a civil action would not lie for an injury resulting in death, for, under that law, the cause of action did not survive the injured party but died with him, and, that being true, there was no cause of action to be transmitted to any one on which an action could be maintained, and, while under said section 2121 the cause of action survived the injured party, yet it was transmitted only to those who were authorized thereby to sue for the recovery of the damages, none of whom, however, was the executor or administrator of the estate of the beneficiary under the statute. Bates v. Sylvester, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761; Proctor v. H. & St. J. R. R. Co., 64 Mo. 112; Connor v. Chicago, R. I. & Pac. Ry. Co., 59 Mo. 285; Broadwater v. Railroad, 212 Mo. 437, 110 S. W. 1084; Strottman v. Railway Co., 211 Mo. 227, 109 S. W. 769; Crohn v. K. C. H. Tel. Co., 131 Mo. App. 313, 109 S. W. 1068. In holding no cause of action lies for an injury which resulted in death at common law, the Supreme Court of the United States in the case of Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580, said : "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." The Missouri decisions are in full accord with the foregoing. McNamara v. Slavens, 76 Mo., loc. cit. 330; Town of Carrollton v. Rhomberg, 78 Mo., loc. cit. 549; Gibbs, Adm'r, v. City of Hannibal, 82 Mo. 143; Vawter v. Railway Co., 84 Mo., loc. cit. 683, 54 Am. Rep. 105; Barker v. Railway Co., 91 Mo. 86, 14 S. W. 280, and following; Davis v. Morgan, 97 Mo. 79, 10 S. W. 881; McIntosh v. Railway Co., 103 Mo., loc. cit. 133, 15 S. W. 80; Hennessy v. Bavarian Brewing Co., 145 Mo., loc. cit. 112, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554; Brink v. Wabash Ry. Co., 160 Mo., loc. cit. 91, 92, 60 S. W. 1058, 53 L. R. A. 811, 83 Am. St. Rep. 459; McGinnis v. M. C. & F. Co., 174 Mo.,

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loc. cit. 229, 230, 73 S. W. 586, 97 Am. St. Rep. 553; Packard v. Railway Co., 181 Mo., loc. cit. 426, 427, 80 S. W. 951, 103 Am. St. Rep. 607; Strode v. Railway Co., 197 Mo., loc. cit. 626, 627, 95 S. W. 851; Bates v. Sylvester, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761; Casey v. Railway Co., 205 Mo., loc. cit. 724, 103 S. W. 1146; Elliott v. Kansas City, 210 Mo. 576, 109 S. W. 627; Strottman v. Railway Co., 211 Mo. 227, 109 S. W. 769; Broadwater v. Railroad Co., 212 Mo. 437, 110 S. W. 1084; Crohn v. K. C. H. Tel. Co., 131 Mo. App. 313, 109 S. W. 1068; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; Earnest v. Railway Co. (Ark.) 112 S. W. 141; Millar v. Railway Co. (Mo.) 115 S. W. 521.

2. Having seen that respondent has no standing in court under the common law, nor under section 2864, Rev. St. 1899, as it read on October 10, 1904, the date upon which Clifford Ragel was injured, it only remains for us to consider the last insistence of counsel for respondent, and that is: Is his administrator entitled to maintain this action under sections 96, 97, Rev. St. 1899 (Ann. St. 1906, pp. 369, 370)?

Those sections read as follows:

"Sec. 96. For all wrongs done to property, rights or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract.

"Sec. 97. The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

This contention of respondent is untenable for the reason that those sections were intended to provide for the survivor by and against personal representatives of actions for wrongs to property rights and interests only, and not for actions based upon the death of a human being. This was expressly held by this court in the case of Bates v. Sylvester, supra, and on pages 496 to 499 of 205 Mo., pages 73, 74, of 104 S. W. (11 L. R. A. [N. S.] 1157, 120 Am. St. Rep. 761), Judge Gantt, in discussing this question, used this language:

"At common law actions in tort do not survive the death of either the wronged or wrongdoer. This rule of the common law forbidding the survivor of actions or right of action ex delicto was first modified in this state in 1835 by the enactment of what is now sections 96, 97, Rev. St. 1899. [Then follows a copy of the sections of the statute before set forth.] In Higgins v. Breen, 9 Mo. 497, it was pointed out by Judge Scott that St. 4 Ed. III 'only gave actions to executors, and not against them. As against the person committing the injury, the action dies within him. Chitty, 59; 1 Saunders, 217. Our statute has changed the English law in this respect, and has given an action both to and against executors and administrators, and by employing much broader language than the statute of Edward seems to have included by express enactment the injuries which were comprehended in that statute only by construction. The words of our statute are, "for wrongs done to the property, rights or interests of another," etc., with the exception of actions for slander, libel, assault and battery, or false imprisonment, and to actions on the case for injuries to the person. Rev. St. 1835, tit. "Administration," art. 2, §§ 24 and 25.'

"Sections 96 and 97 have been construed by this court. Thus in Vawter v. Railroad, 84 Mo., loc. cit. 685, 686, 54 Am. Rep. 105, Judge Black, speaking for this court, said: 'An administrator appointed in this state receives his power and authority to sue from the laws of this state, and from this state alone, to which he is amenable throughout the entire course of the administration. There is no statute of this state by which he has or can have anything to do with suits of this character or the damages when recovered. He may by section 96, Rev. St. 1879, bring an action for all wrongs done to property rights or interests of the deceased against the wrongdoer. Section 97 provides: "The preceding section shall not extend to actions * * * on the case of injuries * * * to the person of the testator or intestate of any executor or administrator." For fear that section 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate, the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say he may maintain such actions, and that, too, because of a statute of another state. * * * This we cannot do.'

"The learned counsel for plaintiff insist that any action sounding in tort which does not expressly fall within the limitations of section 97 can be revived by or against the representatives of a deceased party to the action, and, as section 97 only bars actions on the case for injuries to the person of the plaintiff, the only question before this court in this case is whether or not this is an action for injuries to the person of the plaintiff, and, as this is not an action for injury to the person of Mrs. Bates, her cause of action survives against the administrator of the alleged wrongdoer, James H. Sylvester. We are unable to concur in this deduction of the counsel for plaintiff, for the reason that at common law the rule was just the other way; that is to say, actions for tort do not survive, and, under section

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96, actions for tort do not survive unless they are within the terms of section 96. And, if by virtue of the general provisions of said section an action might be said to survive, nevertheless, if included within the prohibition of section 97, it will not survive. By reference to section 96, it will be noted that the statute refers to 'wrong done to property, rights or interests of another,' and counsel for plaintiff cite us to James v. Christy, 18 Mo. 162. That was an action by the administrator of James for the negligent killing of his son by the explosion of a steam ferry boat on which his son was a passenger. The son was living with his father, and was 15 years old. The question was whether the action survived to the administrator of the father, and it was held by this court that the father had a property right in the service of his son during his minority and whilst he was under his guardianship, and, if by the misconduct of another he was deprived of those services, or the son's ability of performing them, the law awarded him a compensation in damages. And it was pointed out by Judge Scott that the damages in such case must be limited to the actual value of those services, and that all other damages die with the father. In other words, the language of section 96, to wit, 'Property, rights or interest,' mean and should be read 'property rights or interest,' and this was the construction placed upon it by this court in Vawter v. Railroad, 84 Mo. 686, 54 Am. Rep. 105. At common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances, as has often been decided by the appellate courts of this state. McNamara v. Slavens, 76 Mo., loc. cit. 331; Barker v. Railroad, 91 Mo., loc. cit. 91, 14 S. W. 280; Brink v. Railroad, 160 Mo., loc. cit. 92, 60 S. W. 1058, 53 L. R. A. 811, 83 Am. St. Rep. 459; Stoeckman v. Railroad, 15 Mo. App., loc. cit. 507."

Then follows a review of cases from other states announcing the same conclusion reached by him. To the same effect are Millar v. Railway Co. (Mo.) 115 S. W. 521; Strottman v. Railway Co., 211 Mo. 227, 109 S. W. 769; Broadwater v. Wabash Ry. Co., 212 Mo. 437, 110 S. W. 1084.

So exhaustive and logical are those observations of Judge Gantt they leave nothing we could add upon that subject without being accused of repetition. In fact, if we correctly understand the contention of counsel for respondent in that regard, they do not seriously question the soundness of the position taken by Judge Gantt in that case, but seek to escape the conclusions reached by him therein by contending that the cause of action given to minor children for the wrongful death of their parents is not a transmission to them of the cause of action which their injured father or mother would have had had he or she survived the injury, but is a new cause of action given to them in the first instance because of the wrongful taking from them their rights to the care, support, and maintenance their parents owed them under the laws of the state, and that such rights are property rights within the meaning of said sections 96 and 97. In support of that contention said counsel cite and rely upon the following authorities: Behen v. Transit Co., 186 Mo. 430, 85 S. W. 346; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635; Countryman v. Railroad, 166 N. Y. 201, 59 N. E. 822, 82 Am. St. Rep. 640; Cooper v. Shore Electric Co., 63 N. J. Law, 558, 44 Atl. 633; Pitkin v. Railroad, 94 App. Div. 31, 87 N. Y. Supp. 906; Crapo v. City of Syracuse, 98 App. Div. 378, 90 N. Y. Supp. 553; Quinn v. Moore, 15 N. Y. 432; Yertore v. Wiswall's Ex'rs, 16 How. Prac. (N. Y.) 8; People ex rel. v. Gill, 85 App. Div. 195, 83 N. Y. Supp. 135. In the consideration of this question, Judge Valliant in the case of Behen v. Transit Co., 186 Mo., loc. cit. 445, 448, 85 S. W. 346, 350, said: "But now we have not an action for injuries to the plaintiff's person, nor an action to recover for the mental and physical suffering of his mother, but the action for compensation for what he lost by his mother's death. The action arises not under the common law, but under our statute (section 2864, Rev. St. 1899), which is mainly copied from the English statute (9 and 10 Vict. c. 93), commonly called 'Lord Campbell's Act.' In Seward v. Vera Cruz, 10 L. R. (App. Cas.) 59, the question was: Did the court of admiralty under the statute which gave it 'jurisdiction over any claim for damages done by any ship,' have jurisdiction of a claim arising under Lord Campbell's act, and it was held by the House of Lords that it had not. The language of the opinions in that case has especial reference to the law governing proceedings in rem in admiralty, but the nature of the action given in Lord Campbell's act is discussed in that connection, and it was held that that act created a new action, and did not merely remove a restriction from the action given by the common law. It is there said (loc. cit. 67): 'Lord Campbell's act gives a new cause of action clearly, and does not merely remove the operation of the maxim, "Actio personalia moritur cum persona," because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor.'"

In 4 Sutherland on Damages (3d Ed.) § 1260, the author, discussing statutes modeled after the English statute, says: "The death of a person entitled to sue pending the suit neither abates the action in the common-law sense, nor is the cause of action to be compensated for discharged; but in such a case the damages which may be recovered will be limited in duration to the extent of the life-

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time of such person." In support of the text the author cites Cooper v. Shore Electric Co., 63 N. J. Law, 558, 44 Atl. 633, and Meekin v. Railroad, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635, both of which sustain the text. The New Jersey court in the case above cited, said (loc. cit. 565, 566, 44 Atl. 633, 636): "If the death of the beneficiary before the end of the litigation discharges the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation, and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent of his lifetime. But the death of the beneficiary pending suit cannot be made available or abrogate the liability of the wrongdoer incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending the suit, there was neither an abatement of the action in the common-law sense, nor was the cause of action to be compensated for discharged." We are of the opinion that the right of action in this case on the death of the plaintiff survived to his administrator. In the case of Meekin v. Brooklyn Heights Ry. Co., supra, Judge Vann said: "The Revised Statutes, which are modified to some extent by these provisons of the Code, authorize an executor or administrator to maintain an action 'for wrongs done to the property rights, or interests of another' after his death against the wrongdoer, and, after his death, 'against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract.' This provision, however, does not extend to actions for slander, libel, assault, and battery, or false imprisonment, nor to actions 'for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator.' 2 Rev. St. (9th Ed.) p. 1907. The question therefore is whether the right of action created by the act of 1847 (Laws 1847, c. 450) and continued by the Code of Civil Procedure, is to recover damages for wrongs done to the property rights or interests of another, or for injuries to the person of the decedent. Some confusion has arisen because the statute creates a property right out of an injury to the person, and confers it, not upon the one injured, but upon his representatives, for the benefit of his wife and next of kin. The theory of the statute is that damages should be recovered for injuries to the estate of the beneficiaries of the action, which injuries were caused by the death of the decedent. The beneficiaries named in the statute sustain such a legal relation to the deceased by blood or marriage that it is presumed they would have been pecuniarily benefited by his continuance in life, and hence damages are allowed for a wrongful act or omission causing his death. If he had lived, the support, education, or services required from him by law, as well as benefits in the nature of gifts conferred in the past, might have been continued to the pecuniary advantage of the beneficiary. So the decedent by continuing to live might increase his estate, and thus increase the amount to be inherited from him upon his death in the course of nature." In the case of Quinn v. Moore, supra, the court used the following language: "The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law the right of action ceases with the life of the injured party. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent nor the pain and suffering he may have endured are to be taken into the account. These would be the foundation of the action, and would furnish the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator and through him of the next of kin is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. For example in the present case James Kerns was a minor. His mother was by law entitled to his services until he should come of age. Of these she was deprived by the wrongful or negligent act of the defendants which destroyed his life. The common law gave no action for this injury. The statute possibly with greater justice declares a different principle, and holds the wrongdoer liable to make compensation. * * * The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the Legislature have chosen to regard as a pecuniary right, a right having the essential attributes of property, so that, when it is taken away, compensation is due. * * * The rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered; and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished. * * * In Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25, it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that an action cannot be

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maintained against his representatives. This is a necessary result from the fact that the Code modifies the Revised Statutes and the common law as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury. Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271. * * * Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries, but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from, and not a revivor of, the cause of action, which, if he had survived, he would have had for his bodily injury. 'Although the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages nevertheless are given upon different principles and for different causes.' In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss, and in addition for his pain and suffering of mind and body, while under the statute it is not the recompense which would have belonged to him which is awarded to his personal representatives, but the damages are to be estimated 'with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person.' Whitford v. Panama R. Co., 23 N. Y. 465, 489. As, in the language of the statute, 'the damages awarded to the plaintiff' are to be estimated on the basis of 'a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought,' we think the injury is for a wrong done 'to the property, rights, or interests' of the beneficiary, and that hence the cause of action survives; the recovery, if any, being a part of his estate, the same as it would have been if collected and paid over before his death. * * *" The Meekin Case has since been followed in New York. In Countryman v. Railroad, 166 N. Y. 209, 59 N. E. 822, 82 Am. St. Rep. 640, it is said: "In Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635, it was held that this cause of action is a property right which is not affected by the death of the administrator, who is the sole next of kin of the decedent and vested in his legal representatives." In Pitkin v. Railroad, supra, where the sole beneficiary died before the trial, it was held that the action did not abate. In discussing this question the court says: "The right to these damages is a right of property which accrues at the moment of the negligent killing, and at such moment becomes vested in the beneficiary, for whose benefit the action may be maintained. The right to such damages which thus accrues becomes an asset in the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent or terminate a right of action to recover damages which have thus been by him suffered. Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635."

From this resumé of authorities cited, it is seen that some respectable courts sustain the contention presented by counsel for respondent, namely, that the right of a minor to the care, support, and maintenance of their parents is a property right, and that, when they are deprived of that right by the wrongful killing of the parent, the cause of action created by sections 2864, 2865, Rev. St. 1899 (Ann. St. 1906, pp. 1637, 1644), and that, where the minor dies before the damages are collected, his cause of action will survive under said sections 96 and 97 in favor of the executor and administrator of his estate. After a careful consideration of those cases and the reasons advanced by the courts for so holding, the conclusions reached in all of them seem to me to be unsound, and do great violence to the elementary principles of the common law and the statutes providing for the survival of actions. The language of Judge Valliant before quoted from in the case of Reber v. Transit Co., supra, was obiter, and was in express terms overruled by this court in the case of Bates v. Sylvester, supra. So, under those conditions, his remarks are not authoritative or binding upon this court, and are entitled to only such consideration as should be given to the individual opinion of the distinguished and learned jurist who uttered them, which, however, carries great weight with the writer. But that case, like all of the others relied upon by respondent's counsel, ignored the distinction between the laws that govern personal rights and those that govern the rights of property. The former govern, among other rights, the social and domestic relations of persons, while the latter control the rights of property. The violation of the former is not the violation of a property right, but is the violation of a social duty or a wrong done to the domestic relations. A wrong done to society is denominated a misdemeanor or a crime, and those to the domestic relations and to property are called civil wrongs or torts. The former is punishable by imprisonment or fine, payable to the state; and the latter is generally righted by the wrongdoer paying the damages done by him to the injured party.

By applying these observations to the case at bar, we would convict appellant of violating the domestic relations of respondent's

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intestate—that is, of wrongfully taking the lives of deceased's father and mother, and thereby deprive him of his legal rights to have his parents to care for, support, and educate him, for which he is entitled to recover pecuniary damages in dollars and cents—but it would clearly be a misnomer to say, nor could it be logically contended, that the wrongful killing of deceased's parents was a wrong done to his property, or to his property rights. It would be just as logical to say the wrongful killing of the husband would be a wrong and injury to the wife's property rights, and that, upon her death, the cause of action given to her by said sections 2864 and 2865 would upon her death under said section 96 survive in favor of her executor and administrator, yet every court in Christendom, so far as my knowledge and investigation has gone, are unanimous in holding, under those statutes, her cause of action does not survive, but abates with her death. But, if the minor's cause of action, which is given by the same statute that gives to the wife hers, does not abate with the former's death, then by what process of reasoning can it be logically contended the wife's cause of action abates upon her death? Certainly such an argument cannot be based upon the ground that the husband did not owe the wife the same care, support, and maintenance that he and his wife owed to their minor children. Under our laws, not only does he owe her the same duty, but, if he does not perform it, she may sue for and compel him to properly care for and support her, just as their minor children may do; and not only that, but so grave is the offense of the husband in not caring for and supporting his wife she may on that account sue for and obtain a divorce from him. Could it be seriously contended that the wrongful killing of a woman's husband is an injury to her property rights? I think not; yet she is just as much entitled to the care, society, and support of her husband as are his minor children. According to all laws, excepting the cases before considered, the unlawful killing of a husband or father is a wrong done to the personal rights of the wife and the child, and not to their property rights. Bates v. Sylvester, supra. Gibbs v. Hannibal, supra. This must be so in the very nature of things, for sections 2864 and 2865 give the widow and minor children a cause of action, even though the husband and father had no property or income of any kind whatever, and was totally incapable of earning a dollar for his own support, much less to care for and support them. In fact, his mental and physical conditions might be such as to constitute him a most grievous care and burden to them, instead of a comfort and support, yet, under sections 2864 and 2865, they would be entitled to a recovery for his unlawful death. If that is true, and it cannot be questioned, then their cause of action is given by those sections, because of the violation of their domestic relations, and the wrong done to their personal rights, and not because any wrong was done to their property interest, for he had none to be injured. And, if those sections give the widow and minor children a cause of action for the wrongful death of their husband and father, because that wrong was an injury to their property or property interests, then clearly in a case like the one before supposed neither of them would have a cause of action under those sections against the wrongdoer. That is self-evident. Yet, as before stated, no court in Christendom has or would hold that the widow or minor children would not have a cause of action in that kind of a case. Again, the minor might lack just one day of being of age when his father or mother was killed, still that fact would not interfere in the least with his right to a recovery of the $5,000 under the first section mentioned, or to the actual damages sustained under the latter. That being true, the right to recover the damages could not be based upon the injury done to his property rights, for, under the first section, he would recover $5,000 when under no circumstances could he expect to receive but a few dollars at the outside from his father for that one day's care and support. It is elementary in case of injuries to property the measure of damages is just compensation, and not a penalty of $5,000, no more or no less, as this court has repeatedly held must be paid where death ensues under the former section. The error learned counsel for respondent has fallen into, as have also the able courts whose opinions he relies upon in support of his contention in this case, consists in confusing the pecuniary loss sustained by a minor child caused by the wrongful death of his or her father or mother with the damages done to his or her property or property interests by a wrongful act of another. While the child has sustained a pecuniary loss or damage in both cases, and is entitled to a recovery in each, yet the injury to the one is not the same as the injury to the other. The former is an injury to his personal rights, and the latter is an injury to property rights; nor is the measure of damages the same in each case, as before pointed out. This palpable error is the very corner stone upon which those courts which entertain different views from those entertained by this court base their entire argument in favor of the survival of such a cause of action under sections of their statute which are similar to sections 96 and 97 of our statutes; and without that false basis upon which to rest the opinions of those able courts would be totally destitute of every vestige of reason and plausibility to support them.

Counsel for respondent in discussing the cases of Behen v. Transit Co. and Seward v. Vera Cruz, supra, betray their appreciation

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of the weakness of the argument and reasoning advanced by those courts in support of their holding that the wrongful killing of a parent is an injury to the property rights of his minor children by using this language: "The argument in both those cases is to the effect that the statute gives a right of action to recover the pecuniary loss that the plaintiff has sustained in the death of the person killed. The arguments in both cases would apply more literally to a case arising under the next succeeding section of our damage act than to one arising, as does this case, under section 2864, because under this section the damages are fixed at $5,000, whilst in the next section the jury may give such damages, not exceeding $5,000, as they may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating circumstances attending such wrongful act, neglect, or default. But, although the statute fixes the amount of damages in the one section and leaves it to be fixed by the jury in the other, there is no difference in principle involved. In both cases the damages are given as compensation to the plaintiff for his pecuniary loss in the death of the person killed, or for the suffering of that person." The substance of these remarks of counsel are expressed in the opinions of some two or three of the courts which entertain his views upon this question of survival. He, as well as those courts, appreciates the fact that, if the recovery is had under section 2864, the amount of the verdict and judgment must be for the penalty of that statute, namely, $5,000, and not for the amount of the pecuniary loss the child has sustained by reason of his being deprived of his legal right to be supported and educated. Such a verdict and judgment is necessarily inconsistent with the idea of compensation for the pecuniary loss sustained by the child, yet, if respondent is entitled to a recovery at all, it must be for the entire $5,000, and not for such sum as would compensate the deceased for the actual damages sustained by him in consequence of the unlawful killing of his father and mother. That is true for the reason that had the deceased lived he could have recovered only the $5,000 penalty prescribed by section 2864, and not just compensation authorized by section 2865. Casey v. Transit Co., 205 Mo. 721, 103 S. W. 1146. It must therefore follow that, if the cause of action survived in favor of the respondent, it must have been the same cause of action which his intestate had while living, which was a right of action for the recovery of $5,000 for the injury done to his personal rights, and not to his property rights or interests. Consequently sections 96 and 97 have no application, for the reason they apply only to actions relating to property interests. Bates v. Sylvester, supra; Gibbs v. City of Hannibal, supra. Besides this, there is another substantial reason for holding the theory of counsel for respondent is not tenable; and that is if sections 2864 and 2865 confer upon the minor children a cause of action for the violation of their property rights within the meaning of sections 96 and 97, and not for the injury done to their personal rights, then section 2864, the one respondent must recover upon if at all is clearly unconstitutional, null, and void, for the reason, as we have repeatedly held, and correctly so in my judgment, namely, that whenever a passenger dies from an injury resulting from the negligence of a servant whilst running and operating a train of cars, the owner thereof under section 2864 shall forfeit and pay the sum of $5,000 to the husband or wife of the deceased, and, if there be no husband or wife, then to the minor children of the deceased; and that under such facts a recovery cannot be had for a smaller sum under section 2865. Casey v. Transit Company, supra. The reason for the distinction made by the Legislature between the two sections was for the purpose of better protecting the traveling public against the negligence and carelessness of common carriers. By the imposition of the $5,000 penalty by the former section in favor of the beneficiaries named therein, the Legislature intended thereby not only to compensate them for the pecuniary losses sustained in consequence of the injury done them, but also to induce carriers to exercise a higher degree of care toward the traveling public and for the individual safety of the passenger than they would otherwise do. It is upon that theory the constitutionality of that section is maintained, otherwise it would be open to the objections that it authorized the taking of private property for private use, and the taking of property without due process of law, contrary to sections 20 and 30 of article 2 of the Constitution of 1875 (Ann. St. 1906, pp. 146, 166). If that is true, then it cannot be successfully contended that section 2864 was enacted simply for the purpose of affording compensation for the damages sustained by the beneficiaries mentioned therein, as is true of section 2865. Consequently this case, if maintainable at all, was properly brought under the former section, and could not have been brought under the latter. So, instead of these sections being susceptible of the construction suggested by counsel for respondent, namely, to afford compensation for the damages done to the property rights of the minor children, their purpose was just the opposite—primarily, to secure the personal safety of the passenger; and, secondarily, to compensate those who should be damaged by being deprived of their marital and parental relations by the wrongful act of the carrier in the order stated in said section. If this is not true, but respondent's contention is, which is to the effect that both of these sections were intended to compensate the minor

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for damages done to his property interests, then clearly section 2864 would be unconstitutional and void, for the reason that it would then discriminate in favor of the property interests of the class of persons mentioned therein, which provides that the carrier shall pay to them greater damages for the injuries done to their property interests than the carrier is compelled by section 2865 to pay to all other persons within the jurisdiction of the state who are mentioned in the latter section for doing the same character of injuries to the same character of property interests; and that, too, notwithstanding the fact that the extent of the damage done to the former may not, in fact, be so great in degree as that done to the latter. Under each section, the death of the parent would be the injury done, and the damages under each would be the taking from them their property rights to be cared for, supported, and educated by their parents, which, under the former, might not be for a period of more than one day, and under the latter it might be for 21 years, lacking one day, and, under the former, the amount of the compensation to be awarded would have to be $5,000, no more nor less, while under the latter it might be one dollar or $5,000, or any other sum within those limits. Clearly, if that construction of respondent is to be placed upon those sections, then the former would do violence to section 1 of the fourteenth amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. And any construction of a state statute which brings it in conflict with that provision of the federal Constitution will nullify it as effectually as if it had in the first instance been enacted in conflict with that instrument. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. For that reason, if for no other, respondent's construction should not be placed upon those sections. Not only this, but, if we should adopt the construction of sections 2864 and 2865 contended for by counsel for respondent, then he would have no standing in court for the additional reason that by so doing we would necessarily bring section 2864 in conflict with the provision of the Constitution of the United States before mentioned, and thereby nullify the very section of the statute upon which his case is bottomed, and without which neither he nor his intestate could have recovered had he lived.

There is another reason why the cause of action given by section 2864 to Clifford Ragel for the wrongful death of his father and mother did not survive him under sections 96 and 97 in favor of the administrator of his estate, even though it be conceded the latter sections apply generally to personal injuries, as well as to injuries done to property rights, and that is this: Where there are two statutes and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute, and especially is this true where the special statute was enacted subsequent to the passage of the general. This rule of statutory construction is well grounded in our jurisprudence, as is shown by the following adjudications: Ruschenberg v. Railroad, 161 Mo. 71, 61 S. W. 626; State ex rel. v. Dabbs, 182 Mo., loc. cit. 366, 81 S. W. 1148; State ex rel. v. Frazier, 98 Mo. 426, 11 S. W. 973; State ex rel. v. Slover, 134 Mo., loc. cit. 19, 31 S. W. 1054, 34 S. W. 1102. It is perfectly clear from reading these statutes that the provisions of section 2864 provides specially who shall sue for and recover the penalty given thereby for the wrongful death of the parties referred to therein. It is thus seen that this particular statute provides specially and specifically for all who may sue for the penalty imposed by said section 2864, and neither the executor nor the administrator of any deceased party referred to therein is included among those who are authorized to sue for the penalty. The entire matter is covered by that section, and excludes the application of any other statute thereto. While under the concession before made sections 96 and 97 might be sufficiently broad, if standing alone, to embrace suits of this character, and if section 2864 is not to be considered an exception to the latter sections, then there would be a clear conflict between them; and, since section 2864 was subsequently enacted, and all carried from one revision to another for over 50 years, we must hold it to be either an exception to the former sections or a repeal of them to the extent of their application to the actions mentioned in sections 2864 and 2865. So, viewing this case from any standpoint you may, we are fully satisfied that Clifford Ragel's cause of action did not survive him, but abated upon his death, and we must, therefore, hold respondent has no right to maintain this suit, and consequently has no standing in court.

The judgment of the circuit court is reversed, and judgment will be here entered for appellant. It is so ordered. All concur.

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STATE v. HEATH.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. INDICTMENT AND INFORMATION (§ 189*)—OFFENSES INCLUDED IN CHARGE—DEGREES OF HOMICIDE.

An information, charging murder in the first degree, embraces all the lower grades of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 593; Dec. Dig. § 189.*]

2. INDICTMENT AND INFORMATION (§ 47*)—ALLEGATIONS—SUFFICIENCY.

An information charging murder in the first degree need not allege that accused had been afforded a preliminary examination prior to the filing of the information; the statute as to a preliminary examination going merely to the regularity of the preliminary proceedings.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 148; Dec. Dig. § 47.*]

3. HOMICIDE (§ 307*)—GRADES OF OFFENSE—EVIDENCE—INSTRUCTIONS.

The court, in a homicide case, must submit the grades of the offense as shown by the testimony of the state and by the testimony of accused, though the testimony of the accused is uncorroborated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 638–641; Dec. Dig. § 307.*]

4. HOMICIDE (§ 45*)—MANSLAUGHTER—PROVOCATION.

The common-law rule that words of reproach, however grievous, or contemptuous or insulting actions, without any assault on the person, or any trespassing against lands or goods, do not reduce the killing to manslaughter, but that the provocation must consist of personal violence is the law of Missouri.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 69; Dec. Dig. § 45.*]

5. HOMICIDE (§ 309*)—MANSLAUGHTER—PROVOCATION.

Where the provocation consists of an assault or personal violence sufficient to arouse the heat of passion necessary to reduce the killing to manslaughter, the issue of manslaughter in the fourth degree must be submitted to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 649–656; Dec. Dig. § 309.*]

6. HOMICIDE (§ 271*)—MANSLAUGHTER—PROVOCATION.

Whether an assault aroused the heat of passion necessary to reduce the killing to manslaughter is for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 565; Dec. Dig. § 271.*]

7. HOMICIDE (§ 113*)—SELF-DEFENSE.

One voluntarily engaging as the aggressor in a difficulty with another may in good faith withdraw therefrom; and, where he does so, and the latter pursues him, he may defend himself and use necessary force, though he entered into the difficulty with the felonious intent to do the latter some bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 151; Dec. Dig. § 113.*]

8. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

To warrant the court in giving an instruction on the right of accused, on withdrawing in good faith from a difficulty voluntarily entered into, to defend himself, there should be some substantial testimony showing that accused, after the commencement of the difficulty, in good faith sought to withdraw from it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614–628; Dec. Dig. § 300.*]

9. HOMICIDE (§ 300*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction, on a trial for murder of a teacher by a patron of the school, that accused could go on the public road and invite a conversation with decedent, and ask the reason for his conduct toward a child of accused, and that if he did so, and decedent displayed a knife and threatened accused, who had good reason to believe, and did believe, that decedent was about to carry out such threat, accused could use all reasonable means to protect himself, etc., was properly refused, because it commented on isolated facts and was argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 618; Dec. Dig. § 300.*]

10. HOMICIDE (§ 160*)—EVIDENCE—ADMISSIBILITY.

Accused may show, in explanation of his possession of the pistol with which he killed decedent, that he had previously been threatened with great personal violence, but he cannot show the details of the threat, especially where the state did not contradict the testimony of accused that his life had been threatened.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 301; Dec. Dig. § 160.*]

11. HOMICIDE (§ 286*)—EVIDENCE—INSTRUCTIONS.

Where accused showed, in explanation of his possession of the pistol with which he killed decedent, that he had been previously threatened with personal violence, the court need not charge on the right of accused to bear arms in necessary defense of his person, for the issue was whether he used the pistol at the time of the killing without any lawful provocation, or on a reasonable apprehension of danger to protect himself, or in a sudden heat of passion aroused by a lawful provocation.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 286.*]

12. HOMICIDE (§ 300*)—EVIDENCE—INSTRUCTIONS.

An instruction, on a trial for the murder of a teacher by a patron of the school, that accused, having a child at the school, could inquire of decedent as to a difficulty between decedent and the child, and to bring the matter to the attention of the directors of the school for their action, and to seek to have the punishment of the child controlled by the directors, and that if accused did so in a peaceable manner, he acted within his rights without prejudice to his right of self-defense, was properly refused because argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 618; Dec. Dig. § 300.*]

13. WITNESSES (§ 398*) — IMPEACHMENT — FOUNDATION.

Witnesses, testifying to threats made by accused against decedent, cannot, in the absence of the laying of a proper foundation, be impeached by proof that they made the threats sworn to as having been made by accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1274; Dec. Dig. § 398.*]

Appeal from Circuit Court, Lawrence County; F. C. Johnston, Judge.

Charles Heath was convicted of murder in the second degree, and he appeals. Reversed and remanded.

This cause is now pending before this court upon appeal by the defendant from a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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judgment of the circuit court of Lawrence county, Mo., convicting him of murder of the second degree. On the 5th day of August, 1907, the prosecuting attorney of McDonald county filed in the circuit court of that county an information, duly verified, charging the defendant with the murder of Clarence Mosier, which information, omitting formal parts, was as follows: "Joseph S. Long, prosecuting attorney within and for the county of McDonald and state of Missouri, under his oath of office, and on his knowledge, information, and belief, informs the court that one Charles Heath, at the county of McDonald and state of Missouri, on the 22d day of February, 1907, in and upon one Clarence Mosier, then and there being, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did make an assault, and with a dangerous and deadly weapon, to wit, a pistol, loaded then and there with powder and leaden balls, which he, the said Charles Heath, in his right hand then and there had and held at and against him, the said Clarence Mosier, on purpose and of his malice aforethought, did shoot off and discharge, and with the pistol aforesaid, and the leaden balls aforesaid, then and there feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, did shoot, strike, and penetrate and wound him, the said Clarence Mosier, to wit, in the front part of the body of him, the said Clarence Mosier, giving to him, the said Clarence Mosier, at the said county of McDonald and state of Missouri, on the 22d day of February, A. D. 1907, with the dangerous and deadly weapon, to wit, the pistol aforesaid, in and upon the front part of the body of him, the said Clarence Mosier, one mortal wound, of the width of about one inch and of the depth of about three inches, of which said mortal wound he, the said Clarence Mosier, of the county of McDonald and state of Missouri, on the said 22d day of February, 1907, then and there of the mortal wound aforesaid, instantly died, and so the said Joseph S. Long, prosecuting attorney within and for McDonald county, state of Missouri, aforesaid, under his oath of office and upon his knowledge, information, and belief, does say that he, the said Charles Heath, him, the said Clarence Mosier, in the manner and by the means aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought, at the said county of McDonald and state of Missouri, on the 22d day of February, A. D. 1907, did kill and murder against the peace and dignity of the state." To this information, on August 8, 1907, the defendant entered a plea of not guilty, and on the same day he filed an application for a change of venue from McDonald county, alleging bias and prejudice on the part of the inhabitants. On August 14th said application for a change of venue was taken up, and by the court granted, and the cause ordered transferred to Lawrence county. Defendant duly entered into a recognizance for his appearance in said county to which said cause had been transferred, and the cause, in conformity to the order, was transferred to the Lawrence county circuit court, and all proceedings certified to that court. Subsequently, on November 26th, the trial of said cause was begun. A jury was duly impaneled and sworn to try the cause, and the trial was proceeded with.

There is but little dispute as to what the respective witnesses testified to upon the trial of this cause; in fact learned counsel for appellant in their oral argument practically conceded that the learned Attorney General had made a reasonably fair statement of the facts as shown by the record disclosing the evidence. Therefore we shall be content with making a brief statement of the facts which the testimony tended to show on the part of the state, as well as the facts the evidence tended to establish on the part of the defendant.

On the part of the state the testimony introduced substantially tended to prove that the deceased, Clarence Mosier, was teaching the Saratoga public school, and had been so engaged for about seven weeks preceding the tragedy. Defendant was a patron of this school, having in attendance thereat several children, among whom was a daughter named Lou, of about 16 years of age, and a son named John. On February 21st said Lou Heath violated one of the rules of the school, and Mosier attempted to administer punishment by whipping her. She resisted his efforts, and during the encounter that followed she struck him over the head with an iron poker, and thereupon left the schoolroom and went to her home. That evening defendant went to the home of Mr. Crispin, who together with Mr. Rorark and Mr. Orff composed the board of directors for that district. While there he stated that the teacher had sent his daughter Lou home from school, and would not let her return, and he wanted Mr. Crispin to see about the matter, as he wanted his children to go to school. He said he paid more taxes than anybody else, and that if Mosier whipped his daughter, or any of his children, he would make him walk a merrier gait than he ever did walk.

On the following morning defendant accompanied his children to school, and demanded that Mosier refrain from further punishing his children, saying that he was the largest taxpayer in the district, and his children should not be whipped. Mosier asked defendant to leave the room, saying that he was disturbing the school, and defendant then left, and again went to the home of Mr. Crispin. Mr. Rorark, another director, arrived at Crispin's home about the same time, and defendant told the two directors that he wanted one or both of them to see that Mosier did not whip his daughter. Rorark later said that he had seen Mosier, and had

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asked him to take no further action in the matter until the directors had acted, and defendant and Rorark thereupon left, and went to a public sale that was being conducted at the home of a Mr. Miller. Just before the morning recess Mosier again attempted to punish Lou Heath in the same manner as on the preceding day. After defendant arrived at the Miller sale, he said in the presence of Newt Warvin: "That little school-teacher over there was about to whip me, he was going to whip Lou yesterday, and she hit him over the head with a poker, and broke up his switch and walked out, and he told her not to return. He can't make a scholar quit school that way. I brought her back this morning, and told him what I thought of him, and he told me to get out of the house, as I was disturbing the school. I told him to put me out, and he replied that he knew better. He won't whip her. If he would whip one of my kids, I'd fill him full of lead." At the morning recess defendant's son, John Heath, who was in school when Mosier attempted to punish Lou Heath, left the school and went to the Miller sale. After arriving there said John Heath told defendant that Mosier had again whipped Lou. Defendant thereupon said, in the presence of Taylor Williams: "I told him not to whip that girl. God damn him, I told him not to whip that girl. I'll go over there and fix it with him for it." He also said in the presence of Jack Adcock: "I brought the girl down to the schoolhouse, and told Mosier not to whip her that morning, not to lay his hands on her, and if he did, there would be trouble. Mosier told me that he would give me to understand that he was running the school, and I told him it was more than he had been doing." He also said in the presence of George Shields, after being told by his son John that Mosier had whipped Lou: "Did he whip her? I'll go down there and crawl on him." He also said in the presence of William Terry: "I told him, God damn him, not to whip that child. This occurred this morning. I'll fix him when I get there." After giving utterance to these threats he walked, in company with his son John and brother Jack Heath, to the place where his horse was tied, and, after engaging in some conversation with them, mounted his horse and rode away in the direction of the schoolhouse. When he reached the residence of Mr. Crispin, a distance from the schoolhouse of 140 yards, he dismounted, tied his horse at the gate, and entered Crispin's house. He stated that his son John had come after him, as Mosier had whipped Lou again. Mrs. Crispin then told him that his daughter had been to their house, and had informed them that Mosier had again whipped Lou Heath. The clock was then striking 12, and Mrs. Crispin announced that dinner was ready, and invited defendant to remain. This invitation he declined, and left the house. The school had been dismissed for the noon hour, and Mosier and the school children were coming down the road towards where defendant then was; Mosier being on the way to his boarding house. Mosier, at that time, had in his hand a small knife, with which he was cleaning his nails. Defendant spoke to Mosier, saying, "Hello, hold on there, you damn, dirty devil," or words similar to these. Mosier thereupon stopped, and defendant approached him, saying: "Why did you whip that girl?" Mosier replied that it was because she had violated the rules of the school, and further told defendant to go on and attend to his business, as he wanted to have no trouble with him. Defendant thereupon said that they were going to have trouble whether Mosier wanted it or not. Mosier thereupon walked away in the direction of his boarding house, saying at the time, "I have got to go home to dinner." Defendant at this time was cursing and abusing Mosier, while Mosier was doing nothing except walking towards his boarding house. After Mosier had walked a short distance defendant seized two rocks and threw them at Mosier, who dodged one, the other striking him and causing him to fall. Mosier thereupon got up with a rock in his hand and threw same at defendant, and began to run from defendant. Defendant pursued him, and after running some distance, Mosier telling defendant not to follow, defendant, after getting within close proximity to Mosier, pulled out his gun. Mosier stopped and turned, and took hold of the pistol then pointed at him, in an endeavor to push it away, but defendant prevented this by seizing Mosier's hand. Mosier said, "Don't shoot me," at which time defendant replied, "Damn you," and fired the fatal shot. Mosier staggered first from one side of the road to the other, and fell, at which place he died. Soon after the shooting defendant's daughter Lou asked him why he had shot Mosier, saying, "I told you not to shoot him." He said, "By God, you are the cause of it." Defendant thereupon mounted his horse, rode by the body of deceased, and returned to Miller's sale, and when he arrived there he told his brother of what he had done, and asked him to care for his children during his absence. His brother gave him $50 or $60, and defendant left the country, and was not heard of for three or four days, at which time he surrendered to the officers.

The evidence on the part of the defendant tended substantially to prove that defendant resided within about a mile and a half of the Saratoga schoolhouse, and was the father of 10 children, some of whom attended the public school, among them being a daughter named Lou and a son named John. He had known Mosier only since he began teaching the school.

On the morning of February 21st Lou Heath was turning a lead pencil, and reading therefrom the lettering in such a way as to make a whispering sound. Mosier accused her of

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whispering, which she denied, and in this was corroborated by her sisters, who were immediately in front of her, and the girl who was sitting with her. Mosier grabbed and began to strike her with a switch, at the same time knocking her against the stove and benches, and badly tearing her clothing. She thereupon seized an iron poker and struck Mosier. He took the poker from her hand, and again struck her with the switch, which she grabbed and broke. She thereupon left the schoolroom, and went to the home of an uncle, after which she went to her home. On the same evening defendant went to the home of Mr. Crispin, and asked him to see Mosier and induce him to permit his son to use and recite from a reader different to the one adopted by the board. On the following morning defendant, in company with his children, went to the school, and asked Mosier to defer further action relative to the school trouble until the board had considered the matter, saying he was willing to submit to the decision of the school board. Mosier declared that defendant had come there to cause trouble, and, after agreeing to abide the decision of the school board, ordered defendant from the schoolroom. Defendant thereupon left and went to Crispin's home, where he met two of the directors, Crispin and Rorark, and it was there agreed that the board would meet the following day and consider the matter. Rorark then went to the schoolhouse, and informed Mosier of the arrangement, and asked him not to punish Heath's daughter until the matter had been adjusted. Rorark thereupon returned to Crispin's house, and he and defendant together went to Miller's sale. Just before the morning recess Mosier told Lou Heath that she must take her punishment, whereupon he began whipping and throwing her against the seats. This she resisted, and during the scuffle her clothing was again torn. During the morning recess, which soon followed, defendant's son left the school, and in a hack went to the Miller sale, and informed his father that Mosier had again punished his daughter. Defendant thereupon said that he would go and see the board of directors, and, after talking to his son and brother, left the sale for his home. Crispin's residence was on the way to defendant's home, and when he reached that place, he dismounted and entered Crispin's house. Soon thereafter Mrs. Crispin announced that her dinner was ready, and defendant left the house, having promised to be at home at noon. When passing out of Crispin's gate, he saw Mosier, and addressed him, saying, "Hello, Mosier, I want to speak to you a moment." Mosier said, "All right," and stopped. Defendant asked him why he had whipped his daughter after promising not to, and Mosier said it was none of his damn business, and thereupon called defendant a liar. Defendant replied in the same language, when Mosier jumped up in the road, waved his hand, and swore that he would cut defendant into shoe strings, as he was the nerviest little man that ever came to Missouri. Defendant told him if he would put down his knife, he would strip off and fight him until he was satisfied. Mosier swore that he would not fight any damn, big, six-foot son-of-a-bitch without a knife, and started towards defendant. As Mosier advanced on him, some of the witnesses testified that defendant threw a rock, whereupon Mosier threw one at him, and he another at Mosier. Other parts of the testimony for the defendant tend to show that Mosier, the deceased, and the defendant picked up rocks about the same time and commenced throwing them. The rock thrown by Mosier struck defendant on the head, and Mosier continued to rush towards defendant, all the time striking and cutting at him with the knife. Defendant began to run from Mosier, and after retreating some distance, Mosier then being close to him, he turned and continued to back away. Mosier still pursued him, all the time striking and cutting at him with the knife, and at one time cut through his ear. After defendant had retreated a distance of about 15 steps, and when he had backed up against a fence and could retreat no further, he shot Mosier, just as Mosier was making a lunge at him with the knife. "He shot in order to keep Mosier from cutting him to pieces with a knife." After shooting Mosier defendant returned to the place of the sale, and after getting some money from his brother left, but returned to the county in three or four days, and surrendered to the officers.

Four or five years prior to this difficulty defendant had had trouble with other parties, and on that occasion a note, together with a bunch of switches, had been left at his gate. He had been threatened with death or great bodily harm.

There was other testimony on the part of the defendant tending to show that the witnesses who testified to threats made by the defendant against the deceased were on unfriendly terms with the defendant, and that the threat, as testified to by Williams and Terry, that defendant had said "he would go over and crawl on him" (meaning the deceased) was not in fact true, but that defendant said "he would go over and call on the board." There was other testimony tending to show that the defendant was not at or near the fire where Williams and Terry were when they say they heard threats, and that in fact he was not nearer than 30 or 40 steps of the fire.

At the close of the evidence the court instructed the jury upon murder in the first and second degree, as well as upon every subject connected with the commission of the offense which, in the views entertained by the court, were correct declarations of law, applicable to the testimony developed upon the trial. We deem it unnecessary to here reproduce the instructions given or those

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refused, but during the course of the opinion will give them such attention as in our opinion their importance requires. The cause being submitted to the jury upon the evidence as introduced and the instructions of the court, they returned their verdict, finding the defendant guilty of murder of the second degree, and assessed his punishment at imprisonment in the penitentiary for a term of 40 years.

Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Sentence and judgment were entered of record in conformity to the verdict returned, and from this judgment the defendant prosecuted his appeal, and the record is now before us for consideration.

M. E. Benton, Felix Lindsay, J. A. Sturgis, W. B. Skinner, and George Hubbert, for appellant. Elliott W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). The record in this cause discloses numerous assignments of error as a basis for the reversal of this judgment. However, a number of the errors complained of in the assignment are not discussed, or even alluded to, by learned counsel for appellant in the brief proper where the legal propositions are presented and discussed. We will give such attention to the complaints of appellant as in our opinion they merit and their importance requires.

1. The information in this cause charges every essential element necessary to constitute the offense of murder in the first degree, and that embraces all the lower grades of the offense. It is properly verified, and is in such form as has repeatedly met the approval of this court. State v. Kindred, 148 Mo. 270, 49 S. W. 845; State v. Barrington, 198 Mo. 23, 95 S. W. 235; State v. Privitt, 175 Mo. 207, 75 S. W. 457.

Directing our attention to the suggestion that the information does not allege that the defendant was afforded, prior to the filing of such information, a preliminary examination, it is sufficient to say that this allegation was not essential. It has been repeatedly held by this court that the provisions of the statute concerning a preliminary examination go merely to the regularity of the preliminary proceedings respecting the arrest and trial, and by no means is the question of preliminary examination jurisdictional in the sense that the state must, in a prosecution by indictment or information, allege and prove that a preliminary examination has been afforded the accused. This proposition has been set at rest by the express rulings of this court, as well as in other jurisdictions. State v. McKee, 212 Mo. 138, 110 S. W. 729; Washburn v. People, 10 Mich. 383; State v. Jeffries, 210 Mo. 309, 109 S. W. 614; Ex parte McLaughlin, 210 Mo. 657, 109 S. W. 626.

2. This brings us to the consideration of the most serious proposition involved in this proceeding. That is the action of the court in declining to give an instruction for manslaughter in the fourth degree, as requested by the appellant. At the close of the testimony, and before the cause was submitted to the jury, learned counsel for appellant prepared an instruction upon manslaughter in the fourth degree, presented it to the court, and requested that it be given. This request was denied. In addition to this the record discloses that after the court declined to give the instruction upon manslaughter in the fourth degree as presented by the defendant, the further request was made of the court to instruct the jury properly as to manslaughter in the fourth degree, in accordance with the law in such cases provided. Upon such request being made the court ruled that, upon the facts in evidence, and under the law, the defendant was not entitled to an instruction with regard to that degree of homicide, and refused any such instruction, to which action and ruling of the court the defendant by his counsel duly preserved his exceptions at the time. After a most careful consideration of this proposition, and an analysis of the evidence applicable to it as disclosed by the record, we see no escape from the conclusion that the action of the trial court in denying the request for an instruction for manslaughter in the fourth degree constitutes reversible error.

The rule is well settled that in the trial of cases of this character the trial court, in declaring the law upon the grades of crime to which the testimony is applicable, is not warranted in confining such declaration in the submission of the grades of the offense to the case as made out by the state. If there is substantial testimony offered by the defendant, even though it only consist of the testimony of the defendant himself, which shows a state of facts which would reduce the grade of the offense, it is clearly the duty of the court to submit the issue upon that grade of crime to the jury. It makes no difference as to whether the facts as testified to by the witnesses for the defendant are true or false—so far as the application of this rule is concerned, the truthfulness or falsity of the testimony as given by the witnesses is a question for the jury. If testimony is introduced before the court and jury sufficient to reduce the grade of the crime charged, then we repeat that it is clearly the duty of the court to submit that issue to the jury upon such reduced grade of the offense.

In the discussion of this proposition it is not our province to determine whether or not the facts as testified to by the witness for the defendant were true or false, but we simply refer to the testimony as introduced by the defendant for the purpose of indicating clearly that the evidence manifestly was

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sufficient to warrant the court in submitting the issue to the jury as to the lower grade of the offense; that is to say, manslaughter in the fourth degree. The record discloses that seven or eight witnesses testified on the part of the defendant, and the testimony of such witnesses substantially tended to prove the following state of facts, which occurred at the time of the fatal difficulty; that is to say, when the defendant was passing out of Crispin's gate, he saw Mosier, and addressed him, saying: "Hello, Mosier, I want to speak to you a moment." Mosier said, "All right," and stopped. Defendant asked him why he had whipped his daughter after promising not to, and Mosier said it was none of his damn business, and thereupon called defendant a liar. Defendant then called Mosier a liar. Mosier jumped up in the road, waved his hand, and swore he would cut defendant into shoe strings, as he was the nerviest little man that ever came to Missouri. Defendant told him if he would put down his knife, he would strip off and fight him until he was satisfied. Mosier swore that he would not fight any damn, big six-foot son-of-a-bitch without a knife, and started towards defendant. As Mosier advanced on him, some of the witnesses testified that defendant threw a rock. Other witnesses testified that as Mosier advanced, he and the defendant picked up rocks about the same time. The rock thrown by Mosier struck defendant on the head, and Mosier continued to rush toward the defendant, all the time striking and cutting at him with a knife. Defendant began to run from Mosier, and continued to back away. Mosier still pursued him, all the time striking and cutting at him with a knife, and at one time cut him through his ear. After defendant had retreated a distance of about 15 steps, and when he backed up against a fence, and could retreat no further, he shot Mosier, just as Mosier was making a lunge at him with a knife. Manifestly this was a showing of a difficulty between the defendant and the deceased, in which the deceased, before the fatal shot was fired, inflicted upon the defendant personal violence.

The rules of law applicable to the nature and character of the provocation which must be shown in order to reduce a killing from murder to manslaughter are well settled in this state. In State v. Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830, the distinction between the degrees of passion and of the nature and character of the provocation which arouses such passion are very clearly drawn. It was there said: "The two phases or degrees of passion under our decisions referred to are: First, that passion which is produced by a just provocation; and, second, that passion which is produced by a lawful provocation. Opprobrious epithets, insulting gestures, and the like are held to constitute just provocation in this state; and, where the passion or excitement of mind is produced by such provocation to the extent that it materially interferes with the judgment and reason, an act done at once, under its immediate influence, cannot in law be said to be done deliberately, and the actor cannot in law be said to be in a cool state of the blood. A homicide committed under the influence of such passion is not murder of the first, but murder of the second, degree under our Criminal Code. This passion, thus produced, is a statutory concession of the frailty of human nature; but, before it can operate to mitigate a homicide from murder of the first, to murder of the second, degree, the party acting under its influence must act suddenly, and before he has time to reflect." In that same case it is made clear the nature of the provocation which will reduce the homicide to manslaughter. The court, in further discussing that case, says, in speaking of the provocation necessary to arouse the heat of passion, which would result in reducing the crime to manslaughter: "This court has held that 'legal,' 'lawful,' 'adequate,' and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonyms; and, as a general rule, with very few exceptions, it takes an assault or personal violence to constitute this provocation."

In State v. Gordon, 191 Mo. 114, 89 S. W. 1025, 109 Am. St. Rep. 790, the rule as applicable to manslaughter was stated in this language: "At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder, nor were contemptuous or insulting actions or gestures without an assault upon the person, nor was any trespassing against lands or goods, to have the effect to reduce the guilt of killings to a grade of manslaughter. The provocation must consist of a personal violence. 1 East's Pleas of the Crown, 233; 4 Blackstone, Com. 201; State v. Wieners, 66 Mo. 13. And the common-law rule in this respect is firmly established in this state by a long line of decisions. State v. Starr, 38 Mo. 271; State v. Branstetter, 65 Mo. 149; State v. Hill, 69 Mo. 451; State v. Elliott, 98 Mo. 150, 11 S. W. 566; State v. Gartrell, 171 Mo. 516–519, 71 S. W. 1045." From the cases herein indicated the general rule is clearly deducible that, where the provocation consists of an assault or personal violence sufficient to arouse the heat of passion necessary to reduce the offense to the grade of manslaughter, the issue upon that grade of the offense should be submitted to the jury. The question as to whether or not an assault or personal violence did in fact arouse the heat of passion necessary to reduce the offense to the grade of manslaughter is a question to be determined by the jury from all the facts in the case, and it is the duty of the court, under such state of facts, to submit that question to the jury.

In State v. Sebastian, 215 Mo. 58, 114 S. W. 528, it was insisted that the court committed error in giving an instruction for manslaugh-

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ter in the fourth degree. This court, in treating of that proposition, said: "The testimony of the defendant, who testified in his own behalf in this cause, clearly furnishes a basis for the giving of this instruction, and in fact the refusal of an instruction upon manslaughter in the fourth degree, under his testimony, would have constituted error. The defendant, in giving an account of this difficulty, referring to the deceased, said: 'He picked up a corn knife and struck at me. I was about 10 feet from him, and he took after me, and I ran, I reckon, 10 or 12 steps, and he commenced hitting me with the corn knife on the shoulder and ear. I never shot until they hit me.' We have in that testimony an assault and personal violence before the fatal shot was fired, according to the testimony of the defendant. An instruction for manslaughter in the fourth degree, based upon that testimony, is directly in harmony with the rules of law as announced in the case heretofore cited, applicable to the subject of manslaughter in the fourth degree. We have in this case a killing done by the use of a deadly weapon—that is to say, a pistol—and, according to the testimony of the defendant, such killing was not done until after the defendant had received at the hands of the deceased personal violence in the nature of a blow with a corn knife. Therefore we are of the opinion that it was quite appropriate for the court to submit to the jury, upon the testimony of the defendant, the question as to whether or not the hitting of him prior to the shooting constituted a reasonable provocation, and the sufficiency of such provocation to arouse in the defendant such a heat of passion as would render the killing under its immediate influence simply manslaughter in the fourth degree."

In State v. Weakley, 178 Mo. 413, 77 S. W. 525, this court had in judgment the proposition as to the propriety, under the state of facts as developed in that case, of the giving of an instruction for manslaughter in the fourth degree. This court, speaking through Judge Burgess, very clearly pointed out the duty of the court upon the facts as disclosed in that case. He said: "It has been said that under our statute manslaughter in the fourth degree includes every homicide, not justifiable or excusable, which was manslaughter at common law, and which is not excusable or justifiable, or is not declared by statute to be manslaughter in some other degree. State v. Edwards, 70 Mo. 480; section 3477, Rev. St. 1889; State v. Watson, 95 Mo. 411, 8 S. W. 383. Therefore, 'if the party act upon sudden passion, engendered by reasonable provocation, the existence of malice will be negatived, and the killing, though intentional, will be manslaughter in the fourth degree.' State v. Curtis, 70 Mo. 594. But in order to reduce the offense from murder to manslaughter the killing must be done in a heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances that will not be justifiable or excusable homicide. And the passion which will reduce homicide to the grade of manslaughter is an excited state of the mind produced by some lawful provocation, such as a blow, or an assault of any kind upon the person. State v. Ellis, 74 Mo. 207. It was the duty of the court to instruct the jury upon all questions of law arising in the case which were necessary for their information in giving their verdict (section 2627, Rev. St. 1899 [Ann. St. 1906, p. 1556]); and, as there was evidence tending to show that the deceased assaulted the defendant, and struck him over the head with a revolver just before defendant shot him, which, if true, was certainly reasonable provocation, as it must have tended to arouse that heat of passion which negatives malice, and, whether it did so or not, should have been submitted to the jury, and the court erred in failing to do so, when its attention was called to the fact that it had failed to instruct the jury upon all the law of the case under the evidence." To the same effect is the case of State v. Darling, 199 Mo. 169, 97 S. W. 592, where it was expressly ruled that the evidence disclosed by the record tended to show that, if the defendant was first assaulted by the deceased, it was error for the court to refuse to give an instruction for manslaughter in the fourth degree, and the judgment of the trial court was reversed and remanded upon the ground of such refusal.

We see no necessity for pursuing this subject further. That the state of facts as herein indicated, as shown by the evidence by numerous witnesses on the part of the defendant, made it the duty of the trial court to give an instruction upon manslaughter in the fourth degree, there can be no question. As was said in State v. Weakley, supra, "this evidence, if true, was certainly reasonable provocation, as it must have tended to arouse that heat of passion which negatives malice, and, whether it did so or not, should have been submitted to the jury, and the court erred in failing so to do."

3. Appellant next insists that the court erroneously declared the law by its instruction No. 10. This instruction was as follows: "The court instructs the jury that, if you believe from the evidence that the defendant did voluntarily engage in the difficulty with Mosier, yet he had the right to abandon the conflict and retire therefrom; and, if it be found from the evidence that he did in good faith so attempt to withdraw from said difficulty, but that Mosier pursued and pressed hard on him with knife or stone, so that it became necessary to kill the said Mosier to save the defendant from great bodily harm or from death, then the defendant had a right to defend himself, and to use such force as was reasonably necessary to defend himself from death or great bodily harm, and

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this is true, even though the defendant was the aggressor, provided you further believe from the evidence that the defendant did not enter into the difficulty intending at the time to kill the deceased, or do him some great bodily harm." After a careful analysis of that instruction it seems to correctly declare the law in harmony with the well-settled rules applicable to that subject until it reached the concluding portion of that instruction. It fully informed the jury that the defendant had the right, in good faith, to withdraw from the difficulty, and that if they believed from the evidence that he did in fact in good faith withdraw from the difficulty, and deceased pursued him, the defendant had a right to defend himself and to use such force as was necessary to defend himself from death or great bodily harm, even though he in the first instance was the aggressor, but the concluding part of the instruction is inconsistent with the other portion of it, and clearly not in harmony with the well-considered adjudications by this court. After properly declaring the law the court then concluded the declaration by saying: "Provided you further believe from the evidence that the defendant did not enter into the difficulty intending at the time to kill the deceased or do him some great bodily harm."

In State v. Cable, 117 Mo. 380, 22 S. W. 953, the correct rule applicable to this subject was very clearly announced by this court, speaking through Judge Burgess. It was there said: "It is a well-established rule of criminal law, that, although a person may voluntarily enter into, and engage in, a difficulty, he may abandon the conflict, and if he does so in good faith, and is pursued by his antagonist, he may, when hard pressed, although in the first place the aggressor, if it becomes necessary to take life in order to save his own, he will be justifiable in doing so. If defendant had, in good faith, withdrawn from and abandoned the controversy, and deceased pursued him, then defendant was not deprived of the right of self-defense, because of having first brought on or voluntarily entered into it." In State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31, this court, in treating of this subject, did so in this language: "Though a man should be in the wrong in the first instance, yet 'a space for repentance is always open, and where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict,' and his adversary still pursues him, then, if taking life becomes necessary to save his own, he will be justified. 1 Bishop on Criminal Law (5th Ed.) § 871; Horrigan & Thompson on Self-Defense, 227; Foster, 276." In State v. Lockett, 168 Mo. 480, 68 S. W. 563, after reviewing the evidence as disclosed by the record in that case, it was said: "The evidence tends to show that defendant withdrew from the conflict in good faith, intending to abandon it; and, where this is the case, his right of self-defense will revive upon such withdrawal being made as aforesaid, notwithstanding he began the combat with a felonious and murderous design. This point is absolutely settled by authority. State v. Partlow, 90 Mo., loc. cit. 627, 628, 4 S. W. 14, 59 Am. Rep. 31, and authorities cited; State v. Cable, 117 Mo., loc. cit. 385, 22 S. W. 953." In support of the correctness of the instruction now being considered the learned Attorney General directs our attention to the case of State v. Gordon, 191 Mo. 114, 89 S. W. 1025, 109 Am. St. Rep. 790. It was there said: "If he provoked the combat, or produced the occasion in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder in the first degree, no matter to what extremity he may have been reduced in the combat. If, on the other hand, he had no felonious intent, intending merely an ordinary battery, and during the progress of the fight is compelled to take the life of his adversary in order to save his own, he is guilty of manslaughter; or if, having entered into a fight without felonious intent, he seeks in good faith to abandon it, and withdraws as far as he can, and his adversary still pursues him, then if necessary to save his own life he slay his opponent, he will be justified."

It is clear that this court, in the discussion of the proposition involved, simply had in view the particular facts as disclosed by the record in that case. There was testimony on the part of the state indicating that the defendant commenced the difficulty by an ordinary battery, and the language used by this court, wherein it was said: "Having entered into a fight without felonious intent, he seeks in good faith to abandon it and withdraws as far as he can, and his adversary still pursues him, then if necessary to save his own life he slay his opponent, he will be justified"—manifestly was not for the purpose of announcing the rule that there could not in good faith be an abandonment of a difficulty where it was entered into with a felonious intent. Obviously the court in the Gordon Case was announcing the rule of law as applicable to the particular facts developed in that case, and did not intend to overrule the well-settled rule, which has been repeatedly announced by this court, that there can be an abandonment and withdrawal from a difficulty in good faith, whether it was entered into with a felonious intent to do some great bodily harm or not. It is only necessary to suggest as to this proposition that upon a retrial of the case it should not be overlooked, in order to warrant the giving of the instruction now under consideration, that it is essential that there should be some substantial testimony tending to show that the defendant, after the commencement of the difficulty, in good faith sought to withdraw from it, and, unless there is some substantial testimony showing that state of facts,

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the instruction should not be given at all; but, should the facts warrant the giving of the instruction now under consideration, it should be so modified as to harmonize with the cases herein indicated of State v. Cable, State v. Lockett, and other cases cited.

4. Numerous other complaints are assigned concerning the giving and refusing of instructions. As before indicated, this case must be retried, and it is difficult for this court to foreshadow what the testimony will be in the next trial. To undertake to discuss each and every instruction the correctness of which is challenged, and the complaints as to the instructions refused, would obviously extend this opinion to an unreasonable length. There were too many instructions given in this case, as well as too many requested, which were refused. This case is not absolutely unlike many other cases in which the charge of murder was being investigated, and it would be well for the trial court, upon the retrial of this cause, not to be unmindful of the many approved precedents which, with very slight changes, could be made applicable to the facts developed upon the trial of this case.

Appellant complains of the refusal of instruction D. This instruction undertook substantially to inform the jury that the defendant had a right to go upon the public road and invite a conversation with Mosier, and ask, as a parent and school patron, the reason for his conduct toward defendant's daughter, and if he did so, and thereupon Mosier displayed a knife and threatened to cut defendant, and defendant had good reason to believe, and did believe, that Mosier was about then and there to carry out such threat, the defendant had a perfect right to use all such reasonable means and force as were in his power to protect himself, and such act of defendant, in beginning the conversation under such circumstances, could not be said to be the beginning of a difficulty that would cut off or abridge the right of defendant to defend himself against such violence, etc. In our opinion this instruction was properly refused. It was nothing more nor less than selecting certain isolated facts, and undertaking to comment upon them. It savors entirely too much of an argument to the jury. The court in the instructions given had fully informed the jury that, before the defendant's right of self-defense could be abridged, it was absolutely essential for them to find that he began the quarrel or provoked the difficulty for the purpose of taking advantage of the deceased, and of taking his life or of doing him some great bodily harm. The jury had heard the testimony concerning the defendant's conduct in going upon the public road and the conversation between him and Mosier, and manifestly, if the jury believed defendant merely went upon the public road, and in good faith asked the deceased the reason for his conduct toward his daughter, and the deceased thereupon displayed a knife and threatened to cut defendant, and acted in such a manner as to justify apprehension of immediate danger, they would not find that the defendant either commenced the quarrel or provoked the difficulty. This court has uniformly and repeatedly condemned instructions which undertook to treat of isolated facts which may be developed upon the trial.

What has been said as heretofore indicated respecting instruction D is equally applicable to instructions E and J. Upon the trial defendant introduced testimony tending to prove that he had previously been threatened with great violence to his person. This testimony was doubtless introduced for the purpose of explaining to the jury why he had upon his person a pistol at the time of this difficulty. This testimony was admissible as explanatory of the possession of such pistol. Upon this state of facts appellant requested the court to give instruction E, which recited that the defendant had the right, under the Constitution and laws of this state, to bear arms in the necessary defense of his person; and, if the jury believed that he had previously been threatened with death or great bodily harm, and had good reason to believe it necessary to carry a pistol in defense of his person, then under the law he had the right to carry and use it in the necessary defense of his person, and that he should not suffer any prejudice in this cause on account of carrying a pistol. The court's action in declining to give that instruction was entirely proper. The defendant was not upon trial for carrying a concealed weapon; and, while in the progress of the trial he had the right to explain why he had a weapon, yet manifestly it will not be seriously contended that a jury would undertake to abridge, or in any way lessen, the defendant's right of self-defense if the facts and circumstances warranted the exercise of such a right, from the mere fact that he had in his possession a pistol.

The proposition involved in this instruction was in judgment before this court in State v. Renfrow, 111 Mo. 589, 20 S. W. 299. That was a case of murder, where the defendant was charged with killing an officer. In that case, as in the case at bar, defendant undertook to excuse and justify himself for carrying a pistol and drawing it on the occasion, on the ground of a feud existing between certain parties, and that threats of violence had been made against him, and that he had reason to believe that such threats would be carried into execution. Instructions were requested similar to the one now under discussion, asserting the proposition that, under such circumstances as were shown by the evidence, the defendant had the right to arm himself and carry a pistol on the day of the homicide. It was expressly ruled in that case that these facts may have availed the defendant as a defense in a prosecution for carrying concealed weapons had

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he been arrested and tried for that offense, but as applicable to that case it furnishes no excuse or justification for the unlawful use of such pistol in the perpetration of the homicidal act, and that the instructions were properly refused. So it may be said in the case at bar. Obviously the fact as to whether he was in the possession of a pistol and had a right to carry it, or was carrying it unlawfully, has no tendency to prove or disprove any of the issues submitted to the jury. The overshadowing question, so far as this proposition is concerned, is as to the use made of such pistol at the time of the difficulty; that is to say, whether or not the defendant, without any just or lawful provocation, killed the deceased by the use of such pistol, or on the other hand, whether or not he used it upon a reasonable apprehension of danger and for the purpose of protecting his own life, or used it in a sudden heat of passion aroused by some just or lawful provocation, and not strictly upon the ground of self-defense, as defined in the instructions in this cause.

Instruction J requested by the appellant, which was refused, substantially declared that the defendant, as a patron, having a child at the school taught by Mosier, had a right to inquire into the difficulty between the teacher and his child, and to bring it to the attention of the governing directors for their action under the law, and to seek to have the punishment of the child deferred and controlled by the directors charged by law with the control of the school; and, if the jury believed he did so in a peaceable manner, he must be regarded as acting so far within his rights, without prejudice to his defense in this case. That instruction was properly refused, and it is unnecessary to repeat what was said as to the refusal of instructions D and E, but it is sufficient to say that the rule as to those two instructions is equally applicable to this one. This instruction is more in the nature of an argument presented to the jury than it is a declaration of law, declaring legal principles which are applicable to a certain state of facts.

5. This brings us to the consideration of the errors complained of respecting the action of the court in excluding certain evidence offered by the defendant. Witnesses Terry and Williams were introduced by the state, and testified to a certain character of threats made by the defendant about the time the defendant was leaving the Miller sale to go in the direction of the schoolhouse. The defendant offered testimony as to the conversation, occurring at the fire after the defendant had left, between these two witnesses and others, by which it was sought to prove in these conversations that these two witnesses who had testified for the state had used the words themselves which they had sworn to as being used by the defendant against the deceased. This testimony was clearly inadmissible. If the testimony offered by the defendant sought to impeach them, or to contradict any statements they had made respecting threats by the defendant against the deceased, then it was essential that the attention of these witnesses while on the stand be directed to the particular conversations by which it was sought to impeach them. This was not done; but to introduce witnesses to show a conversation between these witnesses and other parties there at the fire was simply hearsay, and in the form as offered could not be made the basis of a contradiction or impeachment of these witnesses.

It is next insisted that the court committed error in the exclusion of a note, which had been left at the gate of the defendant some time prior to this fatal difficulty. This evidence doubtless was offered for the purpose of showing threats against the defendant, as explanatory of his reason for having the pistol in his possession. This note was in the following form:

"Mr. ———: You are hereby notified that you must pay to Wm. Oeff the entire cost of that suit in fifteen days after this notice is posted, and fifty dollars for that hog that you did not buy or pay for, * * * or we'll call on you and settle with you in our way we settle with such men as you; you may find our way a hard one, remember how we settled with Grubb. [Signed] Sugar Creek and Elkhorn Regulators." This testimony was properly excluded. While it was entirely proper for the defendant to testify that he was threatened with personal violence, and to introduce auy other witnesses who could testify to threats made against him, which were afterwards communicated to him, as explanatory of his act in carrying a weapon, but this does not mean that all the details of what the threats were, and how they were made, should be detailed in evidence. To have permitted this note in evidence, or have permitted other witnesses to testify in detail as to what the threats were, and all the particulars surrounding the making of them, would have injected into this trial an issue entirely collateral to the issue upon trial before the jury. The defendant had the right to testify generally that he had been threatened, might go to the extent of showing by whom, but the details of such threats could serve no useful purpose, and were clearly inadmissible. If, on the other hand, every minute detail as to the threats made against this defendant were admitted in evidence, then obviously the state would have a right to frame an issue as to the truth of those details, and the time of the court would have been unnecessarily occupied in hearing testimony upon an issue that was entirely collateral to the issue to be tried by the jury. For the purposes of the explanation sought by the defendant as reason for carrying the pistol, it was only essential that he show in

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a general way that threats had been made against him, and for that reason he had carried it, and the court very properly excluded all testimony which sought to give in a detailed way the nature and character of such threats. But aside from all this, it was not a disputed question that the defendant's life had been threatened prior to this fatal difficulty. The record before us discloses that state's counsel admitted that they were not seeking to contradict the testimony of defendant that his life had been threatened, and that he had a right to carry a pistol. Upon this state of the record the exclusion of the testimony of which appellant is complaining did not by any means prejudice the rights of the defendant to a fair and impartial trial.

6. It is next insisted that the prosecuting officer in his argument to the jury made use of improper remarks, of such a character as prejudiced the rights of the defendant in his trial before the jury, and that this improper conduct upon the part of the prosecuting officer constitutes reversible error. It is sufficient to say upon this proposition that upon the retrial of the cause counsel representing the state should not be unmindful of the repeated admonitions by this court that they should keep within the record.

7. As herein indicated numerous other complaints are suggested in the brief by counsel. We shall not further extend this opinion in the discussion of them. It is sufficient to say that the rules of evidence, as well as the rules of law applicable to such evidence, are well settled in this state, and we shall be content with indulging the presumption that the learned trial judge, in the retrial of this cause, will not be unmindful of the settled rules of law, as well as evidence applicable to cases of this nature and character.

We have given expression to our views upon the controlling legal propositions disclosed by this record. For the reasons indicated, the judgment of the trial court should be reversed, and the cause remanded for a new trial. It is so ordered. All concur.

WOHRADSKY v. WOHRADSKY.

(St. Louis Court of Appeals. Missouri. July 6, 1909.)

APPEAL AND ERROR (§ 305*)—EXCEPTIONS—NECESSITY.

No exception having been taken to the action of the trial court in overruling a motion for a new trial, the appellate court cannot review the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1759; Dec. Dig. § 305.*]

Appeal from St. Louis Circuit Court; Dan'l D. Fisher, Judge.

Action by Josephine Wohradsky against John J. Wohradsky. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Stern & Haberman, for appellant. Eugene C. Slevin, for respondent.

NORTONI, J. This is a proceeding for divorce. The wife instituted suit against the husband on the ground of indignities. The indignities alleged relate to the conduct of the defendant's mother in frequently scolding the plaintiff. The court dismissed the petition, and plaintiff appeals.

Plaintiff and her witnesses testified that the defendant had treated her with kindness and affection at all times, and that he was a good, kind, and devoted husband. He was a stone mason by trade, made on an average $23 per week, and gave this money all into the keeping of his wife, who gave him in turn such portions thereof as were necessary to pay his individual expenses. Both parties seem to be good people. So much is conceded. They resided in an apartment separate and apart, across the hall, from the defendant's mother and her family. It is said defendant's mother came across the hall into plaintiff's apartment and scolded the plaintiff at times. Plaintiff, becoming tired of this, took her leave from defendant's home while he was absent, and remained away thereafter. The plaintiff's real grievance was that her husband refused to scold his mother for scolding her. After hearing all of the evidence on both sides, the court found the issues for the defendant and dismissed the bill.

We have read the entire testimony and believe the judgment of the court was entirely proper. However, we will not go into the matter further, for the reason the question is not open to review here. Although a motion for new trial was duly filed and overruled, it appears no exception whatever was saved to the action of the court in that behalf. This being true, we are not permitted to review the merits of the cause on appeal. Wilbrandt v. Laclede Gaslight Co. (Mo. App.) 115 S. W. 497.

The judgment will be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

STATE ex rel. HOLLADAY v. RINKE, Mayor, et al.

(St. Louis Court of Appeals. Missouri. July 6, 1909.)

1. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION LAW—FINDINGS—CONCLUSIVENESS.

A county court's finding, in an order directing submission of the local option question to a county election, that the county contained no incorporated town or city having a population of more than 2,500, was not subject to collateral attack in mandamus to compel the issuance of a county license on the theory that the election was void.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 33.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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2. INTOXICATING LIQUORS (§ 32*)—LOCAL OPTION — ELECTION — STATUTES — "INHABITANTS."

Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), provides that on application by petition, signed by one-tenth of the qualified voters of any county who shall reside outside the corporate limits of any city or town having at the time a population of 2,500 inhabitants or more, who are qualified to vote for members of the Legislature in any county in the state, the county court shall order an election to determine whether intoxicating liquors shall be sold within the county outside the corporate limits of such city or town. *Held*, that the word "inhabitants," used with reference to excluding cities having 2,500 inhabitants or more, was not synonymous with "voters," and did not require that cities, in order to be excluded, should have 2,500 qualified voters within its limits; 2,500 general residents being sufficient.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 4, pp. 3594–3604; vol. 8, p. 7687.]

3. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION—ELECTION—NOTICES.

An order for the submission of local option questions to a county election found that the county contained no incorporated city or town having a population of 2,500 or more, and directed the clerk to give notice by publication of an election to be held on a certain day. The published notice, however, recited that, in accordance with the above finding, it was ordered by the clerk of the county court "that the qualified voters" of the county be notified, and they were notified, that a special election would be held at the usual voting precinct on March 7, 1908, to determine whether spirituous and intoxicating liquors, including wine and beer, should be sold within the limits of the county and "outside the limits of all cities or towns having 2,500 inhabitants or more." *Held*, that the notice, in so far as it attempted to limit the sale of liquor to the county outside the limits of any town of 2,500 inhabitants or more, was a departure from the order directing the holding of the election, which was therefore void.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 33.*]

4. STATUTES (§§ 152, 158*)—REPEAL.

A statute is repealed only by an express provision of a subsequent law or by necessary implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 219–228; Dec. Dig. §§ 152, 158.*]

5. STATUTES (§ 161*)—IMPLIED REPEAL—PARI MATERIA.

A later statute will not repeal a former one by implication, when the two are not irreconcilably inconsistent and can stand together, in which case the later statute will replace the older one only pro tanto as to inconsistent provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230–234; Dec. Dig. § 161.*]

6. CENSUS (§ 8*)—STATUTES—APPLICATION.

Acts 1905, p. 80, interpolating section 5895a into article 5, c. 91, Rev. St. 1899 (Ann. St. 1906, p. 2990), providing for the taking of a census of cities of the fourth class, was intended to apply only to the taking of a census to determine the tax levy rate, and hence left section 6300 in force for the purpose of ascertaining the population of such cities for every purpose other than taxation.

[Ed. Note.—For other cases, see Census, Dec. Dig. § 8.*]

7. INTOXICATING LIQUORS (§ 31*)—LOCAL OPTION ELECTION—INVALIDITY.

A void local option election is not to be considered in determining whether an election has been held in the territorial subdivision within the legal period.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 31.*]

Mandamus by the State, on relation of James W. Holladay, against one Rinke, as Mayor of the City of Flat River, and others. Writ granted.

This case was entitled, when filed, "State ex rel. James W. Holladay v. A. H. Mitchell et al." As the questions involved in it necessitate reference to the case of State ex rel. Retonez v. Mitchell et al., not yet officially reported, but in 115 S. W. 1098, we use in the title the name of another of the defendants to avoid confusion between the two cases. It is a proceeding by mandamus to compel defendant Rinke, alleged to be mayor, and the other defendants, alleged to be councilmen of the putative city of Flat River, to issue to relator a license as dramshop keeper in Flat River. An alternative writ was issued by us June 4, 1909.

The facts in the case, as disclosed by the record now before us, are these: On the 3d of February, 1908, a petition was filed with the county court of St. Francois county, praying the court to order an election in the county to determine whether or not spirituous and intoxicating liquors, including wine and beer, should be sold within the limits of the county. The petitioners set out, by way of recital in their petition, "that there is no city or incorporated town in said county at this time having a population of 2,500 inhabitants or more," and that the petitioners constitute one-tenth of the qualified voters of the county. On the 4th of February the county court entered up an order in which it is recited that the court, acting "on an application by petition, duly signed by 867 persons, who reside in St. Francois county, Mo., praying the court to make an order entered of record ordering and authorizing and directing that a special election be held in St. Francois county, Mo., and submitting to the qualified voters thereof what is known as the local option law * * * and to decide at such special election the fact whether or not said St. Francois county shall adopt the law known as the local option law, and thereby decide if spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of St. Francois county, Mo., lying outside of the corporate limits of any city or town having 2,500 inhabitants or more for the next four years after said special election," and it was recited that the application by petition having been taken up, and all and singular the matters and issues being submitted, the court finds that the petition is signed by 867 persons, bona fide citi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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zens and qualified voters of St. Francois county, entitled and qualified to vote for members of the Legislature in that county, and that the number of signers constitute more than one-tenth of the qualified voters of the county, as shown by the pollbooks of the previous general election; it appearing by the pollbooks that 5,792 votes had been cast in the county by persons entitled to vote for members of the Legislature. "The court further finds that there is no incorporated city or town in said county having at the time the petition was filed a population of 2,500 inhabitants or more," and that no election under the local option law had been held within the preceding 4 years, and that more than 10 years have elapsed since the question of local option had been submitted, and that the period of 40 days from the day of filing of the petition will expire more than 60 days before any general election is to be held under the laws of the state or any special election held by virtue of any order of the court, which matters being considered, "said special election is granted on said petition, and it is ordered and adjudged that a special election be held in St. Francois county, Mo., on Saturday, the 7th day of March, 1908, at the usual voting precincts in said county, * * * and vote on the proposition and the question submitted and to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of said county." It is also ordered that the clerk give notice by publication for four consecutive weeks, that he furnish ballots for use at the election, and the order further provided for the appointment of judges for the several election precincts throughout the county to act at that election. On February 8th the county court proceeded to the appointment of the judges of the election to serve at this special election, and the clerk was ordered to issue certificates of appointment, and the sheriff ordered to deliver them to the parties appointed. Judges were appointed for the two election precincts into which the city of Farmington is divided, as well as for all the other precincts in the county. Publication of notice of the election was also made, as appears by evidence, for four weeks; the first publication being made February 6th, and the last on March 6th. The notice published set out the order of the court as above, including the statement that the court found that there was no incorporated town or city within the limits of the county having a population of 2,500 or more, and that the election was on the proposition whether or not St. Francois county should adopt the local option law, "and thereby decide if spirituous and intoxicating liquors * * * shall be sold within the limits of St. Francois county, Mo., for the period of four years." The published notice concludes: "Now therefore, in accordance with the above finding, it is ordered by the clerk of the county court of St. Francois county, Mo., *that the qualified voters of St. Francois county*, Mo., be notified and they are hereby notified that a special election will be held *at the usual voting precincts in said county*, on Saturday, March 7, 1908, to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of said county, *outside the limits of any city or town having 2,500 inhabitants or more.*" (The italics are ours.)

On March 10th, the matter of the election coming before the county court, this entry appears on the records of the court: "The matter of the special election coming on to be heard and determined by the court, the court finds that heretofore on the 4th day of February, 1908, an order was made of record upon the presentation of a petition signed by more than one-tenth of the qualified voters of St. Francois county, Mo., *who reside outside the limits of any city or town having at the time of such petition and order a population of 2,500 or more inhabitants* and who are qualified to vote for members of the Legislature, directing that a special election be held in said St. Francois county * * * March 7, 1908, to determine whether or not intoxicating liquors * * * shall be sold within the limits of said county *lying outside such limits of such town or city having 2,500 or more inhabitants, as aforesaid.*" (Italics ours.) The court finds that the notice of the election was duly published, election held and conducted in accordance with the law, that the vote cast at the election had been duly canvassed, and that the result of the special election was that there were cast against the sale of intoxicating liquors 3,240 votes and for the sale of intoxicating liquors 2,763 votes, and that the majority of votes at the election was 477 against the sale of intoxicating liquors, and the total number of votes cast at the special election was 6,003, and the clerk of the court was ordered to publish the result of the election. It appears by this return that the election was held in every voting precinct in the county, including those within the city of Farmington. There were 467 votes cast against, and 351 cast in favor of, the adoption of the local option law in the voting precincts of Farmington, being a majority in that city against adoption of 116, and, if that 116 is taken off of the 477 cast for its adoption, it appears that the proposition was carried outside of Farmington by a majority of 361 votes. The proposition, it thus appears, was carried in the county outside of Farmington by a decided majority.

It further appears by the record before us that, among the petitioners petitioning for the submission of the proposition, a large number were citizens of Farmington. That number has not been counted up for us by counsel; but, roughly stated, there appear to

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be about 194 out of the 867 persons petitioning who, if the vote was to exclude Farmington, were not entitled to be counted in as part of the 10 per cent. of the qualified petitioning voters of the county. Taking this 194 from the 867, who had petitioned for submission of the question, gives 673 as outside of Farmington petitioning, and as the total vote in the preceding election in the county was 5,792, and the total vote cast at this special election in Farmington was 818, deducting that from the 5,792 leaves 4,974 voters outside of Farmington, and the 673 petitioners outside of that town are considerably over the 10 per cent. required. There can be no question whatever in the case but that the number of petitioners requisite to institute the election had signed petitions for the election, excluding the voters of Farmington entirely from the calculation, so that if this had been a proposition submitted in lawful manner to the voters of the county, outside of Farmington, the requisite number of voters had petitioned for it, and it had been carried by a majority vote by the people outside of the city. We mention these matters now and call attention to these figures, not claiming them to be accurate, but substantially so, in order that it may not be said that we have overlooked this phase of the case in arriving at the conclusion which we shall hereafter state.

Resuming the history of the transaction, it appears by the record in the case that on the 3d day of February, 1908, the board of aldermen of the city of Farmington passed an ordinance requiring the taking of a census of the inhabitants of the city, providing for the appointment of enumerators, and requiring them to complete and make return of the census within four days, proceeding under the provisions of section 6300, Rev. St. 1899 (page 3147, Ann. St. 1906), and it appears that on the 7th of February the enumerators completed their work and made a return of the enumeration on the 7th of February, 1908, to the city clerk of Farmington, who duly filed it and reported it to the board, by whom it was that day approved. By this enumeration and return it appeared that the city of Farmington at that date had a population of 2,771 people. A duly certified copy of the return of the enumerators and of the enumeration made was filed with the clerk of the county court of the county on the 10th of February. Farmington is the county seat of St. Francois county, and the county court held its sessions in that city.

J. H. Malugen and H. B. Ledbetter, for relator. G. O. Nations, for respondents.

REYNOLDS, P. J. (after stating the facts as above). At the outset of the case, we are met by the suggestion from a member of this bar, acting as amicus curiæ: That the proceeding is not in good faith; that relator is a well-known advocate of local option; that if he is granted a license he would not use it; that the lease of the building occupied by him on lot 48, in block 1, in Flat River, in terms forbids the use of the building or premises for "a dramshop, beer garden or house for the exposure or sale of any kind of liquors or drinks, or for any store or any like purpose"; and that by decree of the circuit court of St. Francois county, of date June 16, 1909, now, however, under appeal, it was adjudged that the order of the county court purporting to incorporate the city of Flat River was held to be null, void, and of no effect, and the territory embraced within the limits of said putative city held to be unlawfully incorporated.

In view of the importance to the people of St. Francois county of a definite settlement of the question sought to be submitted by this case and attempted to be raised in other cases coming from that county which we have been compelled to dismiss for various technical defects, and that we may, if possible, put an end to a somewhat accrimonious and vexatious dispute, we have concluded that the ends of justice and the settlement of the minds of the people of St. Francois county on this subject are of more importance than the mere form in which the matter is presented to us.

The question involved in this, as in all these various cases, is whether the local option law was legally adopted by St. Francois county, by virtue of an election held in that county on March 7, 1908. This court held, in the case of State ex rel. Retonez v. Mitchell, 115 S. W. 1098, the decision being filed December 1, 1908, that the local option law was not in force and effect in the city of Farmington. It was stated in that decision that, while the election was invalid so far as the city of Farmington was concerned, there was some doubt in the mind of the court as to whether it was valid, and the local option law in force in the rest of the county. It is under the doubt arising from this suggestion that much contention has arisen. The question presented to the court in the Retonex Case was solely as to whether the local option law was operative in the city of Farmington. While it was argued that it was operative in the county outside of that city, the record was not in such shape that this court could pass on that. It seems that the circuit court and the county court have been proceeding on the theory that it was not in force in the county; the one so holding in criminal prosecutions, and the other in the issue of dramshop licenses. In the case at bar it is claimed by the respondents that it is in force throughout the county, the city of Farmington excepted.

Section 3027, Rev. St. 1899 (page 1733, Ann. St. 1906), provides that: "Upon application by petition, signed by one-tenth of the qualified voters of any county who shall

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reside outside of the corporate limits of any city or town having, at the time of such petition, a population of 2,500 inhabitants or more, who are qualified to vote for members of the Legislature, in any county in this state, the county court of such county shall order an election to be held in such county at the usual voting precincts for holding any general election for state officers, * * * to determine whether or not spirituous and intoxicating liquors * * * shall be sold within the limits of such county lying outside of such corporate limits of such city or town." While section 3027 reads, "having a population of 2,500 inhabitants or more who are qualified to vote for members of the Legislature," it has never been understood that this meant that the incorporated city or town was to have 2,500 qualified voters within its limits; so far as we know, the test being applied to inhabitants in the sense of population, and not in the sense of qualified voters. We would be doing violence to the general opinion of the state to construe the 2,500 here referred to as meaning 2,500 voters, and we decline to do so. Section 3028 makes it clear that the number of inhabitants is meant. In the present instance the county court recites as a fact that there was at the time no incorporated city or town within the limits of the county at the time having a population of 2,500 inhabitants or more. In this collateral attack by mandamus, the existence of this jurisdictional fact is not open to inquiry. When the county court found, as recited in its order, that there was no incorporated city or town within its limits with that population at the time it entered up its order in this case, that finding is conclusive on us in this case. State v. Searcy, 39 Mo. App. 393; State v. Dugan, 110 Mo. 138, 19 S. W. 195; State v. McCord, 207 Mo. 519, 106 S. W. 27, 123 Am. St. Rep. 410. But the regularity of the proceeding is open to inquiry. Whether the essential steps required by the statute have been taken can be inquired into. While the county courts have no jurisdiction to order an election under the local option law to be held by the voters of the whole county, when that county includes within its boundaries an incorporated city or town having at the time of such petitioning a population of 2,500 inhabitants or more, the determination of the fact of whether there is such town or city is primarily within the jurisdiction of the county court, and its determination thereof not open to collateral attack. The court having so found, it was the duty of the clerk to give notice, accordingly, of an election by all the voters of the county, to vote on the proposition of putting the law in operation throughout the county. The notice and order of election published, and under which the voters were formally notified of what they were to vote on, did not do this.

The notice of the election, as published by the clerk of the county court, recites: "That the qualified voters of St. Francois county, Missouri, be notified and they are hereby notified that a special election will be held at the usual voting precincts in the county, on Saturday, March 7, 1908, to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of said county, outside of the limits of any city or town having 2,500 inhabitants or more." This was a departure from the order of the court, was not the election ordered, and was an illegal notice. No such limitation, excluding any town or city, was contained in the order. This was a marked and substantial and fatal variance from the order and is not supported by the order. If there was such a town or city, then the electors of that town or city had no right to participate in the election, nor had the electors outside of any such town or city any right to vote the local option law into operation in such town or city. The attempt of the clerk to exclude any incorporated town or city with 2,500 inhabitants was without legal effect. Furthermore, when the county court entered up its order declaring the result of the election, which it did on March 10th, it seems to have overlooked the fact that it had determined that there was no such town in the county, for it repeated these words, excluding any such town or city which might be in the county, as having been in the order of February 4th, when in fact they were not present in that order.

The points against the validity of the notice of the election and against the form in which the county court declared the result were not presented in the Retonez Case in the phase they are here, and neither was our attention called to section 5895a, p. 80, Sess. Acts 1905 (3 Ann. St. Mo. 1906, p. 2990), concerning the mode of taking a census in a city of the fourth class. If the census taken by the city of Farmington was not binding on the county court because the method prescribed in that section was not followed in taking it, and if the opinion in the Retonez Case erred in losing sight of that section, or for any other reason (which we do not decide), the right result was nevertheless reached because of the invalid notice of election.

A consideration of section 5895a in connection with section 6300 (page 3147) leads us to the conclusion that, in the matter of taking a census to ascertain the population of a city of the fourth class, section 6300 governs in all cases except where a census is to be taken for the purpose of fixing the amount of a tax levy for city purposes. We are led to this conclusion by following the well-settled rules governing the interpretation of our statutes: That a statute is held to be repealed only by an express provision of a subsequent law or by necessary impli-

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cation; that a later statute will not repeal a former one by implication when the two laws are not irreconcilably inconsistent and can stand together; that, if by any fair interpretation all the sections of a statute can stand together, there is no repeal by implication; and that, where there are two statutes upon the same subject, they should be so construed as that both may stand if possible, the later repealing the earlier, pro tanto as to inconsistent provisions. It is a further rule of construction that, if two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together, and both will have effect. Pacific R. R. Co. v. Cass County et al., 53 Mo. 17; State ex rel. v. Dolan, 93 Mo. 467, 6 S. W. 366; State ex rel. v. Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; Kansas City v. Smart, 128 Mo. 272, 30 S. W. 773; State ex rel. v. Stratton, 136 Mo. 423, 38 S. W. 83. The act of 1905, interpolating section 5895a into article 5 of chapter 91, Rev. St. 1899, in our opinion, was intended to apply to the taking of a census solely to determine the tax levy rate. Section 6300, on the contrary, is general in its object, being taken to ascertain population "for any other purpose that the law may require or have any other act or thing to be done making the population the basis thereof," and it expressly enacts that "this section shall apply to cities of the fourth class, and towns and villages, and cities and towns under special charters." When a census is to be taken in a city of the fourth class, for any purpose other than ascertainment of population for taxation, it must be taken under section 6300, Rev. St. 1899.

Our conclusion on the whole matter is that the local option election of March 7, 1908, was not a lawful election. It was held on a petition praying for submission to vote of all the voters of the county. Its ostensible object was to put the law in force over all the county, and the order recited there was no city or incorporated town of 2,500 inhabitants in the county. The notice of election distinctly negatived or left open as uncertain, to be determined, in effect by the votes, whether there was any such town or city in the county. In this respect the notice of election did not follow the order. For this reason we hold the election of March 7, 1908, void. We do this with less hesitation, because the opportunity is still open to the people of that county to test the sense of the voters on the matter at an unquestionably legal election. It is better for all concerned that this be done, than to attempt to hold on to an election, the legality of which would always be open to question in the minds of many, whichever way we decided it. No matter how great the majority may be, if cast at an unlawful election, it avails nothing. It is very evident from the record in this case that the people of St. Francois county were in favor of local option, and the consequent prohibition of the sale of liquor. It is within the power of the majority of the voters of St. Francois county to put into force local option by entirely lawful means and measures. The election held in March, 1908, being void, as we hold, there has been no election on that matter within the legal period, so that, if it is still the will of the people of that county, outside of the city of Farmington, or any other incorporated town or city with the prescribed population, to put the question to the test, the way is open to them. The relator is entitled to his city license. What effect that will have on his lease is for his own determination. Whether he shall then go forward and apply for and obtain a county license is for him; he being presumed to know that a city license alone, without one from the county court, will be no protection to him in case of prosecution for selling without a dramshop license.

The alternative writ heretofore issued is made absolute.

Writ of mandamus awarded. All concur.

GUION MERCANTILE CO. v. CAMPBELL.

(Supreme Court of Arkansas. June 28, 1909.)

1. SALES (§ 202*)—REQUISITES AND VALIDITY OF CONTRACT—PASSING OF TITLE.

Where a contract for the purchase of ties is entered into by plaintiff and the owner of the ties, and plaintiff takes possession of them and pays part of the purchase price, the sale is complete, and the title to the ties passes to plaintiff, and the seller cannot thereafter transfer a good title to another.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542–551; Dec. Dig. § 202.*]

2. TRIAL (§ 260*)—INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse requested instructions, where they are fully covered by others given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICATION OF INSTRUCTIONS TO CASE.

It is not error to refuse instructions requested, where they are inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

4. EVIDENCE (§ 231*)—DECLARATIONS—ABSENCE OF PARTY.

In replevin by a purchaser of ties to recover possession of the ties from a subsequent purchaser from the original seller, where the issue in the case was whether the original owner had sold and delivered the ties to plaintiff, evidence as to statements made by such owner and plaintiff in making their contract of sale is admissible, although made in the absence of defendant; statements of a vendor being inadmissible in evidence only if made subsequent to the sale and delivery of the property and in the absence of the other claimant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 852–859; Dec. Dig. § 231.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Appeal from Circuit Court, Izard County; John W. Meeks, Judge.

Action by P. B. Campbell against the Guion Mercantile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Baker, for appellant. P. B. Campbell, pro se.

FRAUENTHAL, J. This is a replevin suit brought by the plaintiff, P. B. Campbell, against the defendant, the Guion Mercantile Company, for the recovery of 100 cross-ties. It was instituted in a justice of the peace court, and an appeal was taken from the judgment of that court to the circuit court, and in that court a jury returned a verdict in favor of the plaintiff for the cross-ties.

The evidence tended to prove that about December 10, 1907, the plaintiff entered into a contract with one Sonchersee, by which the latter, in consideration of certain supplies furnished him by the plaintiff, agreed that he would sell to plaintiff all the cross-ties which he cut and made on his land and to deliver them to plaintiff at that place in the woods, and they agreed that plaintiff should pay 24 cents for each cross-tie. The plaintiff furnished to him supplies amounting to $17.80 and thereafter in the same month Sonchersee, under the above agreement, delivered to plaintiff in the woods on the land the 100 cross-ties in controversy, and the plaintiff then hauled and placed them on the railroad right of way. The plaintiff did not sell the cross-ties on account, as he claimed, of no immediate demand for same, and he did not pay the balance of the purchase money to Sonchersee and still owes said balance. Thereafter, on January 1, 1908, Sonchersee sold the ties to defendant, who paid him therefor.

It is urged by the defendant that a sale is not complete as long as anything remains to be done between the buyer and seller in relation to the goods, and on this principle the sale to plaintiff under the evidence was not complete. Under the evidence on the part of the plaintiff, the only thing that remained to be done between him and Sonchersee was for plaintiff to pay him the remainder of the purchase money. The ties were sold and delivered to plaintiff. As is said in Beller v. Block, 19 Ark. 573: "The purchase money may remain to be paid, and yet the sale may be complete, if the goods be delivered." The title to personal property will pass and the sale be complete if it is the intention of the parties to transfer the title on the one part and to accept same on the other, and in pursuance thereof a delivery is made, even though something remains to be done, as, for example, the fixing of the quantity or exact value of the property or the payment of the purchase money. Chamblee v. McKenzie, 31 Ark. 155; Gans v. Holland, 37 Ark. 483; Shaul v. Harrington, 54 Ark. 305, 15 S. W. 835; Lynch v. Daggett, 62 Ark. 592, 37 S. W. 227; Priest v. Hodges, (Ark.) 118 S. W. 253. However, in this case, under the evidence on the part of the plaintiff, the price was agreed upon, and the plaintiff simply owed to Sonchersee a balance of the purchase money. Under that evidence the sale was complete, and the title to the ties was in plaintiff. After that Sonchersee could not transfer a good title to the ties to defendant. Jetton v. Tobey, 62 Ark. 84, 34 S. W. 531. The issue in the case therefore was whether Sonchersee had sold and delivered the ties to plaintiff. The court presented that issue to the jury by instructing them, in substance, that before the plaintiff could recover it devolved on him to prove by a "preponderance of the evidence that Sonchersee sold and delivered the ties in controversy to the plaintiff."

The defendant requested the giving of certain instructions which were refused; but those instructions were fully covered by the ones given on the part of the plaintiff, or were inapplicable to the evidence adduced in the case.

The court permitted certain witnesses to testify to the statements made by Sonchersee and plaintiff in making their alleged contract of sale in December, and defendant urges that this testimony was incompetent because the statements were made in the absence of defendant; but those conversations related to the sale at or about the time it was made and prior to the delivery of the ties by Sonchersee to the plaintiff. Such testimony was competent. Phipps v. Martin, 33 Ark. 207; Seawell v. Young, 77 Ark. 309, 91 S. W. 544. The statements or declarations of a vendor are only inadmissible in evidence if made subsequent to the sale and delivery of the property, to such vendee, and in the absence of the other claimant. Humphries v. McCraw, 9 Ark. 91; Finn v. Hempstead, 24 Ark. 111; Smith v. Hamlet, 43 Ark. 320; Crow v. Hatkins, 48 Ark. 169, 2 S. W. 659; Hughes Bros. v. Redus (Ark.) 118 S. W. 414.

We find no prejudicial error in the trial of this case.

The verdict of the jury being sustained by the evidence, the judgment is affirmed.

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WHEELER v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1909.)

1. CRIMINAL LAW (§ 359*) — EVIDENCE — ADMISSIBILITY.

Accused may meet the charge by showing that another, or others, committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.*]

2. HOMICIDE (§ 234*) — EVIDENCE — SUFFICIENCY.

Where the case against accused was circumstantial only, and he showed that another person, or others, committed the homicide, he was entitled to acquittal, provided he did not assist in the offense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.*]

3. CRIMINAL LAW (§ 770*) — EVIDENCE — INSTRUCTIONS.

Where the evidence raises an issue favorable to accused, he is entitled to an affirmative charge thereon, and a negative presentation thereof is not sufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 770.*]

4. CRIMINAL LAW (§ 775*)—ALIBI—INSTRUCTIONS.

Where circumstantial evidence alone was relied on to show that accused killed decedent, and accused proved an alibi, and showed that a third person committed the offense, the failure to charge affirmatively that if another committed the offense, or if there was reasonable doubt thereof, the jury should acquit, was erroneous, though the court charged on reasonable doubt, alibi, and circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833–1837; Dec. Dig. § 775.]

5. HOMICIDE (§ 290*) — EVIDENCE — INSTRUCTIONS.

As a rule it is not necessary to define deadly weapons in the instructions in a homicide case, unless there is some question as to whether the weapons are of that character, considering the circumstances and the manner of their use.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 595; Dec. Dig. § 290.*]

6. CRIMINAL LAW (§ 806*)—INSTRUCTIONS—REPETITION—"DEADLY WEAPON."

Where, in a homicide case, the weapons used were a shotgun and six-shooter of 45 caliber, and the court in its charge on murder in the first degree defined a "deadly weapon" as a weapon reasonably sufficient to accomplish death by the mode of its use, the failure to define a "deadly weapon" in the charge on murder in the second degree was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 806.*

For other definitions, see Words and Phrases, vol. 2, pp. 1853–1856; vol. 8, p. 7627.]

7. HOMICIDE (§ 340*)—MURDER IN THE SECOND DEGREE—INSTRUCTIONS—EVIDENCE.

Where the evidence showed that the one who killed decedent laid in wait and shot him, the error in an instruction that if the killing was done with a deadly weapon, in a sudden transport of passion, aroused without adequate cause, with intent to kill, the killing was murder in the second degree, was not reversible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 717; Dec. Dig. § 340.*]

8. HOMICIDE (§ 23*)—"MURDER IN THE SECOND DEGREE."

"Murder in the second degree" is constituted by the absence of express malice on one side and extenuating circumstances or self-defense or adequate cause on the other; and where the one who killed another laid in wait for him and shot him, adequate cause and self-defense were not in the case, and the killing could not be lower than murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 5, pp. 4641, 4642; vol. 8, p. 7727.]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Godie Wheeler was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Geo. D. Neal, Carl T. Harper, and W. W. Meachum, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given 20 years in the penitentiary.

The facts, in substance, disclose that bad feelings and animosities existed between deceased and appellant, somewhat critical in nature. On the night of the homicide both parties attended a revival meeting in the neighborhood. After services deceased escorted a young lady to her home and was returning to his father's residence. Upon reaching a certain point he was shot to death. Appellant was arrested. On the trial, among other things, to meet the state's case, appellant proved other parties in the neighborhood had motive and equal opportunity as himself to slay deceased. It is not the purpose of this opinion to go into a detailed statement of the testimony.

1. It is well settled in Texas, since the case of Dubose v. State, 10 Tex. App. 230, that a party accused of crime can meet this accusation by showing that another, or others, committed the homicide. This case was one purely of circumstantial evidence. If appellant could show that another party, or other parties, committed the homicide, he was entitled to an acquittal, provided he did not assist them. Appellant introduced evidence showing his whereabouts, which, if true, established an alibi. Wherever the evidence raises an issue favorable to the accused, he is entitled to have the law applicable to that issue charged pertinently and affirmatively to the jury. White's Ann. Code Cr. Proc. §§ 794, 801, subds. 2, 3, 801b. No authorities are necessary to sustain these propositions. Negatively presenting the defensive theories is not sufficient. This has been the settled law in Texas from the beginning of our jurisprudence.

The court charged upon circumstantial evidence and alibi, but did not affirmatively instruct the jury that if other parties, or another party, whose name is stated, committed the homicide, or if there was a reasonable doubt of this, the jury should acquit appellant. Exception was reserved to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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charge for this omission. The bill of exceptions recites this: "The court should have instructed the jury that if they should find from the evidence, or have a reasonable doubt as to whether Sam Thomas, the deceased, was killed by Robert Powledge, or any other person than the defendant, Godie Wheeler, they would find the defendant, Godie Wheeler, not guilty in this case." The court qualifies this bill by stating that he charged upon reasonable doubt, the defense of alibi, and upon circumstantial evidence, and limited the right of the state to a conviction to proving appellant's guilt by legal evidence beyond a reasonable doubt that the defendant killed the deceased unlawfully. An inspection of the record, as stated above, shows the court gave a charge on alibi, and charged the law applicable to a case of circumstantial evidence, upon reasonable doubt. We are of opinion that appellant's contention is correct, and that under the facts of the case this charge should have been given. Appellant may be guilty, or Powledge may be guilty, or others may be guilty; and it may be stated, perhaps, that under the circumstances the jury might be warranted in coming to a conclusion as well against one as the other. This, we think, would emphasize the fact that the court should have specially directed the jury to appellant's theory that he did not shoot the deceased, but others did.

The charge upon alibi and that upon circumstantial evidence negatively, perhaps, presents the issues. It has been, as before stated, the universal rule in Texas to hold that wherever a defensive matter is set up, and supported by facts, the accused is entitled to an affirmative charge on that defensive matter. The law is not satisfied with a negative presentation, and it has been held directly that where there is evidence that another, or others, may have committed the crime, and not the accused, the court must submit this issue to the jury. Kirby v. State, 49 Tex. Cr. R. 517, 93 S. W. 1030. For a discussion of the matter generally, see Harrison v. State, 47 Tex. Cr. R. 393, 83 S. W. 699; also Hart v. State, 15 Tex. App. 204, 49 Am. Rep. 188; McInturf v. State, 20 Tex. App. 335; Leonard v. Washington Territory, 2 Wash. T. 396, 7 Pac. 878; Kunde v. State, 22 Tex. App. 97, 3 S. W. 325; Coffelt v. State, 19 Tex. App. 442; Murphy v. State, 36 Tex. Cr. R. 24, 35 S. W. 174; Sawyers v. State, 15 Lea (Tenn.) 694.

2. Exception was reserved to the charge on murder in the second degree, where it undertook to apply directly the law to the facts. The language used is as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, with deadly weapons as same have hereinbefore been defined to you, in a sudden transport of passion, aroused without adequate cause, with the intent to kill, did shoot and thereby kill Sam Thomas, as charged in the indictment, you will find him guilty of murder in the second degree," etc. It is urged that this charge is insufficient, in that it fails to define deadly weapons; and, second, that it omits to instruct the jury that in order to convict of murder in the second degree the charge must inform them that the killing must be upon malice.

In regard to the first proposition, that deadly weapons are not defined, we think in a preceding part of the charge deadly weapons are sufficiently defined, if it was necessary in this character of case to define them, wherein the court instructed the jury in regard to murder in the first degree, to wit, that if appellant selected and used the weapon or instrument reasonably sufficient to accomplish the death by the mode and manner of its use, etc. The weapons used to bring about this tragedy were a shotgun and six-shooter supposed to be of 45 caliber. We are of opinion this character of weapon used with such deadly effect would hardly need defining, and that as a rule it is not necessary to define deadly weapons, unless there is some question as to whether they were weapons of that character, taking into view various circumstances of the case and the manner of their use. We are of opinion that this contention is not of sufficient import to require a reversal.

In regard to the second contention made, we are of opinion that if there was any evidence or issue of self-defense in the case, or any evidence tending to show it, the contention of appellant would be serious and well taken. It will be noted that the court instructed the jury that if the killing was done with deadly weapons in a sudden transport of passion, aroused without adequate cause, with the intent to kill, and the killing occurred, it would be murder in the second degree. This is not the law, nor is it a correct statement; but under the circumstances we are of opinion that the error is not of sufficient moment to reverse. See Crow v. State, 37 Tex. Cr. R. 300, 39 S. W. 574. Murder in the second degree is constituted by the absence of express malice upon one side and extenuating circumstances or self-defense or adequate cause upon the other. In this case the party who did the killing laid in wait for his victim and shot him to death. Adequate cause, manslaughter, and self-defense are, therefore, under these facts, not in the case; and under the facts we do not see how the killing could possibly have been of lower culpability than murder of the second degree. Had this charge gone further, and stated, in connection with the expression "aroused without adequate cause," and not in defense of himself, and not in self-defense, the charge would have been sufficient, even without using the expression "with malice," or "with malice aforethought," under the recent case of Puryear v. State (decided at the present term) 118 S. W. 1042. Therefore we are of

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opinion that this charge, while not correct, under the peculiar circumstances and facts of this case, is not sufficiently erroneous to require a reversal.

But we would suggest that trial courts adhere to the well-known definition of these terms in charging the jury. These omissions serve no good purpose and complicate the appeal, when by taking sufficient time, and adhering to the well-settled rules in regard to charges on these questions, all such matters could be avoided.

For the error pointed out, the judgment is reversed, and the cause is remanded.

BLUITT v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1909.)

1. STATUTES (§ 171*)—SUSPENSION OF LAWS.

Sp. Laws 1897, p. 150, c. 110, amended by Sp. Laws 1905, p. 262, c. 30, creating a road system for Ellis county, and providing a penalty for failure of persons, liable to work on the roads, to attend and work thereon after being legally summoned, is not violative of Const. art. 1, § 28, providing that no power of suspending laws shall be exercised except by the Legislature, on the ground that power to suspend the law is vested in the commissioners' court of Ellis county.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 171.*]

2. STATUTES (§ 64*)—PARTIAL INVALIDITY—SUSPENSION OF LAWS.

Even if the law gave such a power of suspension, the law would not be held invalid for that reason, but the provision for suspension would fail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66; Dec. Dig. § 64.*]

3. TAXATION (§ 40*)—CONSTITUTIONAL PROVISIONS—UNIFORMITY.

Sayles' Ann. Civ. St. 1897, art. 5048, requiring that every male between the ages of 21 and 60 years, with certain exceptions, shall pay a poll tax, not being violative of Const. art. 8, § 1, requiring taxation to be equal and uniform, the classification being uniform and resting on a substantial basis and reason, Sp. Laws 1897, p. 155, c. 110, § 15, amended by Sp. Laws 1905, p. 263, c. 30, § 15, providing that any person in the county subject to payment of a poll tax who shall fail to pay it before a certain time shall be subject to road duty for a period of three days during the year, etc., is not violative of the section of the Constitution.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 40.*]

4. OFFICERS (§ 30*)—HOLDING TWO OFFICES.

Sp. Laws 1897, p. 150, c. 110, as amended by Sp. Laws 1905, p. 263, c. 30, § 1, making the county commissioners of Ellis county ex officio road commissioners and superintendents, with charge of road work, and allowing them a compensation while so acting, is not violative of Const. art. 16, § 40, providing that no person shall hold at the same time more than one civil office of emolument with certain exceptions, unless otherwise specially provided therein, since the commissioners' court and the commissioners themselves are charged with the duty of attending to matters affecting the public roads, and the duties imposed on the commissioners by the act come reasonably within the general scope of their duties.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 30.*]

5. CRIMINAL LAW (§ 1064*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—SUFFICIENCY.

A motion for new trial upon conviction of accused, alleged to have been delinquent in payment of his poll tax, for failure to appear for road work, alleging that the conviction was not warranted by the evidence, was too general to require consideration on appeal of the question whether a poll tax had been levied in the county.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1064.*]

6. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—TOWNS AS INCORPORATED TOWNS.

Courts cannot judicially know that towns, even where they are county seats, are incorporated towns.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 705; Dec. Dig. § 304.*]

7. CRIMINAL LAW (§ 1100*)—APPEAL—STATEMENT OF FACTS—SUFFICIENCY.

As the court could not take judicial notice of such fact, on appeal from a conviction of an alleged poll tax delinquent for failure to appear for work on the roads, when legally summoned by a road commissioner of the county, an allegation in the statement of facts that accused resided in the corporate limits of a certain city, of intended to raise the point that accused was a resident of an incorporated city over whose streets the county would have no control, would be insufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1100.*]

8. STATUTES (§ 97*)—LOCAL LAWS—POWER OF LEGISLATURE.

Under Const. art. 8, § 9, as amended in 1890, giving the Legislature power to pass local laws for the maintenance of public roads and highways, it could give control to the county commissioners over citizens residing in incorporated cities and towns as respects work upon such roads and highways.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 97.*]

9. HIGHWAYS (§ 151*)—FAILURE TO WORK ON ROAD—CRIMINAL RESPONSIBILITY—EVIDENCE—PRESUMPTIONS.

In a prosecution for failure of a delinquent poll tax payer to appear for road work, while a strong inference might arise from an agreed statement of facts reciting that accused was correctly assessed for a poll tax in 1905 for that year by the tax assessor, as shown by the tax rolls of the county, and that he did not pay any poll tax in 1905 or 1906, that a poll tax had been levied for those years, it could not, in the absence of proof to that effect, be assumed that there had been a levy, in the absence of a clear agreement to that effect.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 151.*]

10. INDICTMENT AND INFORMATION (§ 87*)—SUFFICIENCY OF ACCUSATION—TIME OF OFFENSE—LIMITATIONS.

A complaint and information in a prosecution of an alleged poll tax delinquent for failure to appear for work on the roads when legally summoned, which charged that accused was a delinquent poll tax payer in the county, liable under the law to work upon a certain public road, and was legally summoned to do so at a certain time and place by the road commissioner for the district, and willfully failed and refused to do so, etc., was insufficient because failing to allege that accused was liable and in

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default of payment of a tax for a year within the period of limitation.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 247; Dec. Dig. § 87.*]

Davidson, P. J., dissenting.

Appeal from Ellis County Court; J. T. Spencer, Judge.

Jesse Bluitt was convicted of failing, after being legally summoned, to work on a public road or pay the sum required by law, and appeals. Reversed, and prosecution ordered dismissed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Ellis county with the offense of willfully failing and refusing, after being legally summoned, to attend and work on a public road or to pay the sum required under the law.

The validity of the information is vigorously assailed in a well-prepared motion by counsel for appellant, in which it is claimed in substance and effect that the act of 1897 (Sp. Laws 1897, p. 150, c. 110), entitled "An act to create a more efficient road system for Ellis county," together with the amendment thereto of 1905 (chapter 30, p. 262, of said Special Laws), are void because contrary to article 1, § 28, of the Constitution of the state of Texas, in that the power suspending the same is vested in the commissioner's court of Ellis county, Tex. Again, it is urged that said special law is invalid, in that same is in conflict with the general laws on the same subject, especially with article 4736, Sayles' Ann. Civ. St. Tex. 1897, and also that article 5048, Sayles' Ann. Civ. St. 1897, is contrary to and inhibited by article 8, § 1, of the Constitution of the state of Texas, in that the taxation levied and prescribed in such article of said statutes is not equal and uniform, in that persons between the ages of 21 and 60 years are discriminated against by the levy and exaction of a poll tax, which is a prerequisite to the right to vote and a necessary qualification under the Terrell election law (Laws 1905, p. 520, c. 11), and, further, that the amendatory act of 1905 (Sp. Laws 1905, p. 262, c. 30) of said Ellis county road law amending chapter 110, p. 150, of said act of 1897, is contrary to and inhibited by section 40, art. 16, of the Constitution of the state of Texas, in that said act undertakes to create and impose on a county commissioner another civil office of emolument than that of county commissioner, which cannot be held by one man under the provisions of said Constitution above indicated. It is to be regretted that we have not been furnished with a brief on these matters by counsel for appellant, and we are not sure that from the brief statement of the objections to the act in question as contained in the motion to quash that we fully grasp, in detail at least, the grounds upon which the attack rests. It occurs to us, however, that the law is not subject to any of the objections urged.

1. A case very similar to this which rested practically on the same form of indictment was decided by this court in the case of Young v. State, 51 Tex. Cr. R. 366, 102 S. W. 117. The particular insistence in that case was that the act applicable to Ellis county was violative of article 3, § 56, of the state Constitution, which prohibits the passage of such laws. The act, however, was upheld as being authorized by article 8, § 9, of the Constitution as amended in 1890, which is as follows: "And the Legislature may pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws." This view was upheld by the Court of Civil Appeals of the Fifth Judicial District in the case of Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

2. We think that the act in question is not invalid in that same contravenes article 1, § 28, of the Constitution, because, as claimed, the power of suspending the law is vested in the commissioners' court of Ellis county, Tex. If it could be held that any such power of suspension was given in the law, we should not declare the law invalid for this reason, but hold that the power of suspension therein undertaken to be created was itself invalid, and the law would stand and the suspension fail.

3. It cannot be held, we think, that so far as affected by article 5048 of Sayles' Ann. Civ. St. 1897, the law is contrary to and inhibited by article 8, § 1, of the Constitution, in that the burden of working the road is to be construed and tested as if it were taxation levied and prescribed in said article of the statute, and not equal and uniform, for that persons between the ages of 21 and 60 years are discriminated against by the levying and exaction of a poll tax. We held in the case of Solon v. State (Tex. Cr. App.) 114 S. W. 849, that the law levying a poll tax was not invalid, for this reason: that the Legislature had the right to make the levy applicable to a class where such classification was uniform and rested on a substantial basis and reason. The matter is fully discussed in the case above referred to, and requires no further elaboration.

4. Nor do we think that the act in question is invalid or inhibited by section 40, art. 16, of the Constitution, in that said act undertakes to create and impose on a county commissioner another civil office of emolument, which appellant claims cannot be held by one man under the provisions of the Constitution. The commissioners' court and the commissioners themselves are charged by law with the duty, authority, and obliga-

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tion of giving attention to all matters affecting public roads in their respective counties, and the duties imposed on the commissioners of Ellis county by this act come reasonably and seasonably within the general scope of their duties under the law.

5. In addition to the grounds urged why the indictment should be held invalid, appellant's motion for a new trial is in these words: "In the alternative, defendant says that the judgment of conviction in this case is not warranted by the evidence. That the state failed to prove that a poll tax had been levied against the male citizens, for any year, in Ellis county, Tex." We are not sure that it is intended by this motion to allege that the judgment of conviction is invalid for any other reason than that the state failed to prove that a poll tax had been levied in Ellis county. The mere allegation that the judgment of conviction is not warranted by the evidence would be so general as that we would not be required to pass on same. If, however, we should do so, it does not seem that there are any valid reasons why the judgment should be set aside. Sp. Laws 29th Leg. p. 263, c. 30, § 15, contains the following provision: "Any person in Ellis county subject to the payment of a poll tax (whether assessed or not) who shall fail to pay same on or before the first day of February thereafter shall be a delinquent poll tax payer, and shall be subject to road duty for a period of three days during the year, and they shall be summoned by the road commissioner, road superintendent, road overseer or any person appointed by the road commissioner to work the road, and shall be liable to road duty in the road district where they reside, or to any road district to which they may be assigned by the commissioners' court; and any delinquent poll tax payer who resides in any city or town shall be assigned to work on some road leading into said city or town. And it is made the duty of the tax collector, as soon as practicable after the first day of February and before the first day of May thereafter, to make out and give to the commissioners' court a complete list of all delinquent poll tax payers for the previous year, with their residence as shown in said collector's office. And each of said delinquent poll tax payers shall be subject to road duty in the road district where he lives, or to any road district to which he may be assigned by the commissioners' court. The performance of the road service provided for in this section shall not exempt a person from any other road duty to which he is subject. And any person when liable to work the roads and summoned for that purpose under this section who shall fail to appear and perform the work required shall be subject to the same punishment as in other cases of failing to appear or do good work on the roads, and when convicted shall satisfy the fine and costs as in other misdemeanor convictions; but any person who may become liable to road duty as a delinquent poll tax payer, when summoned, may satisfy said summons and be relieved from road duty by paying to the road commissioner, superintendent or road overseer the sum of three dollars, to be accounted for as other road money." If it is urged that the conviction cannot be sustained for the reason that appellant was a resident of the city of Ennis, which had been regularly incorporated under the laws of this state, over whose streets and alleys the county would have no control, it would be a sufficient answer to say that the only suggestion in the statement of facts raising this is the following, contained in the statement of facts: "Defendant resided in the corporate limits of Ennis, Ellis county, Tex., in 1904, 1905, 1906, and up to September, 1907. Since said last date he has been employed in the oil mill at Corsicana, Tex., and that he paid street tax in Ennis." It is a well-settled rule that courts cannot judicially know that towns, even county seats of counties, are incorporated towns. Patterson v. State, 12 Tex. App. 222; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200; Sipe v. Holliday, 62 Ind. 4; Cyc. of Evidence, vol. 7, p. 1022. Again, it is not shown by any evidence that any part of the road which appellant was summoned to work was situated in the corporate limits of the city of Ennis, if, indeed, we might assume that such city was incorporated. Again, it is our opinion that under the constitutional provision (article 8, § 9), as amended in 1890, by which the Legislature is clothed with authority to pass local laws for the maintenance of public roads and highways, it is competent for the Legislature to give control to the county commissioners' court over citizens residing in incorporated cities and towns. This provision of the Constitution is sweeping and unrestricted, and we are not aware of any limitation on this authority in other parts of the Constitution. The special law quoted in terms applies to residents of cities and towns. The decisions of our courts in respect to offenses for failing to work the public road have no sort of application. Such were the cases of State v. Jones, 18 Tex. 874; also, Ex parte Roberts, 28 Tex. App. 43, 11 S. W. 782. Here the offense consists in the failure to pay the poll tax when the citizen is subject to such payment. In this poll tax the county would be interested. It is competent for the Legislature to attach a penalty to its payment in money, which will innure to the benefit of the county, or, if it saw proper, as it has done, to attach a penalty of road duty for three days or any other reasonable time. We call attention also to the fact that this punishment was intended to be cumulative, as evidenced by the following provision of the

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law in question: "The performance of the road service provided for in this section shall not exempt a person from any other road duty to which he is subject." There is no decision in this state or elsewhere that militates against these facts. There is no constitutional restriction that interferes with the power of the Legislature to pass, on behalf of any county or all the counties in the state, such a law as has been passed, presumably on their demand, for the benefit of the citizens of Ellis county. We are unwilling to strike down and nullify this law by remote analogies or under the pretense or some constitutional restriction that has no existence in fact.

6. Appellant also contends that the state had failed to prove that a poll tax had been levied against the male citizens of Ellis county for any year by the proper authorities. There seems to be some merit in this contention. The only proof touching this matter is the following sentence contained in the agreed statement of facts: "Defendant was correctly assessed for a poll tax in 1905, for said year, by the tax assessor of Ellis county, Tex., as shown by the tax rolls of said county." Admission was also made that appellant did not pay any state or county poll taxes in 1905 or 1906. From these admissions it is urged by the state that of necessity it is implied and admitted that a poll tax had been levied for the years named. While a strong inference to this effect might arise from the admission contained in the record, it is not, in the absence of proof to that effect, to be assumed that there had been a levy, in the absence of a clear agreement to this effect, and in this respect we think the proof and evidence on another trial should be strengthened.

7. Finally, we think the case must be reversed and dismissed on account of the insufficiency of the complaint and information. The charging part of same is as follows: "* * * In the county of Ellis, state of Texas, Jesse Bluitt was a delinquent poll tax payer in Ellis county, Tex., and was liable under the law to work upon the public road leading from the city of Ennis to the village of Ensign, called the 'Ennis and Ensign Road,' in road district No. 2 in said county, and was legally summoned to attend and work on said road, at a time and place designated by A. N. Thomas, road commissioner for said district, to wit, on the 17th day of January, A. D. 1907. And the said Jesse Bluitt did then and there willfully fail and refuse to attend at the time and place aforesaid, and did willfully fail and refuse, on or before the day upon which he was summoned as aforesaid to attend, to pay to the said road commissioner, road superintendent, or road overseer the sum of three dollars." Appellant moved to quash this complaint and information, for the following reasons: "Because it does not appear therefrom that defendant was liable to road duty for and during a period of time of three days prior to January 17, 1907; and, because said affidavit and complaint are vague, indefinite, and uncertain, and charge no offense against the laws of Texas." It will be noted by a careful examination of this complaint and information that same do not state for what year appellant was liable under the road law to work upon the public roads of Ellis county. In order to sustain a conviction, it must and should have been alleged that he was liable for and in default of the payment of a tax for a year and time within the period of limitation provided under the laws of this state. This the complaint does not do.

We have, in view of the importance of this matter to the people of Ellis county, and out of deference and respect to the well-considered motion of appellant, gone somewhat thoroughly into the matter, so as to make the opinion, as far as may be, full and conclusive on the questions urged, though it is to be regretted that we have not had the benefit of any brief or argument on behalf of appellant.

For the error pointed out, the judgment of conviction is set aside and the prosecution ordered dismissed.

DAVIDSON, P. J. (dissenting). I agree with my Brethren in reversing and dismissing the prosecution. I think that portion of the majority opinion is correct. In the disposition of some of the other questions I cannot concur. The evidence discloses that appellant lived within the corporate limits of Ennis, in Ellis county. This residence included the years 1904, 1905, and 1906, and up to September, 1907, since which time he has resided in the city of Corsicana, in Navarro county. During the years mentioned he paid street tax in Ennis, required under the charter and by-laws and regulations of that town. It was sought during this time to require him to work upon the public roads of the county. These roads, of course, were outside of the corporate limits of the city of Ennis. This he declined to do, and for this failure this prosecution was brought. Those who reside in incorporated towns and cities are not required nor can they be forced to work upon public roads of the county. Their duty in this respect is to work the streets or pay street tax, either or both, required of him as a resident of the incorporated town. The county has control of the public roads, but towns and cities have control of the streets. The county has no authority over the streets of an incorporated town, nor has the county any authority to summon or require work of those who reside in such incorporated towns to work upon county roads. The county and the cities and towns are municipalities independent of each other, each being supreme within its own jurisdiction and political sphere. The county cannot as-

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sume jurisdiction of the streets, nor can the city assume jurisdiction of the county roads. They are municipal bodies entirely separate and distinct from a political standpoint, each governed by such laws as the Legislature under constitutional authority may enact or authorize. Such has been the legal and judicial history of Texas. This question first came up in the case of State v. Jones, 18 Tex. 874. It was again decided by the Supreme Court in Norwood v. Gonzales County, 79 Tex. 218, 14 S. W. 1057. The Jones Case, supra, has been followed by the appellate courts of this state in all the decisions. There have been several cases decided by the Court of Appeals and Court of Criminal Appeals. Ex parte Roberts, 28 Tex. App. 44, 11 S. W. 782. I deem it unnecessary to collate these, as all the decisions are harmonious, not even having been broken by a dissent. Nelson v. Garfield Co., 6 Colo. App. 282, 40 Pac. 474; Gallaher v. Head, 72 Iowa, 174, 33 N. W. 620; McCullom v. Black Hawk County, 21 Iowa, 418. This is also the rule in other states. For the first time in the history of Texas a majority of the court in this case holds that the residents of an incorporated city or town can be compelled to work on the county roads. This is evidently erroneous. If my Brethren are correct, then the residents of cities and towns could not only be required to pay taxes levied and collected for the purpose of keeping up the streets as well as working on said streets, but they would be required as well to go out into the county and work the public roads, thereby being burdened with onerous double duties. I do not care to follow this question, it is so obviously incorrect.

There are other questions in the case to which I do not agree, one of which I will mention. My Brethren hold that the Legislature is authorized to levy $3 poll tax for road purposes in Ellis county, being a special law of that county. The Constitution requires payment of poll tax as a prerequisite to the right of suffrage. This conclusion of the majority of the court seems to be upon the idea that the Legislature has a right to classify voters, as was held by the majority in the case of Solon v. State (Tex. Cr. App.) 114 S. W. 349. The Solon Case is made the authority for this decision. I cannot agree that the right of suffrage is an occupation, or that a poll tax may be classified, for the Constitution, in regard to the right of suffrage, places every man, who is authorized to vote, upon the same plane. Under the Solon Case and the decision in this case, voters would be required to pay as a county tax in Ellis county—not a state tax—very considerably more than in other counties. I cannot believe this is correct under our Constitution. I therefore respectfully enter my dissent.

LONG et al. v. CONSUMERS' LIGHT & HEATING CO.

(Court of Civil Appeals of Texas. April 17, 1909. Rehearing Denied May 22, 1909.)

TRIAL (§ 194*) — INSTRUCTIONS — WEIGHT OF EVIDENCE.

In an action by a light and heating company for breach of a contract to light and heat a hotel, the court gave a special instruction to find for plaintiff if a verbal contract was made, by the terms of which an electrical engineer was not to be furnished, nor steam heat furnished after the 1st of April. *Held*, that this clearly eliminated an issue, made by the pleading and evidence, as to the breach by plaintiff of an alleged agreement to furnish hot water for use in various rooms, and assumed that, if the jury adopted plaintiff's contention in the particulars pointed out, it was entitled to recover, regardless of the plea and evidence as to the plaintiff's violation of the contract, and to this extent the charge was on the weight of the evidence and erroneous.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by Consumers' Light & Heating Company against J. F. Long and others. From a judgment for plaintiff, defendants appeal. Reversed.

Bryan & Spoonts, for appellants. Capps, Cantey, Hanger & Short, for appellee.

CONNER, C. J. The following statement made by appellants is accepted by appellee as substantially correct and will be adopted, viz.: "This suit was instituted in the district court of Tarrant county, Tex., by appellee against appellants, alleging that on November 5, 1906, appellee's assignor, the Traders' Investment Company, contracted with appellants to furnish electric current and steam heat for the Delaware Hotel, owned by appellants, for one year, and appellant agreed to pay therefor $300 per month for said year; that thereafter, on May 1, 1907, appellants authorized appellee to connect its electric lines with a certain sign and motor at said hotel, and appellants agreed to pay therefor in addition to $300 per month the sum of $22 per month during the balance of said contract; that thereafter, on July 1st, appellants breached the contract; that at the time of the breach appellants were indebted to the appellee in the sum of $644 for services rendered theretofore; that appellee was ready and willing to carry on said contract, but was not allowed to by appellants. Appellee further alleged that it would have made $150 per month during the balance of said contract but for appellants' breach; that, in addition, appellee alleged that it rewired the said hotel building at an expense of $70 which appellants refused to pay, and prayed for judgment in the sum of $1,314. On May 25, 1908, appellants filed their first amended original answer, which consisted of special exceptions, general demurrer, and general

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denial, and specially that they had not breached the contract, but that appellee had breached the same by failing to furnish according to the terms of said contract hot and cold water for the hotel barber shop, bathrooms, toilets, and for use of the barroom, by reason of which appellants sustained loss and damage by failing to have such water in the sum of $744, on account of being compelled to reduce the price of the rent on said rooms; further, that, by reason of such breach on the part of appellee, they were compelled to establish a hot water apparatus to carry on their business at an expense of $552, for which they prayed for judgment against appellee. Appellants further averred that the lighting furnished was very inferior and almost worthless, by reason of which they were damaged in the sum of $500, for which they asked judgment against appellee. Appellants further specially pleaded that, according to the contract, appellee was to furnish an engineer or electrician to keep the lights in first-class condition, which they failed to do, damaging them in the sum of $350, which appellants plead over against appellee, and asking for judgment, and, further, for failure of consideration. Appellee replied by supplemental petition, containing general and special exceptions, general denial, and specially that there was no consideration for any agreement on its part to furnish hot and cold water or to furnish an engineer or electrician. The trial was had before a jury on May 28, 1908, resulting in a verdict and judgment against appellants in the sum of $744, $100 of which was for the reasonable profit to appellee during the remainder of said contract. Thereafter motion for new trial was filed and by the court overruled, to which appellants duly excepted in open court and gave notice of appeal. Statement of facts and appeal bond were properly approved and filed, and assignment of errors was filed in the trial court, and the case is now properly before this court on the assignment of errors for determination."

We think the judgment must be reversed because the court gave in charge to the jury at appellee's request the following special instruction, to which error is assigned, to wit: "If you believe from the evidence in this case that R. C. Armstrong, Jr., representing the Traders' Investment Company and M. D. Watson, representing Watson and Long, made a verbal contract about November 1, 1905, by the terms of which the said Traders' Investment Company was not to furnish steam heat for the purpose of heating the hotel operated by the defendants after the 1st day of April, and was not to furnish an electric engineer, then you will find for the plaintiff, and assess the damages as charged in the court's charge hereinbefore submitted to you." This charge clearly eliminated, as appellants insist, the issue made by both the pleading and evidence relating to the agreement to furnish appellants hot water for use in the various rooms of their hotel. It assumed that, if the jury adopted appellee's contention in the particulars pointed out, appellee was entitled to recover, regardless of appellants' plea and evidence to the effect that appellee had violated the contract on its part to furnish hot water for baths, etc. To this extent the charge was on the weight of the evidence and erroneous.

We find no error in the action of the court in excluding testimony, as complained of in appellants' second assignment, but for the error in giving the special instruction the judgment must be reversed and the cause remanded.

DUNKLIN, J., disqualified, and not sitting.

SLAUGHTER v. COOPER.

(Court of Civil Appeals of Texas. May 22, 1909. Rehearing Denied June 26, 1909.)

1. PUBLIC LANDS (§ 178*)—SALE BY AWARDEE.
Where the state through its regular authorized officer makes an award of public lands to one authorized to purchase, the land so far passes out of the state as to authorize its sale by the purchaser, thereby creating between him and his purchaser the relation of vendor and vendee, and, where possession accompanies such transfer, the second purchaser may not thereafter successfully plead a total failure of consideration upon the forfeiture of his vendor's title.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 178.*]

2. PUBLIC LANDS (§ 172*)—FORFEITURE—EVIDENCE.
Under Acts 1901, p. 294, c. 125, § 3, providing that, if any purchaser shall fail to reside on and improve in good faith as required by law the land purchased by him, he shall forfeit said land and all payments made thereon to the state, etc., and that all forfeitures for nonoccupancy shall have the effect of placing the land on the market without any action whatever on the part of the Commissioner of the General Land Office, no action by the commissioner is necessary to work a forfeiture; and hence an indorsement by the commissioner on the purchaser's application that it was forfeited for failure to reside on the land was not evidence of forfeiture as against the purchaser.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 172.*]

3. PUBLIC LANDS (§ 172*)—FORFEITURE—EVIDENCE.
In an action by a vendee against his vendor to recover a payment made on land, the sale of which to defendant by the state was claimed to have been forfeited, a certified copy of an award to a third party made subsequent to the sale by defendant to plaintiff was admissible, and raised the presumption that the first sale had been forfeited before the second was made.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 172.*]

4. EVIDENCE (§ 83*) — PRESUMPTIONS — OFFICIAL ACTS.
It is always presumed that in any official act or act purporting to be official the officer has not exceeded his authority, and, if he had

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power to act only in a certain contingency, that the contingency has happened; there being no evidence on the other side with respect thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

5. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, on the issue whether a sale of public lands had been forfeited by nonoccupancy of the purchaser, the court properly admitted evidence of a subsequent award to a third party, error in admitting declarations of the Commissioner of the Land Office as to the forfeiture was harmless; the award to such third party prima facie proving the nonoccupancy by the vendee, and being, in the absence of any other evidence to overcome it, conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1051.*]

Conner, C. J., dissenting.

Appeal from Martin County Court; Bailey Anderson, Judge.

Action by J. H. Cooper against R. L. Slaughter to recover a payment made on land, the sale of which to Slaughter by the state was forfeited. From a judgment for plaintiff, defendant appeals. Affirmed.

For former appeal, see 107 S. W. 897.

Caldwell & Whitaker, for appellant. A. L. Green, S. J. Isaacs, and Graham B. Smedley, for appellee.

SPEER, J. This is the second appeal in this case; the opinion in the former appeal having been delivered by the Court of Civil Appeals for the Sixth district and reported in 107 S. W. 897. A reference to that opinion will disclose the nature of the case. While the cause is now to be affirmed, yet we deem it proper to say in passing that we are not quite prepared to assent to the rule announced by Mr. Justice Levy in that opinion that "the title to the land in this case had not so far passed out of the state as to make the land the subject-matter of private contract between appellant and appellee, and to create the relation of vendor and vendee as to the land itself." The cases of Lamb v. James, 87 Tex. 485, 29 S. W. 647, and Rayner Cattle Co. v. Bedford, 91 Tex. 642, 44 S. W. 410, 45 S. W. 554, are cited for the holding, and the reason for this announcement is that the lands involved were considered to be a part of the public domain. But we are inclined to the view that where, as here, the state through her regularly authorized officer has made an award of public lands to one authorized to purchase, thereafter the land has so far passed out of the state as to authorize its sale by such awardee, thereby creating between himself and his purchaser the relation of vendor and vendee, and, that possession accompanying such transfer, the purchaser could not thereafter successfully plead a total failure of consideration upon the forfeiture of his vendor's title. The rule first announced in Lamb v. James and afterward explained in Rayner Cattle Co. v. Bedford, and still later again explained in Williams v. Finley, 99 Tex. 468, 90 S. W. 1087, authorizing the plea of failure of consideration where the land, the subject-matter of contract, is a part of the public domain, does not, we think, extend to a case like this.

A ruling of the court which appears to present error was made, however, in admitting, over the objections of appellant, the certified copy of Slaughter's application and obligation containing the indorsement: "Forfeited for failure to reside upon and improve the land as required by law, November 17, 1905. John J. Terrell, Commissioner." If this indorsement was one required of the commissioner by law, proof of the entry no doubt would be permitted under the well-established rules of evidence, but if it is the mere ex parte statement of the commissioner, made without any express authority of law, it should not be. Article 4218*l*, Sayles' Ann. Civ. St. 1897, provides that: "If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall indorse on such obligation 'Land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser," etc. It also provides: "And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, in the same manner as for nonpayment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred." And the Supreme Court has construed this provision to impose upon the commissioner the duty of declaring a forfeiture for a failure to reside upon and improve the land. Bates v. Bratton, 96 Tex. 279, 72 S. W. 157. But the lands in question were originally sold under, and the decision of the question must therefore be controlled by, the provisions of Gen. Laws 1901, p. 294, c. 125, § 3. The law is there made to read: "If any purchaser shall fail to reside upon and improve in good faith the land purchased by him, as required by law, he shall forfeit said land and all payments made thereon to the state, to the same extent as for the nonpayment of interest, and such land shall be again upon the market, as if no such sale and forfeiture had occurred, and all forfeitures for nonoccupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office." This provision abundantly evidences the intention of the Legislature to declare that action by the commissioner should not be necessary to work a forfeiture of land for failure of the purchaser to reside upon and improve it. If the commissioner, then, is not required to take such action, his doing so cannot consti-

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tute evidence against the purchaser. In this case the very gist of appellee's cause of action is the failure of appellant's title, and such failure is not proved in any other manner than by the entry above quoted, unless the court ruled properly in admitting in evidence a certified copy of an award to one Heffner, of date subsequent to the sale by appellant to appellee, thereby raising the presumption that the first sale had been forfeited before the second was made. While this ruling is itself made the subject of an assignment of error, a majority of us hold that the ruling was correct, and not in violation of the decision of Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064, invoked by appellant. The distinction between that case and the present one consists in this: In that case to have indulged the presumption of the regularity of the second award would have created a conflict with the presumption of regularity attaching to the first award, since the evidence disclosed that the second award was made because of the irregularity of the first award, thereby preventing any presumption that the second award was authorized by virtue of a lawful cancellation of the first award; while in the present case there is no conflict of presumptions whatever. The usual presumption of regularity attaches, not only to the first award, but to the second as well, and, as to the second, is supported upon the theory that the commissioner had either canceled the first award for nonpayment of interest, or that Slaughter had ceased to occupy and improve the land as required by law, in either of which events the second award would have been authorized, and neither of which is excluded by the evidence, as in the Smithers-Lowrance Case. There is no reason in the world for saying that the law will presume in favor of the regularity of one act of a public officer, and not in favor of another act equally within the scope of such officer's authority. It may deny the presumption of regularity where such presumption would have to be based upon the assumption of a fact shown not to exist, but this argues nothing against the rule in favor of the presumption referred to. It is always presumed that in any official act, or act purporting to be official, the officer has not exceeded his authority, and, if he had power to act only in a certain contingency, then that the contingency has happened, where there is no evidence on either side with respect thereto. Throop, Public Officers, § 558. Neither is the decision in Howard v. McKenzie, 54 Tex. 171, when rightly understood, at all different from what we have here announced. In that case to permit the inference that a cancellation of a patent was regular would have required the inference that the patent was wrongfully issued in the first place, thereby destroying the presumption of regularity as to such issue. In the present case there is no conflict of presumptions whatever, the presumption obtaining equally with reference to the Slaughter and to the Heffner awards, the former implying that the land was duly classified and appraised and that the awardee was a settler, etc., at the time, and the latter that for some reason authorized by law the first award was not in good standing, and that the land was again on the market at the time of the sale to Heffner. If, then, there was no error in admitting in evidence the award to Heffner, the error of the court in admitting the declarations of the commissioner as to the forfeiture becomes harmless, since the award to Heffner prima facie, at least, proves the nonoccupancy by Slaughter, and, in the absence of any other evidence to overcome it, is conclusive.

The judgment is in all things affirmed.

CONNER, C. J. (dissenting). I feel unable to concur in the final conclusion reached by the majority. It seems clear, as the majority correctly conclude, that under the act of 1901 the indorsement of forfeiture by the Commissioner of the General Land Office on the application and obligation of appellant Slaughter affords no legal evidence of the invalidity of the Slaughter title purchased by appellee, and I am not prepared to join the majority in the further conclusion that the subsequent award to Heffner constitutes such presumptive evidence of the illegality of the Slaughter title as warrants the affirmance of the judgment on that ground. Forfeitures are not favored in the law, and as against appellant, who was the defendant below and not a party to the ex parte forfeiture proceedings, the burden of proof was upon appellee. To say that this burden was overcome and the forfeiture shown by the mere fact of the subsequent award seems to me to violate the principle of the cases of Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064, and Howard v. McKenzie, 54 Tex. 171, discussed by the majority. The presumption of the existence of the facts authorizing the award to Heffner is not the only presumption in this case. It must be presumed that the award to Slaughter was authorized and that he was then the lawful occupant of the land, and that such occupancy or state of things continued as such occupancy usually continues unless the contrary is shown. It was Slaughter's pecuniary interest as a purchaser of school lands to pay the annual dues to the state, and his duty as well as his interest to continue his occupancy, and the common experience of mankind authorizes the presumption that he did both to avoid loss, so that, as it appears to me, the presumption indulged by the majority is used to overcome other presumptions of equal force, thus contravening the cases sought to be distinguished by the majority, as well as other authorities that might be cited.

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MISSOURI, K. & T. RY. CO. OF TEXAS v. BUTLER.

(Court of Civil Appeals of Texas. July 1, 1909.)

1. RAILROADS (§ 413*)—INJURIES TO ANIMALS—PRIVATE GATES.

It is the duty of the person for whose benefit private gates are placed in a fence inclosing a railroad right of way to keep the same closed, and where stock enters through such gates, which are left open, the railway company is not liable either for stock belonging to the person for whose benefit the gates have been placed in the fence, or the stock of third persons passing through such gates, in the absence of negligence in the operation of its train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1465; Dec. Dig. § 413.*]

2. RAILROADS (§ 446*)—INJURIES TO ANIMALS—ACTIONS—QUESTIONS FOR JURY.

In an action against a railroad company for injuries to mules that had strayed upon its track through a private gate in the right of way fence, whether defendant's servants failed to use that degree of care required after discovering the mules on the right of way and track, is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1637; Dec. Dig. § 446.*]

Appeal from Rockwall County Court; H. M. Wade, Judge.

Action by W. B. Butler against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Coke, Miller & Coke and T. B. Ridgell, for appellant. E. D. Force, for appellee.

TALBOT, J. This suit was brought by the appellee against appellant to recover the value of a mule killed, and damages for injuries received by another mule, alleged to have occurred through the negligence of appellant. It is charged, in substance, that on or about the 14th day of April, 1908, plaintiff's mules entered upon defendant's right of way through a gate in defendant's fence, which was open, and which did not have secure or safe fastenings on same, but was defective and unsuitable for the purpose intended, and would not prevent horses and mules from entering on said right of way; that after entering through said defective gate one of said mules was killed and another injured by defendant's train while being negligently operated, to plaintiff's damage in the sum of $150. The evidence showed without contradiction that appellant's railway was fenced, and plaintiff's mules entered upon its right of way through a gate put in at the request or for the convenience of the owner of the farm through which the railroad ran. The court charged the jury: "That if the mule entered through a gate of defendant, and that defendant did not use ordinary care to keep the gate closed, then the jury should find for plaintiff." In other paragraphs of the charge the jury were instructed, in effect, that it was the duty of the railway company to keep the gate in question closed. These charges constitute error, for which the judgment must be reversed.

It has been often held by the courts of this state that it is the duty of the person for whose benefit private gates are placed in the fence inclosing a railway company's right of way to keep the same closed, and that where stock enters through such open gates the railway company is not liable, in the absence of negligence in the operation of its train. T. & P. Ry. Co. v. Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845; Railway Co. v. Johnson (Tex. Civ. App.) 39 S. W. 323; Railway Co. v. Robinson, 17 Tex. Civ. App. 400, 43 S. W. 76; Railway Co. v. Worsham (Tex. Civ. App.) 105 S. W. 853. Since the railway company, in such cases, is not chargeable with the duty of keeping the gates closed, the same rule governs with respect to stock of a third person passing through such gates upon the right of way and killed by a train. Railway Co. v. Hanacek, 93 Tex. 446, 55 S. W. 1117, Id., 23 Tex. Civ. App. 394, 56 S. W. 938; Railway Co. v. Davis (Tex. Civ. App.) 118 S. W. 234. Whether appellant's servants failed to use that degree of care required of them by law to avoid striking appellee's mules after they discovered them on the right of way and track, is a question of fact for the determination of the jury. It cannot be said from the evidence appearing in the record that such failure was conclusively established.

For the error pointed out in the court's charge, the judgment is reversed and the cause remanded.

ROGERS v. McMILLION.

(Court of Civil Appeals of Texas. May 1, 1909. Rehearing Denied June 5, 1909.)

APPEAL AND ERROR (§ 662*)—RECORD—EFFECT.

The transcript on appeal cannot be contradicted or augmented by the agreement of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2850; Dec. Dig. § 662.*]

Appeal from Deaf Smith County Court; W. H. Russell, Judge.

Action by J W. Rogers against G. W. McMillion. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

S. J. Dodson, for appellant. Barcus & North and Knight & Slaton, for appellee.

SPEER, J. J. W. Rogers instituted this suit in the justice's court of precinct No. 1, Deaf Smith county, against G. W. McMillion, and there recovered a judgment in the sum of $28.62, from which an appeal was taken to the county court, where, upon the verdict of the jury, a judgment was rendered in plaintiff's favor for the sum of $78.80. Upon a motion of defendant to set aside this judgment

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the county court made an order dismissing the cause, for the reason "that the justice's court, from which said cause was appealed, did not have jurisdiction of the amount in controversy." From this latter judgment the plaintiff has appealed.

Neither party has filed a brief in this court; but there is in the record an agreement, signed by counsel for both parties, that the only question presented is one of jurisdiction, and a copy of the account sued on is fully set out in such agreement. By an inspection of this account it appears that the aggregate of the items sued for, less the admitted credit of $85, exceeds $200, the maximum jurisdiction of a justice of the peace under our Constitution; but the difficulty with this agreement is that it finds no support in the record. There is absolutely nothing in the transcript to show that such an account was ever filed in the justice's court, or in the county court, and the transcript cannot be thus contradicted, or even augmented, by the agreement of the parties. The transcript from the justice's court to the county court shows that the suit was "upon debt for $198," and the citation issued out of the justice's court commanded the defendant to answer the suit of plaintiff, reciting that the plaintiff's demand was "for the sum of $198 due upon account." So that, as the record presents the question to us, the county court did have appellate jurisdiction, and therefore erred in entering the order of dismissal upon the grounds stated. This is such error "apparent of record" as calls for a reversal of the case, notwithstanding appellant has filed no briefs in this court.

Reversed and remanded.

VICKREY v. BURKS.†

(Court of Civil Appeals of Texas. June 16, 1909.)

1. APPEAL AND ERROR (§ 601*)—RECORD—STATEMENT OF FACTS.

The original statement of facts must be sent up on appeal to the Court of Civil Appeals, and the incorporation in the transcript of a copy thereof is not sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2652; Dec. Dig. § 601.*]

2. APPEAL AND ERROR (§ 638*)—RECORD—FAILURE TO INCORPORATE ORIGINAL STATEMENT OF FACTS—OBJECTION.

Appellant failed to incorporate in the transcript the original statement of facts, but used a copy thereof, so that if appellee had presented a formal motion to strike out the statement it would have been sustained and the appeal disposed of as if there was no statement of facts, unless appellant subsequently caused the original statement of facts to be filed. *Held*, that where appellee, instead of formally moving to strike out the statement of facts, presented in his brief, three months before the case was submitted, a specific objection to a consideration of the statement of facts incorporated in the transcript, and appellant took no steps to bring up the original statement of facts, the appeal should be disposed of upon the theory that there was no statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2785, 2786; Dec. Dig. § 638.*]

3. APPEAL AND ERROR (§ 644*)—RECORD—MODE OF OBJECTION—WAIVER.

Where a motion to strike out a part of the record is sustained, the part complained of is not physically cast out of court, but is merely ignored, and the same result can be accomplished by timely objection to anything incorporated in a transcript which has no place there, and such method of objection is not an acquiescence in the record as presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795, 2796; Dec. Dig. § 644.*]

Appeal from Hamilton County Court; A. E. Scott, Judge.

Action between W. R. Vickrey and J. V. Burks. From the judgment, Vickrey appeals. Affirmed.

W. M. Whitmire, for appellant. Langford & Chesley, for appellee.

KEY, J. The transcript in this case contains what purports to be a copy of a statement of facts in the case, but the original statement of facts has not been filed in this court. On February 23, 1909, appellee filed his brief in response to appellant's brief previously filed, and the first question presented in appellee's brief is a distinct and specific objection to a consideration of the statement of facts incorporated in the transcript, and in support of that objection cites Royal Insurance Co. v. T. & G. Ry. Co. (Tex. Civ. App.) 115 S. W. 117; Garrison v. Richards (Tex. Civ. App.) 107 S. W. 862; T. & P. Ry. Co. v. Stoker (Tex.) 113 S. W. 3; Bean v. Bird (Tex. Civ. App.) 115 S. W. 121; in addition to which may be cited Railway v. Wall (decided by the Supreme Court April 14, 1909) 118 S. W. 131, and Railway v. Rogers (Tex. Civ. App.) 116 S. W. 624.

The cases cited show that the proper course was not pursued for bringing before this court the facts upon which the case was tried, and as appellee filed his objection to a consideration of the statement of facts copied in the transcript about three months before the case was submitted, and appellant has taken no steps to bring up the original statement of facts, we think the case must be disposed of in this court upon the assumption that there is no statement of facts. In other words, if appellee had presented a formal motion to strike out the statement of facts contained in the transcript, that motion would have been sustained, and, if appellant had not caused the original statement of facts to be filed in this court, the appeal would have been disposed of upon the theory that there was no statement of facts. When a motion to strike out is sustained, the document complained of is not physically cast out of court, but is merely ignored, and the same

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† Rehearing denied.

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result can be accomplished by timely objection to consideration of anything incorporated into transcript which has no place there. Such objection shows that the appellee is not acquiescing.

In the absence of a statement of facts, the assignments of errors fail to show that reversible error was committed.

Judgment affirmed.

LEWTER v. LINDLEY.

(Court of Civil Appeals of Texas. April 14, 1909. Rehearing Denied May 26, 1909.)

1. TRIAL (§ 237*)—INSTRUCTIONS—DEGREE OF PROOF.

A requested charge that if there was any doubt in the minds of the jury, from the testimony, whether the instrument sued on was a bill of sale or a mortgage, they should resolve the doubt in favor of the defendant and find the instrument a mortgage, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 548; Dec. Dig. § 237.*]

2. DAMAGES (§ 228*)—EXCESSIVENESS—REMITTITUR.

Where, in replevin for horses, plaintiff alleged their value at $25 a head, and the jury returned a verdict for plaintiff assessing their value at $35 a head, the excessiveness of the verdict was cured by plaintiff filing a remittitur of the difference in value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 576; Dec. Dig. § 228.*]

3. REPLEVIN (§ 71*)—EVIDENCE—BOND.

In an action for replevin, the replevin bond was admissible in evidence.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 285; Dec. Dig. § 71.*]

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by J. H. Lindley against B. F. Lewter, in justice's court, to recover five head of horses and a wagon under an alleged bill of sale. A justice's judgment for plaintiff, affirmed by the county court, was reversed and remanded by the Court of Civil Appeals (45 Tex. Civ. App. 634, 101 S. W. 276), and from a judgment again rendered in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff claimed title and possession of the property by virtue of a bill of sale executed April 13, 1903, while defendant contended that such instrument was not intended to pass title to the property, but was intended to be a mortgage in payment of a debt owing by defendant to plaintiff.

The assignments of error referred to in the opinion are as follows:

"(2) The court erred in refusing to give the following charge requested by defendant: 'Gentlemen of the jury, you are instructed, at the request of defendant, that the burden of proof is on plaintiff, and, if there is any doubt in your mind from the testimony whether the instrument sued on is a bill of sale or mortgage, then you are to resolve the doubt in favor of defendant, and find said instrument to be a mortgage, and render a verdict for the defendant.'"

"(4) The court erred in that part of its judgment which permits defendant to deliver to the sheriff of Tom Green county, Tex., said property in controversy and only receive a credit of $25 per head.

"(5) The court erred in its judgment which refuses to allow defendant a credit of $35 a head for the horses returned; that being the value found by the jury."

Plaintiff in his petition only alleged a value of the horses replevined to be $25 a head. The jury found a verdict in his favor assessing the value at $35, and plaintiff filed a remittitur of $50 and only asked that an execution issue for five head at $25, or $125.

Lee Upton, for appellant. J. Curtys Simmons, for appellee.

FISHER, C. J. The evidence is sufficient to sustain the verdict and judgment of the court below.

There was no error in the court's refusing to give the charge set out in appellant's second assignment. The expression "doubt in your mind," contained in this refused charge, is enough to kill it.

The fourth and fifth assignments of error are disposed of by the remittitur. The replevin bond was admissible in evidence.

We find no error in the record, and the judgment is affirmed.

MITCHELL et al. v. GRAND LODGE FREE & ACCEPTED MASONS OF TEXAS.

(Court of Civil Appeals of Texas. June 5, 1909. Rehearing Denied June 26, 1909.)

INJUNCTION (§ 98*)—RESTRAINING LIBEL.

The general rule is that injunction will not lie to restrain publication of a libel, especially in view of the guaranty of liberty of speech in Const. art. 1, § 8.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 169–171; Dec. Dig. § 98.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Suit by the Grand Lodge Free & Accepted Masons of Texas against C. L. Mitchell and others. From an order granting a temporary injunction, defendants appeal. Reversed.

Jas. D. Crenshaw, for appellants. Smith & Latimore, for appellee.

DUNKLIN, J. This suit was instituted by the Grand Lodge Free and Accepted Masons of Texas for colored people against C. L. Mitchell and a number of others. Upon application of plaintiff a writ of temporary injunction was issued restraining the defendant from publishing or distributing certain circulars concerning plaintiff and its officers, and from the order of the judge of

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the trial court granting said writ defendants have appealed.

Plaintiff alleged that it has been duly chartered under the laws of Texas; that the circulars which defendants had published and would continue to publish, if not restrained from so doing, falsely denounced plaintiff as a spurious lodge, and its officers as liars and imposters. In its petition plaintiff further alleged that its object and purpose was to upbuild the negro race, that it is doing much to promote its social and religious development, and that the publications complained of have already caused a loss of membership to the fraternity and have greatly injured it financially.

Defendants filed numerous exceptions to plaintiff's petition, all of which were overruled. They also filed an answer to the merits of the petition, admitting the publication of the circulars and alleging that the charges made in those circulars were true.

By one of the exceptions to the petition the contention was made that an injunction will not lie to restrain the publication of a libel. In our research we have been unable to find any case decided by the higher courts of Texas in which this question has been discussed, but the correctness of appellant's contention is sustained by the great weight of the decisions of other courts, and we are convinced that this exception to the application for the writ should have been sustained.

"A libel occupies much the same relative position as a crime, in considering the remedy of injunction. Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may appear to be. This is the universal rule in the United States, and was formerly the rule in England. The present rule in England contra rests on statute." 6 Pom. Eq. Remedies, § 629.

"Upon the question of preventive relief in equity against the publication of libelous statements affecting the character or business of plaintiff, the authorities, both English and American, indicate a noticeable want of uniformity, and are, indeed, wholly irreconcilable. The earlier English doctrine, and that which seems most in accord with the principles governing the jurisdiction of equity by way of injunction, was that, the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity would not restrain the publication of libels or works of a libelous nature, even though such publications were calculated to injure the credit, business or character of the person aggrieved, and that he would be left to pursue his remedy at law." 2 High on Inj. § 1015.

"The courts will, in some cases, interpose by injunction to prevent the perpetration of a wrong, but as a general rule the publication of an alleged libel will not be stayed by injunction." Townshend on Slander & Libel (4th Ed.) § 417a.

"A court of equity has no jurisdiction to restrain a mere libel or slander. Nor does the fact that the false statement may injure plaintiff in his business or as to his property constitute a sufficient ground for an injunction, in the absence of acts of conspiracy, intimidation, or coercion." 22 Cyc. 900, § 6.

See, also, Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165; Kidd v. Horry (C. C.) 28 Fed. 773; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware D. Association (C. C.) 150 Fed. 413; Pratt Food Co. v. Bird (Mich.) 112 N. W. 701; Mayer v. Journeymen Stone Cutters' Association, 47 N. J. Eq. 519, 20 Atl. 492; other cases cited in 27 Cent. Dig. § 169, cols. 1808, 1809.

Article 1, § 8, of our state Constitution reads as follows: "Every person shall be at liberty to speak, write or publish his opinion on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels the jury shall have the right to determine the law and facts under the direction of the court, as in other cases."

This constitutional guaranty of liberty of speech furnishes an additional reason for the application in Texas of the general rule that an injunction will not issue to restrain the publication of a libel. In some of the cases above cited, constitutional provisions substantially the same as the one above quoted are made the sole basis for the denial of the right of injunction in such cases. Thus in the case of Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware D. Ass'n, supra, the following is said: "Whatever the defendant Mannix has done has been as publisher of the Commercial News, and not as a member of any combination. As such publisher he is entitled to invoke the constitutional guaranty contained in section 5, art. 6, of the Constitution of South Dakota, which, so far as pertinent, is as follows: 'Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.' In the jurisprudence of the United States there is no remedy for the abuse of this right conferred by the Constitution, except an action at law for damages or a criminal proceeding by indictment or information. Marlin F. A. Company v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310; Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165; Kidd v. Horry (C. C.) 28 Fed. 773; Brandreth v. Lance,

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8 Paige (N. Y.) 24, 34 Am. Dec. 368; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Singer Mfg. Co. v. Domestic S. M. Co., 49 Ga. 70, 15 Am. Rep. 674; Townshend on Slander and Libel, § 417a; Odger on Libel and Slander, § 13; Owen v. Partridge, 40 Misc. Rep. 415, 83 N. Y. Supp. 249."

For the reasons above noted, the order of the judge of the trial court granting the writ of temporary injunction against appellants is reversed, and the injunction issued in pursuance thereof is dissolved.

HUNTER et al. v. WALLACE.

(Court of Civil Appeals of Texas. July 1, 1909.)

1. EVIDENCE (§ 417*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACT OF SALE.

In an action against a bank and a vendor to recover money deposited in the bank by the purchaser, pursuant to a contract of sale providing that it should be forfeited for the purchaser's failure to comply therewith, provided the vendor should make clear title to the land, evidence that the vendor was to furnish an abstract of title was legitimate as against the contention that such evidence added to and changed the written contract, which, except as stated, did not otherwise refer to the title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1886; Dec. Dig. § 417.*]

2. APPEAL AND ERROR (§ 881*)—RIGHT TO ALLEGE ERROR—ESTOPPEL.

In an action against a bank and a vendor to recover money deposited by the purchaser, if evidence that the vendor was to furnish the purchaser an abstract of title was not legitimate, as against the contention that it added to and changed the written contract, the vendor could not complain, where he furnished a defective abstract, which he promised to, but never did, cure till after the date for paying the first installment, if at all.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 881.*]

3. DEPOSITARIES (§ 4*)—RIGHTS AND LIABILITIES OF PARTIES.

Where a vendor was not able to make a clear title at the date for payment of the first installment, more than two months after the contract was made, the purchaser was not bound by the contract, and a bank, which had notice of the purpose for which the money was deposited with it by the purchaser, to be forfeited to the vendor on the purchaser's failure to comply with the contract, provided the vendor made a clear title to the land, had no right to pay it over to the vendor, and by so doing became liable to the purchaser.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by J. O. Wallace against J. P. Hunter and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Abernathy, Abernathy & Abernathy, for appellants. H. L. Davis and Smith & Wilcox, for appellee.

RAINEY, C. J. Appellee, Wallace, brought this suit against the appellants, Hunter and the First National Bank of Farmersville, to recover the sum of $1,000. Wallace and Hunter entered into the following contract, viz.: "Copeville, Texas, Oct. 17, 1905. Know all men by these presents, that I, J. P. Hunter, have on this day sold to J. O. Wallace 100 acres of land, same being the east 100 acres of my home place; consideration ($6,500) sixty-five hundred dollars, $1,000 paid this day, to be left at the First National Bank at Farmersville, Texas, as a forfeit, provided said Wallace should fail to take the above 100 acres of land and pay $2,200, with the $1,000 paid to-day, on the 1st day of January, 1906, balance to be paid in five annual equal payments, interest 8 per cent. per annum. These notes, or balance, shall draw interest from this 17th day of October, 1905. Should said J. O. Wallace comply with this contract, above $1,000 shall be as part payment on above land, and should he fail it shall be forfeited for the failure to comply with same, provided said Hunter shall make clear title to land as above. Witness our hands to above agreement this 17th day of October, 1905." In pursuance of said contract the sum of $1,000, together with the said contract, was placed in escrow with the bank. On January 1, 1906, Hunter was unable to make Wallace a clear title to the land. Wallace, knowing that Hunter could not make him a clear title to the land, left Collin county on December 31, 1905, and remained away until the following April. In the meantime the bank paid over said $1,000 to J. P. Hunter. Wallace on January 1, 1906, was willing and able to complete his part of the contract.

Complaint is made that the court erred in permitting Wallace to testify that Hunter was to furnish him an abstract of title to the land. The contention is that said evidence adds to and changes the written contract. We think this evidence was legitimate; but, if not so, Hunter is in no attitude to complain, for at the time of the making of said contract he furnished Wallace with an abstract of the title to said land for the purpose of an investigation of said title, which was placed in the hands of an attorney, who pointed out to Hunter certain defects in said title, which defects Hunter promised to cure, but he never did until after January 1, 1906, if at all.

Under the facts of this case we are of the opinion that Wallace was not bound by said contract after January 1, 1906, Hunter not being able at that time to make him a clear title to said land; and the bank, having notice of the purpose for which said money was deposited with it, had no right to pay it over to Hunter, and by so doing it became liable to Wallace therefor.

As neither Hunter nor the bank were entitled to hold said money as against Wallace, the judgment is affirmed.

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SHIRLEY v. COFFIN et al.

(Court of Civil Appeals of Texas. May 29, 1909. Rehearing Denied June 26, 1909.)

BROKERS (§ 100*) — CONTRACTS — EXCEEDING AUTHORITY.

Where agents of the owner of land, in contracting to sell it, exceeded their authority by extending the time within which the purchaser could make a cash payment and by receiving a sum to be held for the principal as a forfeit or payment on the purchase price, the purchaser was not entitled to specific performance of the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 142; Dec. Dig. § 100.*]

Appeal from District Court, Deaf Smith County; J. N. Browning, Judge.

Action by T. E. Shirley against J. M. Coffin and others. There was a directed verdict for defendants, and plaintiff appeals. Affirmed.

Knight & Slaton and L. C. McBride, for appellant. W. H. Russell and Morrow & Smithdeal, for appellees.

SPEER, J. This is an action brought by T. E. Shirley against J. M. Coffin and others to recover a 2,424-acre tract of land in Deaf Smith county and to enforce specific performance of a written contract for the conveyance of said land. The trial court peremptorily instructed a verdict for defendants, and the plaintiff has appealed.

The contract upon which appellant bases his right to recover is as follows: "The State of Texas, County of Deaf Smith. This indenture, entered into in duplicate this the 23d day of February, 1906, by and between J. M. Coffin, of Hill county, Texas, acting by and through C. G. Witherspoon and L. Gough as his agents, party of the first part, and T. E. Shirley, of McLennan county, Texas, party of the second part, witnesseth: That the said party of the first part, acting by and through his legally constituted agents, the said C. G. Witherspoon and L. Gough, has this day sold unto the said party of the second part 2,424 acres of land, lying and situate in Deaf Smith county, Texas, and about 16 miles N. W. from Hereford, Texas, and known as the 'Coffin Ranch,' and being the same land purchased from the Capitol Freehold Land & Improvement Company, Limited, by deed dated ———, 1902, and recovered in volume 9, page 212, of the Deed Records of Deaf Smith county, Texas, except certain portions of said land heretofore sold off of said purchase; the said original purchase containing 3,704 acres, and being parts of Capitol Leagues Nos. 391, 408, and 408½, all in said Deaf Smith county, Texas. The terms and conditions of said purchase being as follows: That said T. E. Shirley is to pay the sum of $5 per acre, one-half of said sum to be in cash, and the balance in one, two, three, four, and five years, respectively, with 7 per cent. interest on deferred payments. That the sale shall be closed on or before April 1, 1906, the said Coffin being allowed that time to prepare his deed of conveyance, abstracts, and other muniments of title, if need be, and the said Shirley may be allowed that time, if need be, to complete his purchase; and the said T. E. Shirley now pays to the said Witherspoon and Gough the sum of $1,000 for the said J. M. Coffin and as his legally constituted agents for the sale of above-described land, the receipt of which is hereby acknowledged, which said sum is to be held by them for the use and benefit of the said J. M. Coffin until the said J. M. Coffin shall execute and deliver his deeds of conveyance, with abstracts showing good and sufficient title to the said land, when the said C. G. Witherspoon and L. Gough shall deliver said sum of money to said J. M. Coffin, and it shall be paid as a part of the cash payment of said land. It is further agreed that said sum of $1,000 shall be held and considered as a forfeit to the said J. M. Coffin in the event that said T. E. Shirley shall fail to comply with his undertakings as herein set forth, and it shall be considered as a part of the cash payment on the purchase of said land, and shall be held as binding on the said J. M. Coffin to make and execute his deeds of conveyance as above set forth to the said T. E. Shirley. In testimony whereof, witness our hands this the 23d day of February, 1906. J. M. Coffin, Party of First Part, by C. G. Witherspoon, Agent. L. Gough, Agent. T. E. Shirley, Party of the Second Part."

The authority of C. G. Witherspoon and L. Gough as agents of appellee was oral, and to the extent only of making a sale of $5 an acre, one-half cash and the balance in five equal annual payments at 7 per cent. interest. We are of the opinion the peremptory instruction for defendant was right, for two reasons: First, because the written contract above set out, whereby the agents sold to appellant appellee's lands, exceeded the agents' authority in extending time to appellant from February 23, 1906, to April 1, 1906, in which to make the cash payment; and, second, because no authority is shown in the agents to receive for their principal the $1,000 advanced as a forfeit or payment on the purchase. The first of these reasons is made the basis for affirming a judgment in the case of Gough et al. v. Coffin, 120 S. W. 210, by the Dallas Court of Civil Appeals, in which these agents had sued appellee to recover their commissions for having made this particular sale, and the elaborate reasoning of that opinion commends itself to us.

The judgment of the district court is therefore affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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MAXWELL GINNING CO. et al. v. WALLAN.

(Court of Civil Appeals of Texas. July 3, 1909.)

MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

Where a servant working with a cotton bale press was familiar with any supposed defects in it, knew that it would occasionally drop cotton onto the floor, and that it was necessary to replace it between the rollers, and as a man of mature years knew the danger of placing his hand between the rollers, and that there was no shield to prevent his hands from coming into contact with the rollers, he assumed the risk of injury from replacing between the rollers with his hands cotton which had fallen from the press.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. § 217.*]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Personal injury action by A. V. Wallan against the Maxwell Ginning Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Wagstaff & Davidson, for appellants. Ben L. Cox and Grogan & De Bagory, for appellee.

SPEER, J. Appellee received certain injuries while in the employ of appellants, for which he sued and recovered judgment in the sum of $2,500, from which judgment this appeal is prosecuted. At the risk of being tedious, we set out the testimony of the witnesses illustrating the character of the accident.

The plaintiff testified as follows: "In the summer of 1907 I was employed by Robert W. Maxwell to work for the Maxwell Ginning Company, and my work was to begin about the middle of August. I was to be foreman, and to have charge of the hands and machinery, except a certain round bale press which the company was having put in. I told Mr. Maxwell that I was familiar with all the machinery except this round bale press, and that I knew nothing about it. He stated that a man from the round bale press factory would come to run this press, and that I would not have to operate it. I was to receive $75 per month. The gin did not begin running as early as we expected, and after it had run for a while Mr. Maxwell told me that, owing to the shortness of the crop, we could not run with a full crew. At first I was running the gin stands and the square bale press, but later in the season we agreed that we ought to cut down the force, and could dispense with the fireman easier than any other man, so I fired and ran the square bale press. This was very heavy labor on me, as I had to go back and forth from the boiler room to the ginroom. The round bale press was started to work about the middle of September. The man came from the factory to run the round bale press, and worked about two months and quit, and I hired George Combs to take his place at the round bale press, and Combs ran it until about the 15th or 20th of December. Mr. Robert W. Maxwell, who had general charge of the gin company's business, on account of sickness of his relatives, spent nearly all of December, 1907, in Alabama, and Combs and I had a misunderstanding, and he quit his job. I did not have time to hunt up another man, especially since round bale men were scarce, and to keep the machinery from stopping I got a green man and put in my place. I took the round bale press till I could get the new man familiar with the machinery, when he was to take the round bale press, and I was to go back to the square bale press and firing. We worked this way two or three days, and Mr. Maxwell returned from Alabama. He did not procure another man, and, if we ran at all, it was necessary for me to continue at the round bale press. We lacked only a day or two of being through ginning for the season, and I continued to work there for about three days after he returned, up to the time I was hurt on the 28th day of December. Combs and this man that I hired to fire after Combs quit were the only hands that I had ever hired. Maxwell had hired the others. I had authority to hire hands. We worked most of the season with a crew of three men, when six would have constituted a full crew. When Maxwell left for Alabama, about December 1st, he sent me a letter, and told me to take charge of the business and run everything till he got back. Up to the time that Combs quit us, I had never examined the round bale press; had practically no opportunity to do so, as I was too busy. When Combs quit, I thought I would take it, and do the best I could with it till Maxwell came back. When he returned, he made no other arrangements, and I continued to work there. My recollection is that he told me to continue to operate that press, at least that was my impression, and there was no one else there to operate it, and on the particular day that I was hurt, he directed me to make what cotton was then in the ginhouse into round bales, and we were on the last bale when I was hurt. This round bale press was so constructed as to compress or roll the cotton into bales by four cylinder rollers working close together, two above and two below, the bottom of the lower one being about 3 feet above the floor, and the space under it, where the bales were allowed to drop out after being compressed, was a little more than 3 feet long and about 3 feet high. The walls of the building and the position of the press and its construction were such that you could not see well under the press so as to study the construction of it. These four large compression rollers were each about 22 inches in diameter and 36 inches long, and when the press was running, the

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cotton from the condenser passed between the top rollers into the space between the four rollers, and they rolled so as to roll it into a round bale about 36 inches long and 20 inches in diameter. These rollers were so geared that they would yield or spring apart as the bales increased in size or neared completion. When the press was running, if you got under it, you could not determine how the rollers were running, or how it was constructed, owing to the fact that some cotton and some dust were falling out thereunder which would get in your eyes when you looked up. The few days that I had been working at the round bale press furnished all of the knowledge I had of it, as my observation of it previous to that time had been limited to simply noticing how the other employés had operated it. The press was defective, but I could not tell wherein the defects lay, owing to my lack of familiarity with it, but I knew it to be defective because it would continually let some of the cotton fall out under the press, instead of carrying it in its proper course into the bale. I never considered it dangerous, except about the top where the cotton went in. R. W. Maxwell had not warned me that it was dangerous in any way. On the day that I got hurt I was reaching under the press and pushing some loose cotton that had fallen down up between the rollers so it would go on into the bale. I could not see thereunder very well, but this was the customary way to get the cotton back. This was the method I had observed Combs and the factory man to use, and I had pushed the cotton back this way myself a great many times. R. W. Maxwell had been around and observed me doing it in this way, and had never warned me of any danger. While pushing up the cotton in this way, my left hand was caught in the rollers, my arm pulled in and broken in several places, and my shoulder crushed, my back skinned, and my head mashed. * * * At the time I was hurt I presumed that it was safe for me to put the cotton back in the way that I was doing. I knew that if I put my hand in between the rollers while they were running that I would get hurt. I knew that the machinery was heavy and the pressure very great, but I did not know that I could get my hand in the rollers. I thought there was a shield or guard under there to prevent my hand from coming in contact with the rollers. I never told Robert W. Maxwell, nor any one else, that I was injured through my own negligence. I never looked to see if there was a shield under the rollers to prevent one's hand from getting between the rollers. I had never worked with a press like this one and had never seen one with a shield under the rollers. When the press is in position, and a bale is finished, it is gotten out of the press by allowing it to drop between the two bottom compression rollers to the floor under the press. I do not know how the bale, when finished, could drop out between the bottom rollers if there was a shield there sufficient to prevent loose cotton from dropping down while the bale was forming, unless the shield was in some way removed. I have been running and managing gin plants for more than 10 years, and I understand ordinary ginning business very well, but I have not run a round bale press. There was nothing to prevent me from seeing whether or not there was a shield there to keep one's hand from getting between the rollers if I had gotten down under the press and looked up at the rollers, but one operating the press could not see whether or not there was a shield, unless he did get down and examine it, as the rollers would prevent his seeing it unless it were entirely below the rollers. There was nothing to prevent a person from getting down under the compression rollers if he wanted to do so. These compression rollers do not revolve rapidly. I am 38 years old. I employed George Combs, and you might say I discharged him."

George Combs testified: "While running the round bale press, the bat of cotton going into the press and being rolled into a bale would sometimes break in two, and, owing to the construction of the press, some of the cotton would drop out between the lower rollers and fall down under the press, and it was necessary to pick it up and push it back up between these two lower rollers to keep it going in the right direction. There was no shield or guard under the press to catch the cotton and keep it from falling out, nor to keep objects from coming in contact with the rollers from the bottom side of the press. There was no danger of a person coming in contact with those rollers under the bottom unless he got under there. I never saw a shield on or under a press to keep the cotton from falling out between the lower rollers. I do not know how a shield could be placed to keep the cotton from sometimes falling down between those rollers, nor how the cotton could be pushed back between the rollers if there was a shield there. While I was operating that press, I picked up the cotton that fell down there with my hands, and pushed it up against the rollers and let them take it into the bale. I could have pushed it up with a stick, but I always placed it up there with my hands, and was careful not to put my hand between the rollers. I suppose Mr. Wallan had seen me so place the cotton between the rollers, but he gave most of his attention to other parts of the work there. * * * I was familiar with that round bale press. I did not consider it dangerous, except as all presses are dangerous if you get caught in them. This press was not out of repairs, but it was not very satisfactory for the reason that it was so constructed that when cotton was being rolled and compressed into a bale, it would frequently drop a part of the cotton down between the lower compression rollers, and it

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would have to be picked up and fed into the press again. It was easiest to feed it in from the bottom. The cotton passed from the gin stands in a sheet or bat, and passed into the round bale press, going down between the two top rollers, and was rolled into a bale between four large compression rollers that rolled the same way and rolled the cotton into a round bale, and when finished the two lower rollers were by the operator opened wider apart, and the bale dropped down through the opening onto the floor through the same space that the cotton was disposed to fall through while the bale was being formed or compressed. When I was down under the press, the rollers could be plainly seen, and the loose cotton could be easily placed between them. They revolved slowly."

Robert W. Maxwell testified: "I hired Mr. Wallan to act as manager of that ginning business, and to have general charge of the machinery and of the hands, with full authority to employ and discharge hands. Mr. Wallan represented to me when I hired him that he was familiar with the machinery, and that he knew how to run it, and I gave him no warning as to danger, because I understood him to be experienced. The round bale press was installed in September, 1907, by the manufacturers of such presses, and they kept a man to run it for about a month or two, and after he left, Wallan hired a man named George Combs to run it. The round bale press does not belong to us, but belongs to the manufacturers. This round bale press contained four compression rollers in a frame parallel with each other, two above and two below, said rollers being about 36 inches long, 22 inches in diameter, and being placed in a horizontal position, with automatic appliances to adjust them to the varying size of the bale which is rolled between the four rollers, and when near completion it holds the four rollers apart, distributed equally around the bale. The bottom of the two lower rollers is about 30 inches above the gin floor. When a bale is completed, the two lower compression rollers are drawn further apart, and the finished bale drops on the floor and is rolled out. These rollers were slightly corrugated, and all revolved in the same direction; and, when the press was empty, they nearly touched each other, except there was a small space between the two upper rollers through which the sheets or bat of cotton from the gin stands passed down into the space between the four rollers, where it was rolled into a round bale. Occasionally cotton would drop down between the lower rollers onto the floor, or the bat or sheet of cotton would get broke, and would run down between the bottom rollers to the floor. The operators of the press picked it up and stuck it back between the rollers. There was no shield or guard on the lower compression rollers to prevent cotton from falling out, nor to prevent objects from coming in contact with the rollers from below. The rollers were visible from below, and I know of no way that a shield could be practically placed there. * * * I did not put plaintiff to working or operating the round bale press, nor tell him to operate it. He began it, and ran it of his own accord. There was nothing between the rollers and the floor, and they could be easily seen; were open to view. There was no shield placed under or between the compression rollers to prevent the cotton from dropping down between them to the floor. I do not know how a shield could be placed there that would prevent the cotton from falling down between those bottom rollers when the bat or sheet broke. There might be a shield to keep it from falling on the floor, but such a shield would not prevent a person from putting his hand up between the rollers, or, if the shield were placed up so close to the rollers as to prevent the cotton's falling away from the rollers, it would have to be removed before the cotton that fell onto it could be pushed up between the rollers. This cotton that fell down between those rollers could have been pushed up between them with a stick, but the operators generally used their hands. The compression rollers were plainly visible. Any one stooping down and picking up the cotton that fell down between them could not help seeing them if he would look up. They were 2½ or 3 feet above the floor. * * * This round bale press was not out of repairs, nor was the machinery out of order or in need of repairs. The spilling out of the cotton between the compression rollers was the result of the plan it was made on, and would occur with any press like that if the cotton was dry. I knew of no dangers about that press that were not open and visible. Any person could see that the rollers would crush his arm or hand if he let them be drawn into it. Its working had not been entirely satisfactory during the season on account of its dropping out the cotton."

Upon this testimony we conclude that the evidence is insufficient to show any defect in the press for which appellants would be liable. It is undisputed that the press was not out of repairs, and that the dropping of cotton was not the result of a defect at all. But if mistaken in this, we are further of opinion that the evidence is insufficient to support the verdict and judgment in appellee's favor upon the issue of assumed risk. It appears from the testimony of appellee himself that he was perfectly familiar with any supposed defects in the press, and knew very well that it would occasionally drop cotton onto the floor, and that it was necessary to replace the same between the rollers, and necessarily, as a man of mature years, he knew the danger incident to placing his hand between the heavy compression rollers of the size and power these are shown to be. If a shield was practicable,

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and its absence a defect in the construction of the press, he admits he knew of this defect, and we see no way to escape the conclusion that he assumed the risk of the very injury received by him.

For the insufficiency of the evidence to support the verdict and judgment in the two particulars mentioned, the judgment is reversed, and the cause remanded.

LE MASTER v. DALHART REAL ESTATE AGENCY.

(Court of Civil Appeals of Texas. June 5, 1909. Rehearing Denied July 3, 1909.)

1. JUDGMENT (§ 518*)—SUIT TO SET ASIDE—DIRECT OR COLLATERAL ATTACK.

A suit to set aside a default judgment is in the nature of a bill of review for a new trial after the term and after the time allowed for appeal or writ of error, the petition setting up the defects in the proceedings, alleging a meritorious defense, and giving an excuse for the delay, and hence is a direct, and not a collateral, attack on the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.*]

2. JUDGMENT (§ 415*)—SUIT TO SET ASIDE DEFAULT—QUESTIONS FOR DETERMINATION.

In a direct attack on a default judgment by suit to set it aside, whether the judgment is absolutely void need not be determined, but only whether defects complained of are available in a direct proceeding as an appeal, writ of error, or for injunction.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 415.*]

3. BROKERS (§ 74*)—SELLING AGENT—RECOVERY AGAINST PURCHASER FOR FAILURE TO FULFILL CONTRACT.

A mere selling agent or broker has no such interest in a contract to purchase land secured by him as authorizes a recovery of damages in the way of lost commissions from the proposed purchaser who has refused to comply with the contract.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 74.*]

4. JUDGMENT (§ 425*)—GROUNDS FOR SETTING ASIDE DEFAULT—AMENDMENT OF PETITION.

It is not ground for setting aside a default judgment for damages for loss of commissions on a sale of real estate that the amended petition prayed for a recovery of a larger amount than was sought in the original; it appearing that it was explainable by mathematical calculation from the number of acres, the price per acre, and the rate of commission, stated alike in both petitions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 803; Dec. Dig. § 425.*]

5. JUDGMENT (§ 17*)—OMISSION IN CITATION AFFECTING DEFAULT.

The omission of the citation to give the date of filing the petition renders a default judgment erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. § 17.*]

6. PLEADING (§ 214*)—GENERAL DEMURRER—ACCEPTING PETITION AS TRUE.

For the purposes of a general demurrer, the averments of a petition must be accepted as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

7. JUDGMENT (§ 460*)—SUIT TO SET ASIDE DEFAULT—SUFFICIENCY OF PETITION.

A petition to set aside a default judgment alleged that at the time of suit defendant resided outside the state; that soon after service of the citation, and before the meeting of court, he employed an attorney residing in the state of plaintiff's residence to look into the matter, and ascertain whether there was any cause of action and sufficient service to confer jurisdiction, and in such case to represent him; that the attorney wired him that the cause would not be tried; that no further steps were to be taken, and that he would not be needed; that a few days afterward, and before default, his attorney returned and reported that the pleadings stated no cause of action against him; and that the cause had been abandoned by plaintiff, and nothing further would be done. It further alleged that defendant believed such statements, paid the attorney his fee, and discharged him, and never, in fact, knew of the judgment till more than two years after its rendition, and that defendants or some of them induced his attorney to believe that the cause had been abandoned, and caused him to so report to plaintiff, or, if this was not true, his attorney was caused by accident to believe that such was the case and so reported, or else made such representations acting in bad faith to mislead and deceive him, and to perpetrate a fraud on him, and induced him to believe the cause was abandoned and would not be prosecuted. *Held* sufficient to entitle plaintiff to a submission on the merits of the issue whether the facts averred sufficiently excused his failure to prosecute the usual legal remedy by appeal or writ of error to correct the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879–891; Dec. Dig. § 460.*]

Appeal from District Court, Dallam County; L. S. Kinder, Judge.

Action by Mike C. Le Master against the Dalhart Real Estate Agency. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

Cooper & Stanford, for appellant. Gustavus, Bowman & Jackson and Chauncey & Carter, for appellee.

CONNER, C. J. Appellant instituted this suit in the district court of Dallam county on November 5, 1908, to enjoin and to vacate a judgment by default rendered in the same court on April 13, 1906, in favor of appellee, the Dalhart Real Estate Agency, and against appellant, Mike C. Le Master, for the sum of $1,786. From this judgment no appeal or writ of error was ever prosecuted. At the inception of the present suit, a temporary injunction was granted as prayed for, but at a term of the court thereafter, viz., on April 16, 1909, the court sustained appellee's general demurrer to appellant's petition, and ordered the dissolution of the injunction. Appellant obtained leave to amend his petition, and the cause on the merits was continued for the term. To the order dissolving the injunction, however, appellant excepted and duly prosecutes an appeal therefrom to this court. The grounds upon which appellant in the petition excepted to bases his right to an injunction are: First, that the pleadings in the original suit affirmatively

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show that appellee had no right of recovery as adjudged on April 13, 1906; second, that said judgment of April 13, 1906, was predicated upon an amended petition which set up a new cause of action and to which appellant had not been cited to answer; and, third, that the citation in the original suit served upon appellant was insufficient to confer jurisdiction of the court over his person. In verification of these averments, the citation, the original and the amended original petition in the original suit were attached as exhibits to the petition for injunction, which also further set forth that no indebtedness as adjudged in fact ever existed, and gave appellant's excuse, to be hereinafter more particularly noticed, for not having earlier sought to set aside the judgment of which complaint is made.

The original petition in the suit, culminating in the judgment of 1906, averred as a basis for the action that the plaintiff (appellee herein) was engaged in the real estate business, and on January 3, 1906, "had for sale the 7,489 acres in Dallam county, Tex., of and belonging to one W. M. Pardue, and that thereafter plaintiff offered said land to defendant at the sum of $5.50 per acre, wherein plaintiffs were to receive the sum of 5 per cent. commission for selling same to any one on the following terms: $2,500 cash, balance in the following payments, one-third, less $2,000, in 60 days, with remainder in one, two, and three years at interest at the rate of 8 per cent. per annum from date thereof." The petition further alleged that the defendant herein by telegram accepted said offer, but later breached the contract of purchase, which at all times they were able and willing to complete, to plaintiff's damage $1,024, for which there was a prayer for recovery. The amended petition filed after appellant had been personally served with the citation herein assailed was substantially the same as the original petition, save that it set forth the correspondence ending in appellee's acceptance of terms and agreement to buy, and concluded with a prayer for damages in the sum of $1,786, instead of $1,024, as originally sought. The defects in the citation served upon appellant which it is insisted invalidates the judgment of April 13, 1906, are that the citation did not give the date of the filing of the original petition, and failed to command the defendant to appear and answer the petition. The case has been presented to us on the theory that the defects pointed out render the judgment of April 13, 1906, absolutely void and subject to collateral attack; the argument being that it is necessary to so conclude in order to authorize the injunction. It is to be observed, however that this is not a case where the judgment is collaterally brought in question, as where the judgment is offered as a muniment of title in a suit of trespass to try title, or the sale of a given piece of property is sought to be enjoined, but one where the judgment itself is the direct object of the attack. It is in the nature of a bill of review for a new trial after the term and after the time allowed for an appeal or writ of error, the petition setting up the defects in the proceedings, alleging a meritorious defense, and giving an excuse for the delay. Hence this suit constitutes a direct and not a collateral, attack upon the judgment of April 13, 1906. Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325; Foust v. Warren (Tex. Civ. App.) 72 S. W. 404. This being true, we need not discuss the question whether the judgment of 1906 is void in an absolute sense, although inclined to agree with appellee that it is not, but need only determine whether the defects complained of are available in a direct proceeding as an appeal, writ of error, or for injunction as here. Of this we entertain no doubt.

It was clearly decided by our Supreme Court on writ of error in Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946, that a mere selling agent or broker has no such interest in a contract for the purchase of land secured by him as authorizes a recovery of damages in the way of lost commissions from the proposed purchaser who has refused to comply with the contract. To the same effect is the decision in the case of Tinsley v. Anderson, 33 S. W. 266, by the Court of Civil Appeals of the Fourth Judicial District. On the authority of these decisions, which we approve, we are of opinion that in neither the original nor amended original petition upon which the judgment of April 13, 1906, is predicated, did appellee show a cause of action entitling him to recover any sum of money from appellant, and the judgment therefore was clearly erroneous. We are not inclined to attach any weight to the fact that the amended petition prayed for the recovery of a larger amount than was sought in the original; it appearing that it was a mere enlargement explainable by mathematical calculation from the number of acres, the price per acre, and the rate of commission stated alike in both petitions, but the omission of the citation to give the date of the filing of appellee's petition also renders the default judgment of April 13, 1906, erroneous. See Durham v. Betterton, 79 Tex. 223, 14 S. W. 1060; Dunn v. Hughes (Tex. Civ. App.) 36 S. W. 1084.

Appellant's petition distinctly alleging that appellant in fact was not indebted to appellee as adjudged in 1906, or in any other way, we have but to determine whether the facts averred sufficiently excuse appellant's failure to prosecute the usual legal remedy by appeal or writ of error for the correction of the errors in the judgment. On this subject the petition alleges, in substance, that at the time of the suit in 1906 appellant was residing in Altus, in the state of Oklahoma; that, soon after the service of citation upon him, and before the meeting of the court at Dalhart,

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Tex., he employed W. T. McConnell, an attorney at law residing at Altus, "to look into the matter for this plaintiff and ascertain whether or not there was any cause of action against this plaintiff, and whether or not there was any sufficient service to confer jurisdiction upon this plaintiff, and that in case there was such cause of action, and in case the court at Dalhart had acquired jurisdiction over this plaintiff, then the said W. T. McConnell should represent this plaintiff in said matter"; that said McConnell attended the court at Dalhart, and wired appellee that the cause would not be tried; "that no further steps would be taken in said cause and that he would not be needed, whereupon this plaintiff returned to his home in Altus, Okl.; that a few days afterward, and some time before the judgment by default was rendered herein, the said McConnell returning to his home in Altus, Okl., and reported to this plaintiff in person that the pleadings of the plaintiff in said cause at Dalhart stated no cause of action whatever against him, and that said cause had been by the plaintiff abandoned, and that nothing further would be done in said cause." The petition further alleged that appellant believed the statements made to him by his attorney McConnell, who was thereupon paid his fee and discharged, and that he never in fact knew of the judgment by default until the service of a writ of garnishment more than two years after the rendition of the judgment. The petition further averred that "the defendants herein, or some of them, induced the said W. T. McConnell to believe that said cause had been abandoned and would not be prosecuted further, and caused the said W. T. McConnell to so report to this plaintiff, or, if the above is not true, by accident or by mistake the said W. T. McConnell was caused to believe and to understand that said suit had been abandoned, and would not be prosecuted further, and so reported to this plaintiff, or else the said W. T. McConnell, acting in bad faith with this plaintiff and for the purpose of misleading and deceiving this plaintiff, and for the purpose of perpetrating a fraud upon this plaintiff, made representations to this plaintiff that said cause had been abandoned, and would not be prosecuted further, and thereby misled and deceived and induced plaintiff to believe that said cause had been abandoned, and would not be prosecuted, and that plaintiff did believe that said cause had in all things been abandoned." For the purposes of the general demurrer these excusing averments must be accepted by us as true, and, so considering them, we have concluded that they are sufficient to entitle appellant to a submission of the issue upon the merits. Watson v. T. & P. Ry. Co. (Tex. Civ. App.) 73 S. W. 830; Cetti v. Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787.

So concluding, we think the court erred in dissolving the injunction, and that the cause should be remanded for a trial upon the merits.

STONE et al. v. STITT.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied June 26, 1909.)

1. WITNESSES (§ 202*)—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.

Evidence of an attorney to show that deeds executed by defendants in accordance with his advice were in fraud of creditors of the grantor was not privileged as a communication between attorney and client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 757; Dec. Dig. § 202.*]

2. APPEAL AND ERROR (§§ 728, 742, 743*)—ASSIGNMENTS OF ERROR — RULINGS ON EVIDENCE.

Assignments complaining of rulings on evidence, but failing to set out the grounds of the objections or any statements thereunder, and referring to the record for such information, were improper and would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3000, 3010, 3011; Dec. Dig. §§ 728, 742, 743.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—STATEMENTS.

A statement following an assignment of error to the admission of evidence, which was merely a conclusion as to the effect of the testimony, is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

An assignment of error and the statement thereunder, failing to point out in what respect the charge objected to was inconsistent with the main charge or not applicable to the facts, was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

5. FRAUDULENT CONVEYANCES (§ 309*)—ACTION—INSTRUCTIONS.

An instruction that the jury should find for plaintiff if they found that at the time of the conveyance to S. the grantor was indebted to others, and made the conveyance to delay, hinder, and defraud the other creditors, and to cover up and place the land conveyed beyond their reach, and not for the bona fide purpose of paying the debt due the grantee, and she knew of such fraudulent intent, if any, of the grantor, was erroneous.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 309.*]

6. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—INSTRUCTIONS.

An assignment of error to a paragraph of the charge was insufficient, where neither the assignment nor any proposition thereunder pointed out the respects in which it was claimed the instruction conflicted with the balance of the charge or was calculated to mislead the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3013; Dec. Dig. § 730.*]

7. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMED FACTS.

It is not error for the court to assume in its charge a fact established by undisputed testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432–434; Dec. Dig. § 192.*]

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8. Appeal and Error (§ 231*)—Instructions—Objections in Trial Court.

An objection that a paragraph of the charge was confusing, ambiguous, and contradictory, that it was also inapplicable either to the facts or law of the case, and should not have been given, was too general to merit consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 689, 690; Dec. Dig. § 231.*]

9. Fraudulent Conveyances (§ 309*)—Vacation—Instructions.

A request to charge that a verdict should be for defendants unless the jury should find that at the time of the alleged fraudulent transfer the grantor and his mother, the grantee, were actually conspiring to effect a sale of merchandise to defraud the grantor's creditors, was properly refused as ignoring another theory of plaintiff's cause that the transfer of the land to the mother was without valuable consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 309.*]

Appeal from District Court, Deaf Smith County; J. N. Browning, Judge.

Action by J. W. Stitt against Sallie Stone and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Knight & Slaton and Barcus & North, for appellants. N. J. Wade, for appellee.

DUNKLIN, J. The decision of this court on a former appeal of this case is shown in 103 S. W. 1192. J. W. Stitt was appointed trustee in bankruptcy of Will H. Stone's property on September 26, 1903, and he prosecuted this suit as such trustee to recover two lots in the town of Hereford which Will H. Stone had attempted to convey to his mother, Mrs. Sallie Stone, by deed dated March 14, 1903. From a judgment in favor of the trustee canceling said deeds and decreeing title to both of said lots in the trustee, Mrs. Sallie Stone and W. H. Stone have appealed.

By their first assignment appellants complain of the admission of certain testimony of the witness Womack. They objected to the testimony upon the ground that Womack had been attorney for appellants, and that his evidence consisted of information received by him as such attorney, and was therefore privileged. The entire testimony of this witness was favorable to appellants, except such portions as tended to show that the deeds executed by Will H. Stone to his mother by advice of the attorney were in fraud of creditors of Will H. Stone. Communications of that character between attorney and client are not privileged. Taylor v. Evans (Tex. Civ. App.) 29 S. W. 174; Hyman v. Grant (Tex. Civ. App.) 114 S. W. 853.

By the second, third, fourth, and fifth assignments it is contended that the court erred in admitting certain other testimony of the same witness over appellants' objections, but the grounds of these objections are not set out in the assignments nor in any statements thereunder, and we are referred to the record for such information. This is not in compliance with the rules for briefing, and appellee's objection to the consideration of those assignments is sustained. Scanlon v. Ry., 45 Tex. Civ. App. 345, 100 S. W. 982; Poland v. Porter, 44 Tex. Civ. App. 334, 98 S. W. 215; Rules 24, 25, 29 and 31 (67 S. W. xv, xvi). Furthermore, the brief contains no statement of the evidence complained of in the third assignment, while the statement following the fourth assignment is a mere conclusion as to the effect of the testimony given by the witness in answer to the eighteenth interrogatory, and the statement following the fifth assignment of error wholly fails to show the evidence objected to. See rules and decisions, supra; also Peach River Lbr. Co. v. Ayres, 41 Tex. Civ. App. 334, 9 S. W. 387; El Paso Elect. Ry. v. Furber, 45 Tex. Civ. App. 348, 100 S. W. 1042.

The sixth assignment of error is as follows: "The court erred in reading to the jury the first subdivision of paragraph 3 of the court's charge." Under this assignment, propositions are submitted as follows: "First. Each paragraph of the court's charge should be in line with and reconcilable with the remainder of the charge. Second. The law as laid down in the first part of the third paragraph of the court's charge, on page 11 of the transcript, is misleading as to the law, and is calculated to confuse the minds of the jurors, and is ambiguous and not applicable to the facts in this case." This assignment and the propositions thereunder fail to point out in what respects the charge complained of is misleading or ambiguous or inconsistent with the main charge, or not applicable to the facts in this case, and appellee's objection to the consideration thereof, as being in violation of rules 24 and 25 (67 S. W. xv) governing practice in the Court of Civil Appeals, is sustained. Garrison v. Ochiltree Co. (Tex. Civ. App.) 111 S. W. 445, and authorities there cited.

The trial court instructed the jury to find in favor of the plaintiff if they should "find and believe from the evidence that at the time of such conveyance of said real estate to said Sallie Stone the said Will H. Stone was indebted to other parties, and that he made the said conveyance for the purpose and with the intent on his part to delay, hinder, or defraud the other creditors, or to cover up and place said real estate beyond the reach of his said other creditors, and not for the bona fide purpose of paying the debt due the said Sallie Stone, and that she knew of such fraudulent intent, if any, of the said Will H. Stone." This instruction was error for which the judgment must be reversed. Bruce v. Koch, 94 Tex. 192, 59 S. W. 540; Haas v. Kraus, 86 Tex. 688, 27 S. W. 256.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Subdivision B of paragraph 3 of the main charge is criticised as being in conflict with the first part of said paragraph and calculated to confuse the jury, but neither by the assignment nor by any proposition thereunder do appellants point out in what respects the supposed conflict consists, or just how the charge was calculated to confuse the jury. This is not in compliance with rules 24 and 25 (67 S. W. xv) supra; Garrison v. Ochiltree Co., supra. The same paragraph of the charge is further criticised as not being applicable to the facts in the case. In the decision on the former appeal of this case the following language was used: "Fraud vitiates everything into which it enters, and if the 'slaughter sale' was fraudulent, and contemplated by both parties as a part of the transaction when the conveyances of real estate were made, as there was evidence tending to prove, the whole scheme should be condemned." And we think that the portion of the charge last above referred to substantially and correctly submitted the issue discussed in the quotation, and that the evidence warranted its submission.

In the fourth paragraph of the charge the following language is used: "You are further instructed that Will H. Stone, although in failing circumstances, had the right to prefer any one of his creditors over others, and to convey him his property in satisfaction of such preferred creditor's claim." This language is criticised as assuming that Will H. Stone was in failing circumstances, and therefore upon the weight of the evidence. The undisputed testimony showed that Will H. Stone was in failing circumstances at the time the deeds were executed, and the court did not err in assuming such to be true. Another criticism of the same paragraph of the charge is as follows: "The whole of this paragraph is confusing, ambiguous, and contradictory, and we do not think it applicable either to the facts or law in this case, and should not have been given." This is entirely too general to merit consideration. See rules 24 and 25 (67 S. W. xv), above referred to; Garrison v. Ochiltree Co., supra.

Appellants requested the court to charge the jury in effect that a verdict should be in their favor unless the jury should find that at the time of the transfer of the house and lots Will H. Stone and his mother, Sallie Stone, were actually conspiring together to effect a sale of the merchandise for the purpose of defrauding the creditors of Will H. Stone. This charge ignored the other theory of plaintiff's case, that the transfers of the lots to Mrs. Stone were without valuable consideration, and the requested charge was correctly refused.

Appellants also requested the following charge: "You are charged that if on the 14th day of March, 1903, the date of deeds from Will H. Stone to Sallie Stone to the houses and lots described in plaintiff's petition, Will H. Stone had other property sufficient to pay his debts, you will find for defendant Sallie Stone." This charge ignored the issue raised by the evidence and referred to in the quotation above made from the former decision of this court, and there was no error in refusing the request.

By their twelfth assignment appellants complain of error in the fifth paragraph of the court's charge, which reads as follows: "If you find for the plaintiff, the form of your verdict will be as follows: 'We, the jury, find for the plaintiff that the conveyances from Will H. Stone to Sallie Stone of the real estate are fraudulent.' If you find for the defendants, your verdict will be: 'We, the jury, find for the defendants.'" We fail to perceive any error in this instruction, and the assignment complaining of it is overruled.

For the error above indicated, the judgment is reversed and the cause remanded.

STEPHENVILLE, N. & S. T. RY. CO. v. COUCH.†

(Court of Civil Appeals of Texas. June 9, 1909.)

1. MASTER AND SERVANT (§ 315*)—INDEPENDENT CONTRACTOR—NEGLIGENCE.

In general, one who has contracted with a competent and fit person exercising an independent employment to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and not subject to control except as to the results of the work, etc., will not be answerable for the wrongs of the contractor, his subcontractors, or servants committed in the prosecution of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1256; Dec. Dig. § 315.*]

2. MASTER AND SERVANT (§ 316*)—INDEMNITY (§ 13*)—IMPLIED CONTRACT—"INDEPENDENT CONTRACTOR."

An "independent contractor" is one who renders services in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. Such contractor must answer for his own wrongs and those of his servants; and, if the proprietor has been compelled to pay damages on account of the contractor's negligence, he may recover them from the contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316;* Indemnity, Cent. Dig. §§ 29, 34; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 4, pp. 3542–3543; vol. 8, p. 7686.]

3. MASTER AND SERVANT (§§ 317, 318, 319, 323, 324*)—INDEPENDENT CONTRACTOR—NEGLIGENCE—EMPLOYER—LIABILITY.

The defense of independent contractor is not available, where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the work or the manner of its execution involves a duty to the public incumbent on the proprietor or employer; when the work is intrinsically dangerous, and the performance of the contract will

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†Rehearing denied October 27, 1909.

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probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work, or it has been completed and accepted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1254, 1250–1265; Dec. Dig. §§ 317, 318, 319, 323, 324.*]

4. MASTER AND SERVANT (§ 317*)—INDEPENDENT CONTRACTOR—NEGLIGENCE.

Where an independent contractor in the prosecution of his work must exercise, in whole or in part, a franchise granted by the Legislature to his employer, the latter is liable for the contractor's torts, because the proprietor is bound to see to the correct execution of the powers conferred on it by the Legislature.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1254; Dec. Dig. § 317.*]

5. MASTER AND SERVANT (§ 315*)—INDEPENDENT CONTRACTOR—INJURIES TO LANDOWNER.

Where contractors for the construction of a railroad had not completed their work, and the road had not been turned over to the railroad company, the latter was not liable for injuries to the land of an adjoining owner, resulting from the contractors' negligence in scattering rock thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1256; Dec. Dig. § 315.*]

Appeal from Hamilton County Court; A. E. Scott, Judge.

Action by John Couch against the Stephenville, North & South Texas Railway Company and others. Judgment for plaintiff against defendant railroad company, and in favor of defendant railroad company over against the Fidelity & Deposit Company of Maryland, and defendant railroad company appeals. Reversed and remanded.

Marshall Ferguson, for appellant. Langford & Chesley, for appellee.

RICE, J. Appellant railway company employed Read Bros. & Montgomery, a firm of railway contractors, to construct a certain portion of its railroad. In so doing they scattered rock upon the premises of appellee through which the road ran, thereby damaging the same, for the recovery of which this suit was instituted by appellee against appellant, who brought in said firm of contractors, and also the Fidelity & Deposit Company of Maryland, who was surety upon said contractors' bond. Appellant dismissed as to Read Bros. & Montgomery, on the ground that they were nonresidents and insolvent. Upon trial in the justice's court judgment was rendered in favor of appellee against appellant for $145, and in favor of appellant over against said Fidelity & Deposit Company, from which judgment the appellant appealed to the county court, where a trial was had with the same result, from which this appeal is prosecuted.

Appellant answered, pleading a general denial, and that the damages suffered, if any, were done by Read Bros. & Montgomery, who were employed under a contract with appellant to construct its line of railway, and that under the terms of said contract they were independent contractors, over whom appellant had no control, except as to the result of the work to be done, wherefore it was not liable for the wrongful acts of said contractors in scattering rocks upon the premises of appellee. The following conclusion of law of the trial court is assigned as error: "I find that the defendant railway company could not legally absolve itself from its duties to the general public in building a railway under a charter, and therefore the plaintiff is entitled to recover directly against said company, although Read Bros. & Montgomery were independent contractors in constructing said railway." The court found as a fact that the injury complained of was occasioned by Read Bros. & Montgomery, who were independent contractors in the construction of said railway through the premises of appellee, so that the question to be determined is whether or not appellant is liable for the injuries thus occasioned by said independent contractors.

In 1 Thompson on Negligence, § 621, it is said: "It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment to do a piece of work, not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control except as to the results of his work, and subject to other qualifications hereafter stated, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work. An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants; and, if the proprietor has been compelled to pay damages on account of the negligence of the contractor, he may recover them from the contractor," etc. Speaking with reference to this rule as to railway contracts, the same writer says (section 626, same volume): "This rule has generally been applied so as to exempt railway companies from liability for wrongs done by contractors employed by them in the construction and repair of their roads. The rule is the same although the contract is by parol; but, as hereafter seen, the rule does not extend so far as to excuse such company in failing to perform a statutory obligation; nor can it devolve the exercise of its franchises upon a contractor so as to exonerate itself." And in further discussing the same subject in section 671, he says: "Where the

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railway company has not committed the execution of any of its franchises to contractors employed by it to build its road, the courts in general hold that it stands under the same immunity from liability to answer for the wrongs done by the independent contractor whom it employs merely to produce certain results, and over whose methods it exercises no control, as that which attaches, under like circumstances, to any other proprietor. These cases proceed upon the view that a contract by a railroad company with another person or corporation for the construction of its road is not such a delegation of its charter rights as will render it liable for unauthorized wrongs committed by the contractor or his servants in the prosecution of the work. Therefore a railroad company will not be liable to a third person for a nuisance resulting from a negligent or improper construction of the road by a construction company occupying the position of an independent contractor, even though, in the view of one court, it is notified that the work is being improperly performed. For example, a railroad company was exonerated from liability for the drowning of a boy in a pool of water, formed by a heavy storm against an embankment constructed by an independent contractor, and still in his possession and under his uncompleted contract. Nor is it answerable in damages for the negligent management by such a contractor or his servant of a construction train employed by him in doing the work, unless, as shown in a preceding paragraph, it allows the contractor to assume its franchises of carrying passengers. Even where the railway company furnishes the motive power, and operates the construction train by its own engineer, it will not be liable for damages created in operating it, where the engineer is under the control of the contractor. It has also been held that a railroad company, which has not accepted its road from an independent contractor for its construction at the time a third person received injuries from a nuisance, cannot be held to have ratified any act of the contractor by which the nuisance was created, in the absence of any evidence showing that it had knowledge thereof"—citing many cases in support of the text.

The same doctrine has been held in this state in the case of Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632, denying the right of a party riding as a passenger on a construction train operated by independent contractors, and before the road had been received by the company, to recover damages for injuries sustained; the court saying: "That the contractors may have used, as a means to assist in carrying out their contract to construct the road, a train belonging to defendant company, and operated by servants primarily employed by it, would not of itself make the company liable for their acts, unless it had immediate control and management of the train. To hold otherwise would virtually forbid parties to construct works of improvement, and to perform many other acts, except by their own servants, unless at great peril for liability for the actions of others over whom they had no immediate control." But further says: "The principle that a railroad company cannot delegate to an employé its chartered rights and privileges so as to exempt it from liability does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. Thus, after having first procured the right of way, the company can delegate to another lawful authority to enter upon the same and make its roadbed and perform other proper acts of construction; but it cannot delegate such lawful authority without having first secured the right of way by donation, purchase, or the exercise of the right of eminent domain."

In Railway Co. v. Van Bayless, White & W. Civ. Cas. Ct. App. § 500, it was held that the railroad company was not liable for damages for the killing of a mule which was run over by a construction train operated by independent contractors; the court saying that "there was no duty to Van Bayless devolving upon, and neglected by, the railroad, nor was any trespass upon him or his rights incident to the proper performance of the contract."

In discussing the rule and its exceptions in the case of McHarge v. Newcomer & Co., 117 Tenn. 604, 100 S. W. 702, 9 L. R. A. (N. S.) 298, the court says: "While the general rule of law is as stated that the proprietor or employer is not liable for the negligence of his contractor and the servants and assistants of the latter, yet there are well-established exceptions and limitations to it. These exceptions in general are: Where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the thing to be done, or the manner of its execution, involves a duty to the public incumbent upon the proprietor or employer; when the work contracted for is intrinsically dangerous, and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work. Nor does it apply when the work has been completed and accepted"—citing 1 Jaggard on Torts, § 231.

We do not understand that appellee contends that any of the above exceptions are applicable here, but he does insist that wherever an independent contractor, in the prosecution of his work, must exercise, in whole or in part, a franchise granted by the Legislature to his employer (that is, the railroad), the company must answer for his torts, be-

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cause it is bound to see to the correct execution of the powers conferred upon it by the Legislature. The principle contended for by him is sound and supported by ample authority, but it is not applicable here, for the reason that the independent contractor in this instance was not exercising, or undertaking to exercise, any franchise granted to the company. The contractors had not completed the construction of the road, and it had therefore not been turned over to appellant.

In the case of Sanford v. Pawtucket Street Railway Company, 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564, where it was sought to make the company liable for damages occasioned to a traveler on account of the negligence of an independent contractor, it is said: "Again, the principle that a railroad company cannot delegate to a contractor its chartered rights and privileges, so as to exempt it from liability, does not extend to the use of the ordinary means employed for the construction of the road, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of legislative grant. In other words, where the wrong and injury for which the action is brought were committed in the performance of acts by virtue of the authority of the corporation derived from its charter, and could have been performed in no other way, then the party injured has the right to hold the corporation responsible, because it is really the corporation that is acting." In the case of Atlantic & Florida R. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, it is held, as stated in the syllabus, that a railroad company may employ an independent contractor to construct its road, and that a contract of this character is not such a delegation of its charter rights as will render the company liable for the unauthorized wrongs of the contractor or his servants while engaged in the work.

A number of cases have been cited by appellee in support of his proposition, which in our judgment are not applicable here, because each of them, when closely analyzed, will be found to fall within some of the exceptions as above stated to the general rule. The case of Railroad Company v. Warner (Tex. Civ. App.) 31 S. W. 66, cited by appellee as supporting his contention, has been overruled by the Supreme Court. See Id., 88 Tex. 642, 32 S. W. 868. That case was sustained by the Court of Civil Appeals of the First District upon the theory that the crossing upon which the accident occurred was a public crossing, where the statute imposed the duty upon the railway company, in crossing the same, to restore the highway thus intersected to its former state and keep such crossing in repair, in which the contractors were derelict; but the Supreme Court in reversing the case held that the crossing in fact was not a public crossing, and therefore no such duty was imposed upon the company. From a careful reading of the cases on this subject it will appear that before a railway company can ordinarily be held liable for injuries occasioned by the negligent acts of independent contractors, it must be shown, either that some legal duty was imposed upon the company which could not be delegated to such independent contractors, and which they wholly or negligently failed to perform, or that the case came within some of the well-known exceptions to the general rule. In the present case, said contractors, in our judgment, were exercising no privilege or franchise granted to the company. Hence no duty was imposed by statute upon the company relative thereto, for which reason it could not be held for the negligent performance of the acts complained of, unless it appeared that said acts came within some of the well-known exceptions to the rule making the employer responsible for the acts of an independent contractor, which is not contended by appellee.

We, therefore, hold that under the facts shown by the record appellant in this case was not responsible for the damages sustained by appellee. But as the contract between the company and said independent contractors was not in evidence, notwithstanding the general finding of the court to that effect, we are inclined to believe that it is our duty to reverse and remand the case, rather than to reverse and render, since the case in this respect may be more fully developed, and it is so ordered.

Reversed and remanded.

STEPHENVILLE, N. & S. T. RY. CO. v. CARTER.†

(Court of Civil Appeals of Texas. June 9, 1909.)

Appeal from Hamilton County Court; E. A. Scott, Judge.

Action by Dal Carter against the Stephenville, North & South Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Marshall Ferguson, for appellant. Langford & Chesley, for appellee.

FISHER, C. J. The questions involved in this appeal are the same as those passed upon by this court in S., N. & S. T. Ry. Co. v. Couch (this day decided) 121 S. W. 189.

For the reasons given in the opinion in that case, the judgment in this is reversed, and the cause remanded.

Reversed and remanded.

†Rehearing denied October 27, 1909.

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LIPSCOMB v. FUQUA et al.†

(Court of Civil Appeals of Texas. May 1, 1909. Rehearing Denied June 13, 1909.)

1. VENDOR AND PURCHASER (§ 296*)—REMEDIES OF VENDOR—RESCISSION.

An instrument, denominated a "contract of sale," recited that vendor had sold to the purchaser described real estate; that a part payment was to be made at the signing of the contract, a second payment on a day fixed, and the balance on or before a subsequent date. It was stipulated that the purchaser might sell the land, or any amount thereof, and that in making such sales he should be limited to prices fixed, and turn over to vendor the proceeds thereof, and that, if the purchaser failed to pay the entire price on the day specified, the first two payments should be forfeited, or for any failure to turn over the proceeds of sales. *Held*, that the instrument did not vest absolute title, with an implied lien only for the unpaid purchase money, but showed an intent that the superior title should remain in vendor until full performance by the purchaser, and that upon his default vendor might repossess himself of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 832; Dec. Dig. § 296.*]

2. VENDOR AND PURCHASER (§ 251*) — VENDOR'S LIEN—RESERVATION.

The express reservation of a lien is not the only way by which the vendor may evince his intention to retain the superior title, but such intention should be given effect, where it can be gathered from the language used.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

3. DEEDS (§ 6*) — CONSTRUCTION — DISTINGUISHED FROM OTHER TRANSACTION.

That an instrument is not acknowledged in a manner to authorize its registration is a circumstance tending to show that the parties did not intend it to be a completed conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. § 6.*]

Appeal from District Court, Sherman County; J. N. Browning, Judge.

Action by T. D. Lipscomb against W. H. Fuqua and another. Judgment for defendants, and plaintiff appeals. Affirmed.

John W. Veale, J. W. Crudgington, and R. R. Hazelwood, for appellant. Madden & Truelove and W. D. Wilson, for appellees.

SPEER, J. Appellant and appellee Fuqua, on January 3, 1906, entered into the following agreement:

"Contract of Sale of Real Estate.

"This contract made and entered into this the 3d day of January, 1906, by and between W. H. Fuqua by his agent L. M. Price of the county of Potter, state of Texas, the seller, and T. D. Lipscomb of the county of Sherman, state of Texas, the buyer.

"Witnesseth, The seller has bargained and sold to the buyer the following described real estate situated in the county of Sherman, state of Texas, to wit: Sections 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, block 2, B. G. H. R. R. Co., in Sherman county, at and for the price and sum of $63,744.00 (sixty-three thousand seven hundred and forty-four dollars) to be paid as follows: $5,000.00 at the signing of this contract, which is deposited with the Stratford Mer. Co. as a part of the consideration of the sale and the balance whereof is payable in the following manner, to wit: $5,000.00 (five thousand dollars) on Jan. 10, 1906, and the balance $53,744.00 (fifty-three thousand seven hundred and forty-four dollars), on or before April 3, 1906.

"It is further agreed that the said T. D. Lipscomb has the right to sell this land section at a time or any amount, the said T. D. Lipscomb agrees that in selling this land he will turn all the money received from the sales of any of this land into the said W. H. Fuqua until the full amount of $63,744.00 (sixty-three thousand seven hundred and forty-four dollars) has been paid.

"The said T. D. Lipscomb agrees not to sell the four sections nearest to Stratford of this twenty-four for a less sum than six dollars an acre, and the next nearest four for a sum not less than five fifty an acre and the next nearest four at a sum not less than five dollars an acre and the remainder not to be sold for a less sum than four fifty an acre, all of which, the said Lipscomb agrees to pay to the said W. H. Fuqua. It is agreed that in the event the said T. D. Lipscomb fails or refuses to pay all of the $63,744.00 on or before April 3, 1906, the five thousand now paid and the five thousand to be paid on January 10, 1906, shall be forfeited to the said W. H. Fuqua the seller. Also, any failure on the part of the said T. D. Lipscomb to turn in promptly any amounts realized from sales, shall forfeit the amounts already paid and render this contract null and void.

"[Signed] W. H. Fuqua,
"By His Agent, L. M. Price,
"Party of the First Part.
"[Signed] T. D. Lipscomb,
"Party of the Second Part."

On October 21, 1908, appellant filed his first-amended original petition complaining of appellee and L. M. Price, alleging, in substance, that though he had paid the two first payments of $5,000 each, according to the terms of the foregoing contract, but was in default as to the $53,744 to be paid on or before April 3, 1906, and though he had gone into the possession of said property and exercised the exclusive ownership over the same, nevertheless the defendants did, about May 1, 1906, wrongfully eject him therefrom, and appropriate the same to their own use, selling much of the land for a large sum of money. He prayed for an accounting, offering to do full equity, and asked for judgment for the title and possession of that portion of the lands remaining unsold, and for the value of those portions which had been sold by defendants, less the amount of his indebtedness to the said Fuqua. To this petition the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error pending in Supreme Court.

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defendants interposed a general demurrer, which the court sustained, and from this ruling the appeal is prosecuted.

The contention of appellant is that the instrument of writing above set forth conveyed to him the 24 sections of land described therein, subject only to an implied vendor's lien to secure the balance of unpaid purchase money due the appellee Fuqua under the terms of said instrument. If this contention is sound, then there can be no question under the authorities but that appellee Fuqua would be denied the remedy of rescission accorded by law to the vendor of real property by an executory contract expressly reserving the vendor's lien. See Ransom v. Brown, 63 Tex. 188; Baker v. Compton, 52 Tex. 252; Rindge v. Oliphint, 62 Tex. 682; Branch v. Taylor, 40 Tex. Civ. App. 248, 89 S. W. 813. But we are of opinion that the instrument is not to be construed as vesting the absolute title to the land in appellant, with an implied lien only for the unpaid purchase money, but, on the contrary, we think the instrument, when read as a whole, clearly evidences the intention of both parties that the superior title to the land should remain in Fuqua until full performance on the part of appellant. True, in the first paragraph of the instrument, which the parties themselves denominate "Contract of Sale," it is declared that appellee, "the seller has bargained and sold to the buyer," appellant, the real estate in controversy, but in the next paragraph it is expressly stipulated that appellant "has the right to sell this land section at a time or any amount," and in making such sales the appellant is limited as to price, and furthermore required to turn over all the proceeds of such sales to appellee. If the parties to this undertaking had intended thereby to vest title to the property in appellant, the instrument of conveyance would hardly have contained a stipulation of this kind, since it would have been altogether a useless provision; but that the intention of the parties was that the superior title should remain in appellee until full performance by appellant is quite apparent from the further stipulation "that in the event the said T. D. Lipscomb fails or refuses to pay all of the $63,744.00 on or before April 3, 1906, the five thousand now paid and the five thousand to be paid on January 10, 1906, shall be forfeited to the said W. H. Fuqua the seller." Now, these payments would not be forfeited, in the common acceptation of that term, if, notwithstanding appellant's default, he yet could hold the land by paying the balance of the purchase price, or any other amount. The proposition now asserted by appellant that the effect of this provision was only to require him to again pay to appellee the $10,000, is a strained construction of the contract, and one doubtless which never entered the mind of either party at the time of its consummation. Ordinarily an agreement that the purchaser in the event of his default in subsequent payments should forfeit the amount already paid on a contract for the purchase of land could mean nothing else than that such purchaser would lose the amount of money thus paid, and that the seller should retain the land. We think this is the meaning of the present instrument, and upon appellant's default appellee had the right, which he exercised, to repossess himself of the land, and to convey the same to another, precisely as though he had expressly retained the vendor's lien in the contract of conveyance. The express reservation of a lien is not the only way by which the vendor may evidence his intention to retain the superior title. Such intention should be given effect where it can be gathered from the language used, and the paragraphs referred to are indicative of such intention. Besides, it is worthy of notice that the instrument is not acknowledged in a manner to authorize its registration, which is another circumstance tending strongly to show that the parties did not understand it to be a completed conveyance.

We find no error in the judgment, and it is affirmed.

WESTERN UNION TELEGRAPH CO. v. STATE.

(Court of Civil Appeals of Texas. March 31, 1909.)

1. CONSTITUTIONAL LAW (§ 48*) — FOREIGN CORPORATIONS — REGULATION — CONSTRUCTION OF STATUTES FAVORING VALIDITY.

Under the rule that if a statute is capable of two constructions, one of which will render it valid and the other invalid, the former construction will be adopted, Act May 16, 1907 (Laws 1907, p. 500, c. 22), requiring every foreign corporation, to obtain a permit to do business in the state, to pay a fee depending upon the amount of its authorized capital stock, though broad enough to embrace foreign or interstate business, should be construed to apply only to domestic or intrastate business, so as not to violate the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—LICENSE FEE—EXTENT OF STATE'S POWER.

A foreign corporation, not empowered to do so by the federal government, has no authority to transact a local or domestic business in a state, unless authority be granted by the state, which can impose any conditions as a prerequisite to permission to do such business, and the corporation cannot question the reasonableness or validity of the law prescribing the conditions, and hence the state could exact a fee; the sum depending upon the amount of the corporation's entire capital stock, the major portion of which was outside of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509; Dec. Dig. § 636.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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3. TELEGRAPHS AND TELEPHONES (§ 26*) — POWER GIVEN BY CONGRESS — CONSTRUCTION OF STATUTE.

Act Cong. July 24, 1866, c. 230, 14 Stat. 221, being an act to aid in the construction of telegraph lines and to secure to the government the use of them for postal and other purposes, provides that any telegraph company organized under the laws of any state shall have the right to construct and operate telegraph lines over the public domain and along any military or post roads of the United States, that government messages shall have priority over the lines of telegraph companies accepting the benefits of the act, and prohibits the transfer of the rights granted, and provides that the government may within a specified time purchase the lines. *Held*, that the act is not equivalent to a federal charter to transact a general local business within a state, but deals with the right to use public property, and does not render companies accepting its benefits agencies of the federal government, whereby the state would be powerless to prescribe conditions upon their right to do a local business.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 26.*]

4. CONSTITUTIONAL LAW (§ 207*)—PRIVILEGES AND IMMUNITIES—ABRIDGMENT BY STATE.

A foreign corporation having no power to transact a local nongovernmental business in a state without the state's permission, the fact that such a corporation had for a long time done such a business and acquired valuable property in the state would not render the enforcement against it of a statute, exacting conditions as a prerequisite to its doing such business, an abridgment of privileges and immunities of a citizen of another state prohibited by the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625–648; Dec. Dig. § 207.*]

5. CORPORATIONS (§ 651*)—FOREIGN CORPORATIONS—REQUIRING LICENSE FEE—RIGHT TO ENFORCE PENALTY NOT PROVIDED BY STATUTE.

Const. art. 4, § 22, makes it the duty of the Attorney General to inquire into the charter rights of private corporations, and to take proper action to prevent them from exercising any power not authorized by law. Act May 16, 1907 (Laws 1907, p. 500, c. 22), provides that foreign corporations, to obtain a permit to do business in the state, shall pay certain fees, but does not prescribe any penalty for failure to pay the fees. Another statute provided, as a penalty for failure of a foreign corporation to obtain a permit to do business in the state, a loss of right to sue in the courts of the state. *Held* that, where a foreign corporation doing a local nongovernmental business in the state had not paid the fee, it was exercising a corporate power not authorized by law, and the Attorney General under the Constitution could proceed to prevent it from further exercising such unlawful power, regardless of what other penalty the Legislature had prescribed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 651.*]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by the State against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hume, Robinson & Hume and Spoonts, Thompson & Barwise, for appellant. R. V. Davidson, Atty. Gen., and Jas. D. Walthall, Asst. Atty. Gen., for the State.

KEY, J. The state of Texas, acting by its Attorney General, brought this suit against the Western Union Telegraph Company, a foreign corporation, chartered under the laws of the state of New York, alleging that the defendant had failed to comply with an act of the Legislature, approved May 16, 1907 (Laws 1907, p. 500, c. 22), requiring every foreign corporation obtaining a permit to do business in this state to pay fees as follows: $50 for the first $10,000 of its authorized capital stock, and $10 for each additional $10,000 or fractional part thereof. It is alleged in the petition that the authorized capital stock of the defendant is $100,000,000, which would require the payment by appellant of $100,040 in order to obtain the state's permit to do business. It is also alleged that the defendant is engaged in a general telegraph business, extending over the entire domain of the United States, and extending into every portion of the state of Texas, and that, long prior to and continuously since the year 1897, it has exercised within the state of Texas corporate powers and franchises not conferred upon it by law, and continued its business within the state by receiving, transmitting, and delivering, within the state of Texas, messages and telegraphic communications from various and numerous points within the state to other points within the state. This is a mere summary of the facts set forth in detail in the petition, which concludes with a prayer for judgment ousting the defendant from the exercise of the corporate power of transacting any telegraphic business wholly within the state, and enjoining it from the further exercise of such corporate rights and franchises.

The defendant admitted in its answer that its capital stock was $100,000,000, and that it had not paid to the state the fees prescribed by Act May 16, 1907, and asserted that it was not required to pay any fees to the state of Texas, nor obtain any certificate of authority from it to transact any of its business within said state. By way of an affirmative defense, the defendant filed an elaborate answer, averring, in substance: That it is a New York corporation, chartered to do a telegraph business throughout the United States. That under said authority, and long prior to 1907, it had constructed numerous lines of telegraph throughout the United States and the state of Texas, and has continuously been, and is still, operating same under the charter referred to. That since the year 1889 it has, with the consent and acquiescence of the states, districts, and territories referred to, including the state of Texas, established and equipped its said business at great expense, and that in the state of Texas said business embraces 794 different stations. That it has accepted and is bound by the terms and conditions of Act Cong. July 24, 1866, c. 230, 14 Stat. 221, en-

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titled "An act to aid in the construction of telegraphic lines, and to secure to the government the use of the same for postal, military and other purposes," and is therefore an instrument of interstate commerce and an agency of the United States government for the transaction of public business, and that to exclude it from domestic and nongovernmental business within this state would seriously cripple and affect its efficiency as an instrument of interstate and governmental business, thereby contravening the federal Constitution. That only a small part of its property has an actual location and situs in this state, and therefore the state has no power to require it to pay a license tax based upon its entire capital stock, the greater portion of which is beyond the limits of the state.

The trial court sustained a general demurrer to the special answer referred to, and upon trial rendered judgment for the state enjoining the defendant from doing any domestic or wholly intrastate business within the state, save and except for the government and officers of the United States. The judgment recognizes and does not interfere with the defendant's right to transact interstate business and business of any and every character for the federal government. The defendant interposed various exceptions to the state's petition, which were overruled, and the questions thereby raised are presented to this court for decision.

The first proposition urged is that the legislative enactment of May 16, 1907, and all previous enactments upon the same subject, prescribing the conditions upon which foreign corporations doing a telegraph business might transact business in this state, are so broad and comprehensive that they necessarily include within their scope and purport interstate and governmental business, as well as domestic or intrastate business, and are therefore violative of the federal Constitution and absolutely void. The Act of May 16, 1907, uses the language: "Each foreign corporation obtaining a permit to do business in this state shall pay fees as follows: $50 for the first $10,000 of its authorized capital stock, and $10 for each additional $10,000 or fractional part thereof." The former statutes relating to the same subject contained language as broad as the one quoted. Counsel for appellant have cited decisions of the Supreme Court of the United States and other federal decisions construing other legislative enactments of similar breadth and scope and tending to sustain the contention urged. However, as to the construction of state legislation, the cases referred to are not controlling, and many state courts have held that such statutes should be construed in subordination to the provisions of the federal Constitution and as applying only to subjects within the lawful jurisdiction of the state Legislature, and, when so construed by state courts of last resort, the Supreme Court of the United States has accepted such constructions and upheld such statutes. Osborne v. Florida, 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99, affirmed in Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; State v. Western Union Tel. Co., 75 Kan. 620, 90 Pac. 299; L., N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599, affirmed in Louisville, etc., Ry. Co. v. Miss., 135 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; Lacy v. Packing Co., 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; Kehrer v. Stewart, 117 Ga. 569, 44 S. E. 854; Id., 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; McCullogh v. Virginia, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382; Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; People ex rel. Roberts, 171 U. S. 661, 19 Sup. Ct. 58, 43 L. Ed. 323; Ratterman v. Western Union, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; Western Union Tel. Co. v. Mass., 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773; Postal Tel. Co. v. City of Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; Pelk v. Chicago, etc., 94 U. S. 164, 24 L. Ed. 97; Chicago, etc., v. Ackley, 94 U. S. 179, 24 L. Ed. 99. The cases cited apply the rule that if a statute is capable of two constructions, one of which will render it valid and the other render it invalid, the former will be adopted, and some of them hold that, by the use of the phrase "business in this state," the Legislature intended that the statute should apply to domestic or intrastate, and not to foreign, or interstate, business.

In State v. Western Union Telegraph Co., 75 Kan. 620, 90 Pac. 299, a case to which further reference will be made, the Supreme Court of that state expressed the rule on the subject in the following manner: "This court has declared too often to make a repetition of the statement necessary here that if an act of the Legislature be susceptible of two interpretations, one of which would render it obnoxious to some paramount constitutional provision, while the other would place it in harmony with the fundamental law, that interpretation must be preferred which will sustain the act, rather than the one which will destroy it. The court must therefore, in the discharge of its duty, take it for granted that the Legislature did not intend to fly in the face of the federal Constitution and try to exclude foreign corporations engaged in interstate commerce from doing interstate business here, unless they first procured permission from the charter board. It must be presumed that the Legislature intended to act within the scope of its lawful powers. No words of the statute may be construed to relate to subjects within the exclusive jurisdiction of Congress. Nothing

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contained in the act can be viewed as having any relation whatever to the right of the defendant freely to enter the state and here transact all business of an interstate character which it may desire to undertake. And the court must necessarily hold that the words 'business in this state' mean, when applied to commerce, domestic business only; business which originates, is carried on, and is completed, within the jurisdiction of this state."

If the rule of construction contended for by appellant should prevail, and every statute should be held to embrace everything falling within its literal terms, much of the legislation of this state in reference to common carriers would contravene the federal Constitution, because such legislation is in general terms and, not in so many words, restricted to intrastate business. Furthermore, probably half of the articles of the Penal Code of this state defining offenses are couched in such general terms as to place that, if construed literally and without any restriction, would include acts committed outside of the limits of the state as well as those within; yet it has never been contended, in so far as we know, that such provisions of the Code are invalid because they were intended to apply to matters beyond the jurisdiction of the state. On the contrary, it being a well-settled principle of law that a state cannot legislate upon any matter beyond its own limits, common sense suggests, and the courts would hold, that the provisions of the Penal Code referred to were not intended to relate to any acts other than those committed within the borders of the state or producing results within the state.

The provision of the statute of this state requiring common carriers "to feed and water live stock during the time of conveyance and until the same is delivered to the consignee or disposed of as provided in this title" is broad enough, if literally construed, to include interstate as well as domestic shipments; but in construing it our Supreme Court held that it was not intended to apply to interstate shipments, and therefore was not obnoxious to the commerce clause of the federal Constitution. G., C. & S. F. Ry. Co. v. Gray, 87 Tex. 313, 28 S. W. 280. The main reason assigned for the conclusions reached was that it could not be supposed that the Legislature would undertake to prescribe what should be done at a point outside of the state, though the language of the statute is broad enough to authorize that construction. When analyzed, the point of the decision is that, although the language of the act is broad enough to authorize it, the courts will not hold that the Legislature intended that the act should apply to matters clearly beyond the Legislature's power and authority.

In the case of I. & G. N. R. R. Co. v. Railroad Commission of Texas, 99 Tex. 332, 89 S. W. 961, the statute there under consideration authorized the Railroad Commission "to correct abuses," and, while the court conceded that the language used was broad enough to include all abuses, it was held that the Legislature did not so intend, because to so construe it would render the statute unconstitutional. In our opinion the construction urged on behalf of appellant would overstress mere literalism and disregard the more satisfactory rule applied by our Supreme Court in the cases cited, and by many other courts in similar cases. But if the construction urged by appellant should be held tenable, still, unless appellant is protected by the federal statute invoked by it, it would seem that it cannot question the validity of the state statute prescribing the franchise tax. Appellant is a foreign corporation, and, unless so empowered by the federal government, has no authority to transact a local or domestic business in Texas, unless such authority be granted by the state. Such being the case, it is well settled that the state can impose any condition as a prerequisite to permission to transact such business within its borders, and appellant cannot question the reasonableness or validity of the law prescribing such conditions. Horn Silver Mining Co. v. New York, supra; Waters-Pierce Oil Co. v. Texas, supra.

What has just been said disposes of the second proposition under the first assignment of error, which challenges the power of the state to fix a fee for permission to transact business in the state according to the amount of appellant's entire capital stock, the major portion of which is beyond the limits of the state.

The third assignment urges the proposition that Act Cong. July 24, 1866, and appellant's acceptance thereof, confers upon it the right to transact local or domestic business within this state, and therefore the Legislature could not lawfully lay a tax upon its franchise or right to transact such business, nor compel it to discontinue such business because of its failure to pay such tax. In support of that contention, counsel for appellant cite State v. Texas & Pacific Railroad Co., 100 Tex. 279, 98 S. W. 834, and certain decisions of the Supreme Court of the United States referred to and followed by our Supreme Court in that case. Those cases establish the doctrine that when a corporation derives its franchises to be a corporation and transact its business, including local and intrastate as well as interstate business, from the federal government, the state has no power to levy a franchise tax upon either class of business. The act of July 24, 1866, is entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." The first section declares: "That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through

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and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States; provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station, but such stations shall not be within fifteen miles of each other." The second section declares: "That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General." The third section prohibits any transfer of the rights granted, and contains a stipulation to the effect that within a specified time the United States shall have the right to purchase all telegraph lines, property, and effects of any and all of the companies accepting the terms of the act at an appraised value to be ascertained by five competent, disinterested persons. The fourth and last section requires telegraph companies, in order to obtain the benefits of the act, to file written acceptances with the Postmaster General.

Appellant has accepted the provisions of this act and has placed its telegraph lines in this state along and upon the right of way of various railroads, which are, by force of another federal statute, United States military or post roads, and, if the statute in question is equivalent to a federal charter to transact a general local or domestic business within this state, then, under the decisions above referred to, appellant cannot be required to pay a franchise tax to the state, and this case should be reversed and rendered. However, we are of opinion that such is not the proper construction of that statute. It does not create any corporation, nor does it, in terms, grant a franchise to transact any business. It deals mostly with the right to use public property, and grants to telegraph companies the right to construct and operate telegraph lines through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States, and over, under, and across the navigable streams or waters of the United States. The language used is appropriate for the purpose of granting the right to use public property in the respects referred to, and we find nothing on the face of the act or within its reasonable purport indicating that it was the intention of the federal Congress to grant to such corporations the right to transact a general local or domestic business within the borders of the several states. One of the conditions upon which such right of user was granted is prescribed in the second section, to the effect that telegraphic communications between the several departments of the government of the United States and their officers and agents shall have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General. Congress had the right to place that stipulation in the act as a condition upon which the right of user could be obtained; but such stipulation does not render such companies any more an agency of the federal government than does a contract made with the Postmaster General for carrying United States mail. If the owner of a livery stable has a contract to carry the mail from one post office to another, while no tax can be levied upon him because he performs that service, can it be successfully contended that, because of that contract, the state, city, or town in which he transacts all the rest of his business cannot impose upon him a franchise tax for pursuing such livery business?

In Postal Telegraph Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871, similar objections were urged against an ordinance of the city imposing a license fee upon every telegraph company or agency doing business in the city for business done exclusively in the city, not including business done to and from points without the state or business done for the government, its officers or agents, and it was held in an opinion by Mr. Justice Shiras that the ordinance was valid. In that case the ordinance by its terms excluded from its operation those things which we hold are, by construction, excluded from the statute involved in this case. In other words, the ordinance by its terms was made applicable to local nongovernmental business only, and in the course of the opinion it was said: "It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866 (Rev. St. U. S. §§ 5263–5268 [U. S. Comp. St. 1901, pp. 3579–3581]), are in the line of authority to construct and maintain its lines as a means or instrument of interstate com-

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merce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited." See, also, Postal Telegraph Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; State v. Western Union Tel. Co., 75 Kan. 650, 90 Pac. 290.

The Kansas case cited, and from which we have heretofore quoted, contains a luminous opinion covering all the questions save one that are presented in this case, and we quote again from that opinion:

"The claim of the defendant is: That this statute was enacted in the exercise of constitutional authority to establish post offices and post roads, as well as to regulate commerce among the several states; that its purpose was to secure to the people of each state the means of communicating with each other, as well as with the people of other states; that upon accepting the terms of the act the defendant became a constituent part of the postal system of the United States, an agency of the government in executing its will within the jurisdiction of states in respect to matters of importance both to the government and to the people; and hence that Kansas has no control over the defendant's local business within her boundaries.

"Although urged with much earnestness and plausibility, the claim is not new. It was first pressed upon the attention of the Supreme Court of the United States in 1869, by Mr. John P. Usher, in an effort to defeat taxes levied in Douglas, Wyandotte, and Jefferson counties in Kansas upon the property of the Union Pacific Railroad Company, Eastern Division. It was said: That that company was a part of a railway and telegraph system constructed under the direction and authority of Congress for the use and purposes of the United States in the exercise of its power to provide for the common defense and general welfare of the people of the United States, to regulate commerce among the several states, to establish post offices and post roads, to raise and support armies, to suppress insurrection and rebellion, and to resist invasion; that it had been adopted as an instrument of the government; and that it was entitled to exercise its franchises free from state burdens. Thompson v. Pacific Railroad, 76 U. S. 579, 19 L. Ed. 792. The claim was renewed in opposition to a property tax by the Union Pacific Railway Company, which had been incorporated by Congress itself for the purpose of constructing a railway and telegraph line to assist in the performance of governmental functions, and it was said that the company would be crippled in the performance of its governmental duties if it were obliged to support the governments of the various states through which its lines ran by contributing to their revenues. Railroad Co. v. Peniston, 85 U. S. 5, 21 L. Ed. 787. It has since been brought forward to resist state property taxes in general (W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; Western Union Tel. Co. v. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116); to resist taxes upon intrastate business apart from interstate and governmental business (Ratterman v. Western Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; W. U. Tel. Co. v. Alabama, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409); to resist taxes upon intrastate private messages (Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067); to resist city license fees (Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871); to resist a license tax for the privilege of exercising franchises within a state (Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 360, 39 L. Ed. 311); to resist charges by the proprietor of streets for their use (St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380); to defeat a state law requiring the diligent transmission and delivery of messages sent from other states (Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105); and in support of the right to enter upon private property without the consent of the owner (Western Union Tel. Co. v. Penn. R. R. et al., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312).

"The claim has never been recognized further than to prevent a state from excluding telegraph companies from the occupation of post roads within its limits (Pensacola Tel. Co. v. West., etc., Tel. Co., 96 U. S. 1, 24 L. Ed. 708; W. U. Tel. Co. v. Mass., 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790), and to keep interstate commerce and governmental business free (Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Ratterman v. Western Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311). The right to require municipal licenses for the transaction of local business to be taken out, the right to require the payment of state privilege taxes, the right to tax private messages according to the financial needs of the state, and the right to regulate the transmission and delivery of private messages, are all utterly incompatible with the notion that the defendant is a part of the government's postal system to the extent proposed.

"In Pensacola Tel. Co. v. West., etc., Tel. Co., 96 U. S. 1, 24 L. Ed. 708, the power of Congress to pass the act of 1866 was rested in part upon the power to establish post offices and post roads, and in Leloup v. Port of Mobile, supra, it was remarked that communication by telegraph is in the nature of postal service. There can be no doubt that the plenary power of Congress over the public domain and navigable waters of the United States, and over its military and post roads, gives it the right to permit them to

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be used by telegraph companies to facilitate the transmission of intelligence; but the transactions of a telegraph company which has availed itself of the privileges conferred by the act are postal only so far as messages are carried for the departments of the United States government and its officers and agents. Such a telegraph company is a part of the government establishment only in respect to the government business. Intercourse between private parties by means of telegraphic communication is simply commerce, although they are carried over routes which are post roads, as the carriage of express packages for private parties over post roads is commerce. In Pensacola Telegraph Co. v. West., etc., Tel. Co., 96 U. S. 1, 24 L. Ed. 708, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are, in some respects, different; but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

"Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster General. Thus, as to government business, companies of this class become government agencies. The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Telegraph Co. v. Texas, 105 U. S. 460, 464, 26 L. Ed. 1067.

"The same view was fully elaborated in the case of W. U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, as follows: 'Although intercourse by telegraphic messages between the states is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the states, which consists in the carriage of persons and the transportation and exchange of commodities upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons or with visible and tangible things; but the telegraph transports nothing visible and tangible. It carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other. * * * But, with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the state over the subject. In Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708, this court had before it Act Cong. July 24, 1866, c. 230, 14 Stat. 221, "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," and it held that the act was constitutional so far as it declared that the erection of telegraph wires should, as against state interference, be free to all who accepted its terms and conditions, and that a telegraph company of one state accepting them could not be excluded by another state from prosecuting its business within her jurisdiction. In Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067, from the opinion in which we have quoted above, it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the state, was a regulation of foreign and interstate commerce, and therefore beyond the power of the state. In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the state can impose no impediments to the freedom of that commerce. In conformity with these views, the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states.' W. U. Tel. Co. v. Pendleton, 122 U. S. 356, 358, 7 Sup. Ct. 1126, 1128, 30 L. Ed. 1187.

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"In Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, involving a state statute regulating the transmission and delivery of messages coming into the state, it was said: 'It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the above clause in the federal Constitution, and that the messages passing over such lines from one state to another constitute a portion of commerce itself. * * * Such messages come within the protecting clause of the Constitution just quoted, and, if the statute in question can be construed as regulating commerce between the states, the statute would be invalid on that account. The Congress of the United States, by Act July 24, 1866, c. 230, 14 Stat. 221, legislated upon the subject of telegraph companies. That legislation has become a part of the United States Revised Statutes (sections 5263 to 5269, both inclusive). The sections referred to do not, however, touch the subject-matter of the delivery of messages as provided for in the state statute. The provision in the section of the Revised Statutes as to the precedence to be given to the messages of officers of the government in relation to their official business are not inconsistent with or in any manner opposed to the provisions of the Georgia act, nor are they upon the same subject, within the meaning of the rule which permits state legislation in some instances only until Congress shall have spoken.'

"In the case of Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, 700, 14 Sup. Ct. 1094, 1097, 38 L. Ed. 871, involving the right to impose a city license for the transaction of local business upon a telegraph company which had constructed its lines upon post roads, it was said: 'It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866 (Rev. St. U. S. §§ 5263–5268), are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce.'

"In the case of Western Union Tel. Co. v. Alabama, 132 U. S. 472, 473, 10 Sup. Ct. 161, 33 L. Ed. 409, it was said: 'That principle is, in regard to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866 (sections 5263 to 5268 of the Revised Statutes of the United States), that they shall not be taxed by the authorities of a state for any messages or receipts arising from messages from points within the state to points without or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of the principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power.'

"In W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 548, 8 Sup. Ct. 961, 963, 31 L. Ed. 790, it was said: 'It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered.'

"And in West. Union Tel. Co. v. Pennsylvania R. R. et al., 195 U. S. 540, 571, 25 Sup. Ct. 133, 144, 49 L. Ed. 312, after a full review of the previous cases involving the act of 1866, it was said: 'We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph.'

"Conceding that the government of the United States may absorb telegraph lines located upon post roads and fully incorporate them with the postal establishment, it has not yet done so, and the intrastate business of the defendant, aside from messages carried for the government, is domestic commerce and subject to the provisions of the Bush act."

As above stated, the case of State v. T. & P. Ry. Co., 100 Tex. 279, 98 S. W. 834, does not support appellant's contention as to its right of protection under the act of Congress of July 24, 1866, because the latter act does not, as did the federal statute considered in that case, create and confer a corporate franchise to engage in local or domestic business. However, the ruling made in that case as to the effect of the railway company's acceptance of the act of the Legislature of Texas of May 2, 1873 (Sp. Laws 1873, p. 318, c. 108), tends to support our construction of the federal statute now under consideration.

Appellant's contention that, because of its long-continued business and valuable property within the state, the statute of the state, if enforced against it, will violate the fourteenth amendment to the federal Constitution, denying to the states the power to abridge privileges and immunities of citizens of the several states, is untenable. In so far as the right to transact local nongovernmental business is concerned, appellant, being a foreign corporation, cannot invoke the provision of the Constitution referred to for the purpose of limiting the power of the state to prescribe the conditions upon which appellant will be permitted to transact such local business. The cases heretofore cited estab-

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lish that doctrine, and it is unnecessary to elaborate upon that question.

There are some other questions relating to the validity of the state statute, which we deem it unnecessary to discuss in this opinion. They are all decided against appellant in one or more of the cases already cited. There is one point, however, which we deem it proper to notice, and that is appellant's contention that, inasmuch as the act of May 16, 1907, does not, in terms, prescribe any penalty for the failure to pay the fees prescribed, and as by the terms of a former statute it is provided that, when a foreign corporation fails to obtain a permit to do business in the state, it shall not have the right to sue in the courts of the state, therefore the penalty of ouster should not have been inflicted in this case. The contention is that, as the state has prescribed one penalty, it is limited to such penalty, and is not entitled to enforce any other. Section 22, art. 4, of our state Constitution, in prescribing the duties of the Attorney General, says: "He shall represent the state in all suits and pleas in the Supreme Court of the state in which the state may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the state, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or collecting any species of taxes, toll, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law."

The facts show that appellant has been and is exercising a corporate power not authorized by law, and, such being the case, the provision of the Constitution quoted empowered the Attorney General and made it his duty to institute and prosecute to successful termination this suit in order to prevent appellant from further exercising such unlawful power. This being the case, it is immaterial what other penalty the Legislature may have prescribed, because such action by the Legislature could not render inoperative, or otherwise affect, this provision of the Constitution.

Upon the whole case, our conclusion is that no error has been shown, and the judgment is affirmed.

Affirmed.

FT. WORTH & R. G. RY. CO. v. ROBERTSON et al.

(Court of Civil Appeals of Texas. April 17, 1909. Rehearing Denied May 15, 1909.)

1. MARRIAGE (§ 54*) — INVALID MARRIAGE — COMMUNITY PROPERTY — RIGHTS OF PUTATIVE WIFE.

Where a woman marries in ignorance of the fact that the man she marries has another wife living, and lives with him until his death in ignorance of the existence of the former wife, she is entitled to the rights of a lawful wife in the property acquired by them or either of them during their marriage, regardless of whether she contributed anything to the community property.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 100; Dec. Dig. § 54.*]

2. HUSBAND AND WIFE (§ 260*)—COMMUNITY PROPERTY—DAMAGES FOR INJURIES TO HUSBAND OR WIFE.

A chose in action accruing to either spouse during the marriage by reason of an injury to the person is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 912; Dec. Dig. § 260.*]

3. ABATEMENT AND REVIVAL (§ 72*)—PERSONAL INJURIES—WHO MAY SUE.

Under Sayles' Ann. Civ. St. 1897, art. 3353a, providing that causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death shall not abate by his death, but shall survive in favor of "the heirs and legal representatives of such injured party," a woman who in good faith married a man in ignorance of the fact that he had a wife living, and lived with him until his death in ignorance of such fact, is entitled to enforce a cause of action for injuries to the man which did not result in his death.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 72.*]

4. LIMITATION OF ACTIONS (§ 127*)—COMPUTATION OF PERIOD—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADINGS.

Personal injuries out of which an action for damages arose were inflicted March 28, 1906, and action was instituted on April 4, 1907, and plaintiff died in August of that year, and the action was abandoned. In September, 1907, action was instituted by plaintiff, who supposed at the time that she was the lawful wife of the former plaintiff, and on June 11, 1908, learning of the existence of a former wife, she filed an amendment asserting her rights as a putative wife. *Held*, that the two years' limitation on actions of that kind had not run against the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

Dunklin, J., dissenting.

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by Maggie M. Robertson, as surviving widow of John P. Robertson, and as next friend for Annie Robertson, a surviving child of John P. Robertson, against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Andrews, Ball & Streetman and H. M. Chapman, for appellant. McLean & Carlock, for appellees.

SPEER, J. Maggie M. Robertson instituted this suit in behalf of herself, as surviving widow of John P. Robertson, deceased, and as next friend for Annie Robertson, a surviving child of the said John P. Robertson, to recover damages for injuries received by the said John P. Robertson through the negligence of the Ft. Worth & Rio Grande Rail-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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way Company, which injuries did not result in his death. There was a verdict and a judgment in favor of the plaintiffs for the sum of $2,500 each, from which the defendant has appealed, complaining only of that portion of the judgment in favor of Maggie M. Robertson.

There is practically no controversy in the facts of this case, and the issue presented is purely one of law. Maggie M. Robertson, while quite a young girl, was married to the deceased, John P. Robertson, observing all the solemnities of law, and the two continued to live together as husband and wife until the date of his death, more than 10 years thereafter. At the time of the attempted marriage, John P. Robertson had a living wife from whom he had never been divorced, but of the existence of this marriage appellee was ignorant. At the time of her marriage, and at all times until the truth was disclosed on the trial of this case, she had no reason to believe that her marriage was not in all respects lawful, but, on the contrary, firmly believed that the same was regular. There is evidence to indicate that the deceased also entered into the marriage with appellee in good faith, but as to this we express no opinion, since it is unimportant in the view we take of the case. John P. Robertson during his life instituted suit against appellant to recover for the injuries sustained by him, but died before the cause proceeded to judgment.

The issue of law presented is very clearly stated in appellant's propositions, as follows: "First. Maggie M. Robertson, not being the lawful wife of John P. Robertson, deceased, had no interest in an action by him for injuries done to his person, and such action, being brought by him in his lifetime, did not survive at his death to plaintiff, Maggie M. Robertson, but only survived to his heirs and legal representatives. Second. Plaintiff, Maggie M. Robertson, was the putative and not the lawful wife of John P. Robertson, deceased, and as such had no interest in a cause of action which abated at his death except as to his heirs and legal representatives, but only had an interest in such property as they by their joint efforts may have acquired during the unlawful cohabitation, and the action brought by deceased in April, 1907, having been abandoned, plaintiff, Maggie M. Robertson, had no such interest in said cause of action as would authorize her to maintain this suit."

It will thus be seen that two questions of law are involved: First, whether or not Maggie M. Robertson, as the putative wife of John P. Robertson, deceased, had an interest in her own right in the cause of action against appellant for personal injuries not resulting in the death of John P. Robertson; and, second, if not, then is the said Maggie M. Robertson an heir or legal representative, within the meaning of our statute, surviving such causes of action? It would be unprofitable to review the many authorities and to rehearse the arguments leading up to the conclusion so clearly announced in Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147, wherein Mr. Chief Justice Gaines uses the following language: "Therefore we think it should be taken as the settled doctrine in this state that, in case of a marriage of the character of that in controversy, the putative wife, so long as she acts innocently, has, as to the property acquired during that time, the rights of a lawful wife." See, also, Allen v. Allen (Tex. Civ. App.) 105 S. W. 53; Speer on the Law of Married Women, § 178. In the Supreme Court case from which the above quotation is taken it is very clearly pointed out that the rule of the common law with respect to such marriages does not obtain in this state, and the earlier cases of Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, and Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246, wherein the Courts of Civil Appeals had recognized the property rights of the putative wife, were expressly approved. Appellee, then, having married John P. Robertson in good faith, is undoubtedly entitled to the rights of a lawful wife in the property acquired by them, or either of them, during their marriage. It is equally well settled that a chose in action accruing to either spouse during the marriage by reason of an injury to the person is community property. Ezell v. Dodson, 60 Tex. 331; T. C. Ry. Co. v. Burnett, 61 Tex. 638; Speer on the Law of Married Women, § 193. So it necessarily follows, we think, that appellee was an equal owner with her husband in the cause of action against appellant, and was only precluded from suing for the same prior to his death by reason of the rule of law in this state that such causes of action may be maintained only by the husband. Upon his death the impediment was removed, and she, like any other litigant, might properly assert her legal rights, irrespective, we think, of any statute surviving the cause of action as to the heirs and legal representatives of the deceased husband. In other words, the chose in action, being property, was acquired by John P. and Maggie M. Robertson during the time they were living together as husband and wife, and, as such, belonged jointly to them, and after his death she, as such owner was authorized to maintain a suit for its recovery, precisely as the surviving wife of a perfectly regular marriage might sue to recover the community property. We furthermore think this conclusion should be wholly uninfluenced by any consideration of the question whether or not appellee actually contributed anything toward the acquisition of this cause of action. If the marriage between appellee and John P. Robertson had been regular, undoubtedly then the law would not inquire whether the wife's efforts had entered into the acquisition or not. If the logic of the decisions already referred to is sound, and we think it is, the law will not inquire in the present case whether the acquisition was by the joint efforts of the hus-

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band and wife, or attempt to adjust their respective rights in proportion to the amount each contributed thereto. The law will not concern itself with such an inquiry, but will leave the parties to share in the property in the same proportion as though the marriage contract was what the wife had every reason to believe it to be, i. e., a valid marriage. To accord to appellee a right to share in the acquisitions of herself and John P. Robertson only in the proportion in which her earnings or efforts entered into the acquisition would be to accord her the rights of a stranger, and not of a wife at all. Such a conclusion would be at variance with the whole theory upon which the decision of Barkley v. Dumke, and the line of cases therein reviewed, is based.

We would further hold, if it were necessary to a disposition of the case that the cause of action survived to appellee under article 3353a, Sayles' Ann. Civ. St. 1897. That article provides: "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in the case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party, and against the person, receiver, or corporation liable for such injuries and his legal representatives; and so surviving, such cause may be hereafter prosecuted in like manner and with like legal effect as would a cause of action for injuries to personal property." We think the evident purpose of the Legislature was to abolish the common-law rule that a cause of action for personal injuries not resulting in death should abate upon the death of either party, and that a liberal interpretation of this remedial statute would include the appellee within the scope of the terms "heirs and legal representatives."

The injuries out of which this suit arose were inflicted March 28, 1906. The deceased instituted suit on April 4, 1907, and died in August of that year. That suit was abandoned after his death, and this suit instituted in September, 1907. On June 11, 1908, appellee, learning on that day for the first time of the existence of the other living wife, filed her trial amendment asserting her rights as a putative wife. Under these circumstances, the appellant's plea of two years' limitation was properly overruled.

We find no error in the judgment, and it is affirmed.

DUNKLIN, J. (dissenting). Although Mrs. Maggie Robertson acted in perfect good faith in her attempted marriage to J. P. Robertson, yet, as it was conclusively shown that he was never divorced from Mrs. Annie Budd, and therefore was legally incapable of contracting a second valid marriage, it follows that Mrs. Maggie Robertson was never the lawful wife of J. P. Robertson. For the same reason Mrs. Annie Budd never changed her legal status, as the lawful wife of J. P. Robertson, by her attempted marriage with John Budd; and the fact that she has not seen fit to become a party to this suit and ask for damages for the injuries in controversy sustained by J. P. Robertson does not affect the question as to whether or not Mrs. Maggie Robertson is entitled to recover. If Mrs. Maggie Robertson was not the lawful wife of J. P. Robertson, then in no sense was she his heir, within the meaning of Sayles' Ann. Civ. St. 1897, art. 3353a, providing that causes of action for personal injuries other than those resulting in death shall, upon the death of the person injured, survive to and in favor of his heirs and legal representatives. She did not sue as the executrix or administratrix of his estate for the benefit of his heirs and creditors, but sought to recover, and did recover, $2,500 in her own personal right, with no evidence to support that claim except the fact that she in good faith married and lived with J. P. Robertson as a wife, and that the cause of action accrued to J. P. Robertson during the existence of that relation. Unquestionably Mrs. Annie Budd, as the surviving lawful wife of J. P. Robertson, had an interest in the cause of action asserted in this suit. Under the laws of this state, J. P. Robertson did not at his death leave two surviving lawful wives. Under the common law the cause of action asserted abated with the death of J. P. Robertson, but by article 3353a, Sayles' Ann. Civ. St. 1897, it is made to survive to his heirs and legal representatives. The basis for her contention that she is a legal representative of J. P. Robertson is her claim that she acquired and owned a half interest in the cause of action before his death. I deem it unnecessary to consider whether or not such an interest would constitute her a legal representative of J. P. Robertson after his death, as I do not believe she ever acquired such an interest. Her contention is that, as she was in good faith his putative wife, the cause of action was community property between them, and each owned an undivided one-half interest therein.

Sayles' Ann. Civ. St. 1897, art. 2968, reads as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only." By this article of the statute the cause of action sued on prima facie was made the community property of J. P. Robertson and his wife, Mrs. Annie Budd, vesting in each a half interest therein. Un-

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der repeated decisions of our higher courts, it is a settled principle of law that, when a marriage is held to be unlawful, the putative wife, who has assumed and sustained that relation, believing in good faith the marriage to be lawful, will be entitled to one-half of all property acquired by the joint labors of the two, even in the absence of proof of the extent of labor contributed by each. Barkley v. Dumke, 99 Tex. 153, 87 S. W. 1147; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246; Allen v. Allen (Tex. Civ. App.) 105 S. W. 54; Chapman v. Chapman, 16 Tex. Civ. App. 383, 41 S. W. 533; Speer on the Law of Married Women, § 178.

The case of Lawson v. Lawson, supra, was a controversy between Harry Lawson and his putative wife, Caroline Lawson, over certain property acquired by them during their marriage, Caroline in good faith believing that the marriage was a lawful marriage; and the finding of the trial court was as follows: "All the property in controversy was acquired by the joint efforts of Caroline and Harry in the same manner as if they had been husband and wife, but in what proportion their respective labors contributed to such accumulation I am unable to say." A judgment was rendered by the trial court decreeing to Caroline Lawson one-half the property so acquired, and, in the opinion of the Court of Civil Appeals affirming that judgment, the following language was used: "In the case at bar, inasmuch as plaintiff was never the lawful wife of Harry Lawson, she could not in any event be entitled to the full property rights of a wife, such as homestead rights in a homestead the separate property of the husband, or a one-third life estate in his separate realty. But if in good faith she has entered into the relation, the courts will not refuse her the just fruits of the labor of her hands and permit the husband, who is equally guilty, if either is, to appropriate the partnership earnings to his own use. That this distinction has been recognized is clear from the opinion in Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 543, cited by appellant, where the court refused to award to the putative wife the full rights of a wife in property which was a donation by the state to a husband and to the acquisition of which she contributed nothing, but did give to her a partnership interest in personal property acquired by their joint efforts during the existence of the relation. It would seem that good faith, whether resting in mistake of fact or mistake of law, is enough to authorize the courts to treat the relation as a partnership upon proof that something was actually contributed by each to the acquisition of the property claimed."

The case of Morgan v. Morgan, supra, was a controversy between Susan H. Morgan, surviving lawful wife of John E. Morgan, and his surviving putative wife. The property involved was 160 acres owned by John E. Morgan at the time of his putative marriage, and other property accumulated after that marriage; and, following an extensive review of the authorities, the Court of Civil Appeals used this language: "We are of the opinion, therefore, that, if appellant (the putative wife) in good faith believed that she was the lawful wife of John E. Morgan, she should not be deprived of her right to participate in the property acquired through their joint efforts, and that she should have been allowed to prove that fact, and that this issue should have been submitted to the jury. Of course, this would give appellant no right to any share in the property which John E. Morgan had at the time of his attempted marriage to her, whether such property be his separate property or the community property of him and his first wife. This by our statute would go to his lawful wife and child. Newland v. Holland, 45 Tex. 588."

It will be noted that in both cases last discussed, Morgan v. Morgan and Lawson v. Lawson, the putative wife was given one-half of such property only as had been acquired by the joint efforts of herself and putative husband. Likewise, in the case of Routh v. Routh, 57 Tex. 589, the property involved was acquired by the joint labor of the parties in the putative marriage, as shown on pages 593 and 594 of the report of that case.

In the case of Barkley v. Dumke, 99 Tex. 153, 87 S. W. 1148, the cases of Morgan v. Morgan and Lawson v. Lawson are approved, and the court uses the following language: "Therefore we think it should be taken as the settled doctrine in this state that, in case of a marriage of the character of that in controversy, the putative wife, so long as she acts innocently, has, as to the property acquired during that time, the rights of a lawful wife." In that case, however, the property in controversy was exclusively the property of the putative wife, and, further than the general terms used, there is nothing to indicate that the Supreme Court intended to extend the doctrine of the two cases of Morgan v. Morgan and Lawson v. Lawson, and to hold that the putative wife is entitled to one-half of the property acquired by the husband during the marriage, but which was not acquired by the joint efforts of the two. It seems to the writer that the language quoted above from the Supreme Court, if construed literally and without limitation, would sustain the claim of the putative wife to administer as survivor of the community upon all property acquired by her and her putative husband during the existence of the assumed relation of husband and wife, contrary to the doctrine announced by Justice Williams in the case of Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564, and would also sustain

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the claim of the putative wife, in case she survive him, to an inheritable interest in property acquired by the husband during the existence of the putative marriage, even though acquired by gift, devise, or descent.

In the case of Allen v. Allen (Tex. Civ. App.) 105 S. W. 54, by this court, and 107 S. W. 528, by the Supreme Court, the right of the putative wife to one-half the property involved was recognized. However, the property involved in that case consisted of a tract of 160 acres of land which was bought by the husband on a credit and afterwards paid for by money acquired by the putative wife by gift from her mother, and a block of land in the town of Tolar, which was purchased with proceeds of crops raised on the 160-acre tract, and all of the property was acquired during the putative marriage.

In the writer's investigation of the decisions of our state, no case has been found holding that property not acquired by the joint labors of the partners of a putative marriage would be owned by them jointly, even though the same might be the community property of the husband and his lawful wife under article 2968, above quoted. If that question has never been settled by the decisions of our state, then it was certainly not intended to be embraced in the language of the Supreme Court in the case of Barkley v. Dumke, quoted above, "Therefore we think it should be taken as the *settled doctrine* in this state," etc. (Italics mine.)

It cannot be said that the cause of action in favor of J. P. Robertson accruing by reason of the injuries he received in the accident in controversy, and immediately upon the happening of the accident, was acquired by the joint labors of himself and Mrs. Maggie Robertson. No evidence was introduced to show that J. P. Robertson ever entered into a contract with Mrs. Maggie Robertson specifically conveying to her an interest in the cause of action, and to say that she had such an interest would be to say that such an interest accrued to her as an incident to her marriage contract.

In the case of Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564, Justice Williams, now of our Supreme Court, said: "The right given by our statutes to the survivor of a marriage to administer the estate of the deceased spouse and the property which belonged to them in common (Rev. St. arts. 2165, 2167, 2181) is given to him or her who is recognized by the law as the lawful husband or wife of the deceased, and, as appellant was never lawfully married to Thomas Chapman, she had not the right to administer in preference to any one else. For the same reason, there was no community estate, such as is contemplated by the statute, between herself and the deceased. The community estate is created by law as an incident of marriage, and does not arise from contract between the parties. It is created by law only as between those who occupy towards each other the relation of husband and wife."

Statutes governing the subject-matter of a contract are as much a part of the contract as though expressed therein, and in this sense are incidents to the contract. 11 Cent. Dig. § 750, and authorities there cited. Obviously, this announcement has reference to contracts only which are legally binding. The statutes defining property rights of husband and wife became a part of the marriage contract between J. P. Robertson and his lawful wife, Mrs. Annie Budd, but did not become a part of the marriage contract between J. P. Robertson and Mrs. Maggie Robertson, as J. P. Robertson was not legally capable of entering into the last-named contract, and the same, therefore, had no binding effect in law upon either of the parties.

To establish an arbitrary rule that in all cases a putative wife is entitled to a half interest in such a cause of action as this, accruing to her de facto husband, when she contributes nothing to its acquisition, and thus reduce the interests of the lawful wife and children therein to one-half, regardless of how short may be the duration of that relation, regardless of the pecuniary value of such a claim, and regardless of equities, even, in favor of the lawful wife, in whom the statute has vested a one-half interest in the cause of action, would, in my opinion, extend protection to the putative wife further than is warranted by our decisions, and further than the principles of equity would require.

It would be difficult, if not impossible, to determine how much the efforts of each partner to a putative marriage contract had contributed to the purchase of property acquired by the joint labors of both, and it is well settled that, in the absence of proof of an agreement to a contrary effect, parties to a partnership will be held to be equal partners. Likewise, parties contributing to the purchase of property for their joint use and benefit, but not as partners strictly speaking, are presumed to own the same in equal interests, in the absence of proof that one contributed more than another, or that by contract between them it was agreed that the interest of one should be greater than that of another. Upon this theory the decisions above cited and discussed, holding that property acquired by the joint labors of the parties to a putative marriage is owned by them in equal interests, can be sustained without attaching to such a marriage contract the incidents attached by our statutes to a lawful marriage contract. If some of the statutory incidents of a lawful marriage contract are to be held incidents of a putative marriage contract also, I can perceive no valid reason why all of those incidents should not so attach, and thus give the putative wife the right to plead coverture against her contracts other than for necessaries and

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for the benefit of her separate estate, and inheritable interest in the separate estate of the husband, homestead rights, and all other rights given by statute to a lawful wife. If some of these rights are to attach to the putative marriage contract as incidents thereto, and others denied, where shall the boundary line be drawn between such as do and such as do not so attach?

The fact that Mrs. Maggie Robertson nursed J. P. Robertson in his illness resulting from the injuries for which this suit was prosecuted would no more entitle her to an interest in the cause of action than would the services rendered by his physician in treatment for the same injuries vest in him the right to recover for the infliction of those injuries.

For the reasons above noted, I believe that the judgment in favor of Mrs. Maggie Robertson should be reversed, and, as to her, judgment should be here rendered in favor of appellant.

ST. LOUIS, S. F. & T. RY. CO. v. WALL.

(Court of Civil Appeals of Texas. May 15, 1909. Rehearing Denied June 12, 1909.)

APPEAL AND ERROR (§ 938*)—REVIEW—PRESUMPTIONS—STATEMENT OF FACTS.

Where the statement of facts, prepared by the court on the parties failing to agree on a statement, discloses that the testimony of certain witnesses was stricken out by having pencil marks drawn entirely across the same, the statement will be treated as though such witnesses had never testified, though the indorsement, to the effect that the parties had failed to agree on a statement of facts, and the official signature of the county judge, and also some of the testimony of the witnesses, is written in ink; the court not being at liberty to assume that interlineations and erasures made with pencil were made improperly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3799; Dec. Dig. § 938.*]

Appeal from Hardeman County Court; J. C. Marshall, Judge.

Action by E. J. Wall against the St. Louis San Francisco & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded for another trial.

See, also, 118 S. W. 131.

Decker & Clarke, C. H. Yoakum, and H. M. Chapman, for appellant. M. M. Hankins, for appellee.

SPEER, J. In this case we certified to the Supreme Court whether or not we were authorized to consider the original statement of facts, not incorporated in the transcript, stating at the same time that there were errors, for which the judgment must be reversed, if such statement was to be considered. The Supreme Court have answered that question in the affirmative (St. L., S. F. & T. Ry. Co. v. Wall, 118 S. W. 131), and we therefore proceed to a disposition of the case in the light of the statement of facts.

The action is one by appellee against appellant to recover damages for the defendant's negligence in burning the grass on about 200 acres of land. There was a trial before the court, resulting in a judgment for the plaintiff for $257.60. All of appellant's assignments of error, in one form or another, attack the judgment as being contrary to the evidence, and the third, which we find it necessary to sustain, specifically submits that the judgment is not supported by the evidence, in that the evidence fails to show that defendant caused the burning of said grass. To this appellee replies that the testimony of the witnesses James Jones and J. M. Christie shows that appellant's passing engines did set fire to appellee's grass land; but an examination of the statement of facts, which appears to have been prepared by the court upon the parties' failing to agree upon a statement, discloses that the testimony of these two witnesses is stricken out by having pencil marks drawn entirely across the same, and we are therefore compelled to treat the statement as though these witnesses had never testified. While the indorsement, to the effect that the parties had failed to agree upon a statement of facts, and official signature of the county judge, are written in pen and ink, and also some of the testimony of the witnesses is thus written, and other interlineations and the erasures already referred to are made with pencil, yet we are not at liberty to assume that this has been done improperly; but we must treat the statement as we find it. With the testimony of the witnesses Jones and Christie eliminated, there is absolutely nothing in the statement to indicate that appellant ever set fire to appellee's grass.

The judgment must therefore be reversed, and the cause remanded for another trial.

SPANN v. KING et al.

(Court of Civil Appeals of Texas. May 15, 1909. Rehearing Denied June 12, 1909.)

MECHANICS' LIENS (§ 122*)—NOTICE OF ACCOUNT—STATUTORY PROVISIONS—COMPLIANCE.

Under Sayles' Ann. Civ. St. 1897, art. 3298, requiring service of written notice on the owner or his agent or representative of each item of the account for materials furnished as a condition precedent to the attaching of a lien, service by the materialman on the owner of a copy of the contract with the contractor to furnish the materials and of a copy of the account filed with the county clerk was not a sufficient compliance with the statute to effect a lien on the property.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 165; Dec. Dig. § 122.*]

Appeal from District Court, Fisher County.

Action by N. W. King and others against J. A. Spann. From the judgment, Spann ap-

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peals. Affirmed in part, and reversed in part and rendered.

Beall Bros. & McDugald, for appellant. Cunningham & Oliver, McCrea & Kirk, and Yantis & Hughes, for appellees.

DUNKLIN, J. On July 15, 1907, N. W. King contracted with J. A. Spann to erect a house for the latter according to certain plans and specifications, and to furnish all necessary materials therefor. Originally the contract price for the house was $5,000, but afterwards, by agreement between the parties, certain changes were made in the original plans, necessitating additional expense to the contractor, in consideration for which Spann contracted to pay King the sum of $750 additional to the original contract price of $5,000. King proceeded with the work of constructing the house, but, failing to finish it in accordance with the terms of the contract, Spann terminated the contract, and completed it at his own expense in excess of the contract price. He then sued King and the sureties on the bond which the latter had given for the faithful performance of the building contract, and the Gray Lumber Company intervened, praying for judgment against King for material furnished him and used in the building, and also for foreclosure of an alleged materialman's lien therefor on the building and lots upon which it was constructed. Upon the trial Spann recovered judgment against King and his bondsmen for damages in the sum of $1,500 for the breach of the building contract, and the Gray Lumber Company recovered judgment against King for $2,506.90 for the material furnished King, with a foreclosure of lien for that amount on the house and lots. Spann has appealed from this judgment of foreclosure only, and no appeal has been prosecuted by any of the defendants.

The material used by King in the construction of the house was purchased by him from the Gray Lumber Company under a written contract between these parties dated July 25, 1906, by the terms of which the Gray Lumber Company agreed to furnish to King such material as might be necessary for the building at the market prices, and King agreed to pay for the same upon the completion of the building, but the contract did not stipulate for any particular character or quality or quantity of said material. Acting under this contract, the lumber company furnished to King building material of the market value of $2,506.90, which was used by King in the construction of the house, and on December 26, 1907, filed its account for said material as a lien upon the house and lots upon which it was erected; the same being filed with the county clerk of Fisher county. Attached to the account was an affidavit of George C. Wright, as the general manager of the lumber company, which was in substantial compliance with the statute, except that it failed to state that the lumber company had given to Spann or his agent or representative notice in writing of each item of said account as the same was furnished to King, as required by Sayles' Ann. Civ. St. 1897, art. 3298. In lieu of that allegation, the affidavit, following an averment of the execution of the contract by King to buy the material from the lumber company, above mentioned, contained this allegation: "The said J. A. Spann as well as his agent or representative J. O. Quattlebaum well knew of said contract and also knew the said Gray Lumber Company was furnishing said material for the erection of said house by the said King, and affiant says he has also mailed to said J. A. Spann's agent or representative, J. O. Quattlebaum, a copy of the account hereto attached." During the progress of the work done by King on the building, Spann made payments to him under the contract aggregating $3,000, the last payment having been made the latter part of November, 1907, but after that date Spann made no further payments to King. The only notice ever served by the Gray Lumber Company on Spann as a basis for a lien on the house and lots was a copy of its contract with King to furnish him the material, above referred to, which was mailed to Spann as soon as it was executed, and a copy of the account filed with the county clerk above referred to, which was mailed to Spann on or about December 23, 1907, after Spann had paid to King the $3,000 above mentioned. The facts above found were established by uncontroverted evidence, and they clearly show that intervener failed to comply with the statutory requirements necessary to fix a lien on the property, and that no such lien should have been decreed. Sayles' Ann. Civ. St. 1897, arts. 3296, 3298, 3310; Dudley v. Jones, 77 Tex. 69, 14 S. W. 335; Fall v. Nichols, 43 Tex. Civ. App. 582, 97 S. W. 145.

Accordingly, the judgment of the trial court fixing and foreclosing a lien in favor of the Gray Lumber Company against the house and lots upon which the same was erected is reversed, and judgment is here rendered that said intervener take nothing of plaintiff, J. A. Spann, that intervener's prayer for a decree fixing and foreclosing a lien on said property be and the same is hereby denied, but in all other respects the judgment of the trial court is affirmed.

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WATSON v. DODSON.

(Court of Civil Appeals of Texas. July 8, 1909.)

WITNESSES (§ 178*)—COMPETENCY—"TRANSACTIONS WITH DECEDENT."

Sayles' Ann. Civ. St. 1897, art. 2302, provides that, in an action by a personal representative, neither party shall be allowed to testify against the other as to any transaction with, or statement by, decedent, unless called to testify thereto by the opposite party. In an action on an instrument, certifying that defendant had received specified sums of money to loan for plaintiff's intestate, and that he had advanced to her specified sums, leaving a balance due her, the administrator asked defendant whether the instrument was in his handwriting, to which he answered it was. Thereupon defendant's counsel offered to prove that defendant had made a mistake in the instrument, and that he should have credited himself with a certain additional sum, which evidence was excluded as relating to a transaction between decedent and defendant. *Held* that, notwithstanding the instrument was a "transaction with decedent" within article 2302, yet defendant, having been called by the administrator to testify to a part of the transaction, should have been permitted to testify to the whole of it.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 178.*

For other definitions, see Words and Phrases, vol. 8, pp. 7061, 7062.]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by D. S. Dodson, administrator of the estate of Pallie Watson, deceased, against F. M. Watson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Gross & Allen, McCall & McCall, and John H. Eaton, for appellant. F. O. McKinsey and Albert Stevenson, for appellee.

SPEER, J. This case has been once before appealed to this court under the style of Watson v. Parker, and will be found reported in 111 S. W. at page 771. The issues were substantially the same as those made on the former appeal, and on the last trial there was a verdict and judgment in favor of the plaintiff, Dodson, for a sum which, together with interest, amounted to $6,325.20.

By a proper bill of exceptions it is shown that appellee called appellant to the witness stand, and asked him whether or not the receipt dated October, 1890, a copy of which is set out in the opinion on the former appeal, was in his handwriting, and the appellant answered that it was. Thereupon his counsel offered to prove that he made a mistake in writing the same, and that he should have credited himself, in addition to the credits therein shown, with the sum of $2,600, the amount paid by him for the Ketchum land for Pallie Watson; that he failed to insert said amount in said receipt because he supposed the deed made to Pallie Watson showed that he paid said amount for her. This testimony was excluded upon the objection of appellee that it was a transaction between the defendant and the deceased, Pallie Watson, and that the same was immaterial to any issue, and not admissible in evidence. In this ruling we think the court erred. Article 2302, Sayles' Ann. Civ. St. 1897, is as follows: "In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." That the written instrument sued on in this case, and about which appellant was interrogated, constituted a transaction with the deceased, Pallie Watson, within the meaning of the foregoing article we have no doubt. Appellant, then, would not have been allowed to testify regarding this instrument unless called by the opposite party; but, having been called by appellee to testify to a part of this transaction, undoubtedly he should have been permitted to testify to the whole of it upon cross-examination by his counsel. It is flagrantly unjust to permit appellee to go into the transaction, and, by proving that the instrument was in appellant's own handwriting, thereby to strengthen his contention that no mistake had been made, and yet to deny appellant the privilege of testifying that he had made a mistake. The issue of mutual mistake in the instrument was in the case, and constituted appellant's chief defense. As tending to disprove this defense, appellee introduced the evidence under consideration, and in doing so entered into a field the gate to which was closed to appellant by statute, unless opened by the opposite party. But, having been thus opened, appellant should be allowed to explore it fully, under well-defined rules of evidence.

We find no other error in the record, but for the one discussed the judgment is reversed, and the cause remanded for another trial.

ELLIOTT v. MORRIS.

(Court of Civil Appeals of Texas. March 12, 1908. On Rehearing, April 9, 1908.)

1. JUDGMENT (§ 682*)—CONCLUSIVENESS—PARTIES CONCLUDED.

A judgment in trespass to try title is not conclusive on defendant's prior grantee, who was not made a party to the suit, and who had no connection therewith, except as his partner, in a firm dissolved prior to the commencement of the action, without authority took part in the trial, and except as surety on defendant's bond on appeal from the judgment, executed because

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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defendant, who had no other land, was indebted to the grantee, who at that time had no notice of the execution of the deed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. § 682.*]

2. JUDGMENT (§ 682*)—CONCLUSIVENESS—PARTIES CONCLUDED.

Sayles' Ann. Civ. St. 1897, art. 5275, providing that any final judgment, in a suit to recover real estate, shall be conclusive on the party against whom it is recovered, and all persons claiming under him by title arising after the commencement of the action, restricts the conclusive effect of a judgment to the parties in legal effect before the court; and the judgment against a defendant is not conclusive on his prior grantee not made a party to the suit, and not taking part therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. § 682.*]

3. MORTGAGES (§ 32*)—DEEDS ABSOLUTE IN FORM AS MORTGAGES.

Where a creditor wrote the debtor offering a price for his land, requesting him to go to an attorney to prepare a deed, and the debtor went to the attorney and executed a deed to the creditor, and delivered the same to the attorney, and there was nothing to show that the deed was intended to operate as a mortgage, the deed absolute in form must be construed as a deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 60; Dec. Dig. § 32.*]

4. TRIAL (§ 251*)—INSTRUCTIONS.

Where plaintiff alleged facts entitling him to the foreclosure of a deed operating as a mortgage, on the court finding that the deed absolute in form was a mortgage, and defendant neither alleged nor proved facts defeating the foreclosure, an instruction to find for defendant, on finding that the deed was intended as security only, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

5. TRESPASS TO TRY TITLE (§ 8*)—TITLE OF PLAINTIFF—EVIDENCE TO DEFEAT.

In trespass to try title by a grantee of the purchaser of the land from the state, defendant cannot show that the purchaser perpetrated a fraud on the state, without showing a right in himself to the land other than through the purchaser.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 11; Dec. Dig. § 8.*]

Appeal from District Court, Nolan County; James L. Shepherd, Judge.

Action by J. A. Elliott against I. C. Morris. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See 43 Tex. Civ. App. 482, 98 S. W. 220.

Orrick & Terrell, for appellant. Wagstaff & Davidson, for appellee.

WILLSON, C. J. The suit was brought by appellant against appellee to try the title to section No. 34, in block No. 20, situated in Nolan county, and surveyed for the benefit of the public schools by virtue of a certificate issued to the Texas & Pacific Railway Company. It does not appear from the record when the suit was commenced. Appellee's first-amended original answer was filed November 14, 1905, and consisted of a general denial, a plea of not guilty, a plea of res adjudicata, and a plea of title under the three-year statute of limitation. In accordance with the verdict of a jury on April 5, 1907, a judgment was rendered in favor of appellee.

The evidence shows, and we find as facts: That the land was patented to one W. C. Logan November 14, 1900, as the purchaser thereof from the state, in accordance with the provisions of the act of 1895 (Gen. Laws 1895, p. 63, c. 47) and the act of 1897 (Gen. Laws, 1897, p. 184, c. 129). That on January 4, 1901, appellant from Arlington wrote to Logan at Merkel as follows: "Your letter to hand. Will say that I can't say just when I will be out. Now, W. C., you have a patent to 34. I will give you $2.25 per acre. If you don't want to take the price I would like to have some showing for what you owe me. If you will, I wish you would go to Beall & Beall and fix this up some way." That the Beall & Beall referred to in the letter was a firm of lawyers doing business in Sweetwater, and as such had been representing appellant. That on January 21, 1901, Logan handed to W. W. Beall, a member of said firm of Beall & Beall, the letter quoted above, and stated that he wished to convey the land to appellant. That Beall thereupon prepared a deed to be executed by Logan, conveying the land to appellant and W. F. Elliott jointly. That said W. F. Elliott and appellant had been partners in business, and Beall so prepared the deed on the supposition that Logan wished to convey to the partnership. That, as so erroneously prepared, the deed was executed by Logan, and delivered to Beall for appellant. That Beall placed the deed, with other papers belonging to appellant in his (Beall's) office, which with its contents, including the deed, was destroyed by fire in December, 1901. That at the time it was executed Beall did not then advise appellant that Logan had executed the deed, and appellant did not learn of its execution until the fall of 1903. That November 23, 1903, in lieu of the destroyed deed, Logan made another deed, conveying the land to appellant. That to correct the error in the original deed from Logan to appellant, whereby the land was conveyed to him and W. F. Elliott jointly, the latter, by an instrument executed March 3, 1904, released to appellant his interest in the land. That on February 7, 1901, appellee brought suit against Logan to try the title to the land, which on a trial had April 18, 1901, resulted in a judgment in favor of appellee for the land. And that an appeal perfected from this judgment was not prosecuted, and the same was on March 8, 1902, affirmed on certificate.

On a former appeal of this case the Court of Civil Appeals for the Second District, on testimony the same, apparently, as the testimony in the record on this appeal, held that the instrument executed by Logan January 21, 1901, and delivered to Beall for appellant, thereupon became effective as a deed, and operated to pass to appellant the legal

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title to the land. 98 S. W. 221. We now concur in the conclusion then reached by that court. On that appeal the case was remanded for a new trial because the trial court had made no finding on appellee's plea of res adjudicata. On the trial resulting in the judgment from which this appeal is prosecuted, the issue, with others, was submitted to the jury, and a general verdict in appellee's favor was returned.

The judgment relied upon as being conclusive of the controversy between the parties to this suit was rendered April 18, 1901, in a statutory action of trespass to try title brought by appellee against appellant February 7, 1901. On the face of the record of that suit appellant was not a party to it. The contention on the trial of this suit was that he had employed counsel and assisted in the defense of that suit, and that thereby, while not a nominal, he became a real, party to the suit, and so was concluded by the judgment rendered therein. If we concurred in appellee's view of the law, we would doubt the sufficiency of the evidence in the record before us to support a finding that appellant was concluded by the judgment. Personally he had not employed counsel to defend the suit prior to its trial, nor in any way assisted in trying or preparing it for trial. Personally he was not present when it was tried. His connection, if any, with that suit before it was tried was through his brother W. F. Elliott. The latter, with Logan, employed an attorney to defend the suit, and was present and assisted in its trial. Appellant and W. F. Elliott prior to 1899 had been partners in business, and it may be assumed together, as partners, were then interested in transactions had with Logan respecting the land in controversy and other lands. If that partnership had existed at the time W. F. Elliott took the part he was shown to have taken in the defense of the Morris suit, and if that partnership had then owned the interest in the land which appellant by his suit is now seeking to recover, it might well be contended that appellant was bound by said W. F. Elliott's acts. But appellant testified that the partnership between himself and W. F. Elliott ceased to exist in 1899, long before the commencement of Morris' suit against Logan. There is nothing in the record to contradict his testimony in this particular, except an allegation in the petition, in a suit filed November 8, 1902, by Logan, "Suing," it recites, "for himself and for the use and benefit of W. F. and J. A. Elliott" against one Armstrong, for damages for an alleged failure to properly prosecute an appeal taken by Logan against the judgment rendered in the Morris suit; that they then were, and before that time had been, partners in the land transactions with Logan. The allegation in the petition referred to, which, for anything to the contrary appearing in the record, may have been made without appellant's consent or knowledge, ought not to be given weight as evidence contradicting his testimony. There is in the record no evidence that W. F. Elliott, in any other way than as appellant's partner, had been authorized to act for him in anything he (W. F. Elliott) had done in connection with the defense of the Morris suit. No reason, therefore, is apparent why appellant should be held to be bound by acts or conduct of his brother in connection with the suit. So it may be said there is an absence in the record of evidence sufficient to support the contention that at the time of the trial of the Morris suit, appellant had in any manner had any connection with it. After that suit was tried, however, it appears that appellant became a surety on Logan's bond on his appeal from the judgment rendered, and interested himself in an effort to have the judgment against Logan reviewed by the appellate court. This seems to have been his only connection with that litigation. He was then ignorant of the fact that the land had been conveyed to him by Logan's deed of January 21, 1901, and explained the interest taken by him in the suit by the statement that Logan was indebted to him, was insolvent, and owned no property, other than the land, to which he could look for his debt. We do not think, in any view of the law, that the connection appellant was shown to have had with the suit after it had been finally tried should be held to operate to conclude him from asserting the title he is here asserting to the land.

But there is another view, precluding such a result, to be taken of the case. The Morris suit against Logan was the statutory action of trespass to try title. The law then and now in force declared that "any final judgment rendered in any action for the recovery of real estate hereafter commenced shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, or by title arising after the commencement of such action." Sayles' Ann. Civ. St. 1897, art. 5275. Construing the statute quoted, Chief Justice Stayton, in Stout v. Taul, 71 Tex. 444, 9 S. W. 329, says: "This restricts the conclusive effect of the judgment to the parties in legal effect before the court where it is rendered, makes certain by the record the extent and effect of the judgment, and avoids all uncertainty in reference to such judgments as would result if evidence outside the record might be resorted to for the purpose of showing who are bound by a judgment, or, in other words, who were parties to the action. It establishes a rule consistent with the principle of justice, which denies effect to a judgment against any one not brought before the court rendering it in some mode prescribed by law, except as to those claiming through a party to such action through inheritance or representative, or by conveyance made pending or after the commence-

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ment of the action." And see Haney v. Brown (Tex. Civ. App.) 46 S. W. 57. So construed, it seems to us the statute must be held to be conclusive of the question made on this appeal. The trial court should not have submitted, as an issue to be determined by the jury, appellee's plea of res adjudicata. The plea on its face was insufficient, and the evidence admitted under it did not present a defense to appellant's suit.

The trial court instructed the jury to find for appellee if they believed the instrument executed by Logan January 21, 1901, and purporting to convey the land to appellant and W. F. Elliott, was not intended to operate as a deed, but instead was intended as security for a debt due by Logan to appellant. There is no evidence of any probative force in the record sent to this court tending to show that the instrument may have been intended, at the time it was executed, to operate other than as a deed. Appellant, in his letter to Logan, offered him $2.25 per acre for the land, and expressed a desire, if Logan should not be willing to accept the price offered, for "some showing for what" Logan owed him. Logan's instructions to Beall, after receiving the letter, were to prepare a deed conveying the land to appellant. Such a deed was prepared by Beall, and executed and delivered by Logan. There is not in the record the slightest evidence indicating that the parties then understood that instrument to be or as intended to operate as anything other than a deed. But had the evidence established the instrument as a mortgage, the charge would have been erroneous. In his supplemental petition appellant had alleged facts which, if proven, would have entitled him as the alternative relief he prayed for to a foreclosure of the instrument, if a mortgage, in the absence of allegation and proof on appellee's part of facts sufficient to defeat such a foreclosure. It, therefore, clearly was error to instruct the jury to return a verdict for appellee merely on a finding that the instrument was intended to operate as security for a debt.

It appeared from the evidence on the trial that on January 15, 1896, one Reid, as an actual settler thereupon, applied to purchase section 38, contiguous to the land in controversy; that said section 38 was awarded to him by the Commissioner of the General Land Office February 21, 1896; that on October 13, 1897, he sold and conveyed his right to the land so awarded to him to Logan; that on January 14, 1899, Logan, as an actual settler thereupon applied to purchase said section 38; that on February 23, 1899, Reid made proof that he had occupied the land from the date of his application to purchase it to the date of his sale thereof to Logan; that on March 13, 1899, Logan made proof that he was then the owner of the land by purchase from Reid, and that he and Reid together had resided upon the land for three consecutive years from the date of its sale by the state to Reid; and that on such proof, on January 19, 1901, section 38 was patented to Logan as assignee of Reid. Under the provisions of the law then in force permitting an actual settler who had become the owner of, or who had been awarded a part of, the lands authorized to be sold to purchase other and contiguous lands, on August 10, 1900, Logan applied to purchase the land in controversy, making oath that his home was then on said section 38. In accordance with his application the land was awarded to Logan September 20, 1900, and it was patented to him November 14, 1900.

At appellee's request the court instructed the jury to find in his favor if they believed that, at the time Logan filed on the land in controversy, he did not own section 38, or was not residing thereupon. The only right to the land asserted by appellee in his pleadings was the right acquired by him under the judgment in his favor against Logan, and under the statute of limitations of three years. His plea setting up the statute of limitations was not submitted to the jury as an issue in the case. We are at a loss to understand upon what theory of the pleadings and the evidence the instructions referred to were given. Appellant had proven a clear legal title to the land. The only defense pleaded—except the statute of limitations—as against such title was an estoppel by reason of the judgment in the Morris suit against Logan. In this attitude of the proof and pleadings whether Logan had or had not perpetrated a fraud on the state in his purchase of the land in controversy was wholly immaterial. It was a defense appellee could not assert without proper pleading showing a right in himself to the land other than through Logan's purchase thereof.

For the errors pointed out the judgment of the lower court must be reversed. As this is the second appeal of the case, and we find nothing in the record indicating that on another trial any other than a judgment for appellant could be rendered, it is proper, we think, to here render such a judgment. The judgment of the court below, therefore, will be reversed, and a judgment will be here rendered for appellant.

On Rehearing.

After further consideration of the questions presented by the record on this appeal, we have reached the conclusion that a judgment should not be here rendered, but that the cause should be remanded for a new trial. As evidence of his title to the land in controversy, appellant relied upon a deed conveying same to him, claimed to have been executed by Logan January 21, 1901. Before the alleged deed was ever placed of record, it was, it seems, destroyed by fire. Whether Logan in fact executed the

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alleged deed to Elliott or not seems to have been a controverted issue in the case. That it may be determined in the trial court, the motion for a rehearing will be granted, and the cause will be remanded for a new trial.

FT. WORTH FAIR ASS'N et al. v. FT. WORTH DRIVING CLUB.

(Court of Civil Appeals of Texas. May 22, 1909. Rehearing Denied June 26, 1909.)

1. LANDLORD AND TENANT (§ 80*)—SUBTENANT—LIABILITY.

A subtenant is not liable on the contract between the landlord and the original lessee, though a lien exists in favor of the landlord for rent as against property of the subtenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 256; Dec. Dig. § 80.*]

2. LANDLORD AND TENANT (§ 134*)—SUBTENANT—LIABILITY.

A lessee in a lease prohibiting the sale of intoxicating liquors on the premises under penalty of forfeiture of the lease, who sublets the premises by contract containing no restriction against the sale of intoxicants nor any reference to the original lease, cannot restrain the sublessee having notice at the time of the sublease of the restriction in the original lease from selling intoxicants on the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 485; Dec. Dig. § 134.*]

Appeal from District Court, Tarrant County; J. W. Swayne, Judge.

Action by the Ft. Worth Driving Club against the Ft. Worth Fair Association and others. From a temporary injunction, defendants appeal. Reversed, and application for writ dismissed.

See, also, following case.

Smith, Bradley, Turner & Powell and Bryan & Spoonts, for appellants. Q. T. Moreland, for appellee.

DUNKLIN, J. This appeal is from an order by the judge of the Seventeenth judicial district granting a writ of temporary injunction restraining the Ft. Worth Fair Association and certain of its officers from permitting the sale of intoxicating liquors on the property hereinafter mentioned.

The Ft. Worth Driving Club leased from David Evans a tract of land to be used as a driving track. This lease, which was in writing and for a period of 15 years, contained a provision which expressly inhibited the sale of intoxicants on the land, and stipulated that a violation of that restriction would work a forfeiture of the lease. The driving club by written lease sublet the premises to the Ft. Worth Fair Association for two weeks each year during a period of five years, terminating before the expiration of the period covered by the original lease. The sublease contract contained no restriction against the sale of intoxicating liquors on the premises, and in that lease no reference was made to any of the terms of the original lease in favor of the driving club, although the fair association had notice at the time of the restriction in the original lease. In its petition filed in the trial court the driving club alleged that the sublease was made with the consent of Evans. The driving track was used as a race track by the fair association, and the defendant gave public horse races upon it each year during the weeks covered by its lease. Upon these occasions, for the three years last past, intoxicating liquors were sold upon the grounds under a special permit from David Evans, who received a money consideration therefor additional to the rents provided in the original lease. But David Evans has since sold the property to R. G. Johnson, who refuses to grant a further permit so to do, and who has notified the driving club that its lease will be forfeited if such sales are further permitted.

It is well settled by the authorities that a subtenant is not liable on the contract between the landlord and the original lessee, even though a lien exists in favor of the landlord for rents as against certain property of the subtenant. Forrest v. Durnell, 86 Tex. 647, 26 S. W. 481. The owner of the land is not a party to this suit, and to restrain the defendant from the sale of intoxicants upon the premises would be to enforce against it the restriction in the original lease, while under the sublease contract it would have the right, as against the plaintiff, so to do. We, therefore, hold that the judge of the trial court erred in granting the writ of temporary injunction against the defendant, and his order to that effect is reversed, and the application for such writ is dismissed.

This renders it unnecessary to express any opinion upon the contention urged by appellant that, under the facts above noted, the stipulation in the original lease for a forfeiture in case of a violation of the restriction as to use of the property has been perpetually waived by David Evans, and that such waiver can be invoked against his assignee as well as against Evans.

FT. WORTH DRIVING CLUB v. FT. WORTH FAIR ASS'N et al.

(Court of Civil Appeals of Texas. May 22, 1909.)

1. APPEAL AND ERROR (§ 447*)—EFFECT OF PROCEEDINGS—INJUNCTION.

A temporary injunction restraining a defendant from selling intoxicating liquors on premises is not suspended by appeal under Gen. Laws 1907, p. 206, c. 107, with supersedeas bond required by Rev. St. 1895, arts. 1404, 1406, providing that on the filing of bonds the execution of the judgment shall be stayed, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

2. INTOXICATING LIQUORS (§ 279*)—INJUNCTION—VIOLATION.

An injunction issued in a suit by a tenant against a subtenant which enjoins the subten-

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ant from selling intoxicating liquors on the premises is violated by sales of liquor made by third persons with whom the subtenant had an agreement whereby the third person was given the right to sell intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 414; Dec. Dig. § 279.*]

3. INJUNCTION (§ 230*) — VIOLATION OF INJUNCTIONAL ORDER—ISSUES.

The court, in proceeding to enforce by contempt a temporary injunction, need not consider the merits of the controversy or whether the injunction was improperly granted, but it is sufficient that the injunction was granted and was violated.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 512; Dec. Dig. § 230.*]

Original proceedings by the Ft. Worth Driving Club against the Ft. Worth Fair Association and others to enforce by contempt process an injunctional order pending before the court on appeal. The Ft. Worth Fair Association adjudged guilty of contempt, and the other respondents discharged.

See, also, 121 S. W. 213.

Bujau & Spoonts and Smith, Turner, Bradley & Powell, for relator. Q. T. Moreland, for respondents.

CONNER, C. J. This is an original proceeding before us, instituted on the part of the relator, the Ft. Worth Driving Club, incorporated, to enforce, by way of contempt process, an order, pending before us on appeal, of the Honorable J. W. Swayne, of the Seventeenth judicial district, enjoining the respondent the Ft. Worth Fair Association, also incorporated, and its officers, from the sale of intoxicating liquors on the premises described in the application and held by the fair association under lease from the driving club. The fair association and its president, T. W. Mullally, were duly cited to appear before us to show cause, if any they had, why they should not be fined as for contempt in disobeying said order as prayed for. At the time required, all parties appeared and submitted the questions involved for our determination.

The facts are practically undisputed. It appears that David Evans, the owner, in 1905 leased the premises under consideration, consisting of about 30 acres of land near the city of Ft. Worth, to the relator, the Ft. Worth Driving Club, for a driving park, fair grounds, race track, etc., for a period of 15 years, and that such leasehold interest is a valuable one. The lease contained an express stipulation to the effect that during its existence no intoxicating liquors of any kind should be sold on the leased premises by the lessee or other person, and that in event of the violation of this provision the lessor should have the right to re-enter and take possession to the exclusion of the lessee. Afterwards, with the consent of the lessor, the premises were sublet by relator to the respondent the Ft. Worth Fair Association for a period of five years, in consideration of the sum of $1,350. This lease by its terms has not yet expired, and the fair association is conducting upon the premises a race meeting, for which purpose for a stated period each year the lease was made. In April, 1909, the relator filed before a district judge a petition setting up the above facts, alleging that the restriction in its lease was being violated by the fair association, and prayer was made for an injunction to restrain the alleged sale of intoxicating liquors upon the leased premises. The judge set the cause down for a hearing, to which respondent was cited, and upon such hearing, after a consideration of the respondent's answer and the evidence submitted by the respective parties, the Honorable J. W. Swayne issued his order granting the injunction prayed for upon the relator's filing bond in the sum of $2,000, which was soon thereafter done. Very soon thereafter, and before the writ of injunction was actually served upon the respondent, it gave notice of appeal from said order, and filed an approved supersedeas bond in the sum of $1,000, as fixed by Judge Swayne. In the application before us it is alleged,. and it seems substantially undisputed, that intoxicating liquors are being sold upon the premises in controversy.

Respondents deny that they have sold intoxicating liquors as charged, but answer that, if any such intoxicating liquors have been sold upon the ground, it has been by one W. M. Robinson, with whom respondent "had entered into a lease and agreement" "leasing him a certain portion of the said grounds described in plaintiff's original petition filed in the district court, and that according to the terms of said agreement and lease the said Robinson, who was not a party to the proceedings herein, had the right to sell intoxicating liquors thereon: and your respondents aver that said Robinson has in all things complied with his portion of said contract and lease, and contends for the right to sell intoxicants under his contract: that if, since the granting of this order (the order for injunction), intoxicants have been sold on said grounds, which is not admitted, that he, the said Robinson, has done so on his own responsibility under his lease and contract, and that your respondents have neither permitted the sale of such intoxicants further, nor have they sold intoxicants on said grounds." Further answer is to the effect that the special provision of the lease contract made between the owner and relator has been waived, which answer in this respect was also made before Judge Swayne. The answer further sets up in defense the fact that it had duly appealed from the order of injunction and filed supersedeas bond, and that respondent had been advised by its attorneys that such appeal and bond suspended the order of in-

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junction, which thereafter, until further disposition, offered no impediment to the alleged sale of intoxicating liquors.

No question is made of our right to proceed. That is, it is in effect admitted that the appeal, which is under the act approved April 16, 1907, authorizing appeals from orders either granting or dissolving temporary injunctions (see Gen. Laws 1907, p. 206, c. 107), confers upon this court jurisdiction to determine the matters involved in the present proceeding, and we need not therefore discuss nor cite authorities in support of our power. The principal contention before us in behalf of respondents is that the order for injunction was suspended by the appeal with supersedeas bond by force of the terms of article 1406, Rev. St. 1895, which is as follows: "Upon the filing of the bonds mentioned in the two preceding articles, the appeal or writ of error shall be held to be perfected and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas." In Williams v. Pouns, 48 Tex. 141, it was decided by our Supreme Court that an injunction in full force prior to a final judgment of dissolution was not suspended by an appeal from the judgment of dissolution, notwithstanding the supersedeas bond. This decision, which was written by the lamented Associate Justice Moore, was followed and expressly approved in an opinion by Associate Justice Gaines, now Chief Justice, in the case of G., C. & S. F. Ry. Co. v. Ft. W. & N. O. Ry. Co., 68 Tex. 98, 2 S. W. 199, 3 S. W. 564, but we have found no decision of our own courts that has direct application where the appeal, as here, is from the original order of injunction. Prior to the act approved April 16, 1907, such orders were classed as interlocutory orders from which no appeal was allowed, and hence, unless sooner dissolved upon motion in limine, remained in force until final judgment of dissolution, the appeal having effect merely to suspend the judgment from which the appeal was taken. The decisions referred to, therefore, are not in necessary conflict with the statute quoted, the statute evidently having direct reference to final judgments only, and not to preliminary orders. The decisions in other states are not entirely harmonious, but, without now stopping to review them, we think it can be stated generally that the great weight of authority supports the proposition that it is only where the preliminary order is mandatory—that is, requires affirmative action, performance of specified things—that an appeal with supersedeas suspends the order. In cases, however, where, as here, the order is prohibitive merely, the appeal leaves it operative, the principle of the rule being the same in both cases, viz., to preserve the status quo of the parties and subject-matter during the appeal, leaving them as nearly as possible in the condition the court finds them at the time the appeal is perfected, thus preventing affirmative action either in accord with or violative of the terms of the order. See Telephone Co. v. State ex rel. Board of Commissioners, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Lindsay v. District Court, 75 Iowa, 509, 39 N. W. 817; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; State ex rel. Gibson v. Superior Court, 39 Wash. 115, 80 Pac. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 862. In the case from the United States Supreme Court it is said, inter alia, that an appeal from a mere prohibitive order "is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by the way of analogy." The court further expressly approved the decision of the United States Supreme Court in the Slaughterhouse Cases, 10 Wall. 273, 19 L. Ed. 915, to the effect that neither a decree for an injunction, nor a decree dissolving an injunction, was suspended in its effect by a writ of error, though all the requisites of a supersedeas were complied with. The law as thus stated by the Supreme Court of the United States ignores the distinction before adverted to between preliminary orders granting injunctions and final decrees from which appeals are taken, and the immateriality of this distinction, in the absence of a statute otherwise controlling, is made very clear by the Supreme Court of Washington in the case cited above, which is replete with reason and citation from authorities applicable to the case that we have before us, which need not be repeated here. It was said, however, that, where the decree is in itself an injunction, the injunction is in force and must be obeyed, unless to continue the status quo of the parties pending the determination of the appeal an order for its suspension is made, and that it is not necessary to issue a writ in order to bind the parties to the suit to obedience to the decree. The statute invoked and above quoted only requires that "the execution of the judgment shall be stayed." It does not necessitate the conclusion that the appeal deprives the decree for injunction of all vital force, and a contrary construction would seem necessary in many instances to enable a court of equity to prevent irreparable injury, for manifestly a supersedeas bond under our statute (Rev. St. 1895, art. 1404) can afford no adequate or certain relief in such cases. For instance, let it be supposed that an injunction has been granted to stay the destruction of ornamental trees or other property of small or no actual value, but of large sentimental value, or to stay the operation of a business

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or work threatening immediate danger to life and health. To hold in any such case that the offending person may until final judgment continue his harmful conduct by a mere appeal with supersedeas bond is to deny the power of the courts to afford any relief worth the asking. We, therefore, agree with the authorities cited, and conclude that the statute quoted is inapplicable and does not preclude our further conclusion that the appeal herein did not suspend the order for injunction, which for operative effect was not dependent upon the issuance of a writ. Before dismissing this branch of the subject, however, it is perhaps due the able counsel representing respondents herein to say that we have considered the case of Waters-Pierce Oil Co. v. State (Tex.) 106 S. W. 326, so earnestly pressed upon us by them, but think that case distinguishable from the one before us, among other things, in that the order appointing a receiver, there held suspended by force of supersedeas bond in accord with article 1404, is in nature mandatory—requiring affirmative action—and hence, if considered on a parity with injunctions, such as falls without the principle upon which our conclusion is based. Moreover, the order of appointment itself provided that no action by the receiver should be taken thereunder pending the appeal, although a previous order enjoining the company from removing its effects from the state was continued in force.

We need add but little. It is not alleged nor shown that relator is a party to the agreement by virtue of which Robinson claims the right to sell intoxicating liquors. Therefore that he, and not respondent, is selling such liquors, constitutes no defense available here. As to relator, the driving club, Robinson is at most a mere subtenant or trespasser, for whose occupancy and conduct respondent must be held responsible. See Rev. St. 1895, art. 3250; Gartrell v. State (Tex. Cr. App.) 61 S. W. 487; Brown v. Pope, 27 Tex. Civ. App. 225, 65 S. W. 42; Markowitz v. Greenwall Theatrical Co. (Tex. Civ. App.) 75 S. W. 75; Waggoner v. Snody, 36 Tex. Civ. App. 514, 82 S. W. 355. Nor in this proceeding are we called upon to consider the merits of the controversy, or whether the injunction was properly or improperly granted. It is sufficient that the injunction was granted, and that it is being violated under the authorization of respondent.

We, therefore, finally conclude that respondent is guilty of contempt as charged, and that it should be punished therefor. In view of the fact, however, that respondent appears to have been acting in good faith and in accordance with the advise of counsel of good repute, we think a fine of $25 against respondent will answer the purposes of the law. It is accordingly ordered that the respondent the Ft. Worth Fair Association be fined as for contempt in the sum of $25, and be taxed for all costs of this proceeding, for which execution may issue, but that all other respondents named be discharged.

KRUEGEL v. RAWLINS et al.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied July 2, 1909.)

1. COURTS (§ 480*)—CONCURRENT JURISDICTION—COURTS OF SAME STATE—RESTRAINING ISSUANCE OF EXECUTION—STATUTORY PROVISIONS.

Rev. St. 1895, art. 2996, providing that an injunction to stay execution shall be returnable to and tried in the court where the judgment was rendered, applies to suits attacking the validity of the judgment, or presenting defenses properly connected with the suit in which it was rendered and which should have been adjudicated therein, and does not apply to a suit to enjoin the issuance of an execution in favor of one not entitled to have it enforced.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1273; Dec. Dig. § 480.*]

2. INJUNCTION (§ 110*)—JURISDICTION—DISTRICT COURTS.

District courts, as courts of general jurisdiction, are empowered by law to issue and try injunctions.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 110.*]

3. APPEAL AND ERROR (§ 911*) — PRESUMPTIONS—VALIDITY OF JUDGMENT.

The act of 1889 (Acts 1889, p. 152, c. 128), creating the Fourteenth and Forty-Fourth judicial district courts of Dallas county, gave them concurrent jurisdiction throughout that county, and conferred the power upon the judges of the respective districts to transfer, at their discretion, cases from one district to the other for trial. *Held* that, inasmuch as the legal presumption is that judgments of courts of record are valid, where a judgment was rendered in the Fourteenth district court, and judgment restraining issuance of execution thereon was rendered in the Forty-Fourth district court, and the record on writ of error in the latter case fails to show that the writ of injunction was not issued by the Fourteenth district court and then transferred to the Forty-Fourth district court for trial, it would be presumed, if necessary to sustain the validity of the judgment, that it was issued in the Fourteenth district court, where the former judgment was rendered, and then transferred to the other court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

4. JUDGMENT (§ 470*)—CONCLUSIVENESS.

A valid judgment is binding upon the parties thereto until set aside by a direct proceeding for that purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

5. EXECUTION (§ 172*) — INJUNCTION — TIME FOR GRANTING.

Rev. St. 1895, art. 2991, providing that no injunction to stay an execution upon any valid and subsisting judgment shall be granted after one year from the rendition of the judgment, unless some equitable matter or defense arises after the rendition of the judgment, only applies to matters affecting its rendition, and does not apply to matters that subsequently arise, and would not bar an injunction staying an

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execution for the judgment creditor because he had, subsequent to the rendition of the judgment, ceased to be the owner thereof.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 172.*]

Error from District Court, Dallas County; E. B. Muse, Judge.

Action by Herman Kruegel against A. B. Rawlins and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Herman Kruegel, pro se. Jeff Word and Cobb & Avery, for defendants in error.

RAINEY, C. J. This suit was brought by Herman Kruegel against A. B. Rawlins, district clerk of Dallas county, and his official bondsmen, and J. P. Murphy and Charles F. Bolanz, as judgment debtors, for damages arising from the refusal of said Rawlins, as clerk, to issue, at the instance of said Kruegel, an execution on a certain judgment rendered in the Fourteenth district court of Dallas county, in favor of said Kruegel against the said Murphy & Bolanz; it being alleged that there was collusion between the said Rawlins and the said Murphy & Bolanz. Defendants answered by general denial, and specially that said clerk had been enjoined by the Forty-Fourth district court of Dallas county from issuing an execution in favor of said Kruegel by virtue of said judgment. A trial resulted in a judgment in favor of defendants.

Plaintiff in error presents the following assignment, to wit: "The court erred in permitting defendants to offer in evidence over plaintiff's objection the judgment of the Forty-Fourth district court, rendered in favor of Chas. F. Bolanz on March 26, 1904, in case No. 22,468, Chas. F. Bolanz v. Herman Kruegel et al., for any purpose whatever, but specifically for the purpose of showing that plaintiff, Kruegel, and defendant Jones, as district clerk, and his successors in office, had therein been enjoined from issuing or causing to be issued any other or further execution under plaintiff Kruegel's said judgment rendered in the Fourteenth district court in case No. 12,634." The facts are that on March 17, 1894, in the Fourteenth district court of Dallas county, a judgment was rendered for Herman Kruegel against Murphy & Bolanz for $1,318.60 and costs in cause No. 12,634. On March 26, 1904, the Forty-Fourth district court of Dallas county rendered a judgment in case No. 22,468, Chas. F. Bolanz v. Herman Kruegel et al., in which judgment "it was decreed and adjudged that the ownership of said judgment of Herman Kruegel v. Murphy & Bolanz, No. 12,634, rendered in the district court of the Fourteenth judicial district of Texas, on March 17, 1894, for $1,318.60, had been divested out of said Kruegel, and that he did not own said judgment, and the said Kruegel, his agent and attorneys, and H. W. Jones, the then district clerk of the district courts of Dallas county, and his deputies, and successors in office and their deputies, and J. Roll Johnson, sheriff of said Dallas county, and his deputies, and successors in office and their deputies, were enjoined from issuing or levying any execution for said Kruegel upon said judgment rendered on March 17, 1894, by the district court of the Fourteenth judicial district of Texas, holding session in Dallas county, in said case No. 12,634, Herman Kruegel v. Murphy & Bolanz." No appeal or writ of error had ever been perfected from said judgment. Rawlins was the successor of H. W. Jones, who was district clerk of Dallas county when judgment in case No. 22,468 was rendered. Five executions had been issued on judgment in case No. 12,634, and Rawlins had refused to issue the sixth at the solicitation of Kruegel, claiming that he had been restrained by the injunction in case No. 22,468.

The contention of plaintiff in error is that the judgment for injunction rendered by the Forty-Fourth district court is null and void, as said court was without power to render judgment staying the issuance of execution by virtue of the judgment rendered by the Fourteenth district court. If the judgment of the Forty-Fourth district court was such as urged by appellant, there would be force in his contention; but is it such a judgment? It does not enjoin the judgment of the Fourteenth district court, nor the issuance of an execution on the application of one authorized to demand its issuance. It does not seek to prevent the enforcement of the judgment, but only seeks to restrain its enforcement by one whom it was decreed was not the owner and had no interest in its enforcement.

The statute provides that: "Writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where suit is pending, or such judgment was rendered. Writs of injunction for other causes, if the party against whom it is granted be an inhabitant of the state, shall be returnable to and tried in the district or county court of the county in which such party has his domicile," etc. Rev. St. 1895, art. 2996. In treating this statute, it was said in Van Ratcliff v. Call, 72 Tex. 491, 10 S. W. 578, in reference to suits enjoining the executions of judgment, that it "evidently applies to suits attacking the judgment, questioning its validity, or presenting defenses properly connected with the suit in which it was rendered, and which should have been adjudicated therein. It has no application to parties who do not sue to stay or enjoin the execution primarily of the judgment as contemplated by the statute." As the judgment of the Forty-Fourth district court did not at-

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tack the validity of the judgment of the Fourteenth district court, but merely to enjoin its enforcement in favor of one not entitled to have it enforced, there was no lack of power in the Forty-Fourth district court to render the judgment.

District courts are courts of general jurisdiction and are empowered by law to issue and try injunctions. The act of the Legislature of 1889 (Acts 1889, p. 152, c. 128) creating the Fourteenth and Forty-Fourth judicial district courts of Dallas county, gave them concurrent jurisdiction throughout Dallas county. It confers the power upon the judges of the respective districts to transfer, at their discretion, cases from one district to the other for trial. The record failing to show that the writ of injunction was not issued by the Fourteenth district court and then transferred to the Forty-Fourth district court for trial, and as such may have been done, though such a proceeding might have been irregular in such a case, and as the legal presumption is indulged that judgments of courts of record are valid until their invalidity is established, we are of the opinion that the judgment of the Forty-Fourth district court is not void. Said judgment not being void, it is binding upon the parties thereto until set aside by a direct proceeding for that purpose.

It is also contended that the said judgment of injunction is void because it was granted more than 12 months after the rendition of the judgment by the Fourteenth district court. Rev. St. 1895, art. 2991, provides that "no injunction to stay an execution upon any valid and subsisting judgment, shall be granted after the expiration of one year from the rendition of such judgment, unless * * * some equitable matter or defense arises after the rendition of such judgment," etc. The limitation of one year only applies to matters affecting its rendition, but has no application to matters that subsequently arise. The judgment of injunction, showing that it was granted on account of Kruegel not being the owner, was a matter that arose subsequent to the judgment rendered in the Fourteenth district court. Therefore the one-year limitation has no application in this case.

The record does not contain any evidence showing that Murphy & Bolanz in any way interfered with or induced Rawlins not to issue execution, and therefore there is nothing upon which a judgment for damages could be based as against them. As to Rawlins and his bondsmen, we do not think they were liable for damages. Rawlins was the clerk of both district courts of Dallas county. Said courts having concurrent jurisdiction in Dallas county, the judgment of the Forty-Fourth district court was a sufficient reason for his refusal to issue execution.

The judgment is affirmed.

KRUEGEL v. JONES et al.

(Court of Civil Appeals of Texas. June 19. 1909. Rehearing Denied July 2, 1909.)

Error from District Court, Dallas County; E. B. Muse, Judge.

Action by Herman Kruegel against H. W. Jones and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Herman Kruegel, pro se. Jeff Word and Cobb & Avery, for defendants in error.

BOOKHOUT, J. This suit was filed in the Forty-Fourth district court, April 22, 1905, by plaintiff in error, against H. W. Jones, as district clerk of Dallas county, and Royal A. Ferris, his bondsman, and J. P. Murphy and Charles F. Bolanz, claiming damages, actual and exemplary, because Jones, as district clerk, refused to issue, on demand made therefor by plaintiff in error, on the 25th day of April, 1904, the sixth execution on a judgment rendered by the Fourteenth district court of Dallas county, on March 17, 1894, in favor of plaintiff in error against Murphy & Bolanz for $1,318.60, with interest and costs, in case No. 12,634 on the docket of said Fourteenth district court. On May 21, 1907, defendant Jones and his surety answered by general and special exceptions, general denial, and specially that by judgment and decree of the district court of said Forty-Fourth district rendered on March 26, 1904, in the case in said court styled and numbered "Charles F. Bolanz v. Herman Kruegel et al.," No. 22,468 on the docket of said court, the clerk of the district court of Dallas county, and his successors in office, were enjoined and restrained from issuing, after said date, for said Kruegel, any execution on said judgment of Herman Kruegel v. Murphy & Bolanz, J. P. Murphy, and Charles F. Bolanz, No. 12,634, rendered in the district court of said Fourteenth district on said March 17, 1894, which said judgment of said Forty-Fourth district court was still in full force, unappealed from, and unreversed. On June 3, 1907, judgment was rendered in favor of all defendants.

The only question for determination on this writ of error between plaintiff in error and Jones and his surety is: Is the judgment of the Forty-Fourth district court, rendered March 26, 1904, in case No. 22,468, Chas. F. Bolanz v. Herman Kruegel et al., void? This question is fully answered in the negative in an opinion by this court delivered by Chief Justice Rainey in the case of Herman Kruegel v. A. B. Rawlins et al. (this day filed) 121 S. W. 216, in which the evidence and issues were in all respects similar to those of the present case.

For the reasons stated in the opinion in that cause, the judgment in this cause is affirmed.

PECOS & N. T. RY. CO. v. COFFMAN.

(Court of Civil Appeals of Texas. June 19. 1909.)

1. EVIDENCE (§ 314*)—COMPLAINTS OF PAIN—HEARSAY.

In an action for injury, evidence of plaintiff's complaints of pain and soreness was not objectionable as hearsay.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 314.*]

2. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

Evidence that prior to the accident plaintiff was well and suffered from nothing, but

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that afterwards had an impediment in his walk, was not objectionable as a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2167; Dec. Dig. § 471.*]

3. EVIDENCE (§ 537*)—EXPERTS—PHYSICIANS—QUALIFICATIONS.

A physician in general practice who has studied a particular disease is qualified to testify concerning it, though he had not made such disease a specialty and had never treated a person therefor, his want of experience going only to the weight of his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2345; Dec. Dig. § 537.*]

4. EVIDENCE (§ 537*)—EXPERTS—QUALIFICATIONS—ABUSE OF DISCRETION.

Where there was a sharp conflict as to whether plaintiff had myelitis or sclerosis of the spinal cord, it was an abuse of discretion to refuse to permit a medical practitioner to give his opinion on the question, where he was otherwise qualified, because he had not made a specialty of the disease or treated a patient therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2345; Dec. Dig. § 537.*]

5. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTION—FOUNDATION.

A hypothetical question assuming that defendant's engine was demolished by the collision in controversy, which was not shown by the evidence, was improper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2373; Dec. Dig. § 553.*]

6. WITNESSES (§ 275*)—CROSS-EXAMINATION—SCOPE—POVERTY OF PLAINTIFF.

Where, in an action for injuries, plaintiff testified that prior to the accident he had earned from $5,000 to $7,000 per annum, defendant was entitled to show on cross-examination, if possible, if such was not the fact, and that plaintiff was poor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 969; Dec. Dig. § 275.*]

7. TRIAL (§ 252*)—REQUEST TO CHARGE—EVIDENCE.

Where there was no evidence that some person not in defendant's service left a switch open which resulted in the accident complained of, a request to charge that if the switch was not left open through the carelessness of defendant's employés, but by some other person, defendant was not liable, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

An instruction to find for defendant if plaintiff did not sustain an injury which caused him to suffer a specified disease of the spinal cord was properly refused as ignoring other injuries testified to by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

9. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMED FACTS.

A request to charge assuming as a fact that rheumatism and sciatica might not result from the injury to plaintiff's spinal cord or nerves was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

Appeal from District Court, Deaf Smith County; J. N. Browning, Judge.

Action by J. J. Coffman against the Pecos & Northern Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Madden & Truelove, Carl Gilliland, and Terry, Cavin & Mills, for appellant. Capps, Cantey, Hanger & Short and Knight & Staton, for appellee.

DUNKLIN, J. While J. J. Coffman was a passenger on the Pecos & Northern Texas Railway, the engine ran upon a side track in the town of Hereford and collided with a string of box cars. Coffman instituted suit for damages for injuries alleged to have been received as a result of being thrown against the back of a seat and on the floor of the car by reason of this collision, and from a judgment in his favor defendant has appealed.

Defendant's first four assignments complain of the action of the court in overruling objections to certain testimony of witnesses C. L. Nash, Mrs. Sallie Coffman, Geo. M. Slaughter, and F. C. Davidson. The testimony objected to was as to complaints by plaintiff of pain and soreness in his back, an impediment in his walk, and an answer by Mrs. Coffman, plaintiff's wife, to one question, to the effect that prior to the accident Mr. Coffman was well and suffered from nothing. The objections were that the testimony was hearsay, that the declarations of plaintiff detailed by the witness were self-serving, and that the testimony of Mrs. Coffman to the effect that prior to the accident Mr. Coffman was well was a conclusion which the witness was not qualified to give. There was no error in the admission of the testimony. St. L. & S. F. R. Co. v. Boyer, 44 Tex. Civ. App. 311, 97 S. W. 1070, and authorities there cited; Ry. v. Smith (Tex. Civ. App.) 90 S. W. 929; Ry. v. Wright (Tex. Civ. App.) 84 S. W. 272; Rutherford v. Ry., 28 Tex. Civ. App. 625, 67 S. W. 163, and authorities there cited.

The plaintiff's contention was that from the injury received in the accident he was suffering from myelitis or sclerosis of the spinal cord. He submitted to an examination by physicians in Kansas City for the purpose of determining whether or not his spine was so diseased. Dr. Rogers was present at this examination, and testified that from his observations during that examination he formed, and at the time of the trial had, a definite opinion as to whether or not Mr. Coffman was suffering from any form of myelitis or sclerosis of the spinal cord. Dr. Rogers further testified that he was a graduate of the Medical College of the University of Tennessee, that he had been engaged in the practice of medicine 37 years, that he was not a specialist in spinal cord diseases, had never treated a case of myelitis or sclerosis of the spinal cord, but had read on those subjects, and had such knowledge and information as

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a general practitioner would have. Defendant's counsel then asked him to state to the jury the opinion that he had formed as to whether or not Mr. Coffman had sustained any injury to his spine or was suffering with any kind of spinal affection. Plaintiff objected to this question on the ground that Dr. Rogers was not qualified to express an opinion. The court sustained this objection, stating at the time that "it would be better to question the witness further touching his qualifications," and stated to defendant's counsel that he might go ahead and further qualify the witness to speak. Defendant's counsel thereupon stated that he could not further qualify the witness. The bill of exception approved by the court contains the statement in effect that the witness, if permitted, would have testified that in his opinion plaintiff was not suffering from any spinal affliction. To sustain the ruling of the court, appellee contends that whether a witness has qualified himself to testify as an expert is a question for the determination of the trial court, whose decision will not be reviewed on appeal unless a gross abuse of the court's discretion is made to appear. In support of this contention many cases are cited, such as Meyer Bros. Drug Co. v. Madden, Graham & Co., 45 Tex. Civ. App. 74, 99 S. W. 723; Spaulding v. City of Edina, 122 Mo. App. 65, 97 S. W. 545; Combs v. Rountree Construction Co. (Mo.) 104 S. W. 77; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 559, 11 Sup. Ct. 653, 35 L. Ed. 273; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 484, 12 Sup. Ct. 731, 36 L. Ed. 513; Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035.

The spinal injury was the principal injury complained of by the plaintiff, and upon the issue as to whether or not plaintiff was suffering from this injury the testimony was sharply conflicting, several physicians testifying to such injuries, and several others testifying to the contrary. We think it well settled by the authorities that a physician in general practice who has studied the particular disease concerning which he is called upon to give an opinion is qualified to give such opinion, even though he has not made such diseases a specialty in his practice, and even though he has never had occasion to treat a patient for that disease, a want of experience going to affect the weight of his testimony only. Lawson on Expert and Opinion Evidence (1st Ed.) pp. 118–129, inclusive; Montgomery v. Commonwealth, 88 Ky. 509, 11 S. W. 475; 1 Wigmore on Evidence, §§ 569 and 687.

If it be conceded that ordinarily it would have been discretionary with the trial court to exclude the opinion of Dr. Rogers as an expert, we think that under the authorities, and in view of the conflict of testimony upon the issue as to whether or not the plaintiff was suffering from the spinal diseases complained of, it was an abuse of such discretion to exclude said testimony, and its exclusion constituted error for which the judgment of the trial court must be reversed.

Under the seventh assignment of error appellant insists that the hypothetical questions propounded to witnesses were objectionable in assuming that the engine was demolished by the collision in controversy. We are inclined to think that there was no evidence to show that the engine was demolished, and, while this error might not be sufficient to reverse the case, we suggest that this objection should be avoided upon another trial.

In his charge the court repeatedly told the jury that the defendant owed the duty under the law to exercise the highest degree of care and prudence for plaintiff's safety, while a passenger on its train, and in the charge the following language was used: "And by the term 'highest degree of care' means that degree of care which a person possessed of the highest degree of care and prudence, engaged in the same kind of employment, would exercise under the same circumstances." A more accurate definition of the duty owing by a railway company to a passenger on one of its trains is found in Ry. v. Halloren, 53 Tex. 53, 37 Am. Rep. 744; Ry. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829; I. & G. N. Ry. Co. v. Clark, 36 Tex. Civ. App. 195, 81 S. W. 821; Ry. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343. Appellee contends that the evidence conclusively establishes negligence on the part of defendant as a matter of law, and that, if there was error in the charge given, the same was harmless. Without deciding that question, or the further question whether or not there was error in the charge, we suggest that upon another trial, in defining the legal duty which the defendant owed to plaintiff, it would be better for the court to follow the form of charge approved in the cases last above cited.

Relative to the question presented under the sixth assignment of error, we suggest further that, if upon another trial defendant can prove that plaintiff's financial condition prior to the accident was such as would tend to contradict his testimony that for five or six years prior to the accident in controversy he had earned from $5,000 to $7,000 per annum, defendant upon cross-examination of plaintiff should be allowed to make such proof. We recognize the general rule announced in Ry. v. Lyde, 57 Tex. 510, and Ry. v. Hannig, 91 Tex. 349, 43 S. W. 508, that in such cases the wealth or poverty of the plaintiff are immaterial issues and calculated to prejudice the jury in favor of one or the other party to the suit, yet we believe that, if the defendant should desire to show the poverty of plaintiff under such circumstances, evidence of that fact should be admitted. In most cases the holding that proof of poverty of plaintiff in suits for damages is not ad-

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missible is based upon the idea that such proof would be prejudicial to the defendant. When the plaintiff testifies to large earnings prior to a personal injury, and sues for damages for loss of such earnings by reason of the injury, proof of his poverty shortly prior to the accident might reasonably tend to contradict his testimony as to the amount of his earnings, and, if the defendant sees fit to risk any sympathy that such proof might arouse in the minds of the jurors in plaintiff's behalf, the same should be admitted.

In the case of G., C. & S. F. Ry. Co. v. Matthews, 100 Tex. 63, 93 S. W. 1068, our Supreme Court held certain testimony admissible, over the objection that it was irrelevant and immaterial, which was offered upon cross-examination for the purpose of affecting the weight of the testimony of one of plaintiff's witnesses. In discussing the question of the admissibility of that evidence, the following language was used: "The effort here is to establish the falsity of the witness' testimony material to the case by circumstances, one of which is that that did not happen which would naturally be expected to have happened if the tale were true, i. e., an earlier disclosure of the facts known to the witness. This evidence is directed at the very facts in issue in the case, and not to the proof of irrelevant facts. When the existence of facts material to a plaintiff's case is put in issue by the defense, the truth of the testimony of witnesses to those facts is also put in issue; and evidence which has a tendency to show the untruth of such testimony is as relevant to the issues as testimony of other witnesses denying that the facts exist. As was said by Judge Stayton in Evansich v. Gulf, C. & S. F. Ry. Co., 61 Tex. 28: 'As all issues of fact must be determined by the testimony of witnesses, it would seem that any fact which bears upon the credit of a witness would be a relevant fact, and this whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact.' Evidence, therefore, which bears upon the story of a witness with sufficient directness and force to give it appreciable value in determining whether or not that story is true, cannot be said to be addressed to an irrelevant or collateral issue. It is directed to the issue as to the existence of the material facts to which the witness has testified."

The second special instruction requested by defendant was properly refused. It was in effect that if the switch was left open, not through carelessness of defendant's employés, but by some one other than an employé, the verdict should be for defendant, unless the accident occurred through the negligence of the engineer in running the train into the open switch. There was no evidence that some person not engaged in defendant's service left the switch open, and in the absence of such testimony it would be improper to give such a charge. This renders it unnecessary to consider the question whether or not the instruction would be proper in the absence of that vice. Railway v. Lytle (Tex. Civ. App.) 106 S. W. 900.

By its third and fifth special charges defendant requested the court to instruct the jury to find in its favor if plaintiff did not sustain an injury which caused him to suffer from myelitis or sclerosis of the spinal cord. These charges ignored other injuries testified to by plaintiff, and they were correctly refused.

The sixth special instruction requested by defendant was erroneous, in that it assumes as a fact that rheumatism and sciatica could not result from an injury to the spinal column or nerves.

The judgment of the trial court is reversed, and the cause remanded for another trial.

MARICLE v. McALISTER FUEL CO.

(Court of Civil Appeals of Texas. April 10, 1909. Rehearing Denied July 3, 1909.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERROR.

Where the admission of bills of lading in evidence is objected to, but the record contains only the substance of the bills of lading, and no statement in verification of the objection, the objection is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. EXCEPTIONS, BILL OF (§ 8*)—LIMITATION TO PARTICULAR OBJECTION.

A bill of exceptions to the admission of evidence must be limited to the particular objection made.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.*]

3. SALES (§ 382*)—REMEDIES OF SELLER—ACTIONS FOR DAMAGES—ADMISSION OF EVIDENCE.

In an action by a seller of coal for damages for breach of a contract to purchase, bills of lading for the coal shipped defendant were admissible in evidence, although such bills were "subject to correction"; there being nothing in the evidence tending to show that there had been a correction or that ground for a correction existed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. § 382.*]

4. SALES (§ 388*)—REMEDIES OF SELLER—ACTIONS FOR DAMAGES—INSTRUCTIONS.

Plaintiff sued defendant for breach of a contract to purchase coal of plaintiff. Defendant pleaded a general denial. There was no evidence that defendant refused to accept the coal because it was not the kind specified in the contract. *Held*, that a charge that, if the jury found that the coal shipped to defendant on his order was not the coal specified in the contract, they would find for defendant, was properly modified by adding, "provided defend-

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ant refused to accept said coal" on such grounds.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. § 388.*]

5. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—INDICATING EVIDENCE.

In an action by a seller of coal for breach of contract to take coal purchased, an assignment of error that the verdict for plaintiff is against the weight of the evidence, in that there was not proper or sufficient evidence upon which the jury could ascertain the quantity of coal shipped by plaintiff to defendant, and that the weight of testimony supported the contention of defendant that the coal was not shipped to him within a reasonable time, will not be considered where the evidence relating to the objections is not pointed out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3011; Dec. Dig. § 728.*]

6. SALES (§ 383*)—REMEDIES OF SELLER—ACTION FOR DAMAGES—EVIDENCE.

Evidence in an action for breach of contract to purchase coal of plaintiff *held* to show that the coal tendered defendant was the kind ordered by him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.*]

Error from District Court, Wichita County; A. H. Carrigan, Judge.

Action by the McAlister Fuel Company against P. C. Maricle. Judgment for plaintiff, and defendant alleges error. Affirmed.

L. H. Mathis, for plaintiff in error. J. T. Montgomery, for defendant in error.

CONNER, C. J. The McAlister Fuel Company on the 13th day of October, 1905, sued P. C. Maricle in the district court of Wichita county, alleging that it had shipped and tendered to said Maricle at Wichita Falls nine cars of Wilburton coal ordered by him, worth $909; that Maricle had refused to receive and pay for the coal, which necessitated a disposition thereof by the fuel company, which it did, realizing therefrom the net sum of $70. For the difference, $839, the fuel company sued. The defendant Maricle answered by a general denial, and the trial before a jury resulted in a verdict for the fuel company for the full amount sued for.

In the first assignment objection is made to the introduction in evidence of "nine bills of lading and waybills purporting to have been executed and delivered to the plaintiff by the railway company in the Indian Territory," on the ground, among other things, that "no proof was offered tending to show that they were executed by the parties pretending to have executed them." It seems difficult to avoid the force of defendant in error's objections to this assignment. Neither the bills of lading objected to nor the bill of exceptions taken to their introduction is set out in the statement given in support of the assignment; nor is reference to the pages of the transcript made to enable this court to readily examine the bills of lading and bill of exceptions. We have, however, taken the pains to search the record for the bill of exceptions, and find therein only what purports to be the substance of the bills of lading, but no statement in verification of the objection that there was no proof of their execution. The mere objection on this ground is insufficient. Terrell v. McCown, 91 Tex. 231, 43 S. W. 2. The further objection we find in the bill "that so far as those bills of lading were sought to be introduced as tending to show the quality or the weight of the coal shipped in said cars that it appeared upon the face of said bills of lading that those matters were subject to correction, and that therefore the defendant was not bound thereby even if proof of the execution thereof had been shown." The bill must be limited to the particular objection made. See Minor v. Powers (Tex. Civ. App.) 38 S. W. 400. So limited we see nothing prejudicial in the admission of the bills of lading. Merely because they were made "subject to correction" cannot be material when nothing in the evidence is pointed out tending to show that there had been a correction, or that ground therefor existed. The recitations relating to the quality and weight of the coal were, as to plaintiff in error, as suggested in his brief, no doubt hearsay, but this objection does not appear from the bill of exceptions to have been made at the time. Had it been done, for aught that we can say, defendant in error might have answered it by indisputable proof. Indeed, nothing in the statement under the assignment indicates that there was any dispute as to either the quality or weight of the coal. So that on the whole we think the assignment of error must be held to be of no avail.

Under the second and fourth and the third and fifth assignments of error, the court's charge is attacked on the ground that thereby plaintiff in error's defenses were improperly limited. His only defense pleaded was a general denial, but the court charged the jury to the effect that if they found that the coal shipped to Wichita Falls on his order was not "Wilburton" coal, or had not been transported and delivered at Wichita Falls within a reasonable time, they would find for defendant, "provided defendant refused to accept said coal" on such grounds. It is said in the statements in aid of these assignments that "Maricle himself had testified that, when he refused to accept the coal, he had not even seen the bills of lading, and did not know that the coal had not been shipped from the mine at Wilburton," and that "the testimony of the plaintiff's witness Hightower tended to show that Maricle did not given any reason at all for refusing to receive the coal, except that he was overstocked with coal." It is doubtless true, as insisted, that plaintiff in error could not be deprived of any just defense he had on the ground merely that he failed to base his refusal to receive the coal on such defense, but

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we find nothing in the statement referred to which shows that the evidence raised the issues of the special defenses mentioned and submitted. We cannot, therefore, say that there was prejudicial error in the charges complained of.

The remaining assignment is to the effect that the verdict of the jury is "wholly unsupported by and is against the great weight of the evidence," in that, "first, there was not proper or sufficient evidence introduced upon which the jury could ascertain the quantity of coal shipped by plaintiff to defendant; second, the weight of the testimony supported the contention of the defendant that the coal was not shipped to him by plaintiff within a reasonable time after the plaintiff had received his orders; third, the weight of the evidence supported defendant's contention that six cars of said coal was not Wilburton coal, as defendant had ordered." The evidence relating to the first and second objections above quoted is not pointed out, and the testimony relating to the third seems almost undisputed to the effect that the United States Geological Survey places coal in the Indian Territory in two classes, one known as the McAlister vein and the other as the Wilburton vein, and that all coal mined from the Wilburton vein is known commercially as "Wilburton" coal, and that all coal shipped Maricle was mined from this Wilburton vein. That such classification was unknown to plaintiff in error, or unknown in Wichita Falls, can avail him nothing, in view of the practically undisputed fact that he ordered Wilburton coal and was tendered coal of that class as established by the testimony of many witnesses of large experience from many different portions of the country.

We conclude that the judgment must be affirmed; and it is so ordered.

KIRBY v. BOAZ et al.

(Court of Civil Appeals of Texas. April 24, 1909. Rehearing Denied July 3, 1909.)

1. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS—STATEMENTS OF DECEDENT.

On an issue as to which of two persons of the same name received the bounty warrant for the land in controversy, declarations of a decedent as to his ancestor's service in the Texas army were admissible, it appearing that there was no exciting cause in the way of self-interest; the declarant having no knowledge of his ancestor's death.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 271.*]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—SELF-SERVING DECLARATIONS.

Error, in the admission of evidence of a decedent's self-serving declarations as to his ancestor's family history to sustain one's claim of title, is harmless, where the same history is shown by uncontradicted evidence of declarations of competent declarants, supplemented by the family Bible and the family portrait.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

3. EVIDENCE (§ 320*)—DECLARATIONS—PEDIGREE.

Testimony as to pedigree was properly admitted, where it was based, not only on self-serving declarations of a decedent, but also on declarations of his wife, who had no interest, and on the family Bible and the family portrait.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.*]

4. ADVERSE POSSESSION (§ 13*)—ELEMENTS.

One who has never had possession of land or paid taxes on it cannot maintain an action of trespass to try title against one who has paid taxes on it for 16 years under a claim of title, and has held it adversely for five years, and cultivated and improved it, though the latter is unable to show that the person under whom he claims was the person named in the bounty warrant for the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65–76; Dec. Dig. § 13.*]

5. ADVERSE POSSESSION (§ 47*).

The possession of land by the vendee is not the possession of his vendor, as against an adverse possessor who enters after the sale.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 47.*]

Error from District Court, Jones County; Cullen O. Higgins, Judge.

Action by Moses R. Kirby against Edgar Boaz and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Hardwicke & Hardwicke, Theodore Mack, and A. H. Kirby, for plaintiff in error. Thomas & Chapman and C. H. Steele, for defendants in error.

DUNKLIN, J. This is the second appeal of this case; the disposition of the former appeal appearing in 41 Tex. Civ. App. 282, 91 S. W. 642.

The property in controversy is the John Wall survey of 1280 acres of land situated in Jones county. Moses R. Kirby sued in trespass to try title to recover the land of defendants in error, and, in the alternative, to foreclose a vendor's lien on the property. From a judgment in favor of the defendants plaintiff has prosecuted this writ of error. The land was located by virtue of bounty warrant dated July 6, 1840, in favor of the heirs of John Wall, a soldier of the Republic of Texas, and reciting that he served as such from October 15, 1836, until September 1, 1837, and that he died while on a furlough. The main controversy upon the trial was whether the John Wall mentioned in the bounty warrant was a John Wall from Nash county, N. C., through whom plaintiff claimed title, or a John Wall from Northampton county, N. C., through whom defendants claimed title. Upon his death the Northampton county Wall left surviving him, as his only heirs, his two half-brothers, Wm. H. Hughes and Thomas Hughes, and his moth-

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er, Sarah Hughes. His mother and his half-brother Thomas Hughes both dying without issue, Wm. H. Hughes became their sole heir, and the defendants all claim title through him.

Defendants introduced in evidence the deposition of W. R. Newsome, who testified that he was a native of Northampton county, N. C., and had resided there for 79 years. He further testified that he knew the Northampton county John Wall and his half-brothers, Wm. H. and Thomas Hughes; also knew their mother as early as he knew any one; that she visited in the home of the mother of witness; that she died in 1845; that he knew her for 20 years, and witness had known Wm. H. Hughes 79 years. The following interrogatory, propounded to this witness, and his answer thereto were read to the jury: "Interrogatory. If in answer to interrogatory 11, you have stated that you knew John Wall then, if you know, state whether or not the said John Wall ever went to Texas; and, if you state that he did, then state about what time and for what purpose he went, if you know. Answer. I went to Wake county in 1836, and came back here in 1839. When I came back, they told me he was gone to Texas. He went some time between 1836 and 1839 to fight in the war." Plaintiff objected to all that portion of the answer which related to what the witness was told, on the ground that, in answers to cross-interrogatories exhibited to the court, but not read to the jury, the witness further testified that this information was received from the mother and the above-named half-brothers of John Wall, and that such declarations to the witness were inadmissible because self-serving; John Wall being then dead, and the declarants being his heirs. At the time of the trial all these declarants were dead, and the evidence of the defendants showed that the Northampton county Wall died about the latter part of the year 1837. Being a part of the family history, evidence of these declarations was admissible, unless the evidence affirmatively shows some cause for its exclusion.

The case of Byers v. Wallace, 87 Tex. 510, 28 S. W. 1056, 29 S. W. 760, is the leading case relied on in support of the objection made to this evidence. The following excerpt from that decision gives a correct statement of the particular testimony there under consideration and the ruling of the court thereon: "The court also admitted, over objections of defendants, the declarations of William Wallace, through whom the plaintiffs claim title, to the effect that he had a nephew in Texas named William Wallace, who was killed at Goliad in the Fannin Massacre. The evidence shows that, if the declarations were true, the declarant was the only heir of the party to whom the declarations related. The declaration must have been made after the death of the nephew, and goes directly to establish the title of declarant as the sole heir of the nephew. It was a self-serving declaration, made in the interest of the declarant, and should have been excluded." And on page 518 of the same volume the court, again discussing the admissibility of the declaration referred to in the above quotation, after citing many authorities in support of the ruling, used the following language: "All of the authorities cited above sustain the text of Mr. Phillips (page 228), which is as follows: 'It has been thought to be some safeguard sufficient to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected that the declarant could derive no advantage from his statements, and that there was at the time no exciting cause to induce him to depart from the truth.'" It will be observed that the declarations held to be inadmissible in that case consisted of a statement, not only that the declarant had a nephew in Texas named William Wallace, but also the statement that the nephew was killed at Goliad in the Fannin Massacre. Consequently it could not be questioned that there was an exciting cause in the way of self-interest, if known to the declarant, to induce him to make the declaration.

Mr. Wigmore, in his late work on Evidence (volume 2, §§ 1482, 1483), in discussing the rules relative to admission of hearsay evidence to prove family history, says: "The circumstantial guaranty for trustworthiness (ante, section 1422) has been found in the probability that the 'natural effusions' (to use Lord Eldon's oft-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life. * * * In applying this principle what specific rules have been deduced? Section 1483. First, declarations made during the course of a controversy are to be regarded as lacking in the guaranties of trustworthiness. In the traditional phrase the declarations, to be receivable, must have been made 'ante litem motam.' * * * Principle requires, however, that the dispute, if it is to exclude the statements, should have been more or less over the precise point to which the statements refer; else no bias could be supposed to affect it. There is opportunity for much latitude in applying this limitation. Judges' opinions have differed, but it should be a matter for the trial court's discretion whether under the circumstances of each case bias can be supposed to have existed." In cases cited in the footnotes to that section 1483 the following is quoted from Mansfield, C. J., from Berkley's Peerage Case, 4 Camp. 417: "I have now only to notice the observation that to exclude declarations you must show that the lis mota was known

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to the person who made them. There is no such rule. * * * If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced." But in the same note, and immediately following the above quotation, the author cites Shedden v. Patrick, 2 S. W. & T. 170, 187, as holding that the announcement by Mansfield, C. J., quoted above, was against the reason of the rule, and that "We must judge of the feelings of the party from what he knew at the time." The author cites many other English cases as being in accord with the holding of Creswell, J., in the case of Shedden v. Patrick, supra. None of these English cases are accessible to us, but the announcement quoted from Shedden v. Patrick commends itself as a just and equitable rule, which seems to be recognized by the author in articles 1482 and 1483, as above quoted. It will be noted that in the authorities last above referred to, it seems impliedly conceded that, if the declarations were made ante litem motam—that is to say, before any dispute or controversy arose over the declarant's claim of right—they would be admissible. However, we recognize that the Supreme Court, in the case of Byers v. Wallace, supra, does not agree with this last suggestion.

From the answer objected to in this case, and now under discussion, and above set out, it could reasonably be inferred that the declarants had not heard of John Wall's death at the time these declarations were made, which the answer shows was in 1839. This inference is strengthened by cross-interrogatories Nos. 9 and 10 to the same witness, and his answers thereto, which are as follows: "Cross-interrogatory No. 9. How do you know that John Wall is dead? Who told you he was dead, and when were you so told by each of the parties who told you?" To cross-interrogatory No. 9 he answers: "Mr. William H. Hughes told me he was dead. It was some time about 1840, 1841, 1842, or 1843. Cross-interrogatory No. 10. How do you know when and where John Wall died? Who told you when and where he died, and when were you told by each of the parties who told you?" To cross-interrogatory No. 10 he answers: "Mr. William H. Hughes. I think he told me about 1850." There is not the slightest suggestion of evidence that at the time these declarations were made any dispute had arisen, or was expected to arise, over any land certificate that might thereafter issue in favor of the heirs of the John Wall named in the bounty warrant under which the land in controversy was located; and, assuming, for the sake of argument, that at the time the declarations were made the declarants, living in North Carolina, knew that the Republic of Texas would grant a land certificate to the heirs of her soldiers dying in her service, yet, as the evidence tended strongly to show that at the time the declarations were made the declarants did not know of the death of the Northampton county John Wall, there was certainly no exciting cause for fabrication in the declarations, and we think they were properly admitted.

The same objection urged to the evidence last discussed was interposed by appellant to the following answer of the witness Newsome: "John Wall is dead. I think he died in Tennessee. Think he died some time between 1839 and 1841. He was never married that I know of." The acquaintance of the witness with John Wall was such as to warrant the admission of his testimony that John Wall was never married within the knowledge of the witness. In answer to cross-interrogatories by the plaintiff the witness testified that all his testimony as to the death of John Wall and his service in the Texas army was based upon declarations of John Wall's mother and two half-brothers; but, if the admission of his testimony on any of those points was error, it was harmless, as proof of the same history of John Wall and his family pedigree was made by witness Mrs. E. E. Morgan, and John Hughes, supplemented by the family Bible and family portrait of John Wall, without contradiction from any source. Jamison v. Dooley, 98 Tex. 210, 82 S. W. 780. Mrs. E. E. Morgan's testimony as to the history of John Wall and his family pedigree was based upon declarations of Wm. H. Hughes, then sole heir to the Northampton county Wall's estate, and his wife, and the testimony of John Hughes, son of Wm. H. Hughes, as to the same matters was based upon the family Bible, a family portrait of John Wall, and upon declarations of his father and mother, maternal grandmother and aunt, Mrs. E. E. Morgan, and the testimony of both of these witnesses on the subject was properly admitted, as the declarations of Mrs. Wm. H. Hughes, who was not interested, were certainly competent. Kirby v. Boaz, 41 Tex. Civ. App. 282, 91 S. W. 642, and authorities there cited. There is no evidence in the record to show that Wm. H. Hughes had no other relatives after the deaths of his mother and half-brother, who would be competent declarants upon the subject, and that his wife must necessarily have received from him her information of the family history, as contended by appellant.

Appellant's assignments of error numbered 3, 7 and 9 in his brief are overruled because too general. Evans v. Jackson, 41 Tex. Civ. App. 277, 92 S. W. 47.

The following charge to the jury was given by the trial court: "The plaintiff must recover, if at all, upon the strength of his own title, and must establish his case by a preponderance of the evidence; and, should you be unable to decide from the evidence what John Wall the said bounty warrant No. 9567 was issued to, you will find for the defendants." The court also refused plaintiff's re-

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quested charge, in effect that, if the jury should be unable to decide from the evidence whether the John Wall intended in the bounty warrant was the Nash county John Wall or the Northampton county Wall, then they should return a verdict in favor of plaintiff. The proof showed that defendants, and those under whom they claimed, have paid taxes on the land in controversy ever since the year 1884, under claim of title, and have been in adverse possession of it since the year 1895, taking such possession before the institution of this suit, which was filed in the year 1900, and have cultivated and improved it. The evidence tended to show that plaintiff acquired such rights in the land, if any, as was vested in the heirs of the Nash county John Wall, but the proof further showed that plaintiff and those under whom he deraigns title have never been in possession of the land, nor paid any taxes on it, and that they never took any active steps to claim it until the year 1895. Accordingly there was no error in giving the charge above quoted, and in refusing plaintiff's requested charge. Neither was there error in refusing the charge requested by plaintiff that, if A. E. Thomas, the vendee of E. E. Kirby, plaintiff's vendee, had possession of the land prior to the time defendants took possession of it, then the burden was upon defendants to prove that the Northampton county Wall was the John Wall named in the bounty warrant by virtue of which the land was located, as we fail to perceive how the possession of A. E. Thomas could be held to be the possession of his vendor. Watkins v. Smith, 91 Tex. 591, 45 S. W. 560, and authorities there cited.

For the reasons above noted, the judgment of the trial court is affirmed.

WESTERN UNION TELEGRAPH CO. v. PARSLEY.

(Court of Civil Appeals of Texas. May 27, 1909. On Rehearing, July 1, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 27*)—DELAY IN DELIVERY OF MESSAGES—LIABILITY—WHAT LAW GOVERNS.

The law of the state from which a telegram is sent for delivery to the addressee in another state determines whether the addressee may recover for mental anguish for negligent delay in the delivery of the message at its destination.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 27.*]

2. EVIDENCE (§ 80*) — PRESUMPTIONS — LAWS OF OTHER STATES.

In the absence of evidence as to what the law of a sister state is at the time of a trial, it will be presumed that it is the same as the law of the forum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

3. EVIDENCE (§ 67*)—PRESUMPTION—CONTINUANCE OF FACT OR CONDITION.

Proof of a decision rendered by the Supreme Court of the territory of Oklahoma in 1894, determining the law on a particular subject, is not such conclusive proof of the law of the state of Oklahoma, 14 years later, as would warrant a charge that the law of the state of Oklahoma was as laid down in the decision in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 67.*]

On Rehearing.

4. TELEGRAPHS AND TELEPHONES (§ 36*)—OBLIGATION OF TELEPHONE COMPANY TO TRANSMIT MESSAGES.

The contractual obligation of a telephone company accepting a message for transmission is to use reasonable diligence to deliver it to the addressee.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 26; Dec. Dig. § 36.*]

5. TELEGRAPHS AND TELEPHONES (§ 56*)—FAILURE TO DELIVER MESSAGES—LIABILITY—RIGHT OF ADDRESSEE.

The addressee of a message may sue a telephone company for mental anguish resulting from the breach of contract to promptly deliver the message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 37; Dec. Dig. § 56.*]

6. CONTRACTS (§ 144*)—WHAT LAW GOVERNS.

The rights and duties of parties to interstate contracts are determined by the law of the state where the contract is made unless a contrary intention appears.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 724; Dec. Dig. § 144.*]

7. TELEGRAPHS AND TELEPHONES (§ 66*) — NONDELIVERY OF MESSAGES — BURDEN OF PROOF.

A telephone company sued in Texas by the addressee of a message sent from Arkansas for delivery in Oklahoma, for mental anguish for failure to promptly deliver, *held* to have the burden of proving that the laws of Arkansas do not permit a recovery for mental anguish.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

8. TELEGRAPHS AND TELEPHONES (§ 66*) — NONDELIVERY OF MESSAGES — BURDEN OF PROOF.

A telephone company sued in Texas by the addressee of a message sent from Arkansas for delivery in Oklahoma for mental anguish, which shows that a recovery cannot be had under the laws of Arkansas for mental anguish resulting from a tort committed outside of the state, must, to escape liability, also show that under the laws of Oklahoma, within which the tort occurred, there can be no recovery.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

9. TRIAL (§ 169*) — REFUSAL TO GIVE PEREMPTORY INSTRUCTIONS.

To sustain an assignment complaining of the refusal to give a peremptory instruction for a party having the burden of proving a fact, the evidence establishing the fact must be such as authorizes the court to assume as a matter of law that the fact was established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

10. TELEGRAPHS AND TELEPHONES (§ 68*) — TRANSMISSION OF MESSAGES——LIABILITIES—MENTAL SUFFERING.

A contract by a telephone company for the delivery of a message, entered into in the state of Arkansas, contains, among the substantive provisions, the right granted the addressee by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Kirby's Dig. § 7947, to recover damages for mental anguish for a failure of a performance of its duty.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

11. Evidence (§ 67*) — Presumptions — Continuance of Fact or Condition.

The presumption based on the policy of consistency, which authorizes the inference that, when the judiciary of a country has once adopted a rule of construction, it will be adhered to and considered as prevailing until the contrary is shown does not apply with equal force when there has been an entire change of the judiciary system, and the court will not presume that the decisions of the courts of a territory prevail after the territory has been admitted as a state.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 67.*]

12. Evidence (§ 5*)—Judicial Notice—Common Knowledge.

The court judicially knows that, prior to its admission into the Union, Oklahoma consisted of the territory of Oklahoma and Indian Territory, and that the territories were governed in a large measure by different laws emanating from different sources.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

13. Evidence (§ 67*)—Presumptions.

The court will not presume that a rule of construction adopted in the territory of Oklahoma by its territorial Supreme Court extended over and is made applicable after the admission of Oklahoma into the Union to a part of the state never a part of the territory.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 67.*]

14. Courts (§ 428*)—Territorial Courts.

The territorial courts which existed in the Indian Territory and Oklahoma Territory before the admission into the Union of Oklahoma as a state formed no part of the judicial system provided for in the federal Constitution, and such courts ceased to have any further existence on the admission of the state into the Union.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1133; Dec. Dig. § 428.*]

Error from District Court, Bowie County; P. A. Turner, Judge.

Action by W. A. Parsley against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 114 S. W. 156.

Todd & Hurley, for plaintiff in error. Hart, Mahaffey & Thomas, for defendant in error.

HODGES, J. The defendant in error recovered damages against the plaintiff in error in the sum of $500 for mental anguish suffered in consequence of the alleged negligent failure in the transmission and delivery of a telegram. Defendant in error resided at Haworth, Okl. On the 7th day of March, 1908, his brother, who resided at or near Tuckerman, Ark., sent him a message informing him that their sister at that place was not expected to live, and for him to come at once. The message was not delivered until about 5 o'clock p. m. the next day. The jury found, and we think the testimony is sufficient to support the finding, that the failure to deliver the telegram was due to the negligence of the servants of the telegraph company at Haworth; that had it been delivered with proper diligence the defendant in error could and would have reached his sister before her burial.

The principal issue presented in this court is embraced in the first assignment of error, which complains of the refusal of the court to direct a verdict in favor of the telegraph company. It is claimed that the facts show that the cause of action, if any, arose in Oklahoma, and the right of recovery is governed by the laws of that state; that, under the laws of Oklahoma, no recovery can be had for mental anguish in such cases. We do not agree to the contention that in cases like the present the right of recovery asserted by the addressee of a delayed telegram is governed by the laws of the state where the message is to be delivered. On the contrary, we think both the courts of this state and other authorities of high standing support the conclusion that the law of the state from which the message is sent determines whether or not the complaining party is entitled to recover damages for mental anguish. Tel. Co. v. Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936; Tel. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427; Tel. Co. v. Garrett (Tex. Civ. App.) 102 S. W. 456; Tel. Co. v. Buchanan, 35 Tex. Civ. App. 437, 80 S. W. 561; Ligon v. Tel. Co. (Tex. Civ. App.) 102 S. W. 430; Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579; 2 Wharton, Con. of Law, § 471f. The telegram in this suit having been sent from a point in the state of Arkansas, where a recovery for mental anguish is now permitted, we think the laws of that state should be looked to as determining the rights of the injured party.

But if it should be held otherwise, and that his rights are to be determined by the laws of the state of Oklahoma, we do not think the evidence relied upon as to what the laws of that state were at the time this message was sent and received, or the case tried in the court below, is of such character as to authorize the court to assume as a matter of law that the laws of that state denied a recovery for mental anguish in telegraph cases. The evidence consisted of a decision rendered by the Supreme Court of the territory of Oklahoma in 1894, 13 years before the incorporation of Oklahoma into the Union, with the Indian Territory, as a state, and 14 years before this message was sent. Haworth is situated in that portion of the present state of Oklahoma which was formerly a part of the Indian Territory, and was therefore never a portion of the territory of Oklahoma, and its locality was not affected by the decision rendered in the case referred to. In the absence of proof as to what the law of the state of Oklahoma was at the time of the

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trial, it will be presumed that it was the same as that of the forum. Burgess v. Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833; Tel. Co. v. Lannom (recently decided by this court) 119 S. W. 910. The facts adduced at most furnish only a basis for an inference as to what the law of the present state of Oklahoma was at the time of the trial, and is by no means such conclusive proof as would authorize the court to give a peremptory instruction.

The remaining assignment raises a question predicated upon an issue of fact which we think was settled by the verdict of the jury. The judgment of the district court is accordingly affirmed.

On Rehearing.

In its motion for rehearing the plaintiff in error says that it does not claim that the right of recovery in this case is governed by the laws of Oklahoma solely because the cause of action arose in that state, but does contend that the right is governed by the statute laws of Arkansas, and that under that statute such actionable negligence is a tort and not a breach of contract, and the right of recovery is limited to negligence occurring within the state of Arkansas. It is argued that the courts of Arkansas predicate the right to recover for mental anguish as an element of actual damages in this class of cases upon the ground that the negligence complained of in failing to promptly deliver the message is a tort, not a breach of contract, and hold that the cause of action, if any, arises in the state where the negligence is committed, and for that reason the courts of this state cannot look to the statute of Arkansas for the purpose of determining any of the rights of the defendant in error to recover in this case. Reduced to its final analysis the argument is that this court should not award damages for mental anguish, because the courts of Arkansas would not do so under the same state of facts; that if this suit were brought in that state no recovery could be had, for the reason that the statute of Arkansas had not been violated. It must be conceded that, under the decisions of this state, the addressee for whose benefit a telegram is sent is such a party to the contract by which the telegraph company undertook to transmit and deliver the message as to be entitled to recover damages for mental anguish for a breach of the contract in failing to promptly deliver the message. The contractual duty of the telegraph company when it accepts a message for transmission is to use reasonable diligence to deliver it to the addressee. Klopf v. Tel. Co. (Tex.) 101 S. W. 1072, 10 L. R. A. (N. S.) 498. A failure to perform that duty is a breach of the contract, for which the addressee may sue and recover damages for mental anguish. This is regarded as the settled law in this state, as a result of the judicial construction adopted by our courts in applying the general rules of commercial law regulating the rights of parties to that class of contracts, without reference to the local laws of any state. It must also be admitted that by the rules adopted in this state, and by the great weight of authority in other jurisdictions, the rights and duties of parties to interstate contracts are to be determined by the law of the state where the contract is made, unless it appears that the intention of the parties was otherwise. The laws of the particular state where the contract is made are as much a part of the agreement as if their provisions were expressly made a part of it. 1 Wharton on Conflict of Laws, § 1; 9 Cyc. 582. In view of the well-established rule that the lex loci contractus will, until the contrary is shown, be presumed to be the same as the law of the forum, the burden rested upon the telegraph company in this suit to allege and prove that, by the laws of the state where this cause of action arose and of that state where the contract was made and in part to be performed, there could be no recovery for mental anguish. If it be not shown that a recovery would be denied under the laws of Arkansas, it is wholly immaterial what the laws of Oklahoma be. But if the former should be proved, and the denial of a recovery there should be based upon the grounds claimed by the plaintiff in error in its brief that the negligence complained of was a tort committed beyond territorial jurisdiction of the courts of Arkansas, then plaintiff in error would be under the further duty of showing that under the laws of Oklahoma, the place where the dereliction occurred, there could be no recovery for such negligence. Inasmuch as the assignment now under consideration, and the only one raising the questions here discussed, complains of the refusal of the court to give a peremptory instruction to find for the defendant, it follows that the evidence essential to a discharge of the burden resting upon the plaintiff in error must be such as would authorize the court to assume as a matter of law that the facts in issue had been established by the testimony offered. In support of its pleadings the plaintiff in error offered in evidence section 7947 of Kirby's Digest of the Laws of Arkansas, which is as follows: "All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company." Acts 1903, p. 123. It was admitted that prior to the passage of this law the courts of Arkansas had by judicial construction denied a recovery of damages for mental anguish unaccompanied by physical suffering in telegraph cases.

The plaintiff in error also offered in evi-

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dence a decision of the Supreme Court in the case of Western Union Tel. Co. v. Ford, 77 Ark. 531, 92 S. W. 528, rendered in 1906. In that case the plaintiff in the suit was the addressee in the telegram, and resided in Texarkana, Ark. Her sister died in Missouri, and a niece of the plaintiff delivered to the defendant telegraph company at Joplin, in that state, a message notifying plaintiff of her sister's death, and telling her to come to Carthage. The message was received at the Texarkana office, but there was negligence in delivering it, by which the plaintiff failed to reach Carthage in time to attend her sister's funeral. Suit was instituted in the courts of Arkansas, and a recovery for mental anguish was permitted. It was conceded in the discussion of the case by the court that, under the laws of the state of Missouri, no damages could be had for mental anguish unaccompanied by physical suffering; but on account of the statute law in force in the state of Arkansas, and the fact that the negligence complained of occurred in that state, the court permitted a recovery. In discussing the case the court said: "It will be observed that our statute does not make the right to recover such damages depend upon any contractual relation existing between the telegraph company and the person injured by its negligence, but declares in broad terms that all telegraph companies doing business in the state shall be liable for mental anguish for negligence in receiving, transmitting, or delivering messages. In fact, the right of an addressee to recover damages at all is not based on contract, as none exists." The court then proceeds to quote from Thompson on Electricity, where the rights of the addressee are placed upon the grounds of the public duty which the telegraph company owes to any person beneficially interested in a message. After referring to the case of Peay v. Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463, in which the doctrine was first unequivocally announced in that state that mental anguish unaccompanied by physical suffering would not be allowed as an element of damages for failure to deliver a telegraphic message, the court proceeds: "The present statute was obviously enacted by the Legislature in order to change the rule in the Peay Case as to the right to recover such damages; and if we indulge in any speculation at all as to the motive and intention of the lawmakers, we must hold that the statute was passed with the full knowledge of the decision of this court, holding that no such damages were recoverable in this state for negligence in delivering a message here which had been sent from a state where such damages were allowed." Again, the court says: "We need not and do not decide what would be the effect of the statute if the act of negligence complained of had occurred in the state of Missouri, whence the message was sent. That question does not arise in this case." This was all of the evidence offered by the plaintiff in error as to what were the laws in the state of Arkansas, either statutory or that prevailing by judicial construction.

In rebuttal the defendant in error offered in evidence the case of Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579, decided by the same court more than a year later. In that case it appeared that the suit was by the addressee of the telegram sent from a point in Tennessee to Stuttgart, Ark. The message was transmitted by way of St. Louis, Mo., and thence to Arkansas. The testimony established the fact that it never reached Arkansas; and for this negligence the plaintiff, the addressee in the telegram, asked and obtained a recovery for mental anguish. In the opinion rendered the court referred to the Ford Case and said: "While the right to recover by the addressee is almost universally recognized in America, yet the grounds of recovery are variously sustained; some of the courts holding that the contract of the sender inures to the benefit of the addressee, and others holding that it is an action of tort, and others holding that it is a breach of a public duty. * * * It is argued therefrom that no tort occurred, and no negligence is shown to have been committed in Arkansas, and that consequently no action can be maintained here. A somewhat similar question was presented in the Ford Case, supra. A message was sent from Missouri, where the law does not authorize recovery of damages for mental anguish; but the evidence in that case showed that the telegram was transmitted to Arkansas, and that the negligence occurred in that state. The court did not go beyond that point in determining the principle controlling it." Reference was made to the case of Lee v. Ark. & L. R. Co., 79 Ark. 448, 96 S. W. 148, where a telegram was sent from a point in Arkansas to be delivered in Louisiana, and the negligence occurred in Arkansas. The court held that the negligence was in the transmission in Arkansas, and not in Louisiana, and did not go beyond the facts in determining what would be the effect had there been negligence in delivery in Louisiana. It argues, therefore, that the case then under consideration presented a different phase of the question from any that had theretofore been before the courts of that state. It then proceeds to cite numerous Tennessee authorities holding mental anguish recoverable as an element of damages, and proceeds: "It will be seen by the above-cited cases Tennessee was one of the states which sustained such recovery by judicial construction, and such actions are not dependable upon statute as they are in Arkansas. But the statutory action is intended to place in force in this state substantially what is known as the mental anguish doctrine in the states where it prevails by judicial construction." After citing Western Union Tel. Co. v. Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105,

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it then proceeds to quote at length from Wharton on the Conflict of Laws regulating the rule for the construction of contracts relating to interstate messages, and concludes: "Applying this principle here, it is not material in this case which view is generally taken as to the action, whether ex delicto, ex contractu, or statutory, for the action must be sustained by reason of the Tennessee contract. It is held in Tennessee that the addressee recovers upon contract of the sender inuring for his benefit, and that mental anguish is a recoverable element in such contracts." After citing numerous authorities, the court continues: "In this case, although there may be no statutory action arising in Arkansas, for the reason that no negligence has occurred actionable under the statute, yet here is a contract which, under the laws of Tennessee, where it was made, between the sender and the telegraph company, inured to the benefit of the addressee, and one element of the contract was the right to recover for mental anguish. That action is under the principles heretofore quoted from Wharton, which seem fully supported by the authorities sustainable here; and that is as far as the court is required to go in this case."

This is all of the testimony contained in the record as to what is the law of the state of Arkansas on this subject. From this it is apparent that by the statutory law of that state mental anguish in telegraph cases can now be considered as an element of actual damages, and the rule therefore prevailing by judicial construction is abolished. It follows, therefore, when the message involved in this suit was delivered to the plaintiff in error and it undertook to transmit and deliver it to the defendant in error, among the substantive provisions of the contract was the right of the addressee to recover damages for mental anguish for a failure in the performance of the duty so undertaken. But it is insisted that the courts of Arkansas hold and have established the precedent that, where the negligence occurs beyond the limits of that state, their statutory provisions do not apply, and no recovery can there be had for mental suffering by the addressee. Without undertaking to say what bearing such a ruling, if made, would have upon the determination of this particular case, we feel justified in holding that so far as the evidence adduced shows those courts have not announced such a doctrine since the enactment of the statute referred to. In neither of the two cases, nor in any of those referred to in the opinions incorporated in the record, has that particular question been decided by them. In the Ford Case, the one relied on by the plaintiff in error for authority upon that proposition, the facts were unlike those here involved, and the court decided nothing except the issues directly presented. It is true it was stated in the course of the opinion that the right of the addressee to recover damages (referring to any class of damages) for negligence in failing to deliver a telegraphic message was not based upon any contractual relations of the parties, for the reason that the addressee had no contract with the company for the transmission of the message. But in a much later case involving a somewhat different state of facts the same court does recognize such contractual relations, and there places the right of the addressee to recover solely upon that ground. Plaintiff in error contends that this was due to a spirit of interstate comity. The court, however, did not give that as a reason for the ruling made, but justified its conclusions by referring to the general principles of law pertaining to the construction of contracts. But assuming that it was actuated by a spirit of comity in giving effect to a Tennessee contract, this would of itself indicate that the rule prevailing in Tennessee was in harmony with the recognized policy in Arkansas. In the recent case of Beauchamp v. Bertig, 119 S. W. 76, decided by the Supreme Court of Arkansas, it is held that one of the recognized rules adopted by courts in assuming jurisdiction and awarding relief upon principles of comity is that relief will always be refused when the grounds upon which it is sought contravene some established and important policy of the state of the forum. In disposing of this issue of fact, we think it is sufficient to say that the evidence fails to show that the precise question here involved has ever been adjudicated by the courts of Arkansas, and that it cannot be said that any well-defined policy has there been adopted opposing the rule in this state. It would be premature for this court to now anticipate such a holding. It will be time enough to yield our convictions concerning the general rules applicable to the interpretation of contracts, and for the ascertainment of the rights and obligations of the parties thereto, when the courts of that state have unequivocally adopted a contrary policy.

But assuming that the contention of the plaintiff in error is correct, and that his action must be regarded as one founded exclusively upon a tort committed in the state of Oklahoma in negligently failing to deliver the message within a reasonable time, still, upon principles of interstate comity, the defendant in error would be entitled to recover damages for mental anguish unless it be shown that by the laws of that state no such damages are recoverable in cases of this character when not accompanied by physical injury. As evidence of the law now existing in the state of Oklahoma upon that subject, the plaintiff in error refers to a decision rendered by the Supreme Court of the territory of Oklahoma in 1894, many years before the present state was organized, refusing recognition of what is commonly called the "mental anguish doctrine" as it obtains in

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this state; and also offered parol evidence to the effect that the United States District and Circuit Courts and the Circuit Courts of Appeal so far as they have acted have likewise repudiated that doctrine. Upon the sufficiency of these facts the plaintiff in error relies for support of its contention that the laws of the present state of Oklahoma do not permit recovery for mental suffering unaccompanied by physical injury. It is argued that, having shown the rule of law adopted by these courts in the two territories of which the present state of Oklahoma is composed during their territorial existence, it will now be presumed that the same rule of judicial construction was continued after the organization of the state, and that the same policy is now adhered to by the state courts of Oklahoma. In support of that proposition we have been referred to the last edition of Sutherland on Statutory Construction, §§ 20, 26. In the first section referred to the author quotes from a decision rendered by Chief Justice Marshall in American Ins. Co. v. Canter, 1 Pet. 541, 7 L. Ed. 242, in which the court holds that, when conquered territory is confirmed by treaty, the ceded territory becomes a part of the country to which it is annexed, either on the terms stipulated in the treaty, or such as the master may impose. On such a transfer the relations of the inhabitants toward each other undergo no change; there is merely a change of the sovereign to which they owe allegiance. The author then announces the rule in such cases to be that the laws, usages, and regulations in force at the time of the conquest remain in force till changed by the new sovereign. The decision from which the quotation is made in the text was a case in which the validity of a court created under the territorial laws of Florida before its admission into the Union as a state was involved. Florida had formerly been a province of Spain, and was ceded to the United States by that government in 1819. The court was there discussing the political status of a province, an integral part of a foreign country, after its transference to the new sovereignty of the United States. There is no analogy between such conditions and those which obtain when a territorial government is abolished and a sovereign state formed. The latter involves to a certain extent, at least, the elements of dissolution and reorganization, necessarily producing changes in the relation of the inhabitants toward each other. It is not merely the shifting of a political organization from one sovereign to another. It is clear that neither the author nor the court from which he quotes had in mind the political mutations involved in the organization of a territory into a state under our system of government.

In section 26 the author says that "only a political change is produced by the admission of a state into the Union. * * * The territorial laws enacted by Congress or the local Legislature continue in force so far as they are consistent with the new condition of statehood and the provisions of the state Constitution." The adjudicated cases referred to in the notes do not support the inference deduced by the plaintiff in error from the text quoted. They show that in each instance where it was sought to invoke the authority of a territorial law it has been specially continued in force by an ordinance, or some affirmative declaration by the convention forming the Constitution of the new state. In fact, in every case which has come under our observation, where the continued vitality of territorial laws after the organization of a state are relied upon, there has been some special provision prolonging their application till altered or repealed. It would appear that if territorial legislation by virtue of its original enactment continued in force after the expiration of the territorial government, such precautionary provisions would be wholly unnecessary. The prevalence of the custom to adopt those special provisions when it is desired to continue the applicability of territorial legislation goes far toward showing that there is no established recognition of the doctrine contended for by plaintiff in error's counsel. But if it be conceded that the affirmative enactments promulgated by Congress, or by the local Legislature of a territory, should be continued in force upon the principle contended for, we do not think the rule would go so far as to include a mere rule of construction adopted by the courts of the territory which is not of such long standing and importance as to become a rule of property. It was to legislative enactments that the authority cited had reference, and not to rules formulated by the judicial construction of the courts. These are effective only so long as the courts see fit to follow them. The presumption based upon the policy of consistency which would authorize the inference that when the judiciary of a country had once adopted a rule of construction it will be adhered to and considered as prevailing till the contrary is shown does not apply with equal force when there has been an entire change of the judicial system. When a territory is organized into a state, in our opinion, not only do the laws of the territorial government cease to have any force unless specially continued, but the territorial courts are extinguished and succeeded by an entirely new system. The territorial courts which existed in both the Indian Territory and Oklahoma before the organization into a state were creatures of congressional legislation, formed no part of the judicial system provided for in the Constitution of the United States, and ceased to have any further existence upon the admission of the state into the Union. McNulty v. Beatty, 10 How. 81, 13 L. Ed. 336; Benner v. Porter, 9 How. 235, 13 L. Ed. 119; Moore v. United States, 85 Fed. 465, 29 C. C. A. 269; 26 Amer. & Eng.

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Ency. (2d Ed.) 467; 11 Cyc. 959, and cases there cited.

The presumptions relied upon by counsel for plaintiff in error would be difficult of application to the situation growing out of the organization of the new state of Oklahoma. We know judicially that prior to its admission into the Union this state consisted of the territory of Oklahoma and what was known as the "Indian Territory." We also know judicially that these territories were each governed in a large measure as to their domestic affairs by entirely different laws, emanating from different legislative sources. Each territory was under the dominion of separate and distinct judicial systems. From this condition there would inevitably arise conflicts, both in their legislative provisions and in the rules of decision adopted by the different courts of the two countries. Which shall we now presume were continued in force after the organization of the state, and which shall prevail in cases of conflict? The very fact that this condition may arise in the attempted application of some of the old laws is, we think, a sufficient answer to the contention that any of them will be presumptively continued in force after the organization of the two territories into one state. The law will not create a presumption which logically leads to irreconcilable confusion.

We do not think it can be contended with any show of reason that we should presume that the rule of construction adopted in the territory of Oklahoma in 1894 by its territorial Supreme Court, should, after the organization as a state, be extended over and made applicable to a portion of the country never a part of that territory. Haworth, the place where the negligence is shown to have occurred, was not within the limits of that territory, but was situated in that portion of the country known as the "Indian Territory." We know from the laws of Congress that the Indian Territory was provided with a special judicial system in which the courts could entertain jurisdiction of actions of this class. The testimony fails to show that these courts had ever adopted any rule of construction upon the question here involved, nor is there any evidence as to what rule, if any, had been adopted by the United States Circuit Court of Appeals for the Eighth Circuit. It seems that the Supreme Court of the United States has never yet passed upon the question as to whether or not mental anguish is recoverable as an element of actual damages in this class of cases.

In conclusion, we might add that if the burden of showing what is the law prevailing at the present time in any state of the Union is discharged by such evidence as that here relied upon to prove the law of the state of Oklahoma, the burden is much less onerous than we have heretofore conceived it to be. If the presumptions invoked by counsel for plaintiff in error are applicable to this case and entitled to the cogency claimed, they are equally applicable and entitled to equal force when applied to a case involving the status of the law of any other state of the Union which has heretofore passed through a territorial form of government. If that be true, then it follows that the burden would be discharged in every such instance by simply showing what had been the holdings of the territorial courts, or of the United States courts, while the territory of which the particular state is formed was dominated by the federal judiciary. Lapse of time would be immaterial, and we would thus have the strange spectacle of proving the present law in many of the older states by simply showing the judicial construction adopted by an extinct judicial system, or an antiquated ruling by federal courts made perhaps many years ago. To illustrate: In order to prove the present status of the law in Florida, it would make a prima facie case by showing what the territorial courts held or the territorial Legislature enacted prior to 1845 when it was admitted as a state. To our minds the consequences which would logically flow from such a rule are sufficient to show its inapplicability and unworthiness to be recognized by the courts.

After a careful examination of the question involved, we have reached the conclusion that the former disposition made of this case was correct, and the motion for rehearing is therefore overruled.

KNOWLES et al. v. NORTHERN TEXAS TRACTION CO.

(Court of Civil Appeals of Texas. June 10, 1909. On Rehearing, July 3, 1909.)

1. CORPORATIONS (§ 439*)—POWERS—RIGHT TO SELL REAL ESTATE.

The right of a corporation to dispose of the real estate it is authorized to purchase is a necessary incident to its ownership thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

2. CORPORATIONS (§ 439*)—POWERS—RIGHT TO SELL REAL ESTATE.

A corporation incorporated to erect buildings and to accumulate and loan funds to purchase real estate, and authorized by Sayles' Ann. Civ. St. 1897, art. 651, subd. 4, to sell and convey such real estate as the purposes of the corporation may require, has authority to grant to a traction company a right of way over its land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

3. CORPORATIONS (§ 446*) — RIGHT TO HOLD REAL ESTATE.

A conveyance of land to a corporation incompetent by its charter to take title to real estate is not void, but voidable only, and the conveyance is valid until directly assailed by the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1785; Dec. Dig. § 446.*]

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4. Railroads (§ 65*)—Grant of Railroad Right of Way—Evidence.

Evidence *held* to support a finding that a corporation owning land agreed to the construction of a right of way over the land for a traction company, authorizing the company to claim the right of way.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 65.*]

5. Railroads (§ 63*)—Grant of Railroad Right of Way—Evidence.

Where a traction company shifted its track from its old right of way to the land of a corporation with the consent of the corporation, or where it so shifted the track without such knowledge, but the corporation, after being advised of the facts, approved the act, the corporation could not oust the company from the possession thereof, but its right was limited to an action for damages only.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 63.*]

6. Railroads (§ 65*) — Grant of Railroad Right of Way.

Where a traction company pursuant to the consent of a corporation owning land entered on the land and constructed its track over it, the traction company was lawfully in possession, and its right to the possession did not depend on the terms of a contract to be subsequently agreed on, and on the failure of the parties to agree on a contract regulating the use of the land, the corporation could not revoke its consent, but was confined to an action for damages.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 65.*]

7. Railroads (§ 65*)—Acquisition of Right of Way.

A traction company constructing its right of way over land with the consent of the owner without first complying with municipal ordinances, is entitled to hold its right of way as against the owner and the right to complain is confined to the municipality.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 65.*]

8. Railroads (§ 61*)—Acquisition of Right of Way.

A conveyance of land for an interurban railroad right of way is not void because the corporation is not authorized to take and hold land, to exercise the right of eminent domain, or to construct and operate an interurban road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 61.*]

9. Estoppel (§ 106*)—Right to Rely on Estoppel.

An estoppel may be relied on in a court of law as well as in equity.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 299; Dec. Dig. § 106.*]

10. Railroads (§ 65*) — Acquisition of Right of Way.

Where a traction company entered on land with the consent of the owner and constructed an interurban railroad track thereon, it could urge that the owner was estopped from ousting it, though it had not complied with municipal ordinances, and did not possess the right to hold land or construct and operate an interurban road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 65.*]

11. Corporations (§ 426*) — Obligations — Liability—Ratification.

While a corporation cannot incur an obligation without the consent of its directors, a corporation may be bound by the act of its agent acting within the scope, express or implied, of his authority, and it may become bound by acquiescing in and ratifying an unauthorized act done on its behalf by its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702–1704, 1708–1716; Dec. Dig. § 426.*]

12. Corporations (§ 426*) — Obligations — Liability.

A corporation may ratify by passive acquiescence, as well as by affirmative action, the unauthorized acts of its agents, and its acquiescence with knowledge, if continued for a considerable time, operates as a ratification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702–1704, 1708–1716; Dec. Dig. § 426.*]

13. Corporations (§ 426*) — Obligations — Liability.

When knowledge is brought home to a corporation of the unauthorized act of an agent, it must promptly disavow it, or it will be held to have ratified the act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1703, 1713; Dec. Dig. § 426.*]

14. Corporations (§ 432*) — Obligations — Liability.

Where the unauthorized act of an agent of a corporation is beneficial to it, a presumption of ratification by the corporation arises from slight circumstances.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1718; Dec. Dig. § 432.*]

15. Corporations (§ 432*) — Obligations — Liability.

Evidence *held* to support a finding that a corporation ratified the acts of its president, whereby he consented to the construction of an interurban railroad across the land of the corporation, binding the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*]

16. Appeal and Error (§ 730*)—Assignment of Error—Sufficiency.

An assignment that the court erred in its general charge in submitting a single issue, without necessary qualifications called for by the evidence, and in failing to submit other issues raised by the pleadings and proof, is too general and will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013–3016; Dec. Dig. § 730.*]

17. Appeal and Error (§ 1053*)—Erroneous Admission of Evidence—Harmless Error.

The error in admitting evidence in support of an issue is harmless, where no such issue is submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178–4184; Dec. Dig. § 1053.*]

18. Trial (§ 260*)—Erroneous Instructions.

Where the instructions assumed that the legal ownership of land was in plaintiff, and authorized a verdict in favor of defendant only if the jury believed defendant's possession and use of the land was with the consent of plaintiff's grantor, the refusal to charge that the deed to plaintiff vested in him the legal title was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

19. Trial (§ 256*)—Instructions—Requests —Necessity.

Where an instruction is not affirmatively erroneous, a party must request a proper charge supplying the omissions complained of.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. § 256.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

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Action by C. O. Knowles against the Northern Texas Traction Company, in which R. S. Waldron and others intervened. From a judgment for defendant, plaintiff and interveners appeal. Affirmed.

October 31, 1889, the Midway Company was incorporated under the laws of this state for the purpose of "erecting buildings and the accumulation and loan of funds for the purchase of real property in cities, towns, and villages." It was the owner of a tract of land containing over 200 acres and lying partly within and partly without the corporate limits of the city of Oak Cliff, which in 1889 it subdivided into lots, blocks, streets, and alleys as an addition to said city of Oak Cliff. The Fort Worth Street Railway Company was incorporated June 8, 1874, for the purpose of "erecting, building, constructing, operating, and maintaining a street railway on any or all of the principal streets of the city of Fort Worth, for the transportation of freight and passengers." February 11, 1895, the charter of said Fort Worth Street Railway Company was so amended as to define its purpose to be "the construction, maintenance, acquisition, and operation of lines of street railway for the purpose of transportation of freight and passengers for profit on any or all of the streets and within the corporate limits of the capital city of Fort Worth, Texas, and also on any and all of the streets of any or all additions of said city of Fort Worth and lying outside of the corporate limits of said city whether the same have been already established or may hereafter be established. And also on any or all of the roads of Tarrant county, Texas, leading from said corporate limits to said additions, and upon any private property over which said company may obtain the right of way in, near or adjacent to the said city of Fort Worth, Tarrant county, Texas. And for the construction, acquiring, maintaining and operating any suburban or belt lines of railway within or near the city of Fort Worth, Tarrant county, Texas." March 4, 1901, said street railway company by a further amendment of its charter changed its name to the "Northern Texas Traction Company." By act of the Legislature approved April 5, 1901, it was authorized to "construct, acquire, maintain and operate an interurban electric road from the city of Fort Worth through the counties of Tarrant and Dallas to and into the city of Dallas, in said Dallas county, Texas, by the extension of the lines now owned by it from Fort Worth, in Tarrant county, Texas, through the said counties of Tarrant and Dallas to and into the city of Dallas," and was further authorized in the construction of such an interurban electric road to exercise such rights of eminent domain as were conferred upon railroads by chapter 8, tit. 94, Rev. St. 1895. The traction company commenced, and in 1902 completed, the construction from Fort Worth to Oak Cliff, and from Oak Cliff, over the line of road belonging to the Oak Cliff & Dallas City Street Railway Company, whose rights it had acquired, to Dallas of its line of electric road. In the construction of its line of road, through a portion of the city of Oak Cliff it acquired by a conveyance from the Midway Company a right of way over said Midway Company's addition hereinbefore referred to, said right of way being known and identified by witnesses as the "Ninth Street right of way." This right of way extended from a point in Oak Cliff due west to the west boundary line of the addition. At a point three and one-half blocks, as laid off in the addition, east of the west boundary line of the addition it crossed Jefferson street, which curved south and east to a point where it intersected Tyler street in the city of Oak Cliff.

In the construction of its road the traction company, instead of continuing east on the right of way conveyed to it by the Midway Company, when it reached a point just west of Jefferson street constructed its road in an easterly direction, then along Jefferson street in a southerly direction and then eastwardly, making a double curve, referred to by witnesses as the "S" route. This part of the work of constructing the road seems to have been completed about March, 1902. Being dissatisfied with the way the road had been constructed, on account of the curve referred to, the traction company determined to change and straighten same by shifting its track from the Ninth Street and "S" routes south, so that its line of road would run on a straight line across said addition northwest from a point on Jefferson street about three blocks south of Ninth street. At this time while the land forming the addition had been subdivided into blocks, lots, streets and alleys, as aforesaid, only one or two, if any, of the lots had been sold, and the land was being used for and was treated by its owners as pasture land. In May, 1902, one Coffinberry, representing the traction company, went to Topeka, Kan., where Sweet, the president of the Midway Company, and Mulvane, its treasurer, resided, for the purpose of procuring from said Midway Company a right of way through said addition at the point to which the traction company wished to shift its track. He there saw and conferred with Sweet and with Mulvane, and as a result of such conferences by letter from Topeka instructed the manager of the traction company at Dallas to make the change as desired in the route of its road through the addition. The change was at once accordingly made. At that time one Betterton, a director of the Midway Company, and one Barry, another director, resided in Dallas. Barry was also the secretary of the company, and Betterton was its local agent for the purpose of looking after the

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property constituting the company's addition. It is reasonably clear from the record that both Barry and Betterton, if they did not know it at the time it was being made, shortly thereafterwards ascertained that the change had been made in the route of the traction company's road through the addition. Neither of them objected to or in any manner protested against the change as made. After the change was made, an extended correspondence between Sweet as president of the Midway Company, and Coffinberry and one Bishop, representing the traction company, was carried on, in an effort on the part of the traction company to obtain from the Midway Company a conveyance of the land in the addition appropriated by the former for its road, when the track thereof was shifted. The contents of this correspondence, so far as we think it necessary to do so, will be given in other parts of this opinion.

By a deed dated April 12, 1904, the Midway Company conveyed the land constituting the addition to appellant Knowles, excepting therefrom certain specified lots and blocks, described as "being represented upon a plat or part of said land made by this company some 14 years ago, which plat has since been abandoned by this company, and said lands held and used as acreage property, and not as lots and blocks." The suit was brought by Knowles against the traction company to try the title to and for possession of parts of the land appropriated by the traction company when it shifted its track from the Ninth street and "S" routes. The petition was in the ordinary form, except that in it by separate counts appellant averred title in himself under the 3, 5, and 10 year statute of limitations. Appellants R. S. Waldron, J. P. Blake, T. S. Miller, Jr., and L. A. Stemmons, who had acquired an interest in the property constituting the addition, under a contract with Knowles, intervened in the suit and adopted as their own the pleadings of appellant Knowles. The traction company answered by exceptions, a plea of not guilty, a plea of the 2-year statute of limitations as to damages claimed by appellants, and specially that it had entered upon and appropriated to use as a right of way for its road the land sued for by and with the consent of the Midway Company, its then owner, and relying upon such consent had expended in the shifting, etc., of its said road sums of money aggregating over $7,000, and as further ground of estoppel set up the reconveyance by it to the Midway Company of the Ninth Street right of way in consideration of the Midway Company's promise to convey to it the new way, which said reconveyance, it was alleged, the Midway Company had accepted, and afterwards had appropriated and continued to appropriate to its use the land thereby reconveyed to it. Appellants in reply plead at length matters which we think it unnecessary to state. The trial was before a jury. The only question submitted to them by the court was the one covered by the following instruction: "The question for you to decide and determine in this suit is: Did the Midway Company give its consent for the defendant Traction Company to shift and place its right of way where it now is—the lands thereon being the subject-matter of this suit? You are therefore instructed that if you find and believe from the evidence of this case that the Midway Company did not give its consent to the defendant company to shift its track and place it where it now is, you will find for the plaintiff. If, however, you find and believe from the evidence that the Midway Company did give its consent to the defendant company to shift its track and place it where it now is, you will find for the defendant company."

The verdict of the jury was in favor of appellee. A judgment was accordingly rendered that appellants take nothing by their suit.

T. B. Love, Lewis & Phillips, and R. C. Porter, for appellants. Baker, Botts, Parker & Garwood, Capps, Cantey, Hanger & Short, Finley, Knight & Harris, Walter H. Walne, and J. E. Gilbert, for appellee.

WILLSON, C. J. (after stating the facts as above). In a carefully and ably prepared brief appellants insist that the court erred in refusing to peremptorily instruct the jury to find in their favor. Of the grounds urged as demanding such action on the part of the court, we will examine such as we think deserve consideration.

We do not think there is merit in the contention made that the Midway Company was without power to grant to the traction company a right of way for its road over the Midway Company's addition. The purposes for which the latter company was incorporated appear from its charter to have been the "erection of buildings and the accumulation and loan of funds for the purchase of real property in cities, towns and villages." A right to dispose of the real estate it was authorized to purchase was a necessary incident to its ownership thereof (7 Thomp. Corp. § 8363); and, besides, authority to "sell, mortgage or otherwise convey such real estate as the purposes of the corporation required" was expressly conferred upon it by law. Sayles' Ann. Civ. St. 1897, art. 651, subd. 4. And see Steinway v. Steinway & Sons, 17 Misc. Rep. 43, 40 N. Y. Supp. 718, where it was held that a manufacturing corporation could give away portions of its manufactured goods as an advertisement; Whetstone v. Ottawa University, 13 Kan. 320, where it was held that a donation by a town-site corporation, where the direct and certain tendency of the building of a schoolhouse sought to be obtained by the donation was to enhance the value of its property, was held not to be ultra vires; and Fort Worth City

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Co. v. Smith Bridge Co., 151 U. S. 298, 14 Sup. Ct. 339, 38 L. Ed. 167, where it was held that a corporation created for the purpose of dealing in lands, possessed the incidental power to incur liability for building a bridge to secure better facilities for transit to and from land which it was its business to acquire and dispose of.

Nor do we think appellants' contention that the traction company was without power to take and hold a grant of the right of way, and therefore that the grant, if one was made, was void, should be sustained. The power of the traction company to take and hold the right of way could be questioned by the state alone. The rule was stated by the Supreme Court of this state, in Russell v. Ry. Co., 68 Tex. 652, 5 S. W. 686, quoting from Bank v. Matthews, 98 U. S. 628, 25 L. Ed. 188, to be that "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." And see Schwab Clothing Co. v. Claunch (Tex. Civ. App.) 29 S. W. 932; Ray v. Foster (Tex. Civ. App.) 53 S. W. 56; Scott v. Farmers' & Merchants' Bank, 97 Tex. 31, 75 S. W. 15, 104 Am. St. Rep. 835. For the purposes of this appeal, therefore, we think it must be assumed that the Midway Company had power to make, and the traction company power to take, a grant of the land in controversy. The question is, Having the power, is the evidence in the record sufficient to support a finding by the jury that it was exercised by the respective companies?

The traction company claimed that, among other ways, it acquired a right to make the use it did make of the land by reason of permission given it verbally by Sweet, the president of the Midway Company. Appellants denied that Sweet had so given such permission, and asserted, if he had, he had given it without authority from the Midway Company to give it, and therefore that it was not bound thereby. Whether such permission was so given by Sweet or not, and whether, if it was, the Midway Company became bound by his act or not, depended upon acts and declarations by Sweet evidenced by testimony of witnesses and by certain letters constituting an extended correspondence between Sweet on the one part, as president of the Midway Company, and one Coffinberry and one Bishop on the other part, representing the traction company. It is necessary to refer to that testimony and correspondence.

For the purpose of obtaining the consent of the Midway Company to the shifting of its track from the Ninth Street and "S" routes through its addition to the land it afterwards appropriated in said addition, and a conveyance to it of such land in May, 1902, the traction company sent one Coffinberry to Topeka, Kan., where Sweet resided. The testimony was conflicting as to what there o curred between Coffinberry and Sweet. W must assume that the conflict was determine by the jury in favor of the traction con pany's contention, and confine ourselves t an inquiry as to the sufficiency of the ev dence to support that contention. Accordin to Coffinberry's account of the conferenc he had with Sweet, the latter authorized hi in so many words to make the change as th traction company desired to make it, an promised to call a meeting of the directors o the Midway Company to confirm the consen so given and complete the transaction as i had been agreed upon between himself an Coffinberry. During his conference wit Sweet, Coffinberry endeavored to obtain fron him a statement in writing evidencing th understanding, but was informed by Swee that he could not give a writing more bindin than the promise he had given. Sweet a the same time informed Coffinberry that h (Sweet) had the management of the addition property, and transacted all or nearly al the business pertaining to it. After the conference with Sweet, Coffinberry drafted a letter to one Haynes representing the traction company in Dallas, instructing him to go ahead and make the change, and then sought and had a conference with Mulvane, the treasurer and a member of the board of directors of the Midway Company. In this conference he recounted to Mulvane the conversation he had had with Sweet, and expressed an anxiety to have something in writing to evidence the understanding he had had with Sweet. Mulvane assured him that Sweet had matters pertaining to the property in charge, and that if Sweet had agreed that the change might be made the traction company would be "perfectly safe in going ahead and doing it." Coffinberry then stated to Mulvane that he had drafted a letter to Haynes directing him to go ahead and make the change. To such statement Mulvane replied: "You are perfectly safe in doing that, Mr. Coffinberry." Coffinberry then sent to Haynes the letter he had written him, directing him to shift the track as the traction company desired it to be and as Sweet had consented it might be. The change was accordingly made. On the day following his conference with Sweet, Coffinberry wrote and sent to him a letter as follows: "Topeka, Kansas. May 6th, 1902. Mr. T. B. Sweet, President Midway Addition, City.—Dear Sir: Since my conversation with you yesterday I have concluded to notify our general manager to shift the track to the proposed right of way through the Midway addition at once, as it is very important to have the change made before we begin operating the road. This I do in pursuance of your assurance to me that the owners of the Midway addition are disposed to give us a fair show, and that you thought we could safely go ahead relying upon a deed as soon as your health im-

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proved enough to permit you to give the matter attention. You can readily see that to work in harmony will be to the interest of all concerned. Without this road your property could have been used for farming purposes only, the road will bring it into the market and give it advantages that you could not have hoped for without it. With this change we can assure you that the fare will be but five cents to and through your addition, making it preferable to many locations nearer Dallas as a place of residence. We should, in fact, have had a bonus from you. This we will not contend for. We feel, however, that we are entitled to the route that will best serve our purpose. I will leave the sketch, sent by our engineer, showing the line wanted, and the description with Mr. Laurence, and trust you will have deed executed and delivered at an early date. We will transfer back to you the right of way now occupied by the road. Very truly yours, J. B. Coffinberry." Sweet was sick at the time he had the conference with Coffinberry, and testified he did not remember receiving the foregoing letter, but added: "I presume that I did get the letter, but I doubt if I read it at that time."

Afterwards, in efforts to adjust the right of way matter which had not been concluded by a conveyance to the traction company, the correspondence before referred to was commenced between Sweet for the Midway Company and Coffinberry and Bishop for the traction company, May 24, 1902. Sweet wrote Coffinberry indicating that he did not then understand that the traction company had shifted its track as proposed, nor that the track was to be shifted as it had been. With his letter he inclosed a plat indicating the way his company desired the change to be made. Coffinberry replied May 29, 1902, advising that the change had already been made in a way different from that desired by Sweet, and expressing regret that he had not sooner received the map showing the manner in which Sweet wished the change to be made. In his letter Coffinberry said: "You will remember that I explained to you in Topeka that we wished to avoid a curve in your addition. I understood you to say that you thought that would be all right, and that I would be safe in advising our general manager to make the change. After talking to Mr. Mulvane and explaining to him what we wanted I notified you that I had advised Mr. Haines (general manager) to make change." After some further correspondence between Coffinberry and Sweet which need not be noticed, on October 13, 1902, Bishop wrote Sweet complaining that his company had not received the deed conveying the right of way as promised, and advising that if such a deed was not promptly sent to his company proceedings to condemn the right of way desired would be commenced. October 20, 1902, Sweet answered that he would at once call a meeting of the board of directors of the Midway Company and lay the matter before them. October 23, 1902, Sweet again wrote Bishop, suggesting that the delay he had complained of was due to the traction company's effort to do business with the Midway Company "through various agencies, instead of directly." In this letter Sweet, with reference to the change made in shifting the traction company's line of railway, called attention to the fact that his company had executed a deed conveying to the traction company a right of way over Ninth street, and with reference to the change made said: "A survey lately sent us shows that you have taken a direct line, entering our addition above Ninth street, and thence directly to Jefferson street." He then complained that the change as made so cut the lots and blocks in the addition as to make it difficult to conform the platting thereof to the change, adding that "the Midway Company is not opposed to enterprise and street railways nor disposed to make unnecessary trouble," and that "we had supposed your delay in this matter was because you was in possession of the right of way and using it and was therefore in no particular hurry." With his letter Sweet inclosed a form of a release to be executed by the traction company of the abandoned Ninth Street right of way, and assured Bishop that, when the release was returned to him executed with a description of the new right of way as desired by the traction company, "we will have executed and forwarded you a new right of way through the addition." With his letter dated October 31, 1902, Bishop returned executed the release of the old Ninth Street right of way, and sent to Sweet to be executed by the Midway Company a deed conveying the new right of way to the traction company. In a letter dated November 6, 1902, Sweet acknowledged the receipt by him of the release of the old right of way and of the deed to be executed by his company to the new right of way, but on account of calls in the deed to cross over a portion of the Myers survey, which he thought his company did not own, advised Bishop he would write to Mr. Barry for information before going further, adding, "if you still think we have any land in Myers survey I would give you a right of way through any land we may own in Myers survey as track is now laid and running—but I feel sure you do not run in Myers survey." November 10, 1902, Sweet again wrote Bishop, advising that the Midway Company did not own any part of the Myers survey, and inclosing a description he thought to be correct of the land desired by the traction company as a right of way for its railway. With reference to such description he said: "If I am correct I will complete the deeds at once; if I am not correct please have your man at Dallas confer with B. T. Barry, who knows all about it, and have a corrected description sent me. I thought to cure the matter by giving you

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right of way on any lands owned by the Midway Company in Robinson, Thomas or Myers surveys. As your road is now laid out and running, it is not so technically correct as to run a line as you have ruled it in your description. I therefore await further advices from you." November 26, 1902, Sweet wrote Bishop complaining that he had not received a reply to his letter of November 10th, and expressing a willingness to make at once a conveyance of the right of way desired over the Robinson survey, adding, "and will include Thomas survey if you will furnish the data." Bishop replied December 4, 1902, stating that the papers relating to the matter had been forwarded to the traction company's attorney at Dallas for more accurate information as to the Myers survey, and promising when the attorney had been heard from the matter would again be taken up. December 6, 1902, Sweet, acknowledging the receipt of Bishop's letter of December 4th, wrote: "I think I can make out the proper conveyance of right of way with the description heretofore sent, by describing it as being 'a strip of land 50 feet wide on either side of the center line of the track of the Northern Texas Traction Company's road as now laid and running through any land owned by the Midway Company in Dallas county, in the state of Texas, said land being a part of the J. B. Robinson survey and E. C. Thomas survey.' So far as I can see this would give you a good right of way without attempting to establish the corners and tangents. The road being located and running, it would give you a right of way just where it is running, and that, I understand, is all you want." December 19, 1902, Bishop replied, inclosing a deed to be executed by the Midway Company conveying the right of way. January 8, 1903, Bishop again wrote Sweet returning as unsatisfactory a deed to the right of way, which seems to have been sent to him by Sweet January 5, 1903. Sweet replied January 12, 1903, controverting objections urged by Bishop to the deed returned, and offering, to meet one of those objections, to permit the traction company to fence along the right of way "so long as the property was used for agricultural purposes or until the settlement in the addition should require the opening of the streets across the railroad." With his letter Sweet inclosed a draft of another right of way deed and of an agreement covering the fencing as proposed of the right of way used by the traction company. February 9, 1903, Bishop sent to Sweet, executed by the traction company, for execution by the Midway Company, contracts covering the fencing of the right of way, and at the same time sent to Sweet draft of a right of way deed to be executed by the Midway Company. The fencing contract after being executed by his company, on February 19, 1903, was returned by Sweet to Bishop. At the same time Sweet sent to Bishop executed a deed conveying the right of way, "all of which," he stated in letter transmitting same, "I have submitted to the majority, in interest, of the owners and to the controlling directors and to the secretary and attorney of the company." February 23, 1903, Bishop acknowledged the receipt by him of the papers referred to, and expressed his company's appreciation of Sweet's "courtesy in the matter." This, it might have been expected, would end the correspondence between the parties as to the right of way, but it did not. April 4, 1903, Bishop wrote Sweet expressing dissatisfaction with terms in the deed and returned it. The correspondence so renewed need not be further noticed. It continued until September, 1905, long after the date of the Midway Company's conveyance to appellant Knowles, without results satisfactory to the parties.

The statement of facts is a voluminous one, consisting of more than 400 pages of typewritten matter and we have not endeavored to state all the evidence bearing on the feature of the case now being discussed. That recited we think was amply sufficient, if Sweet's acts and declarations should be regarded as the acts and declarations of the Midway Company, to support, if not to demand, the finding by the jury that the Midway Company, if it had not before the traction company had shifted its track to the land in controversy, consented that said track should be so shifted, after it had been shifted had consented and agreed to it. In the view we take of the case, such a finding would be a sufficient support for the verdict and judgment, and it is not necessary that we should determine whether the evidence was sufficient or not to support a finding that the Midway Company had contracted to convey the land or a right of way over it to the traction company. If the traction company shifted its track from the old right of way to the land in controversy with the knowledge and consent of the Midway Company, or if it so shifted the track without such knowledge and consent, and the Midway Company, after being advised that it had done so, consented to and approved the act, we do not think it afterwards could maintain a suit to recover the land and oust the traction company from the possession thereof. In the one case the possession commenced by the traction company was not unlawful, and in the other, if unlawful when it commenced, it became lawful when the Midway Company consented to and approved the accomplished appropriation of the land for the road's purposes. The right of action existing in favor of the Midway Company under such circumstances we think would be one for damages only. For if the Midway Company consented to such use of its land, it could not, under the facts shown by the evidence, afterwards repudiate such consent and recover the land. The traction company was lawfully in possession, with the understanding that its possession might continue,

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Its right to possession did not depend upon the terms of a contract to be agreed upon. It took or held such possession with the consent of the Midway Company, in the absence of terms agreed upon and in the absence of a condition that its possession should be dependent upon an agreement as to terms. True, it may have been understood between the parties that a conveyance of the right of way should be upon conditions, but it does not appear that those conditions ever were agreed upon, nor does it appear that the traction company's right to continue the use of the land as a way for its road was conditioned upon the parties agreeing upon terms of a contract covering such use. On the contrary, the very nature of the use to which the land was subjected, forbids a conclusion that the parties intended that a failure on their part to agree upon the terms of a contract covering such use should operate to deprive the traction company of a right thereafter to continue to use the land as a way for its road. Evidently, such a contingency was not contemplated by the parties. On the failure of the parties to agree upon terms controlling the traction company's use of the land, we think the Midway Company could not revoke its consent given unconditionally to so use the land, but would be confined to a recovery of damages resulting to it from the use made of the land by the traction company. It was in effect so held, as we understand the ruling, by the Supreme Court in Ry. Co. v. Jarrell, 60 Tex. 269. There the railway company, relying upon Jarrell's promise to give it a right of way, over his land, if the citizens of Henderson county were under legal obligation to it to procure same, entered upon his land and was engaged in clearing a way for its line of railway when Jarrell forbade its proceeding further. There was evidence that afterwards Jarrell agreed that the railway might proceed with the construction of its roadbed over his land if it would throw and heap the dirt from the cuts and excavations in a particular manner; and there also was evidence that about the time he agreed to sign, but afterwards refused to do so, a deed conveying a right of way through the land to the company. The Supreme Court said: "Under all the facts disclosed as to the agreement in reference to the right of way, and as to the actual entry by appellant under such agreement, and the things transpiring between the parties after the entry, we are of the opinion that matters had reached a stage at which this agreement, or license to enter, could not be entirely repudiated by the appellee, and the permission to enter be revoked, and that in reason, as well as on the authority of like cases, he could not maintain the action of ejectment under the circumstances for the purpose of recovering from appellant the strip in question used by them for operating their road through his land." And see Evans v. Ry. Co., 9 Tex. Civ. App. 124, 28 S. W. 903; Ry. Co. v. Sweatt, 20 Tex. Civ. App. 543, 50 S. W. 162; Getzendaner v. Ry. Co. (Tex. Civ. App.) 102 S. W. 162.

The ruling in the Jarrell and other cases cited was based upon the doctrine of estoppel, which we think applies as well in this case. Appellants contend, however, that the traction company should not have been heard to assert an estoppel as against their legal title, because thereby it invoked the equity powers of the court, which, it is asserted, it could not do, because it did not "seek equity with clean hands in this, to wit: at the time of the attempted acquisition of the right of way over the land in suit appellee lacked charter power to acquire such right of way, there was no law under which it could have obtained charter power to receive and hold such right of way, and its attempt to do so and to operate an interurban electric street railway over same was without the consent of the incorporated cities of Oak Cliff and Dallas, Texas, and was in violation of the ordinances of the city of Oak Cliff making such acts criminal offenses, and was in violation of the public policy of the state as shown by its Constitution and laws." It may be that in constructing its line of road in Dallas and Oak Cliff the traction company did so without proper authority first obtained from those cities and in violation of ordinances, but in accepting of the Midway Company the use of its land for such purpose, we hardly think it could be said to have been acting in disregard or violation of the ordinances of those cities. And, if it did so act, it would seem that the right to complain thereof would be confined to those cities, and would not extend to appellants. It may be, also, that the traction company was not authorized by its charter to take and hold lands, to exercise rights of eminent domain, or to construct and operate an interurban road, but, if it was not, we do not think, for reasons already stated, that a conveyance to it of land to be used as a right of way for its road therefore would be void. Russell v. Ry. Co., supra. It was held in Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513, cited by appellants, that a court of equity will not aid in enforcing a trust in favor of a corporation to enable it to acquire title to lands it was not empowered to take and hold. It is insisted that the estoppel asserted by the traction company was an appeal to the equity powers of the court to enable it to hold land it was not authorized by its charter to own, and, therefore, that the ruling made in the Case-Kelly Case should have been applied. But we do not think the estoppel interposed necessarily was an appeal to the equity powers of the court. An estoppel can be relied upon and urged in a court of law as well as in a court of equity. In Schneider v. Sellers, 98 Tex. 380, 84 S. W. 420, the Supreme Court held that the fact that a corporation was not empowered by its charter to purchase land was no reason why, having

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purchased, it should not claim protection as an innocent purchaser for value without notice of the adverse claim. The Case-Kelly Case was referred to by the court and held not to be in conflict with the conclusion reached. The defense of innocent purchaser, it seems to us, is not less an appeal to the equity powers of the court than is the defense of estoppel. Scott v. Bank, 97 Tex. 31, 75 S. W. 15, 104 Am. St. Rep. 835; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317. Had the traction company been in the attitude of seeking affirmative equitable relief as was the case with the corporation in the Case-Kelly Case, the ruling then would be applicable. But the traction company was not in such an attitude. As the corporation in the Schneider-Sellers Case merely invoked as a defense the law protecting an innocent purchaser, so the traction company merely as a defense invoked the law applicable to the estoppel it asserted.

The next question to be considered is as to the sufficiency of the evidence to support the finding of the jury involved in their verdict that the declarations and acts of Sweet were or became the declarations and acts of the Midway Company. While it is true that a corporation cannot incur an obligation without the authority or consent of its directors, it is also true that a corporation, like an individual, may be bound by the act of its agent acting within the scope, express or implied, of his authority as such; and it it also true that it may, like an individual, become bound by acquiescing in and ratifying an unauthorized act done on its behalf by its agent. It appears from the record before us that from April, 1897, to April 6, 1904, when the sale to Knowles was authorized and the business of the company wound up, the directors of the Midway Company had had only one meeting, and that the only business transacted at that meeting was the election of one Dillon as its vice president and the re-election of Sweet, Mulvane, and Barry as its president, treasurer, and secretary, respectively. It further appears that during all the time specified, as testified to by Mulvane, Sweet had "practical management of the affairs of the company." Betterton, a director of the company, residing at Dallas, who had the immediate supervision of the company's property there, renting and otherwise looking after the land constituting the Midway addition, got all his instructions from Sweet and looked to him as the company. Barry, another director, also residing at Dallas, and who was the secretary of the company, as such, without question as to whether it had been authorized by the corporation or not, when it was presented to him for the purpose, verified any instrument executed by Sweet as president of the company. Without any action, so far as the record shows, by the directors authorizing it, the company by Sweet as its president by a deed dated March 25, 1901, conveyed the Ninth street right of way across its addition to the traction company; and by Sweet as its president, without action on the part of the directors, by a deed dated March 2, 1903, donated to Dallas county a right of way for a public road over said addition. In addition to legitimate inference the jury might have made from the testimony just referred to, in determining the extent of Sweet's authority to bind the company by his acts and declarations hereinbefore recited, the evidence, we think, strongly tended to support appellee's contention that, if Sweet acted without authority from it in consenting that it might shift its track, the Midway Company by ratifying it had made his act its own. The letter hereinbefore set out, written by Coffinberry to Sweet, fully advised the latter that he (Coffinberry) understood him (Sweet) to have authorized the shifting of the track. The statement made on the same day by Coffinberry to Mulvane, a director and the treasurer of the company, fully advised him (Mulvane) that on the strength of Sweet's assurance the change would at once be made. Betterton, another director, residing near the addition and charged with the duty of looking after it, and advising the Midway Company of any unauthorized use being made of it, should have known, and presumably did know, of it at the time the track was shifted, yet he did not protest against it. Barry, another director and the secretary of the company, also residing near the land, knew the change was being made, or, if not, that it had been made, directly after it was made, yet made no objection to or protest against it. Sweet in a letter from Coffinberry as early as May 29, 1902, was distinctly informed that the change had been made, yet not only did he not protest against it, but by his letters dated October 23, 1902, November 6, 1902, November 10, 1902, November 26, 1902, and December 6, 1902, hereinbefore referred to, acquiesced in the change. With full knowledge on the part of its president, who seems to have been recognized by all parties concerned as possessing in himself all the powers of the company, on the part of its secretary and its treasurer, members of its board of directors, and on the part of another director charged as its agent with the duty to look after and protect the land in controversy, it would seem that if it were possible to bring home to the Midway Company, in any other way than by information to its directors duly assembled for the purpose, notice of the fact that the traction company had appropriated the land in controversy to use as a way for its road, such notice was brought home to it. 4 Thomp. Corp. § 5195. If it had notice of such fact it must have acquiesced in it, for the record shows no word of protest or complaint thereof ever to have come from it. Appellants' contention, however, seems to be that the Midway Company could become bound only by the act of its board of directors in a meeting regu-

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larly called, and that the unauthorized acts of its officers and agents could be so ratified as to bind the company only in the same way. We do not so understand the law to be. A corporation, like an individual, is bound by the acts of its agent, expressly or impliedly authorized by it. It may become bound by a ratification of unauthorized acts of its agents without any formal action for that purpose by its board of directors. It may ratify by passive acquiescence as well as by affirmative action. Its acquiescence, with knowledge, proven or which should be inferred, if continued for a considerable time, will operate as a ratification. When knowledge is brought home to the corporation of the unauthorized act of its agent, it must promptly disavow it, otherwise, it will be held to have ratified the unauthorized act and so to have made it its own. It has been held that, if the directors of a bank delay as long as two months after acquiring knowledge thereof to repudiate the unauthorized act of its president who has assumed to act as its agent, the rule of acquiescence by silence makes the case the same as if it had authorized its president to so act. Raymond v. Palmer, 41 La. Ann. 425, 6 South. 692, 17 Am. St. Rep. 403. Where the unauthorized act of its agent is beneficial to it, a presumption of ratification on the part of the corporation will arise from slight circumstances. Bank v. Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; 2 Mor. Corp. § 629. And see 4 Thomp. Corp. §§ 5286, 5298, 5299, 5300; Henderson v. Ry. Co., 17 Tex. 574, 67 Am. Dec. 675; Pixley v. Ry. Co., 33 Cal. 183, 91 Am. Dec. 623; Bank v. Bank, 10 Wall. 604, 19 L. Ed. 1008; Roberts v. Ry. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; Miller v. Matthews, 87 Md. 464, 40 Atl. 176; Smith v. Bank, 72 N. H. 4, 54 Atl. 385; Bank v. Bank, 59 Neb. 7, 80 N. W. 48. We think the evidence amply sufficient to support the finding of the jury that the Midway Company, if it did not authorize Sweet's acts and declarations in its behalf, afterwards ratified and so made them its own.

In what has been said we have assumed that the record furnished no evidence of a right in the traction company to the way claimed, other than the acts and declarations of Sweet and other officers of the Midway Company. We are not prepared to say such an assumption is warranted. By its deed duly and formally executed the Midway Company on March 25, 1901, conveyed to the traction company what has before been referred to, and is so designated in the record, as the "Ninth Street right of way" across said Midway Company's addition to Oak Cliff. On a part of this right of way the traction company constructed its line of railway. In his letter to Bishop, dated October 23, 1902, Sweet inclosed a release of said right of way, to be extended by the traction company, promising, on its receipt so executed, that the Midway Company would execute and forward to the traction company a deed conveying to said traction company the right of way in controversy. The release was executed by the traction company and delivered to Sweet for the Midway Company. By its deed dated February 14, 1903, and duly executed, the Midway Company, for a consideration, as recited, of "one dollar and the benefit to be derived by it from the construction and operation of appellee's line of railway over and across its land," conveyed to the traction company the right of way in controversy; and by an instrument dated February 16, 1903, duly executed by the Midway Company, it authorized the traction company to fence and keep fenced, so long as the land in its addition was used for pasture or purely agricultural purposes, its line of road as it then existed across said addition. Both the deed and fencing contract were sent to Bishop by Sweet with his letter of February 19, 1903, and same were received by the traction company February 23, 1903. The fencing contract was thereafterwards retained by the traction company, and its right of way was fenced as authorized by it. The deed to the right of way, after being retained by the traction company until April 4, 1903, was then returned to Sweet, with a letter from Bishop stating that on account of certain conditions inserted in, and others omitted from, the deed the traction company could not accept it. The right of way deed and the fencing contract, Sweet testified, were intended to evidence parts of the same transaction, and together to constitute the contract between the parties. The instruments bear different dates. Neither refers to the other, and the negotiations between the parties evidenced by the correspondence we have referred to, and their conduct, by no means make it clear that the instruments were intended to operate as Sweet testified they were. It does not appear that the Midway Company in any way ever questioned the right of the traction company to use the land in controversy as a way for its road. On the contrary, Sweet's letters indicated not only a willingness, but an anxiety, on his part that it should be so used by the traction company. The controversy between the parties never had reference to a question as to the traction company's having acquired a right to so use the land, but always had reference to the character and terms of the instrument to be executed by the Midway Company as evidencing the traction company's right. The fencing contract not only was acted upon by the traction company, but was retained by it when the right of way deed was returned to Sweet as not acceptable, and it was ever afterwards retained by it, without any question on the part of the Midway Company as to its right to retain and treat it as in force. While we do not place the conclusion reached by us that the testimony was sufficient to support the ver-

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dict of the jury and the judgment of the court, on any force given to the fencing contract as a written instrument evidencing a grant by the Midway Company to the traction company of the right of way in question, we are not sure it is not entitled to be treated as not a part of nor dependent upon the right of way deed, but as independent of same, and, therefore, conclusive of the controversy between the parties to this suit.

The conclusion reached disposes of appellants' first assignment of error, and in effect, also, of their second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments, which we think should be overruled on other grounds as well.

The eighteenth assignment, to wit, that the "court erred in its general charge in submitting a single issue without necessary qualifications called for by the evidence, and in failing to submit other issues raised by the pleadings and proof," is overruled because too general.

The nineteenth, complaining of the action of the court in admitting as evidence over appellants' objection testimony tending to show that the conveyance by the Midway Company to Knowles was colorable only, is overruled because the erroneous action of the court was harmless. No such an issue was submitted to the jury.

The twentieth assignment, complaining of the refusal of the court to instruct the jury that the deed from the Midway Company to Knowles vested in the latter the legal title to the land, is overruled for a like reason. The issue submitted to the jury, and which they were instructed must control their verdict, in effect assumed the legal ownership of land to be in Knowles, and authorized a verdict in appellee's favor only in the event the jury believed its possession and use of the land was with the consent of Knowles' grantor, the Midway Company. If the seventeenth assignment complained of a failure on the part of the court to submit to the jury as an issue Sweet's authority to bind the Midway Company by his acts and declarations as shown by the record, it would present a question entitled to consideration. But it merely complains because the court in his charge authorized the jury to find for appellee if they believed the Midway Company consented to the use made of the land in controversy. The instruction was not affirmatively erroneous. A proper charge supplying the omission in the court's instructions was not requested. The assignment therefore must be overruled.

The judgment is affirmed.

On Rehearing.

A re-examination of the record in connection with the motion for a rehearing has not convinced us that the appeal has not been properly disposed of. On the contrary, further consideration of the evidence has matured into a conviction a belief entertained when we first considered it, that it would not have been error had the trial court peremptorily instructed the jury to return a verdict in favor of appellee.

In the opinion disposing of the appeal this statement was made: "Without any action, so far as the record shows, by the directors authorizing it, the company by Sweet as its president, by a deed dated March 25, 1901, conveyed the Ninth Street right of way across its addition to the traction company." The statement is inaccurate, in that the deed referred to—as did the one dated February 14, 1903, delivered to the traction company February 23, 1903, and returned by it to the Midway Company as not acceptable April 4, 1903, conveying the right of way in controversy—recited that the "Midway Company, a corporation acting by its executive officers by authority of its board of directors," made the conveyance.

The motion is overruled.

SOUTH TEXAS TELEPHONE CO. et al. v. HUNTINGTON et al.†

(Court of Civil Appeals of Texas. Feb. 17, 1909. Dissenting Opinion, Feb. 19, 1909.)

1. CORPORATIONS (§ 573*) — REORGANIZATIONS —CONSTRUCTION OF AGREEMENT.

Plaintiff, who had a judgment against a corporation, which was a lien on all its property to the amount of $35,000, agreed with trustees holding the property that the company should be reorganized, and that plaintiff should take bonds of the new company to the par value of $35,000, that the total issue of bonds of the reorganized company should not exceed $150,000, and that at least $50,000 in cash from the sale of the bonds should be put into extensions or additions to the property. *Held*, that the agreement did not vest in the directors of the new company the discretion to issue $115,000 in bonds in addition to those given to plaintiff and to expend $50,000 in cash on the betterment of the company's property, but the issuance of the bond and the expenditure of the money was mandatory.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 573.*]

2. CORPORATIONS (§ 573*)—REORGANIZATION—AGREEMENTS—RIGHTS—REMEDIES.

Plaintiff who had a judgment against a corporation, which was a lien on its property to the amount of $35,000, agreed with trustees holding the property that the company should be reorganized, and that plaintiff should take bonds of the new company to the par value of $35,000, that the total issue of bonds of the reorganized company should not exceed $150,000, and that at least $50,000 in cash from the sale of the bonds should be put into extensions or additions to the property. After plaintiff's bonds had been issued and delivered to him, a portion of the remainder of the bonds were pledged, thereby placing it beyond the power of the reorganized corporation to comply with said agreement, and the company failed to expend

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing pending.

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the specified amount in the betterment of the property. *Held*, that the failure to carry out the terms of the contract might be regarded as a repudiation warranting plaintiff in declaring the contract at an end, and suing for damages for the breach thereof.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 573.*]

3. CONTRACTS (§ 261*)—RESCISSION—GROUNDS—BREACH.

Where a contract requires the doing of certain things by one party within a certain period, and the promisor either fails or refuses to perform, or by his conduct clearly evinces a purpose not to perform, or places himself in such a position that he cannot perform, the other party may regard the contract as abandoned, and may declare the contract at an end and sue for damages for the breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. § 261.*]

4. CONTRACTS (§ 261*)—RESCISSION—GROUNDS—BREACH.

Where an agreement is mutual and dependent, and one party fails to perform his part, the other party may treat it as rescinded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1174; Dec. Dig. § 261.*]

5. CONTRACTS (§ 261*)—RESCISSION—GROUNDS—BREACH.

Although a partial failure of a party to the contract will not ordinarily give the opposite party the right to rescind, where the failure is in a part so essential to the residue that it cannot reasonably be supposed that the other party would have made the contract without it the contract is dissolved in toto.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1178; Dec. Dig. § 261.*]

6. CORPORATIONS (§ 580*)—REORGANIZATION—AGREEMENTS — ACTIONS — SUFFICIENCY OF EVIDENCE.

In an action to rescind a contract to reorganize a corporation and deliver to plaintiff a specified amount in the bonds of the reorganized corporation, and sell other bonds of the corporation, and expend a specified amount in the betterment of the corporate property, the corporation having performed that part of the contract to deliver the bonds to plaintiff and breached the rest, it is not necessary to introduce the bonds in evidence, as the suit is not one upon the bonds.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 580.*]

7. CORPORATIONS (§ 573*)—REORGANIZATION—AGREEMENT—CONSTRUCTION.

Plaintiff, who held a judgment against a corporation, which was a lien on all its property, made an agreement with the trustees holding the property that the corporation should be reorganized, and that bonds to the amount of plaintiff's claim should be issued to him, and that bonds not to exceed a specified amount should be sold, and a fixed amount of the proceeds used in the betterment of the corporate property, but no time was specified within which the bonds were to be sold, and the money expended on the betterment of the property. *Held*, that the law would imply that the bonds were to be sold and the amount agreed upon expended in the betterment of the property within a reasonable time, and that what would constitute a reasonable time was dependent upon the circumstances surrounding the parties at the time of the execution of the contract as well as subsequent circumstances.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 573.*]

8. CONTRACTS (§ 212*)—CONSTRUCTION—REASONABLE TIME.

If no time is specified within which a contract must be performed, performance must be made within a reasonable time, and what constitutes such reasonable time will depend upon the facts and circumstances of the case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 944–956; Dec. Dig. § 212.*]

9. CONTRACTS (§ 346*)—ACTIONS FOR BREACH—PLEADING—ISSUES AND PROOF.

In an action for breach of contract for which no time for performance was specified, a general denial puts plaintiff on proof of his allegation that one year was a reasonable time within which defendants should have performed the contract, and defendant may introduce any evidence which goes to controvert the evidence introduced by plaintiff.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 346.*]

10. PLEADING (§ 382*)—ISSUES AND PROOF—EVIDENCE ADMISSIBLE UNDER GENERAL DENIAL.

Under a general denial, defendant may prove any fact which goes to show that plaintiff never had any cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1280–1294; Dec. Dig. § 382.*]

11. CORPORATIONS (§ 580*) — REORGANIZATION—AGREEMENTS — ACTIONS FOR BREACH—INSTRUCTIONS.

Plaintiff, who held a judgment against a corporation, entered into an agreement with trustees holding such property, under which the corporation was to be reorganized, bonds to the amount of his claim to be given him, and bonds not to exceed a specified amount issued and sold, and a fixed amount of the proceeds devoted to the betterment of the property. In an action for breach of the contract, plaintiff alleged that one year was a sufficient time within which that part of the contract relating to the issue of the bonds and the expenditure of the money should have been performed, and defendant put in a general denial. *Held*, that evidence that the failure of defendant to perform was due to the interference of plaintiff required the giving of a requested instruction that, where a party by his own act prevents another from performing a contract, such party is estopped from asserting the failure of the other party to perform.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 580.*]

12. CORPORATIONS (§ 580*)—REORGANIZATION—AGREEMENTS—ACTIONS FOR BREACH—EVIDENCE.

Plaintiff, who held a judgment against a corporation for $35,000, which was a lien against the property, entered into an agreement with the trustees holding the property that the corporation was to be reorganized, and he was to be given the amount of his judgment in bonds of the reorganized company, and bonds not to exceed in par value the sum of $150,000 were to be issued, and that enough of the bonds remaining after plaintiff's bonds had been delivered were to be sold to raise $50,000, which sum should be spent in the betterment of the corporate property. *Held*, in an action for breach of a contract by failure to sell bonds according to agreement, that it was not necessary for plaintiff to show that the bonds could have been sold to net at least $50,000 in excess of the amount of the indebtedness assumed by the company, as there was no provision in the contract providing for such contingency.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 580.*]

Key, J., dissenting in part.

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Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by H. F. Huntington and others against the South Texas Telephone Company and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

As the sufficiency of the petition has been questioned by certain exceptions which were overruled, and upon which error is assigned, even at the risk of being prolix, we deem it well to set out the pleading thus challenged, in order to better understand the questions involved in such rulings, and hereby adopt in full the following statement of the nature and result of the case as found in appellants' brief, to wit:

"Appellees H. F. Huntington and F. C. Smith instituted this suit in the district court, Fifty-Third judicial district of Travis county, on June 9, 1906, against appellants South Texas Telephone Company, J. E. Boynton, and J. A. Quisenberry, alleging, in substance, that on June 17, 1905, in a certain cause styled 'Territorial Bank & Trust Company v. Commercial Telephone Company et al.,' in said court, a lien was established in favor of said Huntington upon all the property of said Commercial Telephone Company, to the amount of $35,000; that on August 1, 1905, all of said property was sold to said Quisenberry, J. H. Goeke, and F. Bimel, as trustees, which sale was in all things confirmed on August 10, 1905, and bill of sale to said property made to said trustees, who were required to deposit $20,000 in said court, or releases or satisfaction of said Huntington lien; that on September 6, 1905, said Huntington and said trustees made an agreement, whereby the former agreed to accept $35,000 par value of 5 per cent. bonds of a company to be organized or reorganized to take over said property, such bonds to be secured by first mortgage on said property, and said agreement to be in full payment for the lien of said Huntington in said suit, which agreement was in writing and filed in said cause containing a stipulation that it was 'understood as a part of said agreement that a total issue of bonds of the reorganized company shall not exceed $150,000 of which at least $50,000 in cash is to be put into extensions or additions to the property, and this memorandum is executed as evidence that arrangements have been made with me, so that said bill of sale and conveyance may be executed to said purchasers without any payment or deposit in said cause for me'; that Smith is interested with the said Huntington in the ownership of said bonds; that thereafter said trustees and their associates organized said South Texas Telephone Company, said Quisenberry being made president, and proceeded to issue said $150,000 of bonds, $35,000 of which were turned over to said Huntington under said agreement, and the remaining $115,000, as plaintiffs are informed and believe, were issued or will be issued at once and hypothecated with certain parties as security for alleged claims against said South Texas Telephone Company; that petitioners are informed, believe, and charge that $50,000 in cash is not to be spent in addition and extensions out of the proceeds of said bonds, but that same have been or will be hypothecated by said Quisenberry, in violation of said agreement and the rights of said petitioners; that, if said defendant company is allowed to hypothecate and pledge said bonds with said Quisenberry, he being president and one of the directors thereof, the rights and interests of petitioners will be greatly jeopardized in that they will not have the security agreed upon, and that the agreement not to pledge or dispose of said bonds without the expenditure of said sum as aforesaid will be violated; that plaintiffs have no adequate remedy at law, and their rights will be greatly jeopardized unless an injunction be granted. Thereupon they pray for the issuance of a writ of injunction restraining and prohibiting defendant, its officers, attorneys, and employés, from in any wise hypothecating, pledging, or incumbering said bonds or doing anything therewith, except disposing of them for cash, in accordance with said agreement.

"On June 9, 1906, a temporary restraining order was granted as prayed for until hearing upon application for temporary injunction. On July 2, 1906, plaintiffs filed their first amended original petition, alleging substantially the same matters as contained in their original petition. On July 12th, the court, after hearing, granted a temporary injunction, substantially as prayed for. On January 8, 1907, plaintiffs filed a second amended original petition, alleging, substantially, the same as in their original petition, with these additions: That under the agreement above mentioned, as well as the understanding and agreement made in connection therewith, it was agreed between said parties that $50,000 in cash out of said sum of $115,000 of bonds was to be expended in additions and extensions to the property; that such bonds should be sold and such extensions and additions made within a reasonable time—one year being alleged as a reasonable time—and that defendants bound themselves within the said one year from the date of said agreement to expend said sum as aforesaid; that defendants have made no efforts to sell said bonds or realize on them, but have pledged and hypothecated them with said Quisenberry for the loan of a small amount, and are threatening to sell and dispose of them, not for cash in the open market, as agreed should be done, but secretly and privately to the said Quisenberry; that no additions of any consequence have been made to said property, but same has been permitted to deteriorate, and does not produce sufficient revenue to meet fixed charges and current expenses; whereupon they pray as in their original petition, and, in addition, for judgment for specific performance of said

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contract requiring sale of said bonds at once for cash, and the expenditure of $50,000 thereof in additions and improvements.

"On the 12th of August thereafter, plaintiffs filed a third amended original petition, impleading one A. C. Branch, said amendment not differing from their former pleadings, except that plaintiffs charge that said defendant company and Branch have made a contract whereby said company is threatening to convey to Branch certain of its property, upon which plaintiffs claim a lien, and additional relief is sought to restrain said sale. Thereafter, on September 21, 1907, plaintiffs filed their fourth amended original petition upon which they went to trial. This petition is the same, in substance, as the third amended petition, except that the transaction with Branch is set forth with more detail and with additional allegations substantially charging that, as preliminary to an inducement for the decree in the litigation in said former suit, and for the agreement referred to, the said trustees on May 8, 1905, executed an agreement in writing, reciting that in settlement of matters involved in said cause a decree be entered which should find in favor of said Huntington for said $35,000 lien on all the property of what is known as the 'Lone Star Property,' which was a part of the property foreclosed in said cause and sold under said decree, and which passed to said trustees; said agreement also providing that, if said trustees purchased said property under order of sale in said cause, a new company was to be organized, which should issue $100,000 for 5 per cent. 20-year gold bonds secured by first mortgage on all property and rights of such company; that said trustees were to transfer to said new company all the property and rights acquired by them at such purchase, Huntington to accept in payment of his said lien bonds of said new issue at par; that said agreement was ratified by all parties interested in said property, and said trustees were authorized to carry same into effect, in pursuance of which, on June 15, 1905, said trustees made an agreement with said Huntington, carrying into effect said preliminary agreement; that thereafter said trustees proposed to plaintiffs that such bond issue be increased to $150,000, which proposition was accepted upon the conditions as hereinbefore shown, and in pursuance thereof the agreement set out in the original petition was entered into; that thereafter said trustees conveyed all property they thus acquired to defendant company, such conveyance stipulating for the delivery to said Huntington of $35,000 first mortgage 5 per cent. 20-year bonds; that, under the agreement aforesaid, defendant company obligated itself to expend $50,000 in cash out of the proceeds of said $115,000 of bonds, in extensions and additions to its property; that such sale and such extensions and additions were to be made within a reasonable time—alleged to be one year; that, if such extensions and additions had been made, they would greatly enhance the value of plaintiffs' said securities, and would have been in accordance with said agreements and understanding; that, but for said agreement as to such extensions and additions, plaintiffs would not have consented to the additional issue of $50,000 bonds over the amount originally agreed upon; that the agreement and representation to make such extensions and additions were material; that plaintiffs relied upon them, and but for them plaintiffs would not have made such agreement, and said additional $50,000 of bonds could not have been issued, certified, and delivered; that defendants have made no efforts to sell said bonds or to realize on them or to carry out said agreement, but have pledged and hypothecated all of said bonds, except the said $35,000 belonging to plaintiffs, with said Quisenberry; that such hypothecation is for a loan of a comparatively small amount, and defendants threaten to sell said $115,000 of bonds, not for cash in the open market, as agreed upon, but secretly and privately to said Quisenberry; and to further hypothecate said bonds with said Quisenberry, under terms by which he would sell out said bonds without notice and reason and practically at his own discretion, to secure any claim he may have; that no extensions or additions of consequence have been made to said property, but same has been permitted to deteriorate, and does not produce sufficient revenue to pay fixed charges and expenses. Plaintiffs thereupon allege that they have been damaged by the failure of defendant company to comply with said agreement in that their securities have been rendered of much less value than they would have been if said agreement had been complied with; 'that the plaintiffs here now elect to sue for damages caused thereto, and are willing to surrender said bonds for cancellation, and ask for a judgment for the amount of their said damages, which is $50,000, as the said bonds would have been worth more than par if said agreements had been carried out, according to their tenor and effect.' The final prayer of this petition is substantially the same as the third amended petition, with this addition: That if the court should hold that the plaintiffs are not entitled to the relief asked for as to such specific performance or mandatory injunction above prayed for, then plaintiffs pray for judgment for their damages, and ask for judgment against the defendants in the sum of $50,000. In their third and fourth amended petitions, the name of J. E. Boynton was dropped without explanation. On November 23, 1907, all of the defendants filed jointly their second amended original answer, upon which they went to trial, and in which they urge various general and special demurrers to plaintiffs' petition; also pleading a general denial, and specially setting up various matters in defense of said suit.

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"A supplemental petition was filed, containing exceptions to defendants' answer, and making more specific the allegations of their petition with respect to defendant Branch, of which no further notice is necessary, because of the final disposition of that portion of the case. All demurrers and exceptions were overruled by the court, except the demurrers and exceptions of the defendants to that portion of plaintiffs' petition asking for specific performance of the contract sued upon, which were sustained. Both parties excepted to the rulings of the court so far as adverse upon the exceptions; and a jury trial was had, the case being submitted at the request of plaintiffs to the jury upon special issues, as follows, to wit: (1) Based upon all the facts and circumstances in evidence in this case, has the defendant the South Texas Telephone Company had a reasonable time from the 9th of September, A. D. 1905, to have issued and disposed of the $115,000 of its bonds for a reasonable amount? (2) Did the defendant South Texas Telephone Company, through its duly authorized officers, make a reasonable and proper effort to dispose of the $115,000 of its bonds for a reasonable amount? (3) If you find from a preponderance of the evidence in this case that the defendant, the South Texas Telephone Company, did not dispose of said $115,000 of bonds within a reasonable time, and has made no reasonable or proper effort to dispose of the bonds for a reasonable amount, then state what would have been the value of the $35,000 of bonds belonging to the plaintiffs, had the said defendants' duly authorized officers disposed of said bonds and used $50,000 of the proceeds of the sale of said bonds in extensions and additions to the property of the defendant the South Texas Telephone Company. (4) Since the organization of the South Texas Telephone Company, do you find from the evidence that there has been a time when said $115,000 in bonds of said company could not have been sold at par? (5) As shown by the facts, do you find that there had been an opportunity since the organization of the defendant company and the authorization of the bond issue, when said bonds could have been sold for a price sufficient to net the company $50,000, over and above the amount of the advancement made by and the amount due the bondholders' committee and assumed by the company? (6) Since the organization of the defendant South Texas Telephone Company, has there been a time when said $115,000 in bonds of said company could have been sold at a reasonable price? To which issues the jury returned the following answers, to wit: To question No. 1: Yes. To question No. 2: No. To question No. 3: $46,666.66. To question No. 4: No. To question No. 5: No. To question No. 6: No.

"Defendants moved the court to render judgment in their favor upon the verdict, and on the same day filed another motion in which they prayed for a new trial, in case their motion for a judgment in their favor should be denied. Plaintiffs likewise moved for a judgment in their favor upon the verdict for $46,666.66. The court overruled defendants' motion for judgment, and sustained the plaintiffs' motion, and rendered judgment in their favor against the defendant telephone company for the full amount of $46,666.66 and costs; also rescinding the contract, damages for breach of which were sued for, canceling the bonds of Huntington, and decreeing a lien in favor of plaintiffs to secure the amount of said judgment upon the property known as the 'Lone Star Property,' and declaring said lien to be superior to all rights, claims, and liens of any parties to said suit, and further providing that no execution issue on said judgment until the Huntington bonds be deposited in court to the order of the defendant company. Plaintiffs entered a remittitur of $3,500 upon said judgment, and thereupon said judgment was by the court reduced to $43,166.66. On December 17, 1907, defendants filed a second amended motion for new trial, which was heard and overruled on the same day. Defendants each excepted to the rulings of the court as above set out, and gave notice of appeal to this court, and the usual orders were made allowing the filing of statement of facts and bills of exception.

"Said term of the court expired on December 21, 1907, and on January 6, 1908, the first day of the following term of said court, defendants filed a motion in which they asked that a nunc pro tunc order be entered for the purpose of relieving all questions as to the finality of said judgment. Said motion was made, however, under the express stipulation that none of the exceptions or objections of defendants to any orders, judgments, or rulings of the court in said cause were waived, but that said motion was made solely for the purpose of relieving said judgment of all questions as to its finality, and to guarantee defendants in their right to appeal from said judgment and to enable them to perfect their appeal therefrom; that on the same day the court entered an order in substance reciting that said motion came on for hearing, and all parties appeared in court, waived notice, and agreed that said motion be submitted, whereupon the court recited that it was of opinion that, under the pleadings and evidence, the money judgment and lien recovered by plaintiffs, and decree rescinding said contract, was all the relief plaintiffs were entitled to under the pleadings, evidence, and verdict, and that under their said pleadings, evidence, and verdict plaintiffs were not entitled to have said injunction perpetuated, but that the same should be dissolved; and that it appearing that defendant Boynton had died prior to said trial, and that plaintiffs had filed an

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amended petition omitting said Boynton therefrom as a defendant, and plaintiffs having in open court on said day announced that they would not prosecute further their said suit as against said Branch, and desired a nonsuit as to him, it was ordered: First, that said Boynton be dismissed from the suit; second, that said temporary injunction be dissolved; third, that the suit be dismissed as to said Branch; fourth, that in all other respects said judgment be declared in full force and effect. Whereupon defendants in open court renewed their exceptions to the verdict of the jury, the orders, rulings, judgments, and decrees of the court entered in said cause, including the last order, from all of which they have perfected their appeal to this court."

Cochran & Penn, Sleeper, Boynton & Kendall, and Fiset & McClendon, for appellants. Allen & Hart, for appellees.

RICE, J. (after stating the facts as above). By their first assignment, appellants charge that the court erred in not sustaining the following demurrer: "These defendants further generally except and demur to that portion of said petition wherein plaintiffs offer to surrender the $35,000 par value first-mortgage bonds of said telephone company, held by plaintiffs, and elect to sue for damages, or any portion of said petition seeking a rescission of such agreement, and say that said allegations are wholly insufficient in law, and present no cause of action against these defendants." By their third proposition under this assignment appellants contend, in effect, that the proper construction of said agreement did not absolutely require that $150,000 of said bonds, of which at least $50,000 in cash was to be put in extensions or additions to the property, should be issued, but that only $35,000 thereof should be issued, and that as to whether the remainder should be issued or not was left to the discretion of its board of directors; and that, this being true, the court erred in not holding that plaintiffs' petition failed to state a cause of action. With reference to the question raised by this proposition, we are constrained to believe that no such discretion was given to or vested in the directors of said company by reason of said agreement, but, on the contrary, that it was contemplated that the full amount of $150,000 in said bonds should be issued, and that $35,000 thereof should be delivered to the plaintiffs, and that $50,000 in cash, to be realized from the disposition of the remainder, should be put into extensions and additions to their property, and that this was not permissive, but mandatory, and, in support of this view, we cite Hochstadter Bros. v. Sam, 83 Tex. 464, 18 S. W. 753. If we are correct in this construction, then it would seem that the petition, as against this objection, states a good cause of action.

By their second assignment of error appellants contend that the court erred in overruling their fifth exception to the petition to the effect that the allegation as to damages was wholly insufficient in law, and presents no cause of action against the defendants. The fourth proposition under this assignment urges that the alleged breach of plaintiffs' contract was not such as would authorize a rescission of said contract, a cancellation of said bonds, and the recovery of their value; and that plaintiffs' rights, if any, were to prevent the disposition of said bonds, in violation of their agreement, and to have such other relief as might be appropriate to protect their rights.

It will appear, therefore, that the question raised by these assignments is whether or not, under the facts pleaded, the plaintiffs have the right to elect to declare the contract at an end, and on account of its breach, sue for and recover the value of the bonds. It will be observed that the petition discloses that, notwithstanding the alleged obligation on the part of defendants to issue $150,000 of its bonds, and after the delivery of $35,000 thereof to plaintiffs, to expend at least $50,000 thereof in extensions and additions to the property of said company within a reasonable time—to wit, one year from the date thereof—that the defendant had failed so to do, but, on the contrary, had hypothecated and pledged a portion of such bonds with its president, thereby placing it beyond its power to comply with said agreement.

It seems to be settled by the authorities that where a contract requires the doing of certain things on the part of one of the parties thereto within a certain period, and the promisor either fails or refuses to perform, or by his acts and conduct, clearly evinces a purpose not to do or perform the things he is obligated to do, or has placed himself in such position as to be unable to comply with the terms of the contract, that such conduct or failure or refusal may be regarded as a repudiation or abandonment of the contract, thus giving the right to the promisee to declare the contract at an end, and bring his action to recover damages for the breach thereof. In Kilgo et al. v. Northwest Texas Baptist Ed. Soc. (Tex. Civ. App.) 37 S. W. 473, it is held that where one party to a contract, by his words or conduct, shows a fixed intention to abandon it, the other party is justified in treating it as abandoned. In Supreme Council American Legion of Honor v. Batte, 34 Tex. Civ. App. 456, 79 S. W. 629, it is held that, while there is some conflict in authority as to whether the declaration of one party to an executory contract that he will not perform the contract will authorize the other party to treat said contract as rescinded, still, the great weight of authority, both in England and the United States, is in favor of the doctrine of an anticipatory breach of such contracts, holding that in contracts of this character, where one

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party announces his intention not to perform, the other party may treat it as at an end and recover the amounts paid under it. Where an agreement is, by its terms, mutual and dependent, and one party fails to perform his part, the other party may treat it as rescinded. Cundiff v. McLean & Miller, 40 Tex. 394. In Tomson & Co. v. Heidenheimer, 16 Tex. Civ. App. 118, 40 S. W. 425, it was held that where plaintiffs having repudiated a new contract by refusal to carry it out, defendants were remitted to their original cause of action, having the right to treat the contract as abandoned. In Taussig v. Southern Mill & Land Co., 124 Mo. App. 209, 101 S. W. 605, the same doctrine is held, but it is said that, while this is true, it will be applied only to material failures to comply with the contract, and not to such as are small and unimportant. In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, after a full review of all the authorities on the subject, both English and American, the court held that an unqualified and positive refusal to perform a contract, though the performance thereof was not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach, which will entitle the injured party to bring his action at once.

In the well-considered case of Lake Shore & Mich. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, it is held that breach of a contract which will justify the party not in default in abandoning performance and suing for damages on account of the breach by the other, need not be of such a character as to render the very execution of the contract by him impossible, but if the other party refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether a contract has been partially performed, or the time for performance has not yet arrived, in determining the right of one party to regard it as abandoned by the other. And it is further held that upon election to treat the renunciation of the contract by the other party, whether by declaration or by acts or conduct, as a breach of the contract, the rights of the parties are then to be regarded as culminating and the contractual relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages.

An extended note to this case cites many decisions in support of the doctrine announced by the court, from the various states of the Union, the holdings in some of which are of interest, and from which we quote as illustrative of and applicable to the doctrine involved: In Harrison Mach. Works v. Miller, 29 Ill. App. 567, it is held: If the contract of sale requires the vendee to give security as a condition precedent, the vendor may rescind the contract upon his failure to perform in this respect. In Ward v. Kadel, 38 Ark. 174, it is held, where there is a mutual contract for the performance of successive acts, the refusal upon one side to perform will justify the other party in treating the contract as rescinded. In Cromwell v. Wilkinson, 18 Ind. 365, it is said that, upon principle, one party can no more rescind a contract than he can make it; but in principle, if one party refuses to perform, he is regarded as consenting to a rescission, so that upon the other party's acting on such consent, the contract is at an end. In Graves v. White, 87 N. Y. 463, it is said: "The refusal of one party to perform his contract amounts, on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to an adversary attempting to rescind it, and sue for a breach; or, in a proper case, for a specific performance, or he may assent to its abandonment and so effect a dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved." In Miller v. Thompson, 22 Ark. 258, it is held: "A refusal or neglect by one party to perform his part of the contract justifies the other in treating it as rescinded, and authorizes him to sue in general as in debitatus assumpsit." In Hill v. Rewee, 11 Metc. (Mass.) 268, it is held that where money is paid on an executory contract to deliver goods or transfer stock or the like in the future, and the contracting party fails to perform, it is in the election of the other party to treat the contract as rescinded, and recover back the money, or to affirm the contract and recover damages for the nonperformance; and if the contract fails in part, if it is a precise and definite part, capable of being ascertained by computation, a corresponding part of the purchase money may be recovered back, although the contract is in form entire. In Drew v. Claggett, 39 N. H. 431, it is held that if property has been delivered or money paid under an executory contract which the other party refuses to perform, either wholly or in an essential part, the injured party may either sue for the breach of the contract or treat it as rescinded and sue for the value of the property delivered. See, also, Brown v. Mahurin, 39 N. H. 161; Pierce v. Duncan, 22 N. H. 18; Fuller v. Little, 7 N. H. 535, and Ranlett v. Herran, 20 N. H. 102. In Hayden v. Reynolds, 54 Iowa, 157, 6 N. W. 180, it is held that in the sale of property for notes which were to be indorsed by the purchaser, the seller, after having delivered a part of the property, may rescind the contract and recover the value of the property delivered, upon the purchaser's refusing to indorse the notes. In Beach on Contracts, § 409, it is said: "Positive and absolute refusal by one

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party to carry out a contract is in itself an immediate breach of it on his part, and gives the opposite party an immediate right of action." In Luey v. Bundy, 9 N. H. 298, 32 Am. Dec. 359, it is held that, where the defendant has refused to perform an essential part of an entire contract, the plaintiff may treat the contract as rescinded, notwithstanding a partial performance by the defendant, if he can be placed in as good a situation as before. A partial failure will not, ordinarily, give the opposite party the right to rescind, but where the failure is upon a part so essential to the residue that it cannot reasonably be supposed that the purchaser would have made the contract without it, the contract is dissolved in toto. Graver v. Scott, 80 Pa. 88. In Lake Shore & M. S. R. Co. v. Richards, supra, it is said: "It is well settled that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded and recover upon a quantum meruit, so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and, at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose." In Railway Co. v. Ontario Rolling Mills, 10 Ont. App. 677, it is said: "And the right to rescind depends, not on whether the conduct of one party was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract." And in Armstrong v. St. Paul & P. Coal & I. Co., 48 Minn. 113, 118, 49 N. W. 233, 50 N. W. 1029, it is said: "It is not only an absolute refusal in words to perform the contract, but also any claim, manifested by words or acts, of an intention not to perform it according to its terms that will authorize the other party to treat it as repudiated and bring his action."

In view of the doctrine so well established by these authorities, we are inclined to believe that the petition in this case states a good cause of action, and that the demurrer was properly overruled. It is shown therefrom that the defendant had obligated itself to issue $150,000 of its bonds, and, after delivering $35,000 thereof to plaintiffs, to raise $50,000 in cash from the remainder thereof and apply the same in betterments of the company. It is alleged that this was a material inducement on the part of the plaintiffs to permit the additional issue of $50,000 worth of bonds. It goes without saying that said bonds held by plaintiffs would have been more valuable, if defendant had carried out its contract and invested $50,000 derived from sale of said bonds in additions and extensions to the property of said company. Certainly, if as held in many of the cases cited, plaintiffs would have the right to declare the contract at an end and sue to recover the value of their bonds, in the event defendant had unconditionally announced that it would not perform said contract, surely, where it is alleged that, by its acts and conduct, it has refused in fact to carry out said agreement, this would, in effect, be a repudiation of the contract on the part of appellant, and there could be no question but that the plaintiffs would have the right to declare said contract at an end and bring suit for the value of their bonds. So believing, we overrule this assignment.

What has already been said makes it unnecessary to discuss the exceptions urged to the petition for the grounds set forth in the third and fourth assignments of error.

We do not think there is any merit in the fifth nor sixth assignments, because this was not a suit upon the bonds, and it was not, in our judgment, necessary for plaintiffs to have introduced the same in evidence. These assignments are, therefore, overruled.

By their seventeenth assignment of error it is urged that the court erred in refusing to give special charge No. 5, requested by them, which is as follows: "The jury are instructed that where a party by his own acts prevents another from performing a contract or renders it impossible or impracticable by such acts to perform such contract, such party is estopped from asserting that the party bound has failed to comply with the contract. You are therefore instructed that if you believe from the evidence in this case that the plaintiff Smith, while he was general manager of defendant company, was guilty of acts or conduct which made it impossible or impracticable for the defendant company to sell said bonds at a reasonable figure; and if you believe that said acts of said Smith, if any, were wrongful; and if you believe that the defendant company failed, within a reasonable time, to make a sale of said bonds; and if you further believe that such failure on the part of said company was directly or proximately caused or contributed to by said acts of said Smith if any; and if you further believe from the evidence that said Smith, in performing said acts, if any, was the agent of said Huntington, authorized to act for said Huntington, and was acting within the scope of his authority, if any, from said Huntington—then you are instructed that the plaintiffs are estopped from asserting or claiming that the defendant company has not sold said bonds within a reasonable time. Bearing in mind the foregoing instruction, you will answer 'yes' or 'no' to the following question: Are the plaintiffs estopped from asserting that the defendant company failed, within a reasonable time, to sell said

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bonds?" Appellees insist that this charge should not have been given, and was correctly refused, because there was no plea of estoppel based upon the acts and things therein enumerated. It will be remembered in this case that no time was fixed in which defendants were required to make a sale of the bonds and to invest $50,000 of the proceeds arising therefrom in extensions and additions to the property; and, under such circumstances, the law implies that the same must be done within a reasonable time, and what is a reasonable time is ordinarily a question of law and fact dependent upon the circumstances surrounding the parties at the time of the execution of the contract, as well as the facts and circumstances occurring thereafter. Evans v. Hardeman, 15 Tex. 480; Benavides v. Hunt, 79 Tex. 395, 15 S. W. 396; Hart v. Bullion, 48 Tex. 279. And, in determining the question of reasonable time, the court will consider all the circumstances by which the question of diligence can be affected. Nickols et al. v. Blackmore, 27 Tex. 587. When no time is set within which a contract must be performed or a duty discharged, performance must be made within a reasonable time. What amount of time would constitute such reasonable time depends upon the facts and circumstances of the case, not upon mere opinion or expectation. Volume 23 Am. & Eng. Ency. Law, 971, and note 1 thereto, and numerous cases in support of the text. No time being fixed in the contract for the performance of this obligation on the part of defendant, plaintiffs alleged that the same must be performed within a reasonable time, and that one year would be a reasonable time for the performance thereof. There was a general denial upon the part of the defendants, which put the plaintiffs upon proof of the allegation that one year was a reasonable time within which defendants should have performed said contract, and, under a general denial of the allegations of the plaintiffs' petition, defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action. Volume 1, Ency. Plead. & Prac. 817. Under the general denial, defendant may prove any fact which goes to show that the plaintiff never had any cause of action. Volume 1, Ency. Plead. & Prac. p. 817. For what may be proven under a general denial, likewise see G. H. & S. A. Ry. Co. v. Henry et al., 65 Tex. 688; Altgelt v. Emilienburg, 64 Tex. 150; Tisdale v. Mitchell, 12 Tex. 68; Willis & Bro. v. Hudson, 63 Tex. 678; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85.

So that, in this case, plaintiffs having alleged that one year was a sufficient time within which to have performed the contract on the part of defendant, a general denial having been filed, it devolved upon them to establish their allegations in this respect; and if the facts and circumstances in evidence raised an issue as to whether one year was a sufficient time within which defendant should have sold the bonds and made the extensions and additions contemplated, then it seems to us that it was the duty of the court to give a charge pertinently presenting this issue. It is immaterial that there was no pleading on the part of appellants setting forth what were the facts and circumstances showing or tending to show that the time pleaded was not a reasonable one within which to have performed its obligation. There was evidence in the record tending to show that the acts and conduct of Smith during said period, who was in fact the owner of the bonds (as Huntington only held the same as collateral for him), had a tendency to prevent, and did prevent, the sale of said bonds within the time alleged. It is immaterial what his acts and conduct may have been, provided they were sufficient to raise the issue and occurred within the period. Certainly the plaintiffs could not interfere or put obstacles in the way so as to prevent the performance of the contract on the part of defendant within the time that would otherwise be held reasonable for its performance, and thereby reap an advantage from their own wrong; so that, in this case, if the evidence raised the issue as to whether the acts and conduct of Smith, done within the period mentioned, did prevent the performance of the contract on the part of the defendant, or had a tendency so to do, then it seems to us that such acts and conduct on the part of Smith could, under a general denial, be shown in defense of its failure to perform its obligation within the time the law, under the facts and circumstances, would otherwise have held it to perform. The record does show certain acts and conduct on the part of Smith raising this issue; and, where there is any evidence upon an issue, it is the duty of the court to charge thereon, especially when requested so to do. In our judgment, the special charge requested ought to have been given, and it was error to have refused it. We therefore sustain this assignment.

We do not think the court erred, as complained of in the ninth and tenth assignments, because we do not believe it was necessary, before the judgment could be sustained, for the plaintiffs to have shown, either that the bonds could have been sold at par or have netted at least $50,000 in excess of the amount due by the bondholders' committee and assumed by the company, because there was no provision in the contract providing for such contingencies; but, on the contrary, defendant had expressly bound itself to the issuance of $150,000 in bonds, $50,000 of which it had agreed should be expended in betterments for the company.

The remaining assignments being chiefly as to supposed errors of the court in refusing special charges, or as to the sufficiency of the

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evidence to sustain the verdict, are all overruled, because we do not think said charges were applicable, and, if applicable, they seem to be argumentative and upon the weight of evidence; and, as to those raising questions of fact, we deem it unnecessary to discuss them in the view we have taken of this case, except to remark in closing that we are unable to determine from the evidence as to how the jury arrived at the amount of their verdict, but, since the case is to be reversed for other reasons, it will not be necessary for us to consider this feature further.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

KEY, J. (dissenting). The writer concurs in the judgment of reversal in this case, but does not concur in the conclusion reached by the majority of the court on some of the points ruled upon, and is of the opinion that this court should reverse and render judgment for appellants, and the reasons for that conclusion will now be stated:

1. I am strongly inclined to the view urged in appellants' brief under their first and second assignments of error, to the effect that a proper construction of the contract did not render it obligatory upon the South Texas Telephone Company to issue any bonds other than the $35,000, which were to be issued to appellee Huntington. If this is not the proper construction of the contract, then it is ambiguous, and it would have been proper to have required the jury to pass upon it, but I have no desire to elaborate this question.

2. As shown by the plaintiffs' petition, as well as the undisputed testimony, the parties interested in a former corporation agreed among themselves to the effect that in litigation then pending a judgment was to be entered establishing a lien against the property of that corporation in favor of the plaintiff Huntington for $35,000. There was to be a new company organized, which was to acquire the property of the old company, and was to put forth a $100,000 issue of 5 per cent. bonds, secured by a first mortgage on the property; that $35,000 of those bonds were to be delivered to and accepted by Huntington at par value, in payment and satisfaction of his $35,000 lien against the other corporation. In the petition upon which the plaintiffs went to trial, after setting out in full the facts above referred to, they allege that thereafter the bondholders' committee proposed to the plaintiffs that the bond issue should be increased from $100,000, as provided for in the agreement, to $150,000, which proposition was accepted by the plaintiffs on the condition that at least $50,000 of the net cash realized from the proceeds of the sale of the bonds should be expended in extensions and additions to the property of the reorganized company, upon which a mortgage was to be executed to secure the payment of the bonds. It is clear from the plaintiffs' petition, as well as the undisputed testimony, that the supplemental agreement by which authority was conferred upon the new company to enlarge the bond issue from $100,000 to $150,000, is not the contract which obligated Huntington to accept $35,000 of the bonds in satisfaction of his pre-existing lien against the property. That obligation had been placed upon him by a contract previously made, and therefore the supplemental agreement for the enlargement of the bond issue made thereafter did not and could not operate as an inducement to the plaintiffs to accept the $35,000 in bonds in satisfaction of their prior lien. The supplemental agreement being subsequent to the former agreement, it is impossible that it could have influenced either party in making the former agreement. Such being the case, in my opinion there is no such connection between the two contracts as will authorize a rescission of the former because of a breach of the latter. The contract by which the plaintiffs acquired the bonds was fully executed, and was not breached by the defendants' failure to comply with the other contract made thereafter, although the latter was supplemental to the former. Hence it seems to me that whatever rights the plaintiffs may have had, they were not entitled to a rescission of the contract by which they acquired the bonds and to a foreclosure of their former lien against the property. In fact, they did not ask for that relief in their petition. Their prayer was that the injunction be perpetuated, and that they have a judgment decreeing specific performance of the contract; and, if not entitled to that relief, judgment for damages. It is true, the petition offers to surrender the bonds and concludes with a prayer for general relief, but it does not specifically ask for a judgment of rescission and a foreclosure of the lien. I have no fault to find with many of the principles stated in the majority opinion and supported by the authorities referred to, but do not believe they find application in the facts disclosed by this record.

3. However, if mistaken in the views above expressed, it seems clear to me that the eleventh assignment of error is well taken, and that upon the sixth finding of the jury the court should have rendered judgment against the plaintiffs. The South Texas Telephone Company was held liable, and judgment rendered against it upon the theory that it had entered into a contract with plaintiffs by the terms of which it obligated itself to sell the remaining $115,000 in bonds and invest $50,000 of the proceeds in improvements or extensions, and that it had breached that contract. The sixth finding of the jury is to the effect that the bonds referred to could not have been sold at a rea-

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sonable price at any time since the organization of the company. If a reasonable price could not have been obtained for the bonds, did the contract between the parties obligate the defendant company to sell them at less than a reasonable price? It seems to me that this question must be answered in the negative. It appears with reasonable certainty from the plaintiffs' petition, and with absolute certainty from the testimony, that the bonds referred to were part of the same issue or series of bonds, of which the plaintiffs' bonds are a portion, and that they were all secured by the same mortgage, and were each and all denominated first mortgage bonds. The form of the bonds is copied in the trust deed given to secure them, and contains this recital: "This bond is one of a series of three hundred bonds, numbered consecutively from 1 to 300, inclusive, for five hundred dollars each, bearing even date herewith, being of the same tenor and amount, and all of said bonds as issued are of equal rank and equally secured by a first mortgage or deed of trust executed and delivered by said the South Texas Telephone Company to said Mississippi Valley Trust Company, trustee." Hence it is obvious that if the $115,000 in bonds, or any portion thereof, had been sold, the holder of such bonds would have held a claim against the property upon the same footing with the bonds held by the plaintiffs. Such being the case, if the $115,000 in bonds had been sold for $50,000 and the proceeds invested in improving the property, instead of the plaintiffs' security being strengthened, and their bonds thereby enhanced in value, the result would more likely have been the reverse, because an additional lien for $115,000 would have been fixed against the property on a parity with the plaintiffs' lien and only $50,000 added to it. It seems unreasonable to suppose that it was the intention of the parties that the defendant should be obligated to pursue a course that might result in harm to both parties to the contract. As to the price at which the bonds may be sold the contract is silent, and it seems much more in accord with reason and justice to hold that it was the intention of the parties that they were not to be sold at less than a reasonable price, then to adopt the contrary view, and go to the extent of holding that the company was obligated to sell them, regardless of market price, and regardless of the harmful results which might follow. Hence I conclude that the defendant company was not under obligation to sell the bonds at less than a reasonable price; and the jury having found that it could not have accomplished that result, the court should have rendered judgment for the defendants.

The apparent, if not real, conflict between the sixth and the first findings of the jury has not been overlooked, but, if they are in conflict, then the sixth finding neutralizes the first and breaks down the plaintiffs' case. Nor have I overlooked the contention urged on behalf of appellees to the effect that there was testimony tending to show delay in organizing the new company, and that there was a market for such bonds at that time. Without stopping to consider whether or not the new corporation can be held responsible for delays which occurred before it came into existence, it seems to me that a sufficient answer to appellees' contention is the fact that after the new company was organized, and after the occurrence of the alleged delay, they accepted the $35,000 in bonds issued by the new company. If at that time there had been any such breach of the contract as would have entitled the plaintiffs to refuse to accept the bonds, such acceptance should be held to cut them off from the right to rescind the contract on account of that breach.

4. But if wrong in the construction placed on the contract, and if it should be construed as requiring the company to sell the bonds, regardless of the price for which they could be sold, nevertheless, as the sixth finding of the jury shows that they could not have been sold for a reasonable price, and as it is probable that a sale of them for an unreasonable price would have resulted in more harm than benefit to the plaintiffs, they ought not to be awarded a rescission of the contract. Rescission is an equitable remedy, and is not granted except for the purpose of preventing substantial injury; and, if a breach of the contract to sell the bonds would not have produced that result, the judgment in this case should not have been rendered. The testimony shows that the entire series of bonds, amounting to $150,000, had been prepared and properly executed, and that the trust deed to secure them had been executed and recorded. But it also appears that none of them, except those held by the plaintiffs, had been so disposed of as to fix a lien enforceable against the property. Therefore, and as long as the remainder of the bonds is not disposed of by the company, the plaintiffs' bonds are secured by a prior lien on all of the company's property, but whenever any of the other bonds are disposed of an additional lien will be fixed upon the property equal to that held by the plaintiffs; and, as pointed out above, if the remainder of the bonds had been sold at such an unreasonable price as that the proceeds derived therefrom when invested in improving the property would not more than offset the disadvantage to the plaintiffs' bonds resulting from the enlargement of the indebtedness secured by the same mortgage, then it would seem that no injury would result to the plaintiffs.

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TEMPLE v. DURAN.

(Court of Civil Appeals of Texas. March 19, 1908. On Rehearing, April 9, 1908.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—ERRONEOUS OVERRULING OF EXCEPTIONS TO PETITION.

The error in overruling exceptions to the petition, insufficiently alleging grounds for exemplary damages, is rendered harmless by the court in its charge correctly confining the issue of exemplary damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4098; Dec. Dig. § 1040.*]

2. APPEAL AND ERROR (§§ 932, 1040*)—HARMLESS ERROR — ERRONEOUS OVERRULING OF EXCEPTIONS TO PETITION.

Where the jury rendered a verdict for a lump sum without indicating that it was not for actual damages warranted by the evidence, and the instructions given or requested did not require the jury to separate the actual and the exemplary damages, the court on appeal must presume that the verdict included actual damages only, and rulings on the petition, based on the allegations demanding exemplary damages, were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3760, 4105; Dec. Dig. §§ 932, 1040.*]

3. TRESPASS (§ 45*) — INJURY TO PERSONAL PROPERTY — EXEMPLARY DAMAGES — EVIDENCE.

In an action for damages to personalty wrongfully removed from a leased building, an instrument executed by an employé of plaintiff, conveying to defendant specific articles in, and the rent of, the building, was admissible on the issue of exemplary damages, though authority to execute the instrument was not shown.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 45.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

Where the jury awarded actual damages only, the error in excluding evidence relieving defendant from liability for exemplary damages was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

5. WITNESSES (§ 275*)—CROSS-EXAMINATION—EXTENT.

A party, testifying as a witness in his own behalf, should not be required to express on cross-examination his opinion of the truth or falsity of the testimony of a witness contradicting his testimony.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 275.*]

6. APPEAL AND ERROR (§ 1032*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the bill of exceptions stated no facts justifying the conclusion that a party was injured by the admission of improper testimony, the court on appeal must presume that he suffered none.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047–4051; Dec. Dig. § 1032.*]

7. TRESPASS (§ 45*)—INJURIES TO PERSONAL PROPERTY—EVIDENCE.

In an action for damages to saloon fixtures wrongfully removed from a leased building, evidence of the issuance of a liquor dealer's license to a third person, and of the failure of plaintiff to secure the issuance of a license to himself, was inadmissible to show that the third person, and not plaintiff, was the owner of the fixtures.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 45.*]

8. TRESPASS (§ 6*)—INJURIES TO PERSONALTY—LIABILITY.

A purchaser of real estate, who unlawfully interferes with the personal property of another, stored in a building on the premises either under a verbal or written contract with the vendor, is liable for the damages to such property caused thereby.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 6; Dec. Dig. § 6.*]

9. TRESPASS (§ 45*)—INJURIES TO PERSONAL PROPERTY—EVIDENCE.

In an action for damages to personal property wrongfully removed from a leased building, the consent of a third person to the removal is immaterial on the issue of actual damages, in the absence of proof that the third person had authority from plaintiff to give such consent.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 45.*]

10. TRIAL (§ 194*) — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction which states the meaning of a written instrument admitted in evidence, and which instructs the jury as to its legal effect, is not on the weight of the evidence; the construction of the instrument being for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439–466; Dec. Dig. § 194.*]

11. TRESPASS (§ 68*)—INJURIES TO PERSONAL PROPERTY—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action for damages to personal property wrongfully removed from a leased building, an instruction that plaintiff's measure of damages is the reasonable market value of the property destroyed is sufficient as against the objection that the jury should have been instructed that the market value referred to the market value at the place where the goods had been stored, in the absence of a request supplying the omission.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 68.*]

12. TRESPASS (§ 49*)—INJURIES TO PERSONAL PROPERTY—MEASURE OF DAMAGES.

Where, in an action for damages to personal property wrongfully removed from a leased building, the evidence showed that a third person owned specified articles, and that they were in plaintiff's possession with the third person's consent, who assisted in moving the property from the building, the court should charge that, in case the jury found that the articles belonged to the third person, plaintiff could only recover such damages as he suffered because deprived of their use in violation of the contract with the third person.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 133; Dec. Dig. § 49.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by J. L. Duran against John Temple. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Reese Tatum, for appellant. Chauncey & Carter, for appellee.

WILLSON, C. J. About September 15, 1906, under a contract made with one Inman when he was the owner thereof, appellee was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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in possession of a house in Texline. On the first floor of the building he had stored some bar fixtures, etc., and on the second floor, where he and his son slept, he had bedding, clothing, etc. Until a few days prior to the time mentioned one Murphy, an employé of appellee, with his wife had occupied a portion of the first floor of the building, and appellee and his son had boarded with them. Prior to the date mentioned Inman had sold and conveyed the building to appellant. Desiring to secure possession of the premises, and having failed in an effort to induce appellee to vacate same, about the date mentioned appellant, without appellee's consent, forcibly removed from the building to the street the saloon fixtures, etc., and the clothing and household goods which appellee claimed to own. The articles so removed from the building remained in the street unsheltered, and as a consequence some of them were injured, and others were lost or destroyed. Appellee brought his suit to recover $1,600 as the actual damages thereby suffered by him, and also sought a recovery of $1,000 as exemplary damages. In accordance with the verdict of a jury, a judgment was rendered in his favor for $800, and from the judgment so rendered this appeal is prosecuted.

In his petition appellee alleged that "on account of the humiliation and embarrassment" suffered by him, and on account of the "wrongful, wicked, malicious and willful acts" of appellant, in addition to the actual damages suffered by him, he was entitled to recover $1,000 as exemplary damages. Appellant specially excepted to the portion of the petition referred to, on the ground that exemplary damages were not recoverable for "humiliation and embarrassment." The exception was by the court overruled. In his charge the court did not authorize the jury to consider as a basis for exemplary damages appellee's humiliation or embarrassment, but instructed them that, if they found appellant's acts to have been wrongful, wicked, and malicious, they might, in addition to such actual damages as they might believe he suffered, find in his favor exemplary damages not exceeding $1,000. Complaint is made that the court erred in overruling the special exception to the petition. It is a sufficient answer to this complaint to say that, if it was error to overrule the exception, the error was rendered harmless by the court's charge confining the jury, on the issue of exemplary damages, to an inquiry as to the motive and spirit which actuated appellant in the performance of the acts complained of. A further sufficient answer to the complaint referred to, as well as to the one based on the portion of the court's charge referred to, that it was improper to name the amount claimed in the petition as the limit for which a recovery of exemplary damages could be had is the fact that the verdict of the jury cannot be construed as including any exemplary damages. In his charge the court did not require the jury to separate the actual from the exemplary damages, if they found any. Appellant did not request the court to instruct the jury in their verdict to separate the damages, if they found both kinds. The jury returned a verdict for a lump sum, without indicating that it was not all for actual damages suffered. Appellee testified that the value of the bar fixtures, etc., was $600, and that the value of his clothing, etc., was $800, and that all of same, except $125 to $150 worth thereof, was lost to him as the result of appellant's unlawful acts. It, therefore, cannot be said that there was not testimony to support the finding of the jury had they designated the amount thereof as all for actual damages. This being true, were it necessary to do so to support their verdict, it should be presumed that their finding included only actual damages suffered. Heiligmann v. Rose, 81 Tex. 225, 16 S. W. 931, 13 L. R. A. 272, 26 Am. St. Rep. 804. What we have said disposes of appellant's second, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth assignments of error.

Appellant offered as evidence an instrument purporting to be a bill of sale, conveying to him certain specific articles in the building and the "rent of the building to October 1, 1906," executed by Murphy. On appellee's objection on the grounds that the instrument was irrelevant and immaterial, that it was prejudicial to his rights, and that authority in Murphy to make such a conveyance had not been shown, it was excluded. On the issue of exemplary damages we think the instrument should have been admitted as evidence for what it might, in the estimation of the jury, have been worth, as showing the trespass to have been malicious or otherwise. As, however, the verdict must be construed as a finding of only actual damages, the error must be treated as harmless. The third assignment of error, therefore, is overruled.

Appellee used Judge Inman as a witness to prove the execution of the instrument evidencing the lease of the building to him. On his cross-examination the witness testified that, at the time he sold the building to appellant, he told appellant about his contract with appellee. Appellant testified in his own behalf. During his cross-examination he testified that when he purchased the building of Inman, the latter stated to him that "there was no contract or lease on it." The following then occurred, as shown by the stenographer's report of the testimony forming a part of the record: "Q. If Judge Inman testified in this case that he did tell you about this lease contract at the time he sold you this property, he either testified falsely or was mistaken? Mr. Tatum: I object to that question, as it is not proper. He can state what Judge Inman told him or did not tell him, but it is not proper to ask that kind of a question. The Court: I overrule

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the objection. Mr. Tatum: The defendant excepts. A. (continued) What is the question? Q. I say, if Judge Inman testified that he did tell you about this contract, then he was either mistaken or testified falsely, did he? A. Judge Inman said— Q. Answer the question. A. He told me— The Court: Answer the question. A. (continued) I would like to answer it this way: He told me there was no lease on it at all, and he gave me a clear deed to the property, and he stated that it was just rented from month to month. Q. I want you to answer my question. The Court: You must answer the question. A. (continued) Do you mean when he testified here or up there, or where? The Court: The question asked you is: If he testified here in court that he did tell you about that contract, did he testify truthfully or falsely? Mr. Tatum: The court understands we are still objecting to the question. A. He did not testify to this. He said there was not any. He said there was no contract existing whatever. Q. We don't seem to be able to get the witness to answer the question. A. I will answer it if you will explain it to me, but I will not answer something that I do not understand. Q. I will ask you the question this way: Did Judge Inman tell the truth, or did he tell a falsehood, here on the stand when he said he told you about that contract at the time he sold you that property? A. He did not tell me about the contract. Q. My question is did he tell the truth or not when he testified to that here? A. I am not telling whether people tell the truth or lies. Let the jury say that. Mr. Chauncey: We want the witness to answer the question. The Court: I think it is about as near as you can get it." It is urged on this appeal that the action of the trial court in requiring appellant, over his objection on the ground that it would be prejudicial to his rights to do so, to answer the questions put to him as above was error. Clearly it was error. Whatever may have been the opinion entertained by appellant, it was wholly irrelevant to any issue then being tried. It, therefore, was not admissible as evidence. Under the most liberal rules which could have been contended for as applicable to the cross-examination of a witness, appellant, had he been a mere witness, and not also a party to the suit, should not have been required to express the opinion sought; and for stronger reasons he should not, while testifying as a party to a suit involving his own rights, have been required over his objection to express such opinion. But, while such action on the part of the trial court was error, it does not appear from the record on this appeal that because of it appellant suffered injury. If it did so appear, the judgment would be reversed. While perhaps it might safely be assumed that such an expression from a witness never is sought for any other purpose than to prejudice the minds of the jury in favor of one or the other side of a controversy, an appellate court cannot assume that it had such an effect; nor, if it did, that it operated against, instead of in favor of, the party complaining. In appellant's bill of exceptions presenting on this appeal the matter complained of, no facts are stated from which the conclusion can be drawn that he suffered any injury. In the absence of such a showing we must presume he suffered none. The fourth assignment of error, therefore, is overruled.

We do not think the court erred in refusing to permit appellant to introduce as evidence the liquor dealer's license issued to one J. J. Duran, nor in excluding as evidence the testimony offered of County Clerk Allen to the effect that appellee had not filed a liquor dealer's bond, nor secured the issuance to himself of a license. The purpose of the evidence excluded, it seems, was to show that J. J. Duran, and not appellee, was the owner of the saloon fixtures, etc. The evidence, we think, if at all relevant on that issue, was entirely too remote.

The court did not err in refusing to charge the jury, as requested by appellant, to find for him if they believed that appellee's possession of the premises was under a verbal, instead of a written, contract. Whether appellee's possession was under a verbal or a written contract with Inman was immaterial. If appellant unlawfully interfered with appellee's property stored in the house, his liability would be the same whether the property was stored in the house under the one or the other kind of a contract. Nor did the court err in refusing to instruct the jury, as requested by appellant, to find for him if they believed that he had Murphy's consent to remove from the building the property belonging to appellee. Murphy's consent may or may not have been a matter worthy of consideration by the jury on the issue of exemplary damages, but it was of no importance on the issue of the actual damages suffered by appellee, in the absence of proof that Murphy had been authorized by appellee to give such consent. There is no evidence in the record tending to show such authority in Murphy; and, if there was, the charge was properly refused, because it ignored the fact that Murphy's consent to the removal of appellee's property from the building, if not authorized by appellee, did not affect his right to recover the actual damages suffered by him.

The court admitted as evidence an instrument in writing purporting to have been executed by Inman, and to be a lease of the building to appellee for a term of one year from December 30, 1905. In his charge the court instructed the jury that the instrument referred to was sufficient to establish in appellee a right to "enter and take possession of the premises in question, and, having obtained such lawful possession of the premises, the defendant would not be authorized by law to forcibly eject him or his effects therein stored." The objection urged to the

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charge is that it was upon the weight of the evidence. It was the duty of the court to construe, and then to instruct the jury as to the legal effect of, the instrument. The tenth assignment of error, therefore, is without merit and is overruled.

The court instructed the jury that, if they found for appellee, the measure of his damages would be the reasonable market value of his property and effects lost and destroyed, etc. The charge is objected to on the ground that it should have instructed the jury that the market value referred to was the market value in Texline. Not having requested a charge supplying the omission complained of, appellant's objection and his eleventh assignment of error must be overruled.

The evidence was conflicting as to whether appellee owned a certain mirror and a certain ice chest, which were among the articles removed from the house, and which were claimed to have been damaged. The issue as to whether the articles specified belonged to appellee or not was not submitted to the jury. In his charge the court assumed that they did belong to appellee, and instructed the jury, if they believed that the specified articles were forcibly removed from the house by appellant, to find for appellee as the damage thereto the difference in their value before they were removed from the building and their value after their removal and exposure to the weather, etc. On the ground that if he did not own the mirror and ice chest appellee was not entitled to recover damages on account of their removal from the building, appellant objects to the portion of the charge referred to. But we think the objection must be overruled. Appellee lawfully was in possession of the ice chest and mirror, and whether he owned them or not, as against appellant—a mere trespasser—was entitled to recover the damages suffered. 4 Suth. Dam. § 1097; 1 Suth. Dam. § 139; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Gillette v. Goodspeed, 69 Conn. 363, 37 Atl. 973.

The judgment is affirmed.

On Rehearing.

The reason given for the rule which permits one lawfully in possession, though not the owner, of personal property to recover its value of a stranger who unlawfully deprives him of such possession is his obligation to restore the property to the general owner, or stand responsible to him for its value. If the general owner consents to the stranger's act, he could not, in face of such consent given, insist that there was an obligation on the part of the person lawfully in possession of his property to restore it to him, or account to him for its value. In this case there was evidence on the part of one Brown that he was the owner, in common with his brothers and sisters, of the ice chest and the mirror, and that same were in appellee's possession, and being used by him with his (the witness') consent. Brown further testified that he assisted appellant in moving the ice chest out of the house. Having done so, he must be held to have consented to the trespass on appellee's part complained of, so far as the ice chest was concerned. Having so consented to it, he would not be heard to insist that the appellant should account to him for the value of the property or damage to it resulting from such trespass. Therefore we think we were in error in holding that the trial court did not err in assuming in his charge to the jury that the ice chest belonged to appellee. The question as to the ownership of the chest and of the mirror should have been submitted to the jury, and the jury should have been instructed, in the event they found for appellee, and further found that those articles belonged to Brown, and that he consented to their removal by appellant, on account thereof to find for appellant, not the value thereof, but only such damages as the evidence might show he suffered on account of being deprived of their use in violation of any contract he may have had with the owners entitling him to such use.

For this error the motion for a rehearing will be granted, and the judgment of the trial court will be reversed, and the cause will be remanded for a new trial.

TEXAS & N. O. R. CO. et al. v. SABINE TRAM CO.

(Court of Civil Appeals of Texas. May 31, 1909. On Rehearing, June 29, 1909.)

1. COURTS (§ 97*) — DECISIONS OF UNITED STATES COURTS AS AUTHORITY IN STATE COURTS.

The decisions of the federal Supreme Court as to what is intrastate commerce and interstate and foreign commerce are conclusive on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 329; Dec. Dig. § 97.*]

2. COMMERCE (§ 33*)—INTRASTATE COMMERCE.

Whether a shipment by the owner from one point in Texas for delivery to his own order at another point in Texas, under a shipping contract, completely performed by delivery at destination, is intrastate or interstate commerce, must be determined by the shipping contract, and not by the intent of the consignee as to the future disposition of the goods.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

3. COMMERCE (§ 33*)—INTRASTATE COMMERCE.

A manufacturer of lumber in Texas sold lumber there for delivery at a port in Texas to a buyer for exportation through the port. The manufacturer delivered the lumber to a carrier under a contract calling for delivery to his own order at such port. The lumber remained at the port until loaded by the buyer on chartered vessels for transportation. There was no local market at the port, and the carrier had never done any local business there. *Held*, that the carriage was intrastate commerce, governed by the rates fixed by the Texas Railroad Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

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4. CARRIERS (§ 20*)—OVERCHARGES—REMEDY.
Under Rev. St. 1895, art. 4568, providing that any person complaining of any act of a railway company "may" apply to the Railroad Commission, etc., and article 4575, authorizing any person, injured by a railway company doing any prohibited act, to sue for damages and for penalties, a shipper may sue for excessive freight charges collected by the carrier and for the penalties therefor, without applying to the Commission for relief.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

5. CARRIERS (§ 20*)—OVERCHARGES—REMEDY.
Under Rev. St. 1895, art. 4573, imposing penalties on a railroad company demanding excessive freight charges, and article 4581, providing that all penalties shall be cumulative, etc., a shipper compelled to pay excessive freight charges on different shipments may recover the penalty for each separate act of extortion.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

6. CRIMINAL LAW (§ 1214*) — EXCESSIVE FINES.
Rev. St. 1895, art. 4581, providing that all penalties accruing under the chapter relating to railroads and imposing penalties for extortion shall be cumulative, etc., construed as authorizing the recovery of a penalty for each act of extortion based on charging excessive freight rates, is not invalid as authorizing the imposition of excessive fines in violation of Const. art. 1, § 13.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304–3309; Dec. Dig. § 1214.*]

7. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW.
The statute so construed is not invalid as depriving one of his property without due process of law in violation of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

8. CONSTITUTIONAL LAW (§ 242*) — EQUAL PROTECTION OF THE LAW.
Rev. St. 1895, art. 4564, providing that in actions between private parties and railroad companies, the rates prescribed by the Railroad Commission shall be conclusive, and shall be deemed just until found otherwise in a direct action, under articles 4565, 4566, is not invalid as denying to the railroads the equal protection of the laws in violation of the fourteenth amendment to the federal Constitution, for articles 4565, 4566, provide a direct and appropriate proceeding in the courts to determine whether the rates fixed by the Commission are just.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 691; Dec. Dig. § 242.*]

9. CARRIERS (§ 12*)—RATES—UNREASONABLENESS OF RATES—STATUTES.
Under Rev. St. 1895, arts. 4565, 4566, authorizing proceedings in the courts to determine whether rates fixed by the Railroad Commission are unreasonable and unjust, a rate which barely returns the actual cost of the service without affording some profit on the investment is unjust and unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 19; Dec. Dig. § 12.*]

10. CARRIERS (§ 20*) — EXCESSIVE FREIGHT CHARGES—PENALTIES.
Under Rev. St. 1895, art. 4575, imposing on a railroad guilty of extortion a penalty, provided it may prove as a defense that the overcharge was made through a mistake of fact, a railroad making an overcharge with knowledge of the facts, but under a mistake of law, is liable to the penalty.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

11. EQUITY (§ 24*)—PENALTIES—EQUITABLE RELIEF.
Where a statute imposing a penalty imposes the penalty for an act committed under a mistake of law, equity cannot relieve the guilty party, though equity may sometimes relieve guilty parties of a mistake of law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 73; Dec. Dig. § 24.*]

12. CARRIERS (§ 20*) — EXCESSIVE FREIGHT CHARGES—PENALTIES.
Rev. St. 1895, arts. 4573, 4575, impose a penalty on a railroad exacting excessive freight charges, and provide that all penalties shall be cumulative. A shipper made 24 shipments on 24 different days. The carrier extorted excessive charges, but its agent allowed the bills to accumulate and collected the charges on 5 occasions. *Held*, that the carrier was guilty of 24 different offenses, authorizing the collection of the penalty for each offense.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

13. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CAUSE ON APPEAL—CORRECTION OF JUDGMENT.
Where a party was entitled to separate penalties for 24 violations of a statute imposing minimum and maximum penalties, and the trial court awarded him separate penalties for 5 violations, and he agreed that the court on appeal might render judgment for the minimum penalty for each offense, the court on appeal would render judgment for the minimum penalty for each of the 24 offenses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4573; Dec. Dig. § 1175.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by the Sabine Tram Company against the Texas & New Orleans Railroad Company and another. From a judgment for plaintiff, defendants appeal, and plaintiff cross-appeals. Reformed and affirmed.

Baker, Botts, Parker & Garwood, Parker & Hefner, Will E. Orgain, and Hiram Glass, for appellants. Greer, Minor & Miller, for appellee.

REESE, J. This is a suit instituted by the Sabine Tram Company, a lumber manufacturing corporation, against the Texas & New Orleans Railroad Company and the Texarkana & Ft. Smith Railway Company, to recover excessive freight charges on shipments of lumber by plaintiff over the lines of railway of defendant, and, in addition, statutory penalties for such overcharge.

It was alleged in the petition that at various times from September 1 to November 1, 1906, plaintiff, the Sabine Tram Company, shipped from Ruliff, Tex., a station on the line of the Texarkana & Ft. Smith Railway Company, to Sabine, Tex., on the line of the Texas & New Orleans Railroad Company, over the lines of said roads, certain car loads of lumber consigned to the said Sabine Tram Company, "Notify W. A. Powell Company"; that the lumber was received by the Texarkana & Ft. Smith Railway Company and by it carried to Beaumont, Tex., at which point it was turn-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ed over to the connecting carrier, the Texas & New Orleans Railroad Company, and by it carried to its destination at Sabine, Tex., and there delivered to plaintiff's order. It was alleged that the rate of freight established by the Railroad Commission of Texas for carriage of said lumber was, from Ruliff to Beaumont, 4 cents per 100 pounds, and from Beaumont to Sabine 2½ cents per 100 pounds, the rate so established being from Ruliff to Sabine, the sum of such two rates, or 6½ cents per 100 pounds; that the Texas & New Orleans Railroad Company, the terminal carrier, on the arrival of said lumber at Sabine, demanded for itself and the Texarkana & Ft. Smith Company, acting for the latter company as well as for itself, 15 cents per 100 pounds, which was paid by plaintiff under protest. The overcharge sought to be recovered was alleged to be $1,788.33, and, in addition, plaintiff sought to recover the maximum penalty of $500 provided by statute upon each car load of said lumber. Defendant set up by way of defense that the carriage of the lumber from Ruliff to Sabine was in the way of transportation of the same to points beyond the limits of the United States, or foreign shipments, and the same came under the provisions of the interstate commerce laws of the United States, and was not subject to rates prescribed by the Texas Railway Commission or the laws of Texas, and, further, that the 15 cents per 100 pounds charged and collected as freight was the proper freight charge, in accordance with schedule of freight charges filed by said railroad companies respectively with the Interstate Commerce Commission, to which said shipments were subject. Other matters were set up by way of defense which need not be here specifically set out. The substantial defense of defendant is that the shipment from Ruliff to Sabine was a foreign shipment, within the purview of the Constitution and laws of the United States.

The trial court instructed the jury that the shipments of lumber in question were subject to the freight rates prescribed by the Railroad Commission of Texas, and that plaintiff was entitled to recover the excessive charges as claimed. As to the penalties sued for, the jury was instructed that plaintiff was entitled to recover under the statute for five separate penalties of not less than $125 nor more than $500 each—that is, that it was entitled to recover in penalties not less than $625 nor more than $2,500—in the discretion of the jury. Under this charge the jury returned a verdict for plaintiff against both defendants jointly for $1,788.33 overcharge of freight and $1,785 penalties, upon which judgment was rendered. From the judgment, their motion for a new trial having been overruled, defendants prosecute this appeal.

There seems to be no dispute as to the material facts with the single exception o the amount of the Texas commission rat applicable to the shipments if they be sul ject to such rate. The evidence establishe the following facts:

At the date of the transaction in ques tion the Sabine Tram Company was en gaged in the manufacture of lumber at it mill at Ruliff, a station in Texas on th line of the Texarkana & Ft. Smith Rail way Company. W. A. Powell Company Limited, was engaged in buying lumber fo export to different points in Europe, throug the ports of Sabine and Port Arthur, bot in the state of Texas. On August 28, 1906 having made sales to customers for fu ture delivery in Europe of large amount of heavy pine lumber for the carriage o which steamships had in part already beer chartered, to fill such contracts W. A. Pow ell Company bought of the Sabine Tram Company 500,000 feet of heavy pine lum ber of certain dimensions, to be delivered during the months of September and Oc tober. The contract provided for delivery either in the water at Orange, Tex., or f o. b. cars at Sabine, Tex., at the option of the seller. The seller exercised the option to deliver at Sabine, a station on the line of the Texas & New Orleans Railway. During the months of September and Oc tober the lumber purchased was delivered to the Texarkana & Ft. Smith Railroad at Ruliff, to be by it transported to Beaumont, the terminus of its line, and thence by connecting carrier, the Texas & New Orleans Railway, to Sabine, and delivery to the Sabine Tram Company. There were 24 several shipments of the lumber on as many different days, the shipments embracing 33 cars, for which 30 separate bills of lading were executed by the Texarkana & Ft. Smith road, for delivery at Sabine to Sabine Tram Company, "Notify W. A. Powell Company, Limited." No other contract or arrangement was made by the Sabine Tram Company for the carriage of the lumber except that evidenced by the bills of lading aforesaid. Waybills accompanied the shipments upon which were marked in pencil "For export," but the Sabine Tram Company had no connection with, or knowledge of, the making of these waybills, which was the act of the railway company alone. According to the course of dealing between the parties, these bills of lading were indorsed by the tram company, and sent through to W. A. Powell Company, Limited, at New Orleans, La., attached to a draft for the price of the lumber, which being paid, the bills were delivered to Powell Company, and by them transmitted to their agent Flanagan, at Sabine. In case of most of the shipments in question the bills of lading reached Flanagan at Sabine before the arrival of the lumber for which they were given. The lumber was carried under the shipping contracts or bills of lading aforesaid by the Texarkana & Ft. Smith

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road to Beaumont, and there delivered to the Texas & New Orleans road, by which it was carried to Sabine. Upon arrival at the station of Sabine it was, by direction of the agent of Powell Company, carried without delay about a quarter of a mile beyond the station to the dock, where the lumber was to be unloaded. The lumber was unloaded from the cars into the water of the slip in reach of ship's tackle, ready for loading onto the ships. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the docks after its arrival at the station of Sabine, but this was done solely at the instance and under the direction of the agent of Powell Company. The transportation from Ruliff to Sabine was entirely within the state of Texas.

The rate established by the Railroad Commission of Texas for transportation of lumber from Ruliff to Beaumont was 4 cents per 100 pounds, and from Beaumont to Sabine was 2½ cents per 100 pounds, and by order regularly made by the said Commission it was provided that the through rate should not be more than the sum of the locals, under which order the through rate demandable from Ruliff to Sabine was 6½ cents per 100 pounds, the orders of said Commission further providing for a switching charge of $1.50 per car from Sabine station to the docks. According to a schedule of freight tariffs filed by the Texarkana & Ft. Smith Railway Company with the Interstate Commerce Commission, the freight charge on lumber for interstate or foreign transportation from Ruliff to Beaumont was 10 cents per 100 pounds, and according to like schedule of freight tariffs filed by the Texas & New Orleans Railroad Company with the Interstate Commerce Commission from Beaumont to Sabine was 5 cents per 100 pounds. When these tariffs were so filed is immaterial, except upon the issue of good faith on the part of defendants, as the plaintiff in no event, regardless of the interstate rate, would be entitled to recover in this suit if the Texas Commission rate was not applicable, which would only be the case if the shipment be regarded as an intrastate, and not a foreign or interstate shipment, which is the fundamental issue. We find, however, that the rate, under the act of Congress relating thereto, from Ruliff to Sabine was 15 cents per 100 pounds. When the lumber had been switched to the docks, W. A. Powell Company, through their agent, presented the bills of lading, and demanded the lumber, offering to pay the freight charges, which according to the course of dealing between the parties they were to pay for the Sabine Tram Company, who owed the same, and which it was to repay to Powell Company. The Texas & New Orleans Company, acting for itself and the Texarkana & Ft. Smith Company, demanded the Interstate Commission rate of 15 cents per 100 pounds, having been previously instructed by the Texarkana & Ft. Smith Company that 10 cents per 100 pounds was its rate from Ruliff to Beaumont. This Powell Company, under the instructions of the Sabine Tram Company, at first refused to pay, but after communicating with the Tram Company, finally paid the freight at this rate under protest, in order to get possession of the lumber. For switching from Sabine to the docks, the rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments, and if foreign or interstate shipments, the Interstate Commerce Commission tariffs would allow a switching charge of $2.50 per car, had not the charge for this service been absorbed in the 15-cent rate established aforesaid. Upon shipment of freight not for export, only 48 hours' free time was allowed for unloading cars, after which demurrage was charged, and if not removed from railroad premises when unloaded, a storage charge was made in addition. No such charge was made upon any of the lumber involved in this suit.

W. A. Powell Company, Limited, regarded the shipments in controversy as export shipments, and demanded, expected, and received the use of terminal facilities, additional free time, and other privileges accorded to shippers of export freight under export tariffs. The railway company knew, when the freight charges were collected, that the lumber was to be placed in its slips and exported to Europe on incoming ships, and the freight was believed by the officers and agents of the railroad company at the time the charges were collected to constitute foreign commerce, and to both permit and require the application of the rate fixed by the tariff on file with the Interstate Commerce Commission, and this rate was applied. All the lumber in question was in fact unloaded from the cars by W. A. Powell Company, Limited, into the Texas & New Orleans Railroad Company's slips, or upon its docks, in reach of ship's tackle, and loaded into the ships previously charged for the purpose by W. A. Powell Company, Limited, which steamships carried same thence direct to Europe, where this lumber was applied upon contracts for sale in Europe made before the lumber began to leave Ruliff, and made in fact before the lumber was purchased from the Sabine Tram Company and before it was sawed, and before the logs from which it was sawed left the state of Louisiana for the Sabine Tram Company's mill at Ruliff, in the state of Texas. One of the ships actually waited at the docks at Sabine for the arrival of part of the lumber which constituted a portion of its cargo. The ship which carried the last of this lumber from Sabine to Europe was chartered by W. A. Powell Company, Limited, for this purpose after these lumber shipments began to arrive at Sabine, but before all of the shipments had left Ruliff. None of this lumber remained in the slip at Sabine, or on the docks, except for the time necessary to await the arrival

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of the particular ship which had previously been chartered for the purpose, and designated by W. A. Powell Company as the ship which was to carry that particular lumber from the port of Sabine to Europe. Any shipment of lumber intended for export to Europe, and in fact shipped from any point in Texas, to and through Sabine as its port of transshipment, could be contracted for, billed to and from Sabine, shipped, transported and handled in every particular just as was this lumber.

W. A. Powell Company, Limited, before this lumber began to arrive at Sabine, took out a blanket policy of insurance, protecting same against loss, from the time this lumber should come into the possession of W. A. Powell Company, Limited, at Sabine, until its final delivery by W. A. Powell Company, Limited, in European ports. At the time this lumber was shipped it was destined by Powell Company for export to some foreign port, but the particular destination of any particular portion of the lumber was not fixed, although the destination of all of the lumber to certain foreign ports was known and fixed. The Sabine Tram Company had no concern with the destination of the lumber after it came into the hands of Powell Company, and had no particular knowledge thereof. It supposed from the fact that it was known that Powell Company were exporters of lumber, from the character of lumber which was such as was intended for export, from the fact that Sabine was an unimportant place at which very little lumber was used, and from other facts and circumstances, known to millmen generally, that the lumber was intended for export, but gave that matter no concern, being only concerned with the delivery of the lumber to Powell Company at Sabine station, and paying the freight thereon. What was done by the Texas & New Orleans Railroad Company after the arrival of the lumber at Sabine, in the way of switching to the docks, allowance of certain privileges allowed only to export freight, was done at the instance and for the benefit of Powell Company, with which the Tram Company had no concern.

The difference between the amount demanded and received by the Texas & New Orleans Railroad Company for itself and the Texarkana & Ft. Smith Railway Company, and the Texas Commission rate was, as found by the jury, $1,788.33. As stated before, there were 33 cars of the lumber for which 30 separate bills of lading were executed, some of the timbers requiring, on account of their length, two cars, which accounts for the difference between the number of cars and the number of the bills of lading. The shipments were made at 24 times—that is, on 24 different days. The agent of the Texas & New Orleans Company at Sabine did not make separate demands upon each expense bill, but allowed them to accumulate, in which way it occurred that only 5 separate demands for freight were made at different dates, the 5 demands covering the entire freight. From this the trial court arrived at the conclusion that the defendants had incurred liability for 5 separate statutory penalties, of not less than $125 and not more than $500—that is, not less than $625 and not more than $2,500—which was the sole issue submitted to the jury. Upon the freight bills was a charge for wharfage against the Tram Company which was paid by Powell Company as a proper charge against them, and not against the Tram Company. Export freight was entitled to 7 days' free time for unloading, and 30 days' free storage on the docks, or in the slips, which privileges were availed of by Powell Company in handling this lumber. The freight bills were made out against the Sabine Tram Company, and defendants knew that Powell Company were paying the freight for the Tram Company. The defendants, in charging the export rate, acted under the advice of their attorneys, that the facts constituted the lumber an export shipment, and subjected it to the Interstate Commerce Commission rate.

While there are other incidental questions presented, the fundamental question involved in this appeal is whether the shipment of the lumber was a transaction falling under the definition of foreign commerce. If it was, then, under the express provisions of the act establishing the Railroad Commission of Texas and prescribing its duties and authority, neither the rate fixed by such Commission nor the provisions of the statute, upon which alone the claim of plaintiff rests, have any application and its suit must fail. Rev. St. 1895, art. 4580, subd. 1. Without pretending to discuss seriatim the several assignments of error and the proposition thereunder, we will dispose of the several questions which are therein presented.

In the view we take of the opinion of the Supreme Court of this state in the case of G., C. & S. F. Ry. Co. v. State of Texas, 97 Tex. 274, 78 S. W. 495, and of the Supreme Court of the United States in the same case, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, in their application to the question here involved, we are relieved of the necessity of a discussion of other cases either of our own Supreme Court or of the United States Supreme Court—the ultimate authority in the decision of such questions—upon the question involved, as it is presented by the record. Nor are we concerned with what may appear to be a conflict between the views there expressed and earlier decisions of either of said courts. We would feel compelled, in fact, to follow decisions of our own Supreme Court unless such decision had been overruled by some later decision of the tribunal of last resort in such cases upon the point involved. Inasmuch, however, as the federal Supreme Court fully approved the decision of the Supreme Court of Texas in the case cited, and as we have been referred to no later decision by the federal Supreme Court, which, in our judgment, tends to im-

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peach the doctrine there laid down, it only remains to determine whether, upon the facts of the case of G., C. & S. F. Ry. Co. v. State, supra, the rule of decision there announced is applicable to the facts of the present case.

The question in that case was whether the movement of the two cars of grain from Texarkana in Texas to Goldthwaite, another point in Texas, was such a part of a continuous movement from Hudson, S. D., or more properly from Kansas City, Mo., as to constitute the former shipment an interstate shipment. If the grain had been bought by the Hardin Grain Company of the Harroun Commission Company at Goldthwaite for delivery to the Hardin Grain Company at Texarkana, the latter intending the grain for its purchaser at Kansas City, and immediately upon its delivery to them continuing the shipment to Kansas City, with only such interruption as would be necessary to transfer the grain to another carrier, for transportation under a new and different contract of shipment or bill of lading, to its customer at Kansas City, there would be an exact parallel between the facts of that case and of this. That it made no difference, in determining whether the movement between Texarkana to Goldthwaite was an interstate movement, whether it was from Kansas City to Texarkana, an interstate movement, thence to Goldthwaite in the same state, or from Goldthwaite to Texarkana, both in Texas, thence to Kansas City, outside of the state, is shown by the following quotation from the opinion of the Supreme Court of the United States in the cited case: "The same question may be looked at from another point of view. Supposing a car load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car, can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended after the goods had reached Texarkana to forward them to some other place outside the state? To state the question in other words, if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a federal law in respect to interstate transportation on the ground that the shipper intended after the one contract of shipment had been completed to forward the goods to some place outside the state? Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715."

It will be noticed that the court puts the case of the owner and shipper himself shipping the goods upon a bill of lading calling for transportation from one point to another in the same state, intending himself to forward them from such point to some point without the state, in this respect going further, probably, than the Supreme Court of Texas. The case is very much stronger here against the view that the movement to Sabine was a foreign shipment, in that the further movement of the lumber after reaching Sabine was a matter with which the shipper, the Sabine Tram Company, had nothing whatever to do, and which was never, at any time, in its mind, except as a surmise or general idea that Powell Company intended the lumber for foreign shipment, after delivery to them, and after it became their property, upon payment for the same and delivery of the bills of lading. We make no excuse for the following extended quotation from the opinion of Justice Brewer, speaking for the United States Supreme Court in the Sante Fé Railway Company Case, as what is said is so apt in its application to the facts of the present case:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sale, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither Harroun nor the Hardin Company changed or offered to change the contract of shipment, or the place of delivery. The Hardin Company accepted the contract of shipment heretofore made and accepted the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company to be delivered by it, under its contract with said owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as a carrier, but simply as a forwarder. No new arrangement having been made for the transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a mat-

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ter immaterial so far as the completed transportation was concerned. In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that must be subject to the law of the state within which that carriage was to be made."

The facts of the Santa Fé Railway Company Case are thus succinctly stated by the Supreme Court of Texas: "The substance of the facts as found by the trial court and the Court of Civil Appeals seems to us to be these: The Hardin Grain Company, doing business in Kansas City, Mo., having made a contract with parties at Goldthwaite, Tex., for the delivery of two car loads of corn at that place, in order to comply with their undertaking, contracted to purchase of Harroun Commission Company, who were also doing business at Kansas City, Mo., and had an agent at Texarkana, Tex., the same quality of corn, to be delivered at the point last named; that the corn with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Tex., through Kansas City, Mo.; that while it was in transit at the latter place the Harroun Commission Company became apprised of the fact; that the corn was delivered at Texarkana, Tex., in accordance with the agreement to the Hardin Grain Company, who thereupon shipped it in the same cars, without breaking bulk, over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Texas.

And upon these facts, in disposing of the question of whether they constituted interstate shipment, the court says: "Here the Harroun Commission Company, the original consignors, were the owners of the corn when shipped and until its arrival at Texarkana and delivery there to the Hardin Grain Company in compliance with their contract of sale. They neither intended nor contemplated any shipment beyond the point to which it was consigned. When the corn was delivered to them at Texarkana, the contract on the part of the carriers was performed and the carriage so far was at an end. Even had they known that the buyers intended to have the corn transported to a further point in Texas, we fail to see that it would have altered the case. Having ceased to be the owners of the corn upon its delivery to the Hardin Grain Company at Texarkana, as contemplated in their contract, they had no further control over it, nor had they any further concern with it."

As said by the Supreme Court of the United States in its opinion, it made no difference that the title to the property was transferred during the course of its transportation. That fact did not affect the character of the movement as evidenced by the terms of the shipping contract. As a reason for holding that the contract of shipment alone was to be looked to, in determining the character of the transportation, Justice Brewer says: "It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, and the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation, when commenced, is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract." And this applies with much more force to the facts of the present case, where it is sought by appellants to determine the character of the shipment, not by the intentions of the shipper and the owners of the lumber, but by the intentions of the consignee, who in fact had nothing to do with the shipping contract when made. This does not, to any extent, affect the doctrine announced in Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, that goods become the subject of interstate commerce and pass beyond the jurisdiction of the state when they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. The effect of this is that the grain did not begin its journey to Goldthwaite until delivery to the carrier at Texarkana for carriage to that point, as, in the present case, the lumber did not begin its journey to a foreign port until the carriage from Ruliff to Sabine had terminated.

To us it seems utterly unreasonable to hold that the character of this shipment of lumber by the owner from one point in Texas to another point in the same state, there to be delivered to its own order, under a shipping contract which was completely performed by delivery at the point of destination under the shipper's contract, should be determined by the intention of the consignee as to its future disposition. If, by allowing the terms of a shipping contract, in a case of this kind, to

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determine whether the transportation shall come under the protection of the laws of Congress as interstate commerce, would place it in the power of the owner of property to control this matter, we must confess that we can see no harm in this, nor any violation of the spirit or purpose of the provision of the federal Constitution reserving to Congress the power to regulate commerce between the states and with foreign nations, and the laws passed in pursuance thereof. Nor do we think that this case can be distinguished from the Santa Fé Railway Company Case on the ground that that case involved the question of an interstate or intrastate shipment while this involves the question of a foreign or intrastate shipment. The difference between the authority of the Interstate Commerce Commission over interstate traffic and foreign traffic in that it has control only over such foreign traffic to and from the port, and not over the ocean carriage, does not at all affect the applicability of the doctrine announced in this case, which must be governed by the same rules as if the lumber was intended by Powell Company for shipment to another state, instead of to a foreign country not adjacent to the United States.

We conclude that the trial court rightly held that upon the undisputed evidence the shipment was an intrastate shipment, and governed by the rates prescribed by the Railroad Commission of Texas.

Appellants presented a plea in abatement, to the effect, in substance, that under the provisions of article 4568, Rev. St. 1895, complaint must first be made to the Railroad Commission of Texas of such violation of law as is here complained of, and that there must first be a determination by the Commission that the rate charged is in violation of law, before suit can be instituted in the courts to recover for such violation. Appellee excepted to such plea, and the court sustained the exception and overruled the plea, and the ruling is assigned as error. There is no merit in the assignments, and they are overruled.

If it had been intended by the Legislature that complaint must first be made to the Commission before suit could be instituted in the courts to recover overcharges for freight, we think such intention would have been more clearly expressed than is done in this article of the statute, which merely provides that such complaint may be made to the Commission. It is provided by the statute that if upon hearing of such complaint it is found that there has been a violation of the law, the Commission shall first determine if the same was willful. If not willful the offending company shall be called upon to satisfy the damage done to the complainant. If this is not done, or if the violation is found to be willful, the Commission shall institute proceedings to collect the statutory penalties due to the state, which are separate and distinct from those allowed the complainant. It is further provided that this procedure shall not abridge nor affect the right of any person to sue for any penalty that may be due any person under the provisions of law. Article 4575, Rev. St. 1895, under which this suit is brought, authorizes suits by any person injured for his damages and also for the penalties provided. We cannot agree with appellants that by the express provisions of the latter part of article 4575, saving the right to sue for penalties, it was intended to limit the right thus reserved to sue for statutory penalties, and by implication to prohibit suits for recovery of the actual damages. No express provision of the statute is necessary to give to the person injured by a violation of the law the right to sue for and recover his actual damages for the injury, and it was probably not thought necessary to reserve such right, or to provide specially that it should not be abridged by the provisions of article 4568, with regard to a hearing before the Railroad Commission. It would be most unreasonable to require an injured person to first apply to the Commission before suing for his actual damages, but to leave him free to sue for the statutory penalties, and such was not the intention of the Legislature.

Under the provisions of the statute appellee was not limited to the recovery of one single penalty, but was, we think, under article 4581, with regard to cumulative penalties, entitled to recover for each separate violation of the law, or each separate act of extortion as defined by article 4573. In view of article 4581, which was intended to provide expressly for the cumulation of penalties for separate violations of the law, the authorities cited by appellants in support of their proposition under the fourth, fifth, and sixth assignments of error have no application. As each act of extortion is distinct and complete in itself, for which the statute provides a penalty, and gives a right of action for the recovery thereof, where there is more than one such act, to the injury of any person, recovery may be had in one suit for the penalty provided for each act. Nor would such construction of the act render it violative of section 13, art. 1, of the Constitution of the state prohibiting the imposition of excessive fines. State of Texas v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951. Such a construction of the statute does not violate the provisions of the fourteenth amendment to the Constitution of the United States, that no person shall be deprived of his property without due process of law, nor be denied the equal protection of the law.

Appellants by their answer allege as defense that the rate prescribed by the Railroad Commission was unreasonably low and insufficient to afford them reasonable compensation for the services performed and required, and was confiscatory, that section 5, p. 58, c. 51, of the act of 1891 (article 4564, Rev. St. 1895) properly construed was not intended to abridge their right to make such defense in this suit, but if it be so construed, then it was violative of section 1 of the four-

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teenth amendment of the Constitution of the United States, in that thereby appellants were denied the equal protection of the laws. The section of the act referred to is as follows, and is set out in full in the answer: "In all actions between private parties and railway companies brought under this law, the rates, charges, rules, orders, regulations and classifications prescribed by said Commission, before the institution of such action, shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof." It seems clear that the act referred to was expressly intended to apply to such a case as is presented by this petition. Its purpose is clear and unmistakable. Careful provision is made by sections 6 and 7 of the act (articles 4565, 4566, Rev. St. 1895), for the institution and speedy trial and final disposition of actions against the Railroad Commission by any railroad company, or other party at interest, who may be dissatisfied with any rate, classification, rule, charge, order, act, or regulation adopted by the Commission, to determine whether the same is unreasonable or unjust. In this way a uniform rule is established, binding upon the railroad company and shipper alike, and it was not open to either the shipper or the railroad company to say that any rate, rule, classification, or regulation adopted by the Commission was unjust or unreasonable until it was so declared in such a proceeding against the Railroad Commission. But it must be borne in mind that a direct and appropriate proceeding was provided in the courts of the country through which this question might be determined after full hearing of all parties, and in this the statute in question is vitally different from that held unconstitutional in Railway v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. We are unable to conceive in what way this statute can be said to deprive appellants of the equal protection of the law.

There is no logical ground, so far as the application of the statute is concerned, to distinguish a rate which is unreasonable because it does not, after paying the expense of the service, afford at least some profit on the investment, to which the railroad companies are entitled, and a rate which is unreasonable and unjust in that it does not return to the carrier the actual cost of the service, and which is on that account, as stated by appellants, confiscatory; between a rate which barely returns the actual cost of the service, and a rate which returns less than that. A rate is unjust and unreasonable in the one case as well as in the other. There is only a difference in the degree of unreasonableness. An infinitesimal fraction of a cent might determine whether a rate was simply unreasonable, or so unreasonable as to be what appellants term confiscatory.

It is no defense to appellee's claim either for the overcharge or the statutory penalties that appellants may have been innocently mistaken as to their belief that under the facts existing with regard to this shipment they had a right to charge the interstate or export rate. To allow such a defense would practically nullify the statute. The statute (article 4575) provides that the railroad company shall not be liable for the penalties therein provided, if it is shown that the overcharge was unintentionally and innocently made through a mistake of fact. The overcharges here complained of were not so made. Every material fact with regard to these shipments which could affect or determine their character as intrastate or export, were as well known to appellants at the time the overcharges were made as they are now. There was no substantial dispute upon the trial as to these facts, and appellants justify the charges made upon the existence of these facts. Whether they constituted an export shipment or an intrastate shipment was purely a question of law, not even a mixed question of law and fact. As to this question of law, the appellants were mistaken. It is probably a harsh rule which makes them liable for heavy penalties, imposed, not for compensation, but for punishment, if they acted under such excusable mistake, even of the law, but it is so written, and we know of no rule of judicial action which would authorize us to set aside the plain provision of the statute to avoid what may be the harsh consequences of its enforcement in the particular case. Courts of equity have sometimes relieved parties of the consequences of a mistake of law, sometimes under the thin disguise of declaring it a mixed question of law or fact, and sometimes without even this disguise. Swedesboro Building & Loan Ass'n v. Gans et al., 65 N. J. Eq. 132, 55 Atl. 82; Ramsey v. Allison, 64 Tex. 703; Moreland v. Atchison, 19 Tex. 309. But there is no room for the exercise of this equity jurisdiction of the court in the matter of the enforcement of the plain provisions of this statute, which expressly provides that, for a mistake of fact appellants may be relieved of the penalties, and, impliedly, that for a mistake of law they shall not be.

Appellants exaggerate, we think, the danger they were in of being mulcted in penalties for violation of the interstate commerce act of Congress if they had charged the State Commission rate. That article, it is true, prescribes a heavy penalty for charging more or less than the rate filed with the Interstate Commerce Commission, but only when such violation is willful, which it could not have been held to be in this case. That seems to us to be the more just and reasonable rule, but the Legislature has thought proper to enforce the penalties in all cases of overcharge except when made under a mistake of fact, whether or not done under such circumstances as would render the act willful.

It appears that the agent of appellant

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the Texas & New Orleans Railroad Company, at Sabine, had allowed expense bills to accumulate in his hands, instead of making his demand and collecting the freight charges on each, and in this way on 5 several occasions he had demanded and collected such charges, on the expense bills in his hands. The trial court concluded, as a matter of law, that this rendered appellant liable for 5 several penalties only under the law, and so instructed the jury. Appellee contends that each shipment, of which there were 24 on as many several days, constituted a separate and distinct offense under articles 4573–4575, for which appellant was liable, and requested a special charge to that effect, which was refused. The correctness of this action of the court is presented by an appropriate cross-assignment of error by appellee. We agree with appellee as to this contention, and that under the undisputed evidence appellant is liable for penalties of not less than $125 nor more than $500 upon each of the 24 separate shipments. This would ordinarily require a reversal of the judgment and that the cause be remanded upon appellee's cross-assignment of error, in order that it might be determined in the trial court what amount of penalties, as between the maximum, should be recovered. But appellee agrees that, in the event their cross-assignment of error be sustained, this court may render judgment for the minimum penalty in each case. Inasmuch as, under our view of the law, we would be required to remand the cause with instructions to determine what amount should be adjudged to appellee for the 24 violations of the law, under which appellant could not be adjudged liable for less than $125 for each of the 24 infractions of the law, for which appellee agrees that we may render judgment instead of remanding the cause, the judgment will be reformed on appellee's cross-assignment, and here rendered in appellee's favor against appellants for $1,788.33, being the amount of the over-charges, and, in addition, for a penalty of $125 for each of the 24 separate shipments; aggregating $3,000.

We have carefully examined each of the several assignments of error presented by appellants and the several propositions thereunder, and, while each of them has not been discussed in this opinion, our conclusion is that none of them present any ground for reversing the judgment, and they are severally overruled.

The judgment is reformed and affirmed as herein indicated.

On Motion of Appellant for Rehearing and Additional Findings of Fact, and of Appellee to Correct Findings of Fact.

We are requested by both parties to correct our findings of facts in some particulars and for additional findings, and, in deference to such request, we desire to correct the findings made and to make additional findings, in what we regard, however, as unimportant and immaterial particulars, in no way affecting any of the questions presented and decided on this appeal. We find as follows:

Powell & Co. purchased lumber from other mills in Texas, with which to supply its said sales in part; it did not know when any particular car or stick of lumber left Ruliff, into which ship or to what particular destination it would ultimately go, or on which sale it would be applied; this not being found out until its agent, Flanagan, inspected the invoice mailed to, and received by him, after shipment. Upon inspection of the invoice, he determined from the character of the lumber described whether it was suited for one cargo or the other. The lumber remained, after arrival, in the slips or on the dock from 1 to 30 days, until a ship chartered by Powell & Co. arrived, when that company selected out the lumber suited for that cargo, and shipped it forward to the destination for which Powell & Co. intended it.

We withdraw our finding that the rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments. The only testimony we can find on this point is that of witness Beard, general freight agent of the Texas & New Orleans Railroad Company, that "the Texas rate for switching these cars would have been $1.50 per car—that is, if Powell & Co. owned the docks—if it was shipped to the warehouse owned by consignees or his place of business." This testimony does not authorize the general finding on this point made by us.

The freight rate due under the tariff on file with the Interstate Commerce Commission and collected on these shipments was 15 cents per 100 pounds, and, under this rate, the services rendered without other charge included switching from Sabine station to the docks, 7 days' free time exclusive of Sundays within which to unload the lumber from the car and 30 days' free storage of the lumber upon the docks at the wharves or in the slips belonging to the Texas & New Orleans Railroad Company. W. A. Powell & Co., Limited, availed itself of all these services and privileges which were stipulated for by the Interstate Commerce Commission tariff and included in the 15-cent rate charged on export freight.

There is not now, and was not at the time these shipments moved, any local market for lumber at Sabine, the population of which place does not exceed 50 in number. Appellees have never done any local business at that point. For the year 1905 there was exported through the port of Sabine 14,667,670 feet of lumber; for the year 1906, 39,554,000 feet. The shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine.

The motion for rehearing is overruled.

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BURGIE v. BAILEY.

(Supreme Court of Arkansas. July 12, 1909.)

1. EVIDENCE (§ 443*)—PAROL EVIDENCE VARYING WRITTEN CONTRACT—SEPARATE SUBSEQUENT AGREEMENT.

B. sold his business and stock in trade to J., who sold to R., who agreed to assume and pay J.'s indebtedness to B. On the same day B. and R. entered into an agreement, also in writing, reciting the sale, and that, in consideration of R.'s covenant to assume and pay J.'s indebtedness, B. released J. from all liability thereon. J., having paid a judgment recovered against him by a creditor for goods used in the business, sued B. and R., claiming that he had surrendered the business to B. on the latter's agreeing to pay all indebtedness, including that due the judgment creditor, and that on the same day B. traded the business to R. for a sum in excess of the amount due B., which excess was to cover the outstanding bills and to pay for some goods used by J. in his business which were not covered in the original trade between J. and B. *Held*, that testimony to substantiate such claim and to show that the sale was made by B. to R., and that B. agreed to pay the debts incurred by J. in running the business, did not vary or contradict the written contracts, and was admissible as tending to show a separate and independent verbal contract between B. and J.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 443.*]

2. FRAUDS, STATUTE OF (§ 23*)—AGREEMENT TO ANSWER FOR DEFAULT OF ANOTHER.

The agreement was not a collateral undertaking on the part of B. to answer for the default of J., but was an original one for a valuable consideration, and was not required to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 23.*]

3. TRIAL (§ 140*)—TRUTH OF TESTIMONY—QUESTIONS FOR JURY.

The question of the truth or falsity of testimony is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Appeal from Circuit Court, Chicot County; H. W. Wells, Judge.

Action by L. & E. Wertheimer against L. C. Jackson, wherein Jackson filed a cross-complaint against H. F. Bailey and another There was a judgment fn favor of the Wertheimers against Jackson, and in favor of Jackson against Bailey and his codefendant, and from such judgment Bailey appealed. Jackson having died, Samuel Burgie was appointed special administrator to conduct the suit. Reversed and remanded.

Harry E. Cook, for appellant. E. A. Bolton and Wm. Kirten, for appellee.

HART, J. On the 24th day of November, 1905, L. & E. Wertheimer brought suit before a justice of the peace in Chicot county against L. C. Jackson for $292.50 alleged to be due them by Jackson for whisky and other merchandise sold to him. Jackson answered and admitted the indebtedness. He also filed a cross-complaint against H. F. Bailey and Gaines Robinson, alleging: That he had purchased the license, stock of goods, and place of business of said H. F. Bailey for the sum of $4,812.20, on which he had paid, in three monthly installments, $1,800; that, becoming dissatisfied with the business and aware that he had paid a grossly excessive price for same, he surrendered to said Bailey the said business, in which he had invested $300 of his own money, and turned over to the said Bailey $230 that he had cash in the bank at the time, submitting to the said Bailey invoices of all goods purchased and all unpaid bills; that in consideration of his surrendering said business and all of his interest in the $300 of his personal funds invested therein, and the $230 check for cash in bank, the said Bailey then and there agreed to assume and pay off the outstanding indebtedness of Jackson, consisting of the claim of the Wertheimers and another small claim amounting to less than $30. He further alleged in his cross-complaint that Bailey had on the same day traded said business to Gaines Robinson for a sum amounting to $3,544.20, being $815 in excess of the amount due Bailey from Jackson, which said excess was to cover the outstanding bills and to pay for some goods used by Jackson in his business, which were not covered in the original trade between Jackson and Bailey. He asked that he be granted judgment against Bailey and Robinson for the sum of $292.50, the amount claimed by the Wertheimers. On November 29th Bailey answered the cross-complaint, denying that he assumed the unpaid bills of Jackson, including that of the Wertheimers, and alleging that Jackson had on his books outstanding accounts amounting to about twice as much as Jackson owed for goods, and that the assumption was by Robinson, and not by himself, Bailey, and further undertakes to account for the $815 excess, in which he includes $320 for four months' rent, being for the months of September, October, November, and December, 1905, when Jackson surrendered possession of the premises on September 6th delivering the same into the possession of H. F. Bailey, who placed Gaines Robinson in possession. The court rendered judgment in favor of L. & E. Wertheimer against L. C. Jackson for $292.50, and rendered judgment on the cross-complaint in favor of L. C. Jackson and against H. F. Bailey and Gaines Robinson for the same amount. From this judgment Bailey appealed to the circuit court, giving bond, with Jno. G. B. Simms as surety.

Execution was issued on the judgment in favor of Wertheimer and against Jackson, the same was stayed for six months, and then paid by Jackson and his sureties. During his lifetime Jackson assigned and transferred his judgment against Bailey to Samuel Burgie and Samuel Epstein, who had advanced him money, and upon his death, same having been suggested to the court, Samuel Burgie was appointed special administrator to con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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duct the suit in the circuit court. In the circuit court the cause was treated by the parties as a suit by Jackson against Bailey for $292.50, the amount which L. & E. Wertheimer had recovered against him.

Jackson introduced in evidence the original contract of purchase from Bailey to him. It reads as follows: "This agreement between H. F. Bailey & Co., of the first part, and L. C. Jackson, of the second part, witnesseth: Said first parties hereby sell and transfer to second party all its stock of whisky, beer, cigars and fixtures, unexpired license at cost, with 10 per cent. added as cost of carriage on said stock. This sale is conditional and considered as a lease during the period of installment payments herein agreed upon, and said business is to continue under the old firm name and by Jackson as agent. Said Jackson shall pay for said property in equal monthly installments at the end of each month, beginning June the 1st next. The amount to be specified in the notes to be fixed by the invoice of said property, and said notes and invoice are a part of this contract. Said Jackson agrees to pay the rent due by the said first parties at the rate of $100 per month in advance, and to have possession of all rented property. Said Jackson agrees to conduct an orderly business, and if he fails so to do to return said property to first party. Said first parties agree to aid and assist in every way they can to secure said business to be a success, and if the trade of the business becomes at any time so dull as to hinder second party in his monthly payments, first party agrees to extend same a reasonable time. Said second party agrees to use from the warehouse of the first party exclusively such goods as are stored therein, and pay cost for the same or cost and 10 per cent. carriage as they are withdrawn and needed by second party in the business. It is understood the invoice of the stock of goods and fixtures, which are situated in the Robinson building, and which are the goods leased hereby, amount to $4,812.50, and the unexpired license amounts to $800, the second parties' notes are eight in number, and for $601.50 each, and when said notes are paid, the property belongs to the said Jackson, and said Bailey & Co. will execute a bill of sale for all the same and all of said notes draw 8 per cent. interest from date until paid. The jugs and bottles are included in this sale, and are partly in warehouse." He also introduced W. D. Hauptman and C. M. Mathews, who testified, in substance, to the matters hereinbefore set out in his cross-complaint.

Bailey, who became a witness for himself, denied the matters set up in Jackson's cross-complaint, and, in substance, said that he had not agreed with Jackson to pay his outstanding indebtedness, incurred while he was running said saloon. He also introduced the written contracts between Jackson and Robinson, and between Robinson and himself. They read as follows:

"Know all men by these presents: That, whereas, Gaines Robinson, party of the first part, desires to purchase from L. C. Jackson, party of the second part herein, the saloon business now owned by the said party of the second part, and situated in the Robinson building in the town of Lake Village, Arkansas; and, whereas, the said party of the second part is indebted to one H. F. Bailey in the sum of $3,544.20 (thirty-five hundred and forty-four and 20–100 dollars): Now the party of the first part agrees to assume said indebtedness and pay the same unto the said H. F. Bailey according to the tenor of a certain contract, now existing between the said H. F. Bailey and said party of the second part, bearing date the 1st day of May, 1905, where the said Bailey sold unto the said party of the second part the aforesaid saloon property, and the said party of the second part for the consideration aforesaid agrees to and by this contract does sell, transfer, assign and convey unto the said Gaines Robinson, party of the first part, hereto, all merchandise, goods and wares, and all fixtures and book accounts in said saloon building and also transfer unto the said Robinson his lease upon said building, and all other rights, things and property which the said Jackson acquired from the said Bailey by the aforedescribed contract, and the said Jackson does immediately upon the signing of this contract deliver the possession of the aforedescribed property unto the said Robinson. In testimony whereof, witness our hands this 6th day of September, 1905. L. C. Jackson. Gaines Robinson."

"Know all men by these presents: Whereas, L. C. Jackson has this day sold and transferred his saloon business, situated in the Robinson building, unto Gaines Robinson, and the said Gaines Robinson has agreed to and with the said Jackson to assume the said Jackson's indebtedness to me, amounting to thirty-five hundred and forty-four and twenty-one hundredths dollars, and the said Gaines Robinson does sign this instrument, and agree and covenant with me that he will assume and pay said sum of money: Now, in consideration of the premises above set out, I hereby release the said L. C. Jackson from any further and all liability to me on account of said indebtedness, and I, Gaines Robinson, hereby agree to and with H. F. Bailey that I will pay unto the said H. F. Bailey the aforesaid indebtedness. Witness our hands and seals this the 6th day of September, 1905. [Signed] Gaines Robinson. H. F. Bailey."

Bailey then moved the court to strike out the testimony of Hauptman and Mathews because it varied the terms of the written contract. The court excluded the testimony. Jackson then offered to prove by Gaines Robinson and by Allen Beadel, the attorney who prepared the contracts, that the sale was

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made by Bailey to Robinson, and that Bailey agreed to pay the debts incurred by Jackson in running the business; but the court refused to permit the introduction of the testimony. The jury was then instructed to return a verdict for Bailey, which was, accordingly, done. Jackson has duly prosecuted an appeal from the judgment rendered.

The court erred in excluding the testimony of Hauptman and Mathews, and in refusing that of Robinson and Beadel. The testimony did not go to the extent of varying or contradicting the written contracts. It tended to show a separate and independent verbal contract between Bailey and Jackson, and was admissible for that purpose. Ramsey v. Capshaw, 71 Ark. 408, 75 S. W. 479.

It was not a collateral undertaking on the part of Bailey to answer for the default of Jackson, but was an original undertaking on his part for a valuable consideration to pay the debts Jackson incurred while running the business, and was not required to be in writing. The question of the truth or falsity of the testimony should have been submitted to the jury. Gale v. Harp, 64 Ark. 462, 43 S. W. 144.

For the error in excluding the testimony as indicated, the judgment is reversed, and the cause remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. LEWIS.

(Supreme Court of Arkansas. July 12, 1909.)

1. MASTER AND SERVANT (§ 101*)—INJURIES TO SERVANT—RAILROADS—SAFE PLACE AND APPLIANCES.

It is the duty of a railroad to exercise ordinary care to provide its employés with a suitable place to work and suitable appliances and means to work with.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173–184; Dec. Dig. § 101.*]

2. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—INSPECTION.

A railroad company is bound to exercise reasonable care by inspection to keep the place, means, and appliances furnished to employés in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.

Evidence that the conductor of a gravel train was injured by the breaking of a defective car step was not sufficient to establish the railroad company's liability, without proof of its negligence in failing to discover and repair the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 955, 962; Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT — RAILROADS — SUFFICIENCY OF EVIDENCE.

Failure of railroad car inspectors to discover and repair a defective car step, by which the conductor of a train was injured shortly thereafter, when inspectors had ample opportunity to do so, was evidence of the railroad company's negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

5. MASTER AND SERVANT (§ 181*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Under the statutes in force in February, 1907, a railroad conductor in charge of a gravel train and a car inspector were not fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 181.*]

6. DAMAGES (§ 33*) — PERSONAL INJURIES — PREDISPOSITION.

Where plaintiff sustained hernia as a result of defendant's actionable negligence, plaintiff was not precluded from recovering full damages because he was predisposed to hernia.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 42; Dec. Dig. § 33.*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by M. R. Lewis against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sam H. West and Bridges, Wooldridge & Gantt, for appellant. W. F. Coleman and T. M. Hooker, for appellee.

BATTLE, J. M. R. Lewis sued the St. Louis Southwestern Railway Company for damages for an injury caused by its failure to properly inspect its cars. He alleged: That he was on the 27th of February, 1907, in the employment of the defendant as conductor on one of its gravel trains, and while so engaged sustained painful and permanent injuries as a result of the gross negligence of the defendant; that in the discharge of his duties as such conductor he caused said trains to be moved to the Bearden gravel pit on its line of railway, for the purpose of loading the same with gravel for use on defendant's railway, and caused it to be stopped at the place where it was the custom of the railroad company to inspect its cars and to repair any and all defects and injuries that any of them may have received, and after it had been stopped sufficiently long for such purpose caused it to be moved to a steam shovel there located to be thereby loaded with gravel, and when it stopped placed his foot upon the stirrup or step of one of the cars of the train for the purpose of alighting, and it, being defective, as he did so, swung around from one end, and threw him to the ground, and thereby inflicted hernia in one of his sides, a painful and permanent injury.

He further alleged: "That said stirrup on said car was defective; that same was known to the defendant, or could have been known to it by the exercise of ordinary care; but that defendant, through its agents and employés, did not exercise ordinary care in the inspection and repair of its said cars,

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but was guilty of gross negligence, thereby causing the injury to the plaintiff as above." And charged: "That defendant has been guilty of negligence in not providing safe appliances for its said cars, and in the use and employ of defective machinery and appliances, to the plaintiff's great injury." And stated: "That, by the wrongful and negligent acts of the defendant, plaintiff has suffered great bodily pain and mental anguish and suffered permanent injury; that he has suffered such injury as renders him unable to perform his usual labors and incapacitates him for performing manual labor of any kind; and that he has been damaged thereby in the sum of $20,000"—for which he asked for judgment.

The defendant admitted that plaintiff was in its employment, and denies all other material allegations, and pleaded contributory negligence and assumed risks by plaintiff as defenses.

A trial of the issues before a jury followed, in which a verdict was returned in favor of the plaintiff for $1,500, and the defendant appealed.

Evidence was adduced in the trial tending to prove the following facts: On the 27th day of February, 1907, plaintiff, Lewis, was a conductor in the employment of the defendant, St. Louis Southwestern Railway Company, being in charge of the moving of the trains of the railway company and the loading of its cars with gravel at Bearden gravel pit. He had caused a line of cars to be moved down to the steam shovel at that place for loading, and was stepping from one of the cars to a step suspended under the sill on the side of the car. The step gave way, and he fell to the ground, a distance of about two feet, which caused a hernia in his left side and much pain and suffering. This step "was in the nature of a stirrup being on the ends of bolts coming down through the sill." It was a flat piece of iron bent in the shape of the letter U. A bolt passed through each end and was secured by nuts. After appellee had fallen, he discovered that one of these nuts had come off, leaving one end of the step unfastened. When he put his weight on the step, the end slipped off the bolt, and he fell. He could not have discovered the defect in the step, before falling, without getting down on the ground and looking up from beneath the car.

Inspectors were sent to and kept at Bearden gravel pit to inspect the cars of the appellant arriving at that place. They made all necessary repairs they could that this inspection disclosed, and if they could not be made there the car was sent to the shops at Pine Bluff, Ark. They made report of cars inspected to a Mr. Adams, "the superintendent of motive power at the Pine Bluff shops." C. E. Yowell was foreman of the freight car repairs of appellant in its shops at Pine Bluff. The inspectors at Bearden gravel pit were employed by him, and he sent them there as car repairers and inspectors. They inspected the car with the defective step a short time before and on the day appellee was injured. They failed to discover the defect, and no good reason is given for the failure. The car was moved a very short distance after the inspection to where appellee fell.

T. S. Stinson was train master of the appellant, and in February, 1907, was in charge of the Bearden gravel pit, together with the gravel trains of the appellant "and the operations of the grading of its road." So it appears that appellee and the inspectors were in different departments of service.

The court instructed the jury, in part, as follows:

Instruction 1:

"It is the duty of the master to exercise reasonable care in providing safe appliances and apparatus with which his servants are required to work, and in inspecting and repairing such appliances and in discovering any defects therein, and the extent or degree of such care—that is, what is reasonable care—must be determined by the nature of the business in which he is engaged and the ordinary manner of their use and the dangers ordinarily arising therefrom. It is such care as a reasonably prudent and careful man, having a reasonable regard for the safety of others, would use under like conditions. But the master is not an insurer of lives, health, or safety of his employés, nor of the soundness or safety of the appliances so furnished for their use. His liability ceases in law when he has used reasonable care in their selection, construction, and maintenance, as above stated, and the mere fact that the injury may have resulted from the use of defective appliance would not, of itself, create a cause of action in the injured party against the master. In order to entitle him to recover damages for such injury the burden is on the plaintiff to show, by a preponderance of the evidence, that:

"(1) He has been injured.

"(2) That such injury was caused by the operation of a defective appliance furnished by the master.

"(3) That such defective condition was known to the inspectors of the company, or some of them, or that it was such that it would have been known by them, or some of them, before the accident, if they had used reasonable care, skill, and diligence in the performance of their duties, and that they did not use such reasonable care, skill, and diligence in inspecting the appliances which caused the injury and in discovering and repairing the defects therein.

"The presumption of the law is that the master had performed his duty in furnishing proper appliances, and that if any defects existed he was ignorant thereof, and the burden is upon the plaintiff to show the contrary by a preponderance of the evidence."

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Instruction 2:

"If you find from the evidence that the injury complained of was caused by a defective, unsafe, and dangerous condition of the stirrup mentioned in the testimony, and that such stirrup was in such defective, unsafe, and dangerous condition at the time of the inspection by the car inspector, as mentioned in the complaint and answer, and that by the exercise of ordinary care the defective, unsafe, and dangerous condition of such stirrup could have at the time of inspection been discovered, so that said defect could have been remedied and such stirrup rendered in a safe condition for use, then your verdict will be for the plaintiff, in such sum, if any, as he has been damaged thereby."

No objection is urged by appellant against the foregoing instructions in its brief. They are substantially correct. It was the duty of the appellant to have provided the appellee with suitable instruments and means with which to do his work, and a suitable place in which he, exercising due care himself, could have discharged his duties as safely as the hazards incident to his employment would have permitted. In the performance of these duties it was only bound to exercise reasonable and ordinary care, and it was its duty to exercise the same care to keep such place, means, and appliances in the same condition. The evidence that the appellee was injured on account of the defective step was not sufficient to hold appellant liable; but it was necessary to show that it did not exercise proper care in the premises. St. Louis, Iron Mountain & Southern Railway Company v. Gaines, 46 Ark. 555; Little Rock, Mississippi River & Texas Railway Company v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; Park Hotel Co. v. Lockhart, 59 Ark. 465, 28 S. W. 23.

In the case at bar appellant employed inspectors to inspect the car. The evidence shows that a step was defective, and that this could have been discovered by proper inspection, and that its appointed agents for that purpose, with ample opportunity and means to do so, failed to make the discovery. Appellant, under the circumstances, ought to have known through these employés that the step was defective. The jury could reasonably have inferred from the evidence that its failure was due to neglect. The appellee and the inspectors, being in different departments of service, were not fellow servants under the statute in force at the time of the injury, and appellant was liable for the consequences of the negligence of inspectors to appellee. St. Louis, Iron Mountain & Southern Railway Company v. Holmes (Ark.) 114 S. W. 221.

The court gave the following instructions to the jury over the objection of the defendant:

"(3) If you find that the defendant company in this case is liable under the instructions heretofore given, and that the plaintiff received the injuries complained of in the manner alleged, and that at the time of such injury he was predisposed to hernia, but otherwise in good health, and that said injury was solely excited or caused by his fall from the car step described in the evidence, without his fault, and that his injury, whatever you find that to be, has directly resulted therefrom, then you are instructed that the plaintiff is entitled to recover to the fullest extent of whatever you find his injuries so received to warrant, notwithstanding such predisposition or weakness of the parts in regard to hernia." This instruction states a rule of law well sustained by the authorities. Louisville, etc., Railway Company v. Falveny, 104 Ind. 409, 426–428, 3 N. E. 389, 4 N. E. 908; Crane Elevator Co. v. Lippert, 63 Fed. 942, 948, 11 C. C. A. 521; Vosburg v. Putney, 86 Wis. 278, 56 N. W. 480; Herndon v. City of Springfield (Mo. App.) 119 S. W. 467; Watson on Damages for Personal Injuries, §§ 219, 220; 1 White's Personal Injuries on Railroads, § 170; 13 Cyc. pp. 30, 31, and cases cited.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

CAZORT & McGEHEE CO. et al. v. DUNBAR et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. PLEADING (§ 312*)—EXHIBITS—EFFECT.

Instruments forming the foundation of the action and made exhibits to the complaint control the averments of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 943; Dec. Dig. § 312.*]

2. PLEADING (§ 34*)—CONSTRUCTION.

In determining whether a complaint states a cause of action as against a general demurrer every reasonable intendment must be indulged in to support it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. § 34.*]

3. PLEADING (§ 367*)—DEFECTS—CORRECTIONS—REMEDY.

The proper mode of correcting defective averments in a pleading is by motion to make more definite and certain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1173; Dec. Dig. § 367.*]

4. MORTGAGES (§ 405*) — INDEMNITY MORTGAGES—LIABILITY.

The condition in a mortgage to save the mortgagee harmless is not broken until the mortgagee is actually damnified by being forced to pay the liability, but the condition of an indemnity mortgage to satisfy a liability incurred is broken as soon as the liability accrues.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1168; Dec. Dig. § 405.*]

5. MORTGAGES (§ 405*) — MORTGAGE FOR INDEMNITY—BREACH OF CONDITION.

The principal in a supersedeas bond conditioned on the performance of the judgment ap-

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pealed from on its affirmance, or any judgment which the Supreme Court might render or order, gave the surety a mortgage reciting that on the failure of the principal to satisfy the judgment, if affirmed, or any judgment rendered against him by the Supreme Court, the surety might sell the mortgaged property, etc. The principal failed to perform that part of the judgment of the trial court which was affirmed by the Supreme Court, and judgment was rendered against the surety in an action on the bond. *Held*, that the surety could foreclose the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1168; Dec. Dig. § 405.*]

6. PRINCIPAL AND SURETY (§ 187*)—JUDGMENT AGAINST SURETY—CONCLUSIVENESS AGAINST PRINCIPAL.

A judgment by consent against the surety, on a supersedeas bond in an action against him alone is only prima facie evidence of the amount of the liability of the principal who had executed a mortgage to the surety to protect him.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 554; Dec. Dig. § 187.*]

7. MORTGAGES (§ 50*)—INDEBTEDNESS CLAUSE—SUFFICIENCY.

The indebtedness clause of a mortgage, which recites that the mortgagee has become a surety on a supersedeas bond given by the mortgagor to supersede a judgment for a specified sum, and that if the mortgagor shall satisfy the judgment, if affirmed, or any judgment rendered against him, by the Supreme Court, the mortgage shall be void, otherwise not, sufficiently sets forth the indebtedness from which the amount thereof may be determined.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 133-140; Dec. Dig. § 50.*]

8. HUSBAND AND WIFE (§ 169*)—WIFE'S SEPARATE PROPERTY—MORTGAGE—ACKNOWLEDGMENT—SUFFICIENCY.

A married woman joined in the granting clause of a mortgage which recited that for a specified consideration she released to the mortgagee all her estate and rights in the lands mortgaged. The acknowledgment recited that she appeared before the officer, and, in the absence of her husband, declared that she, of her own free will, executed the instrument. *Held*, that the mortgage was sufficiently acknowledged to convey her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 664; Dec. Dig. § 169.*]

Appeal from Crawford Chancery Court; J. Virgil Bourland, Chancellor.

Suit by J. H. McGehee and others against E. C. Dunbar and another. From a decree dismissing the complaint on sustaining a demurrer thereto, plaintiffs appeal. Reversed and remanded.

Jesse London and Winchester & Martin, for appellants. Ira D. Oglesby, for appellees.

FRAUENTHAL, J. The plaintiffs, J. H. McGehee and others, instituted this suit in the Crawford chancery court against the defendants, E. C. and W. T. Dunbar, seeking to foreclose a mortgage executed to plaintiffs by John and Ella Sharp on real estate which was subsequently conveyed by the mortgagor, Ella Sharp, to the defendants. To the complaint the defendants interposed a general demurrer which was incorporated in their answer. This demurrer was sustained by the chancery court; and, the plaintiffs declining to plead further, the complaint was dismissed, and from the order of dismissal the plaintiffs bring this appeal.

The complaint, in substance, alleged that in a certain cause pending theretofore in the Crawford chancery court wherein Henry L. Fitzhugh, trustee, was plaintiff and John Sharp and Ella Sharp were defendants, a decree was rendered in favor of the plaintiff in that suit, and the defendants appealed therefrom to the Supreme Court, and on August 1, 1903, executed a supersedeas bond with the plaintiffs in the present case as sureties thereon; that said decree was by the Supreme Court affirmed in part and reversed in part; "that the said Ella Sharp failed and refused to perform that part of the judgment of the lower court which was affirmed by the Supreme Court;" that afterwards said Fitzhugh, trustee, instituted suit in the Crawford circuit court against these plaintiffs upon said supersedeas bond, and on July 3, 1907, recovered judgment against these plaintiffs for the sum of $2,500 and costs amounting to $7.75, and that on October 15, 1907, the plaintiffs paid said judgment; that, in order to secure the plaintiffs by reason of the execution by them of said supersedeas bond as such sureties, the said John Sharp and Ella Sharp on August 1, 1903, executed to them a mortgage on certain real estate, which was duly acknowledged by them, and that the mortgage was duly filed for record on August 11, 1903; that thereafter, on June 6, 1905, the said Ella Sharp conveyed said real estate to the defendants. And the plaintiffs in this complaint prayed for a foreclosure of said mortgage and a sale of the land to reimburse them for the amount paid by them on said supersedeas bond and judgment, and they prayed "for such other relief, general and special, as the facts may justify and as to the court may seem fit." Copies of the supersedeas bond, mortgage, and judgment referred to in the complaint were made exhibits thereto, and also the deed from Ella Sharp to defendants. These exhibits are the foundation of this action, and they are therefore a part of the record of this suit, and will control the averments of the complaint. Beavers v. Baucum, 33 Ark. 722; American Freehold Land Mortgage Co. v. McManus, 68 Ark. 263, 58 S. W. 250. By the provisions of the supersedeas bond the said John Sharp and Ella Sharp as principals and these plaintiffs as sureties did covenant, amongst other things, the following: "Also that they will satisfy and perform the judgment or order appealed from in case it should be affirmed and any judgment or order which the Supreme Court may render or order to be rendered by the inferior court not exceeding in amount or value the original judgment or order." The indebtedness clause in the said mortgage executed by John and Ella Sharp

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to plaintiffs is as follows: "Whereas, the said Cazort & McGehee Company have become sureties on a supersedeas bond given by John Sharp and Ella R. Sharp to supersede a judgment in favor of Henry L. Fitzhugh in the sum of four thousand dollars. Now, if said John Sharp and Ella R. Sharp shall satisfy said judgment if affirmed, or any judgment rendered against them by the Supreme Court in this cause, then this bond shall be void, but, if they fail to do so, then the said grantees or their assignee, agent, or attorney in fact, shall have power to sell said property at public sale, to the highest bidder, for cash," etc.

It is contended by the defendants that the complaint does not state facts sufficient to show that any condition of said mortgage has been broken so as to authorize a foreclosure; that this is an indemnity mortgage; that the condition of said mortgage would only be broken in event that the Supreme Court affirmed the judgment appealed from and rendered judgment in the Supreme Court against the makers of the supersedeas bond, and the mortgagors did not then satisfy such judgment and the mortgagees did pay same, and they contend that such allegations are not made in the complaint. In determining whether the complaint in this cause states sufficient facts to constitute a cause of action, every fair and reasonable intendment must be indulged in to support it. If a cause of action can be reasonably inferred from the allegations, then it is not subject to a general demurrer. If the averments are imperfect, incomplete, or defective, the proper mode of correction is not by demurrer, but by a motion to make the allegations more definite and certain. Upon a general demurrer being interposed to a pleading the test then is, can the pleading be cured by amendment; and, if the facts stated together with every reasonable inference therefrom constitute a cause of action, then the demurrer should be overruled. Murrell v. Henry, 70 Ark. 161, 66 S. W. 647; Moore v. Rooks, 71 Ark. 562, 76 S. W. 548; St. L., I. M. & Sou. R. Co. v. Moss, 75 Ark. 64, 86 S. W. 828; Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773, 113 Am. St. Rep. 155; 6 Ency. Pleading & Prac. 389; 31 Cyc. 289, 290.

From the complaint and exhibits it sufficiently appears that the obligation assumed by the execution of said supersedeas bond was not only to satisfy any judgment for the recovery of money that might be directly adjudged in and by the Supreme Court against the parties, makers on said bond, but any judgment or order that the Supreme Court might render, and therefore, if by any order or judgment of the Supreme Court a liability was incurred by reason of the execution of that bond, the principals in that bond, the mortgagors, agreed to satisfy that liability. That is but a fair and proper inference from the provisions of the supersedeas bond and the mortgage. If by reason of the judgment of the Supreme Court a liability resulted against the makers of the supersedeas bond which could be enforced by suit in any court, that liability the mortgagors agreed to satisfy, and the mortgage was executed to secure the performance of that obligation by the mortgagors; and on a failure, therefore, by them to satisfy that liability the condition of the mortgage was broken. There is a clear distinction between an indemnity mortgage to save the mortgagee harmless, and an indemnity mortgage to satisfy a liability incurred. In the former the condition is not broken until the mortgagee is actually damnified by being forced to pay the liability; in the latter, the condition is broken as soon as the liability accrues. The bond and mortgage in this case form a contract of indemnity against liability; and, when that liability was established, the cause of action accrued to the plaintiffs. From the allegations of the complaint and the provisions of the supersedeas bond and mortgage it may be reasonably inferred that the averments are, in effect, that the mortgagors promised to pay whatever liability would be incurred by reason of the execution of the supersedeas bond; and, to secure that written promise, they executed the mortgage. Upon a failure, then, by John Sharp and Ella Sharp or either of them to pay such liability, the cause of action accrued to the mortgagees. Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Bone v. Torrey, 16 Ark. 83; Faust v. Burgevin, 25 Ark. 170; Gunel v. Cue, Adm'r, 72 Ind. 34; Thurston v. Prentiss, 1 Mich. 193; 22 Cyc. 90; 27 Cyc. 1063. The amount of that liability is alleged in the complaint as being the amount of a certain judgment recovered against the plaintiffs in the Crawford circuit court by the appellee in the supersedeas bond. That judgment, it appears, was recovered against the plaintiffs by consent. John and Ella Sharp were not parties to that suit, and therefore no judgment was recovered against them. The judgment, therefore, can only be prima facie evidence of the amount of the liability secured by the mortgage, because the judgment was rendered by consent does not render it void. The fact that consent to its rendition was given is no evidence of any fraud, for that action may have been taken because there was no defense thereto, and to save cost. If the defendants desired a more detailed or definite statement of the liability, it could have been secured by a motion made for that purpose. The indebtedness clause of the mortgage does not state the exact amount of the debt to be secured. But the character of the indebtedness is sufficiently set forth, from which the amount could be ascertained. "If the mortgage contains a general description sufficient to embrace the liability intended to be secured and to put a person on examining the records upon inquiry, and to direct him to the

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proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." Curtis & Lane v. Flinn, 46 Ark. 70; Hoye v. Buford, 68 Ark. 256, 57 S. W. 795.

It is also urged by defendant that it appears from the mortgage and acknowledgment that Ella Sharp was the wife of John Sharp, and that she did not convey the land in question as her separate property; but only released and conveyed dower and homestead rights. We do not think that there is any merit in this contention, even if it should be conceded that the complaint would be demurrable on this account. It appears from these instruments that Ella Sharp did join in the granting clause of the mortgage; and also that the following clause is in the mortgage: "And I, Ella R. Sharp, wife of the said John Sharp, for the consideration aforesaid and hereinafter set out, do hereby convey and release unto the said Cazort & McGehee Company all my estate, title and interest, and all my rights of dower and of homestead in and to said lands." The acknowledgment states: "And on the same day also voluntarily appeared before me the said Ella Sharp, wife of said John Sharp, to me well known, and in the absence of her husband declared that she had, of her own free will, executed the foregoing deed and executed, signed and sealed the relinquishment of dower and of homestead therein expressed, for the consideration and purposes therein mentioned and set forth, without compulsion or undue influence of her said husband." This is a sufficient execution and acknowledgment of a deed by a married woman to her separate property. From this it follows that the court erred in sustaining the demurrer to the complaint and in entering its decree of dismissal.

The decree is therefore reversed, and this cause is remanded, with directions to overrule said demurrer to the complaint.

WOODSON v. PRESCOTT & N. W. R. CO.

(Supreme Court of Arkansas. July 12, 1909.)

1. NEGLIGENCE (§ 72*)—CONTRIBUTORY NEGLIGENCE—ACTION—EMERGENCY.

When one is forced to act in the face of imminent danger, he is not negligent because he fails to act with the best judgment, or did not take the safest course, especially where the peril has been caused by the fault of another.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—OPERATION OF RAILROAD—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, a railroad fireman, after appreciating that his engine had left the track, elected to remain instead of jumping, whether he was negligent in so doing, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1130; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT — RAILROADS — CONTRIBUTORY NEGLIGENCE.

An instruction that, if after plaintiff, a railroad fireman, knew his engine was derailed, he also knew that he could escape in safety, by jumping, but thought the engine would stop, and decided to remain and take the risk, he could not recover was erroneous, as in effect charging that plaintiff was negligent as matter of law in not jumping.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

4. TRIAL (§ 260*)—REQUEST TO CHARGE—MODIFICATION.

It is not error to eliminate from an instruction proper matter substantially covered by other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

5. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—SAFE PLACE—APPLIANCES—INSPECTION.

A master's duty to exercise ordinary care to provide reasonably safe appliances and places to work includes the duty to see that the place and appliances are properly inspected.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

6. MASTER AND SERVANT (§ 265*)—PRESUMPTIONS.

The presumption that a master has performed the duty required in furnishing safe and suitable appliances, and has not been negligently ignorant of defects therein, may be overcome by proof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

7. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT — NEGLIGENCE — RES IPSA LOQUITUR.

Negligence of a master in failing to provide reasonably safe appliances cannot be inferred merely from the happening of an accident to a servant, but must be proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–881; Dec. Dig. § 265.*]

8. MASTER AND SERVANT (§ 265*) — NEGLIGENCE—BURDEN OF PROOF.

The burden of proof of a master's negligence in failing to provide reasonably safe appliances, resulting in injury to the servant, is on the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–889; Dec. Dig. § 265.*]

9. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE—INSPECTION.

Where a servant was injured by an alleged defective appliance, the master's negligence may be proved by evidence of a defect in the appliance, discoverable by reasonable inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 955; Dec. Dig. § 278.*]

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

Action by Edgar Woodson against the Prescott & Northwestern Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Murphy, Coleman & Lewis and J. O. A. Bush, for appellant. McRae & Tompkins, Hamby & Haynie, and D. L. McRae, for appellee.

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FRAUENTHAL, J. The plaintiff, Edgar Woodson, was in the employ of the defendant, the Prescott & Northwestern Railroad Company, as a fireman on one of its engines; and while in that employment he claims that he sustained personal injuries through the negligence of the defendant, and he brought this suit against defendant to recover damages for those injuries. The defendant in its answer denied all allegations of the complaint, and alleged that any injury the plaintiff sustained was caused by his own negligence. The evidence tended to prove the following facts: The plaintiff had been in the employ of the defendant for about a month as a fireman on one of its engines, and was acting in that capacity at the time of the injury complained of. On November 6, 1907, the train was running in the direction of Prescott, and when it came to a certain switch, known as "Arcadia Switch," the engine left the track, and continued some 40 or 50 yards and turned over. The plaintiff at the time was engaged in his duty as fireman in shoveling coal. He was caught by the engine as it turned over, and was severely injured. The blind drive wheels of this engine had become so worn that grooves had been made in them so that these wheels had flanges on each side. These blind drive wheels were made without any flanges, and all other wheels on the engine had flanges only on the inside of the wheels. From the marks that were made on the ties it appeared that these blind drive wheels, with their flanges on the outside, struck the stop rail at the point where the switch joins the main track, and caused the engine to be derailed. The evidence tended to prove that these grooves had worn into the blind drive wheels to a depth of one-half inch, and that the derailment of the engine was caused by this defect in these wheels. The train was going at the rate of about 10 miles an hour when it left the track, and the plaintiff did not attempt to jump from the engine. The plaintiff requested the court to give the following instruction to the jury: "(1) A railroad company owes to its employés, engaged in the running of its trains, the duty of using reasonable and ordinary care to furnish and keep in safe repair safe and suitable engines and other appliances for the carrying on of such operation, and to inspect, or cause to be inspected, such engines and appliances at all reasonable and necessary times, with the view to keeping the engines in such reasonably safe condition; and, if it does not do so, but negligently permits any wheel, or wheels, of its engines to become so worn as to render the running or operation of such engine dangerous, and by reason thereof its employé is injured, it is liable to him in damages." The court refused to give the instruction as asked, but modified it by striking therefrom the following: "And to inspect, or cause to be inspected, such engines and appliances at all reasonable and necessary times, with the view to keeping the engines in such reasonably safe condition." Among other instructions it gave, at the request of the defendant, the following: "(10) You are further told that if, after the plaintiff knew the engine was derailed, he knew he could have escaped in safety, but thought the engine would stop, and with full knowledge of the facts decided to remain on the engine and take the risk, instead of trying to escape, he cannot recover." The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff prosecutes this appeal.

. It is claimed by the defendant that the plaintiff was guilty of contributory negligence by remaining on the engine, and by not jumping therefrom. The question presented by the above instruction No. 10, given at the request of the defendant, is whether as a matter of law under the circumstances of the case the plaintiff was guilty of contributory negligence by remaining on the engine. The evidence tended to prove that the derailment of this engine was caused by defective drive wheels. These wheels had been in use so long that grooves had worn into the wheels to a depth of one-half an inch, so that it made flanges on each side of the wheels, and this caused the engine to leave the track. It was not the duty of the plaintiff to inspect the appliances that were furnished him. He had a right to rely on the assumption that the defendant had exercised due and ordinary care in furnishing him a reasonably safe engine in which to work. There is no evidence to show that the engine left the track through any fault or negligence of the plaintiff. A perilous emergency was thus presented. It is well established that, when one is required to act suddenly, and in the face of an imminent danger, he cannot be held to be guilty of contributory negligence because he failed to exercise the best judgment, or did not take the safest course. Especially is this true when the peril has been caused by the fault of another.

In the case of Jones v. Bryce, 1 Stark. 493, Lord Ellenborough said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." It is true that it is the duty of the employé to exercise ordinary care to avoid injury, and to take reasonable precaution not to expose himself to extraordinary danger. 3 Elliott on Railroads, § 1314. But where, in the face of imminent peril, the employé is obliged to act on the spur of the moment, he cannot be necessarily charged with negligence if he does not do the right thing. The question is then for the jury to determine whether under all the circumstances he acted as any ordinarily prudent and careful person would have done under similar circumstances. 1 White on Personal Injuries on Railroads, § 422. As is said in case of St. L., I. M. & S. R. Co. v. Stamps, 84 Ark. 241, 104 S. W. 1114: "Where there

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are two courses left open to a person in the face of imminent danger, and he chooses on the spur of the moment the one which is really the more dangerous, he cannot be held, as a matter of law, to be negligent in his choice, although by choosing the other course he might have escaped." Choctaw, O. & G. R. Co. v. Thompson, 82 Ark. 11, 100 S. W. 83; K. C. Sou. R. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967. It then becomes a question for the jury to determine whether he is guilty of negligence, and his conduct must be tried in the light of all the surrounding circumstances of the case.

Now, by this instruction, the court in effect told the jury that the defendant was, in this impending danger, guilty of negligence as a matter of law, if he knew he could have escaped in safety, but thought the engine would stop, and therefore decided to remain on the engine. The plaintiff might have thought that he would be safe by remaining on the engine. The presumption is, from the natural desire to preserve life, that he did think that. And yet, if with these two courses before him he in good faith believed he would be safe by remaining on the engine, under this instruction he would still be guilty of negligence by thus remaining on the engine. This, in effect, would make the employé the insurer of his own safety. In effect, the court by this instruction told the jury that as a matter of law the plaintiff was guilty of negligence in not leaping from the engine. Under the circumstances of this case that was error.

It is urged by the plaintiff that the court erred in modifying the above instruction No. 1 asked for by the plaintiff. The modification eliminated from the instruction the duty on the part of the defendant to inspect its engines. But this was to a great extent covered by instruction No. 2, given on the part of the plaintiff, and for that reason we do not think that this cause should be reversed solely on the refusal to give the instruction No. 1 as asked by plaintiff. But inasmuch as there must be a new trial of this cause, we deem it but proper to say that the plaintiff is entitled to a suitable instruction presenting the duty of defendant to inspect its engines at such reasonable times, and in such reasonable manner, as an ordinarily prudent and careful person would do under like circumstances. "It is the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work, and reasonably safe appliances with which to work. This duty also includes one of making reasonable inspection to see that the place and appliances are safe." 1 Labatt on Master & Servant, § 7; 26 Cyc. 1182, 1177; St. L., I. M. & Sou. R. Co. v. Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173; St. L., I. M. & Sou. R. Co. v. Gaines, 46 Ark. 555; St. L., I. M. & Sou. R. Co. v. Brown, 67 Ark. 304, 54 S. W. 865; Bryant Lumber Co. v. Stastney, 87 Ark. 321, 112 S. W. 740; Ozan Lumber Co. v. Bryan (Ark.) 119 S. W. 73. It is true that the presumption is that the master has done his duty in furnishing safe and suitable appliances; and, even if they are defective, it is further presumed that the master had no notice of the defect, and was not negligently ignorant of it. But these presumptions can be overcome by proof. Negligence of the master cannot be inferred merely from the happening of the accident. That must be proved, and the burden of establishing it is on the plaintiff. But this can be shown by evidence that there was a defect in the appliance which caused the injury, and that this defect was discoverable if it had been reasonably inspected. It would then become a question for the jury to determine whether the defendant was guilty of negligence in failing to inspect and discover such defect. St. L. & S. F. R. Co. v. Wells, 82 Ark. 372, 101 S. W. 738; K. C. Sou. R. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967; 1 Labatt on Master & Servant, §§ 155–157; Bailey v. Rome W. & O. R. Co., 139 N. Y. 302, 34 N. E. 918.

For the error in giving said instruction No. 10 on the behalf of the defendant, the judgment is reversed, and the cause is remanded for a new trial.

REED v. DONIPHAN LUMBER CO.

(Supreme Court of Arkansas. July 12, 1909.)

1. COSTS (§ 150*) — ITEMS — PUBLICATION OF LEGAL NOTICES.

Kirby's Dig. §§ 4919, 4921, providing that the cost of publishing any legal notice shall be paid for by the party at whose instance the same was published, which payment may be taxed as other costs, and fixing the maximum allowance for such publication, do not prevent an individual at whose instance a legal notice is published from contracting with the publisher to publish the same at any price they may agree on; but the court can allow for such publication only the amount fixed by the statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 582; Dec. Dig. § 150.*]

2. COSTS (§ 150*) — PUBLICATION OF LEGAL NOTICES.

A party securing the publication of a legal notice without any express contract fixing the price impliedly agrees to pay the regular price, which the court must tax in the sum fixed by Kirby's Dig. § 4921, especially where the evidence shows that such sum is reasonable.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 582; Dec. Dig. § 150.*]

Appeal from Cleburne Chancery Court; Geo. T. Humphries, Chancellor.

Suit by the Doniphan Lumber Company to quiet title to lands. There was a motion to tax as costs the costs of publishing legal notices in connection with the suit. From an order taxing the costs, Howard Reed, the publisher, appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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The Doniphan Lumber Company brought suit in the Cleburne chancery court to quiet title to certain lands in said county, and employed Howard Reed, editor and publisher of the Jacksonian, to publish two legal notices in connection therewith. On December 17, 1907, he furnished its attorneys, at their request, proofs of publication without first receiving his pay for said services. On October 30, 1908, the Doniphan Lumber Company filed its motion in said court alleging that Howard Reed had charged an exorbitant price for said publication, and moved the court to tax and liquidate the amount which should be paid for said services. To this motion appellant filed his response, to the effect: That in August, 1907, appellee employed him to publish the notices in question for seven weeks; that they amounted to 2,870 lines of nonpareil type, or 287 squares of 268 ems each; that his charge for said publication was $1,148, or $1 per square for first insertion, and 50 cents per square for each subsequent insertion; that on the 17th day of December, 1907, he delivered proofs of publication to appellee's attorney, informing said attorney that his bill was $1,148, and praying the court to allow him for said publications the sum of $1,148, 50 cents for two proofs of publication, with interest at 6 per cent. per annum from December 17, 1907.

The evidence on behalf of appellee tended to show: That its agent employed appellant to print two notices for publication. That at the time appellee delivered the notice to appellant for publication nothing was said about what the charges would be. The agent did not know what appellant had charged appellee for printing former notices, and did not ask what the charges would be for printing the two notices for which the charge in suit was made. One witness, who had been in the newspaper business since 1875, testified: "That $500 would be a big price for publishing the notices." That "If he had the opportunity to do such a job, $500 would be his bid." But this witness further testified that $1,148 would be the legal rate for publishing the notices referred to. He further testified that the usual price for publishing "reading notices" was 5 cents per line. Another witness for appellee, who had been in the newspaper business since 1876, testified that $355 would be a liberal price for publishing the notices in question. His bid would not have exceeded that sum where he made the contract before the work was done. It was not his custom to charge the maximum rates for legal advertisements, which for the notices in question would have been $1,148, the sum appellee charged. He charged 5 cents a line for reading matter known as "pay locals." On the other hand, four witnesses, who were newspaper men of long experience, testified that they would have charged the sum of $1,148 for such notices, and that such was their regular or fixed price to their patrons for such notices. These witnesses show that, unless a contract is made at a certain price in advance by bid or otherwise, the usual price is the legal rate, which makes the amount charged by appellant. The evidence shows that for ordinary reading matter most publishers charge about one-third more than the maximum price fixed by law for legal notices.

The appellant testified, in part, as follows: "Shortly after the first publication, I informed W. L. Thompson, who was the attorney for the Doniphan Lumber Company, that the bill would amount to $1,208; but I made a mistake in my calculation, and afterwards informed him that it was $1,148. At neither of these conversations did he object to the price charged. During the December term of the chancery court, 1907, W. L. Thompson prepared a special affidavit for proofs of publication, to which I attached copies of said notices and made proof of publication of same. I delivered these proofs of publication to W. L. Thompson, and he received them, and at that time I told him my bill was $1,148, to which price he made no objections at the time, but stated to me that the company had made no provisions for paying the same, and asked me if I would let him have the proofs without payment. I told him that I did not ordinarily deliver proofs of publication without receiving pay for same, but, as the company had several thousand acres of land in the county, I considered them good for the amount, and gave him the proofs of publication, and when he received them he well knew the amount of my charge. Ever since I have owned and published the Jacksonian, I have charged the same rate for publishing legal notices that I charged the Doniphan Lumber Company, with one or two exceptions, and then there was a special agreement for a less price. In October, 1906, I published two notices for the Doniphan Lumber Company on the patent side of my paper, for which I charged the same rate that I charged in the above-mentioned notices. These two notices amounted to $186, which the Doniphan Lumber Company paid. In May, 1906, I published three notices for the Doniphan Lumber Company under a previous agreement of 50 per cent. of full legal rate, or the rates charged for the notices above mentioned. The notices consisted of two large notices and one small one, and by our agreement the Doniphan Lumber Company took their copy to the newspaper house in St. Louis which was furnishing me my patent sheet, had it printed by that company on the patent sheet, proof read the copy of the same, and relieved me from all liability of error that might occur in the publication. These notices amounted to—I now remember, to $376. In order to have sufficient room for the notices in question, it became necessary for me to enlarge my paper from a 7-column, 4-page paper to a 6-column, 8-page paper; and, in order to insure the receipt of the paper in time, I went to Little Rock and pro-

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cured another house to furnish the paper to me, superintending the setting of the type, and proof read the same myself, paying an additional expense for said paper of about $1.25 per week. The amount of money expended in accomplishing the publication referred to, in addition to what it would have cost to publish a like paper if these publications were not inserted, was less than $100. I would not have enlarged by paper at the time I did had it not been for these notices. At the time I delivered the notices to Mr. Thompson, I knew he was attorney for the Doniphan Lumber Company, and had previously delivered him notices of like character for said company, which were not paid for at the time of delivery, for which I had charged the same rate of publication that I did for these notices, which were afterwards paid for by the Doniphan Lumber Company. I would not have delivered the proofs of publication to Mr. Thompson had I supposed that my bill for publishing the same would have been questioned, or that I would have had to wait any considerable length of time for my pay. The price I charged for this work is less than my regular price charged my regular customers for the same amount of matter set in the regular reading type of my paper and published for the length of time these notices were published. I set the reading matter of my paper in 10-point type, or what is commonly known as 'long primer,' and had this matter been set in 10-point type, as I set my ordinary paid advertisements, it would have made 4,476 lines, for which I would have charged any of my patrons 5 cents per line for each insertion, which would have amounted to $223.80 per week, or $1,566.60 for seven weeks."

The court decreed that appellant, Howard Reed, have and recover from Doniphan Lumber Company the sum of $750, with interest on said amount from December 17, 1907, at the rate of 6 per cent. until paid. To which ruling, and decree of the court, the respondent, Howard Reed, excepted and prayed an appeal to this court.

Geo. W. Reed, for appellant. S. Brundidge, Jr., for appellee.

WOOD, J. (after stating the facts as above). Section 4919 of Kirby's Digest provides: "When any notice or advertisement relating to any cause, matter or thing in any court of record, shall be required by law or the order of any court to be published, the same when duly published shall be paid for by the party at whose instance it was published, which payment or so much thereof as is deemed reasonable, may be taxed as other costs otherwise allowed by the proper courts in the course of the proceedings to which such advertisement relates." Section 4921 provides: "When any law, proclamation, advertisements, order or notice shall be published in any newspaper for the state or for any officer on account of the state, or for any county or for any officer on account of any county, or for any legal advertisement for any individual, there shall not be allowed for such publication a higher rate than one dollar per square of ten lines (two hundred and sixty-eight ems) of nonpareil type for the first insertion, and fifty cents per square for each subsequent insertion, fractional squares and parts of squares to be counted as whole squares."

Neither of the above sections prevents any individual at whose instance any legal notice is published from contracting with the publisher to publish such notice at any price they may agree upon, and, as between the individual and publisher, the contract would be binding upon them. The individual in a suit between him and the publisher would be liable for whatever amount he had contracted to pay for the publication. The provisions of the statute were not intended to limit the power of any private individual to pay any amount he might contract to pay for any legal publication that was made at his instance. Section 4919 clearly indicates that, as between the individual at whose instance the publication is made and the publisher, they are left to contract for any amount they may agree upon, which amount the individual having the publication made shall pay; but, after he shall have paid it and asks to have the amount so paid by him taxed as other costs by the courts in the course of the proceedings to which such advertisement relates, then the court shall not allow for such publication a higher rate than that prescribed by section 4921, supra, which sum the lawmakers evidently deemed a reasonable charge for the character of work prescribed, for it will not be presumed that the Legislature fixed as a maximum charge an unreasonable amount. Taking the two sections together, we are of the opinion that section 4921 was a declaration by the Legislature of the sum that it deemed reasonable for the court to allow as costs wherever the party at whose instance the publication was made had paid that or a larger sum; in other words, under the statute, when fixing the sum paid for legal publication as costs, unless the sum so paid exceeded the amount authorized to be charged by section 4921, supra, it could not be held unreasonable.

Appellant has submitted, without objection, to having the amount claimed by him for publishing the notices taxed as costs in the chancery proceeding to confirm, otherwise the court would have had no jurisdiction. Treating the case as the parties have treated it, as a motion to tax as part of the costs in the suit to confirm the claim of appellant against appellee, we are of the opinion that under the statute the court should have adjudged the cost of the publication of the notices at the sum claimed by him in his response to the motion, which sum was the amount authorized under the provisions of

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the statute supra; but, if the statute authorizes the court to fix any amount it may deem reasonable under the amount prescribed by section 4921, as contended by the appellee, we are then of the opinion that the finding of the court as to what was a reasonable sum was against the clear preponderance of the evidence, for it was not unreasonable that appellant should charge for his services the regular and customary price charged and paid for such work. It would be unreasonable to expect or require appellant to receive less for his work than others engaged in similar business would have charged appellee for the same work under the same circumstances. Yet, according to the clear preponderance of the evidence, that is what the decree of the chancellor does, for, judging by the record, a great majority of the publishers would have charged the same as appellant.

In the absence of any express contract, appellees must be held to have impliedly agreed, when it requested appellant to do the work for it, that it would pay the regular and usual price. The evidence tends strongly to show that appellee knew from previous transactions with appellant what the price would be, and made no objections to it.

The decree is reversed and remanded, with directions to enter a decree taxing the cost of the publication of the notices at the sum of $1,148, with interest on same at 6 per cent. from December 17, 1907.

MORGAN et al. v. KENDRICK.

(Supreme Court of Arkansas. July 12, 1909.)

1. JUDGMENT (§ 720*)—RES JUDICATA—MATTERS IN ISSUE.

A matter distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

2. LIMITATION OF ACTIONS (§ 167*)—BAR OF DEBT—EFFECT ON SECURITY.

Under Kirby's Dig. § 5399, forbidding foreclosure of mortgages after limitations have run against the debt, and requiring any payment to take the case out of the statute to be indorsed on the margin of the record of the mortgage, when the debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes, as to third parties, an unrecorded mortgage and constitutes no lien as against such third party, notwithstanding he has actual knowledge of the mortgage.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 652; Dec. Dig. § 167.*]

3. LIMITATION OF ACTIONS (§ 167*)—BAR OF DEBT—EFFECT ON SECURITY.

Where the debt secured by mortgage is apparently barred by limitations, rendering the mortgage the same as though unrecorded as to third persons, a lien cannot be defeated by placing the title to the property in a third person for the mortgagor's benefit, nor by giving the property away.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 652; Dec. Dig. § 167.*]

4. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE.

Evidence *held* sufficient to sustain a finding that a deed made by a mortgagor after the debt secured appeared to be barred by limitation, and hence, under Kirby's Dig. § 5399, having only the effect of an unrecorded mortgage as against third persons, was voluntary and fraudulent as against the mortgagee; the mortgage being still binding as an unrecorded mortgage.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 267; Dec. Dig. § 295.*]

5. MORTGAGES (§ 374*)—FORECLOSURE—NECESSITY OF DEED.

Where land was sold in accordance with law and the provisions of the mortgage, it vested in the purchaser an equitable title, although no deed was made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1118; Dec. Dig. § 374.*]

Appeal from Cleveland Chancery Court; Jno. M. Elliott, Chancellor.

Action by J. J. T. Kendrick against W. J. Morgan and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Woodson Mosely and Taylor & Jones, for appellant. Crawford & Hooker, for appellee.

FRAUENTHAL, J. The plaintiff below, J. J. T. Kendrick, instituted this suit on October 1, 1907, in the Cleveland chancery court, for the purpose of confirming a sale of real estate made under and by virtue of a power of sale contained in a mortgage executed to him by W. J. Morgan, one of the defendants, and also to cancel a deed executed by said mortgagor to his two sons, George and Frank Morgan, the other defendants herein. On January 24, 1896, W. J. Morgan for a valuable consideration executed to the plaintiff his note for $563.95 due January 1, 1897, and bearing 10 per cent. interest per annum from date until paid, and on the same day, to secure the payment of said note, executed to plaintiff a mortgage on the land in controversy. The mortgage was duly filed for record in April, 1896. The plaintiff alleged: That payments were made by the maker on the note as follows: January 15, 1901, $1; July 7, 1902, $2. And that on June 11, 1906, the plaintiff indorsed a memorandum of said payments on the margin of the record of said mortgage, which was then duly attested. In May, 1906, the plaintiff sold the land under the power of sale contained in the mortgage, and in making said sale he complied with the terms of said mortgage and all requirements of the law. The plaintiff became the purchaser at that sale, and, although the period for redemption had expired, he did not execute a deed to himself under the sale for the reason that he did not think he had that power. He

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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credited the amount of the bid upon the note, and on November 1, 1906, instituted a suit in the Cleveland circuit court against the defendant W. J. Morgan for the balance of said note. In that suit said Morgan denied making the above payments and pleaded the statute of limitation. Upon a trial and verdict of a jury, a judgment was rendered in that case in favor of the plaintiff and against the defendant W. J. Morgan, for the sum of $639.23, as the balance due on said note. On April 3, 1905, W. J. Morgan conveyed the said mortgaged land to his said two sons for the alleged consideration of $400, and this deed was filed for record on June 19, 1906. The plaintiff seeks to set aside said deed on the ground of fraud.

The defendants in their answers denied all allegations of payments and of fraud, and claimed that by reason of the failure to indorse the alleged payments on the margin of the record of the mortgage until after the note appeared to be barred by limitation, and until after the execution of said deed, the mortgage was invalid as to the defendants George and Frank Morgan. The chancellor found that the note was not barred by limitation, that the mortgage sale of the land was regular in all respects, and that the alleged conveyance made by the mortgagor to the other defendants was fraudulent. He entered a decree canceling said deed and confirming the sale under the mortgage and quieting title in plaintiff, and directed a commissioner of the court to execute a deed to plaintiff for the land. In accordance with the pleadings, the chancellor in said decree also reformed the description of a small portion of the land. From this decree the defendants have appealed to this court.

The sole defense in this suit is made by the defendants George and Frank Morgan, who claim an unincumbered title to the land by virtue of the conveyance from their father. Neither in the answer of the defendant W. J. Morgan, nor in the brief of appellants, is it contended that the said note secured by the mortgage is barred by the statute of limitation. The evidence sustains the finding of the chancellor that payments were made thereon by the maker as above set forth, and that on that account the note was not barred. That issue was also determined by the judgment of the Cleveland circuit court in the above-mentioned suit founded upon said note. As is said in the case of National Surety Co. v. Coates, 83 Ark. 545, 104 S. W. 219: "A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." 12 Cyc. 1215. The judgment of the Cleveland circuit court involved the question as to whether said note was barred, and it therefore became conclusive against the defendant W. J. Morgan and prima facie evidence against the other defendants, and, with the other testimony in the case, fully sustains the finding of the chancellor that the note was not barred.

But the defendants, who are the grantees in said deed, contend that on April 3, 1905, when they obtained said deed, the plaintiff had not made any indorsement of the payments on the margin of the record of said mortgage, and that therefore their rights could not be affected by the payments. Section 5399 of Kirby's Digest provides: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate to revive said debt to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk." The effect of that statute as to strangers to the transaction is that, when the debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and, like an unrecorded mortgage, it constitutes no lien upon the mortgaged property as against such third party notwithstanding he has actual knowledge of the execution of such mortgage. Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Jarratt v. McDaniel, 32 Ark. 598; Neal v. Spiegle, 33 Ark. 63; Ford v. Burks, 37 Ark. 91; Dodd v. Parker, 40 Ark. 536; Martin v. Ogden, 41 Ark. 186; Wright v. Graham, 42 Ark. 140; Hill v. Gregory, 64 Ark. 317, 42 S. W. 408.

But an unrecorded mortgage is still good and binding between the parties. It constitutes a valid lien on the property, except as to the legal rights of third parties. Conner v. Abbott, 35 Ark. 365; Appelwhite v. Harrell, 49 Ark. 279, 5 S. W. 292; Hampton v. State, 67 Ark. 266, 54 S. W. 746; Rhea v. Planters' Mutual Ins. Ass'n, 77 Ark. 57, 90 S. W. 850. The mortgagor cannot defeat the binding lien of an unrecorded mortgage by placing the title to the property in another for his benefit, nor by giving the property away. As is said in the case of Leonhard v.

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Flood, 68 Ark. 162, 56 S. W. 781: "As to one holding the property by a conveyance entirely voluntary, it would be presumed that the conveyahce was made subject to the mortgage." The conveyance therefore by a mortgagor to a third party with the fraudulent purpose of defeating the mortgage, and without an actual and bona fide consideration, would not relieve the property of the lien of a valid mortgage although unrecorded. Leonhard v. Flood, supra.

Now, in this case, it appears that the father conveyed to his two sons the mortgaged land. The deed was executed in April, 1905; but the evidence tends to prove that it was still retained by the father and undelivered, and after the mortgagee proceeded to make sale of the land under the mortgage in May, 1906, the father placed the deed on record on June 19, 1906. The two sons were young men who were members of the father's family, and the evidence does not show that they had any property. They knew of the mortgage which their father had executed to the plaintiff on the land, and knew that it was unpaid. The deed recites that the consideration of $400 was paid for the land; but the defendants testified that as a matter of fact it was not paid. They claimed that they had executed a note therefor; but they and their father testified that they had never seen the note since its execution and did not know when it matured, and this testimony was given three years after its alleged execution. The note was not paid and was not produced, and, finally, the father stated in his testimony: "If they pay me for it, it is all right, and if they never pay for it, it is all right, of course." No other person testified to seeing the deed prior to the date it was filed for record, and no other person testified as to the note. It was claimed that "about $50" was paid along on the note; but no statement is made as to when or in what manner such alleged payments were made. The circumstances thus surrounding this deed and the alleged transaction between the father and sons are sufficient to arouse suspicion and to throw doubt upon them as legitimate contracts. The circumstances of this case and the relation of the parties make out a prima facie case of fraud which impeaches the consideration of the deed, which has not been overcome by any testimony in the case. Leonhard v. Flood, 68 Ark. 162, 56 S. W. 781; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; McConnell v. Hopkins, 86 Ark. 225, 110 S. W. 1039; 20 Cyc. 439.

The chancellor made a finding that this alleged conveyance by the father, W. J. Morgan, to his sons, was not bona fide, but was colorable and fraudulent. The evidence sustains the finding of the chancellor and the conclusion that the deed was in truth and in effect a voluntary conveyance. It therefore follows that this deed did not relieve the land of the valid lien which existed on the land by virtue of said mortgage, and that the conveyance from W. J. Morgan to his sons, George and Frank, is subject to said mortgage, and, inasmuch as the land has been sold under said mortgage, and the period for redemption has expired, said deed should be removed as a cloud from the title to said land.

The land was sold in accordance with law and the provisions of the mortgage, and it therefore vested in the purchaser an equitable title, although no deed was made. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063. The chancellor was therefore right in quieting the title to the land in the plaintiff and directing a deed to be made to him. Kirby's Dig. § 6318.

Finding no error in the decree of the Cleveland chancery court, it is in all things affirmed.

CRAIG v. GREENWOOD DISTRICT, SEBASTIAN COUNTY.

(Supreme Court of Arkansas. July 12, 1909.)

EMINENT DOMAIN (§ 63*) — COMPENSATION — TAKING PROPERTY.

Kirby's Dig. § 3009, providing that, when any county road may be injured by washing, it shall be the duty of the overseer of the road district to notify the county court, and when necessary a survey of a new road shall be ordered, does not authorize recovery of compensation by a landowner whose property has been used for a roadway, where the county court declined to establish a new road.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 63.*]

Hart, J., dissenting.

Appeal from Circuit Court, Sebastian County, Greenwood District; Daniel Hon, Judge.

Action by Sarah Craig against Greenwood District, Sebastian County. From a judgment for defendant, plaintiff appeals. Affirmed.

Winchester & Martin, for appellant. Appellee, pro se.

McCULLOCH, C. J. Appellant, Sarah Craig, presented to the county court of the Greenwood district of Sebastian county a claim for compensation for land used as a public road. The claim was disallowed by the county court, and she appealed to the circuit court, where a trial before the court resulted in an adverse judgment, and she appealed to this court.

The case was tried on the following agreed statement of facts:

"In the year 19—— the county court of Sebastian county, Greenwood district, pursuant to the requirements of sections ——— of Kirby's Digest, established a public road over the lands of Sarah Craig by definite metes and bounds, 30 feet in width, which

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road ran along the bank of the Arkansas river, in some places perhaps running as close as 10 feet to the bank, and in other places perhaps 50 feet from the bank, as close to the bank as was safe for travel. The road so laid out and defined was paid for by the county court according to the damages fixed by the viewers. From time to time after said road was open to travel, the land caved in along the river bank and destroyed the road in various places, and the travel was forced to go onto the lands of the defendant, and this route so traveled also caved in, so that the public travel again made a route over other lands of defendant's adjacent to the bank. The travel is now upon the lands of the defendant and along the bank of the river, and the present route has been so traveled some three or four years, except where it has caved in, and the travel has been diverted upon other lands belonging to the petitioner. The cave-ins began during the second year after the road was open for travel. After the several breaks had occurred and the public travel had been diverted upon her land where the breaks had occurred, Sarah Craig filed in the county court of the Greenwood district of Sebastian county a petition setting out the number of acres so used for travel, and asking that she be paid for same by the Greenwood district. This petition was not acted upon, and each year thereafter she filed a like petition, and none of which were acted upon. On the ——— day of ——— she filed the petition presented herewith, which recites all the different claims theretofore filed, in which petition she set forth the fact that the road had been destroyed by the river, and other lands of hers taken by the public, and prayed (pursuant to section ——— of Kirby's Digest) the appointment of viewers to view out another road, that the county (Greenwood district) pay her for the lands so taken and used, etc. Viewers were by the court appointed, and they filed their report, stating that they had viewed the premises, and that the land was worth $35 per acre. When the matter came up for hearing before the county court, upon the report of the viewers, it was held by the court, as a matter of law, that the county was not liable to the defendant for the said land, and defendant's claim was not allowed, whereupon she took an appeal.

"It was further agreed: That the land of Sarah Craig, over which the road heretofore referred to ran, is situated in road district ———. That they lie in Big Creek township of Sebastian county, which township under act of April 18, 1905, made a separate road district. That the roads in the several townships or road districts are worked or maintained from funds derived from a three-mill road tax levied on the real and personal property in the particular road district in which the said property is located. It is further agreed that, after the road as originally laid out along the river bank had caved in, the subsequent routes traveled by the public were traveled without the consent of the county court as far as any official action was concerned, and with only such knowledge as was contained in Sarah Craig's several petitions asking for pay for the land so used by the public, and that no assurance was ever given to the defendant by any one having a right to bind the county that the county would pay for such roads. It is further agreed: That no appropriation has been made by the last annual levying court, or any other levying court of said county and district, for the purpose of paying for or establishing a new road on defendant's land; that the evidence does not show whether or not any road overseer has worked the road now used by the public over defendant's land; but that the public has continuously used this route since the road was established in 19——, though it is agreed that the county court never ordered the said road, as now traveled, worked, nor that it has ever needed any work. It is further agreed: That by a vote of the last general election, September, 1906, the road tax was put into effect in the Greenwood district of Sebastian county, and the quorum court of said county levied a three-mill tax; that there are 21 road districts in the Greenwood district of Sebastian county, each one of which has a road overseer, and each one of which is elected as other township officers are elected; that the county court has no control over said overseer; and that the funds of each particular road district are separate from all others, and the county court or quorum court has no jurisdiction over same. And this was all the testimony introduced by either side."

A public road may be established by judgment of the county court rendered in accordance with the statute, or by voluntary dedication, or by prescription. It is only when the road is established in the first mode that compensation can be demanded by the owner for land taken. The county cannot be made responsible for the value of land used as a public highway except after judgment of the county court establishing the road. There is no warrant in the statute for liability of the county to be incurred in any other manner, and, in the absence of a statute, no liability can be imposed. Granger v. Pulaski County, 26 Ark. 39; Arkansas County v. Freeman, 31 Ark. 266; Nevada County v. Dickey, 68 Ark. 160, 56 S. W. 779.

Appellant cites the following statute as justification for her claim: "When any county road may be injured or destroyed by the washing of any lake, river or creek, it shall be the duty of the overseer or overseers of the road district or districts in which such injury or destruction may occur, to immediately notify the county court in writing of the nature and extent of such injury; and, if said court shall be satisfied that such road

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has been injured or destroyed to such an extent as to inconvenience the traveling public the court shall appoint three viewers, who may, if in their judgment it is necessary, take with them a competent surveyor, and proceed to view and survey a new road upon such ground as will accommodate the traveling public. Such viewers shall determine the compensation to be allowed the owners of the property sought to be appropriated, at its true value, and the damages occasioned by such new road, and shall make a report of their doings in the manner pointed out in this act as the duties of viewers of new roads. Appeals may be taken from the appointment and orders of said court, and from the assessment allowed by the viewers as a jury to the owner or owners of property, in the manner provided by this act, within the time allowed by law, after the first regular term of the court thereafter held. The appointment of viewers and order of said court herein provided shall be recorded in the records of the court. The court shall be governed in the reception, approving and recording of said report of viewers, in all respects, as is prescribed in the case of new roads, except no notice of the destruction or injury to the road shall be required, except as required by this section. All costs, damages and expenses arising under the provisions of this section shall be paid out of the county treasury." Kirby's Dig. § 3009.

But it is sufficient answer to the contention to say that the county court declined to establish a new route for the road over appellant's land. The basis of her claim is, not that the county court established a road over her land and refused compensation, but that the public used her land for a roadway, and she demands compensation for the taking of it in that way. The public had no legal right to take and use her land for a roadway without her consent (except, perhaps, temporarily until the destruction of the road could become known to the traveling public), and such unauthorized use by the public cannot become the basis for a claim against the county for compensation. Appellant must seek some other remedy. The Constitution of the state wisely leaves it to the county court to determine when and where public roads shall be established and, when once established, what alterations thereof shall be made. Expense of care of public highways cannot be forced upon a county, nor can compensation for land taken for such purpose be demanded of a county without the concurring judgment of the county court establishing the road. Road Improvement Dist. v. Glover (Ark.) 117 S. W. 544.

Affirmed.

HART, J., dissents.

TEXAS & P. RY. CO. v. SMITH.

(Supreme Court of Arkansas. July 12, 1909.)

1. NEW TRIAL (§ 1*)—DEFINITION—STATUTES.
A "new trial" is defined by Kirby's Dig. § 6215, to be a re-examination in the same court of an issue of fact after verdict by a jury or decision by the court.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4788–4790.]

2. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE—MATERIAL ISSUES.
Under Kirby's Dig. § 6215, providing that newly discovered evidence to constitute ground for new trial must be material to the issue tried, where, in an action against a railroad company for the killing of stock, the only issue related to the value of the animals, newly discovered evidence that defendant led the stock onto defendant's right of way, and thus contributed to their death, was not ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215–217; Dec. Dig. § 103.*]

3. JUDGMENT (§ 446*)—VACATION—EQUITABLE RELIEF.
Where defendant was not entitled to a new trial of an action for killing stock, for newly discovered evidence, not applicable to any issue tried, showing that plaintiff led the stock onto defendant's right of way, and thus contributed to their death, defendant's remedy was by suit to set aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 845–848; Dec. Dig. § 446.*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by Daniel W. Smith against the Texas & Pacific Railroad Company. From an order denying defendant's motion for a new trial, for newly discovered evidence, it appeals. Affirmed.

Glass, Estes & King, for appellant. E. F. Friedell, for appellee.

BATTLE, J. Daniel W. Smith brought an action against the Texas & Pacific Railway Company, before a justice of the peace of Miller county, to recover $85 for damages caused by an alleged negligent killing of two burros by defendant. After trial and judgment in justice court, it was taken by appeal to the Miller circuit court, where a jury trial was had on the 29th of June, 1908, and judgment was rendered against the defendant in favor of the plaintiff for $25 and costs. After the rendition of the judgment, an order was made allowing the defendant until the 4th of July following within which to file a motion for a new trial; but no motion was filed, and the judgment became final. The court at the June, 1908, term adjourned on the 4th of July, 1908, and thereafter, on the 14th day of the same month, the following motion for a new trial, based upon newly discovered evidence, was filed by the defendant:

"Comes the defendant herein, in vacation, as provided by law, and files this, its motion

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for a new trial of this case, with the prayer that the verdict of the jury and the judgment of the court rendered herein be set aside and the case be tried anew.

"In support of this motion the defendant respectfully shows that, since the trial of this case and the adjournment of the June, 1908, term of this court, it has discovered new evidence bearing on the issues of this case, which evidence is material to the defense herein, and which, after reasonable diligence, it could not and did not discover and produce at the trial. * * *

"The defendant shows: That, since said trial and the adjournment of said court, it has discovered evidence to the effect that, either the day before or the afternoon or evening when they were struck, the plaintiff led them upon the defendant's right of way and within the inclosure surrounding same; that he led them upon said right of way and within the inclosure surrounding same by pushing down the bottom wire of the fence, and lifting up the upper wire, permitting them to go upon the right of way, between said wires; that at such time they were tied together with a rope and were left within said inclosure, grazing, exposed to the danger of being struck by passing trains, with no chance to escape if upon trestle or curve.

"The defendant shows that said testimony is essentially material to its defense, in that it shows that the plaintiff's own negligence and carelessness caused and contributed to such damage as he sustained, and that such negligence and carelessness, even if negligence were proven against the defendant, which was not, would preclude a recovery by the plaintiff in the case.

The defendant shows: That it could not with reasonable diligence have discovered and produced this testimony at the trial of this case, and says that it made a special effort prior to this trial to get at all the facts and all the merits of the claim involved in this suit; that it sent its special agent to the place where the damage was alleged to have been done, and undertook to ascertain, through said special agent, not only all the facts and circumstances connected with the injury, but also everything relating to the value of the animals; that said special agent spent some time in said vicinity, went to see every man who was reputed to have known anything of the claim, and used every diligence he could to ascertain all the facts about the matter. It says that said special agent never heard it intimated by any one, nor did any one else connected with this defendant hear it intimated by any one, prior to the trial of this cause, that plaintiff had in any manner been responsible for the animals being upon the defendant's right of way, and that after the trial, and after judgment had been rendered and the term of this court had adjourned, a credible person of his own volition, and thinking that the matter had been concluded and terminated, apprised the defendant's agents of the testimony hereinafter set out, and stated to said agent that he himself had observed and seen defendant lead the said animals from the woods and admit them to the defendant's right of way, between said wires of said fence, and leave them within said inclosure tied together.

"The defendant says that it expects to have the testimony of said witness at another trial of this case, and now files this, its petition for a new trial, and prays that summons may be issued as provided by law, on same, requiring the plaintiff to appear and answer on or before the first day of the next term, that the judgment rendered in this case be set aside, and that a new trial be granted herein, and for such other and further relief as the plaintiff may be entitled to.

"The defendant further shows to the court: That the plaintiff in this case is irresponsible, financially, and that, if permitted to execute the judgment heretofore rendered and hereinbefore complained of, the defendant will not be able, in the event a new trial is granted, to force the plaintiff to return and restore to it the money collected on such judgment; and, further, that unless prevented the plaintiff will proceed with the collection and enforcement of said judgment, and thus render of no effect and consequence a judgment setting aside the verdict of the jury hereinbefore rendered and the judgment of this court as hereinbefore rendered, if this motion be granted and the said judgment set aside; that in order to make the judgment herein prayed for effectual, and in order to prevent great wrong and damage and injustice to the defendant, and in order to give force and effect to the judgment that may be rendered by this court on this motion, it is necessary to restrain the plaintiff from the execution of said judgment. Defendant therefore prays that, pending a final hearing of this matter, your honor direct your most gracious writ of injunction to issue, enjoining and restraining the plaintiff from proceeding with the collection of said judgment until final determination of this motion."

This motion or petition was supported by an affidavit, and on the 15th day of August, 1908, was submitted to the judge of the circuit court, who, after hearing the testimony adduced in support of it, made an order directing the clerk to issue an order restraining plaintiff from collecting the judgment recovered by him. The motion came on to be heard by the court for final decision at the November term of the circuit court following, and the defendant adduced testimony of witnesses supporting his motion, which was contradicted by the testimony of the plaintiff, and the court overruled the motion, and from the order overruling the motion the defendant appealed to this court.

The record in the case shows the following facts: That the killing of the burros was not

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denied, "nor was there any defense urged at the trial, except such as related to the value of the animals. That the issue as to the value was submitted under appropriate instructions of the court; no other issues being submitted, and no other fact being investigated in the case."

A "new trial" is defined by the statute to be "a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court." Kirby's Dig. § 6215. It may be granted for "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." Kirby's Dig. § 6215, subd. 7. The newly discovered evidence must be material to the issue tried. Olmstead v. Hill, 2 Ark. 346; Robins v. Fowler, 2 Ark. 133; White v. State, 17 Ark. 404; Bourland v. Skimnee, 11 Ark. 671. Unless it was relevant to the issue, it could not be material, and was not admissible if it had been produced at the trial without an amendment of the pleadings. The newly discovered evidence in the case at bar was not relevant to any issue in the original case and therefore not material and no ground for a new trial; but the defendant is not without remedy. He has his remedy in equity. Mr. Pomeroy, upon this subject, says: "It frequently happens that a party, through no fault of his own, is ignorant of facts constituting a defense to the action. The rule in such cases is that equity will relieve if the party could not, by the exercise of reasonable diligence, have obtained the evidence; but if there has been an ample opportunity to discover the evidence, and it is not then forthcoming, relief will be denied."

Judgment affirmed, without prejudice to appellant's right to institute a suit in equity for relief.

LOUISIANA & A. RY. CO. v. STATE.

(Supreme Court of Arkansas. July 12, 1909.)

RAILROADS (§ 58*) — CONSTRUCTION OF STATIONS—STATUTES—VALIDITY.

Acts 1905, p. 265, requiring a railroad to construct and maintain a station at a certain point, is invalid, where there is no public necessity for a station, and the requirement is unnecessary, unreasonable, and arbitrary, and, if executed, will cause the railroad to incur large expense without any corresponding benefit to it or the public.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.*]

Appeal from Circuit Court, Columbia County; Geo. W. Hays, Judge.

The Louisiana & Arkansas Railway Company was convicted of violating the statute, and it appeals. Reversed and remanded.

Henry Moore and Henry Moore, Jr., for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

BATTLE, J. This cause has been in this court once before on appeal. The opinion delivered at that time can be found in La. & Ark. Ry. Co. v. State, 85 Ark. 12, 106 S. W. 960. The law and proper mode of procedure in the case were determined in that opinion. The judgment of the circuit court was reversed, and the cause was remanded for further proceedings. Up to that time the facts in the case are set out in the opinion.

Upon the return of the case to the circuit court, the defendant filed a special plea, which is, in part, as follows:

"Comes the defendant, Louisiana & Arkansas Railway Company, and reasserting that it is not in any manner amenable to the indictment herein, says:

"(1) That it is not guilty as charged in the indictment.

"(2) The Louisiana & Arkansas Railway Company, further pleading, says: That said 'Snow Crossing' is simply the crossing of a country road over and across the line of defendant's railway, and that no railroad crosses the line of defendant's road at or within many miles of said Snow Crossing. That said Snow Crossing is not a town, and that the only improvements of any kind there consist of a cotton gin and two small houses and a small boxhouse used as a barn, and that the total population of said Snow Crossing consists of two families with about 10 persons in all. That the surrounding country is sparsely settled; the same being largely wild and uncultivated land. That the same is a farming country, principally devoted to the raising of cotton, so far as any salable crops are concerned, which is hauled to the neighboring towns of Magnolia, Lewisville, and Taylor, where the farmers are accustomed to purchase their supplies. That at Experiment, about two miles north of Snow Crossing on the line of the railroad of said railway company, there is a flag station where passengers and freight are received and discharged, and that about five miles south of said Snow Crossing on the line of said railway is the station of Taylor, where there is a depot building, and where a telegraph operator and passenger and freight agents are employed and stationed, and that said stations of Experiment and Taylor furnish to the inhabitants at or near Snow Crossing ample transportation facilities, and that to require the erection and maintenance of a regular station at Snow Crossing would force said defendant to maintain three stations in a sparsely settled country within a distance of about seven miles.

"That to erect a suitable station at Snow Crossing would cost in the neighborhood of $1,000. That Snow Crossing is located at the foot of a very heavy grade on the line of defendant's railroad, and because of the topography of the country it is impracticable (except with very great expense) to provide

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side tracks and passing tracks at said point, such as would be necessary to comply with Act No. 105, p. 265, of Acts 1905, under which this indictment is found. That it would cost to maintain same and pay the necessary agents and employés about $75 per month, and that the receipts from freight and passengers at Snow Crossing would not meet and pay more than a small proportion of such sum and the expenses attendant upon the maintaining said station, and that such station would have to be operated at a large monthly loss to said defendant."

"(5) That Snow Crossing is located at the foot of a very heavy grade on the line of defendant's railway, the heaviest grade at any point on said line. It is a point where there is a rising grade to the north for a long distance some 5,000 feet, 1,100 feet of which is a 1 per cent. grade (that is, a rise of 1 foot for every 100 feet), and said point of Snow Crossing is located about 3,400 feet north of the most abrupt grade on the whole line of defendant's railway, being a hill known as 'Red Cut Hill'; the grade there being a 2 per cent. grade. In order to overcome the difficulty in getting over the heavy grade south of Snow Crossing, it is necessary to use the momentum acquired by trains in going down the hill that lies to the north of Snow Crossing, and, if compelled to stop at Snow Crossing to receive or discharge freight and passengers, ordinary freight trains would have to double to Taylor, as an engine there could only start and pull up over the 2 per cent. hill a little more than 50 per cent. of what is the customary and necessary tonnage of such trains; and passenger trains south bound in handling the usual equipment of such passenger trains, under adverse weather conditions, or with an engine not steaming properly, if required to stop at said Snow Crossing, would be compelled to back up north in order to attain sufficient speed and momentum to take such trains over the heavy grade of said 'Red Cut Hill.' About 3,500 feet north of said Snow Crossing there is a one-degree curve in the line of said railway, which curve is 2,500 feet in length, and which curve, coupled with the necessity of backing trains north of Snow Crossing if they were compelled to stop there, in order to overcome the heavy grade of said Red Cut Hill, would greatly increase the danger of accidents to said freight and passenger trains and to the employés operating same, and to the employés upon United States mail cars, and to the passengers transported upon said line of railway. That to have to cut in two the usual freight trains at Snow Crossing and to double from that point to Taylor would greatly increase the danger to property and to the lives of the employés of said railway company, and this danger would be particularly great when this was required to be done in the nighttime, which would frequently be the case. That the only way in which the provisions of said Act No. 105 as to the establishment and maintenance of a station at Snow Crossing and the stopping of freight and passenger trains at said point could be complied with, with safety to life and property would be the cutting down of said Red Cut Hill so that trains could avoid the necessity of backing up, or of doubling, from that point to Taylor, as mentioned, which would cost not less than $30,000 or $40,000, and that the business of defendant is not of sufficient proportion to justify any such expenditure. So that, the provisions of said Act No. 105 and the enforcement of same and the attempted enforcement of same are unreasonable and arbitrary and repugnant to section 1 of the fourteenth amendment to the Constitution of the United States and of section 8 of article 2 of the Constitution of the state of Arkansas, in this, that the effect of such enforcement would be to deprive the defendant of its property without just compensation and without due process of law, and would be to deny to it the equal protection of the laws, and repugnant to and in violation of the interstate commerce clause of section 8, art. 1, of the Constitution of the United States, and repugnant to and in violation of the statutes of the United States regulating the carriage of the mails under section 10 of article 1 of said Constitution of the United States.

"That the statements as to the conditions and surroundings and physical facts set forth in this plea were the conditions and surroundings and physical facts as to said Snow Crossing at the date of the passage of said Act No. 105 of 1905 and at the date of the finding of the indictment herein."

After hearing the evidence adduced by the parties, the court found that the special act of the Legislature upon which the indictment was founded was a valid statute, and, the defendant admitting that it had failed to comply with the act, fined it (defendant) $25, and rendered judgment against it for that amount. To reverse this judgment the defendant prosecutes an appeal to this court.

The Attorney General, in behalf of the state, confesses that the court erred in holding that the statute in question is valid.

The undisputed evidence adduced in the trial fully sustain the statement of facts in the special plea of the defendant, which shows that there was no public necessity for a station at Snow Crossing on defendant's line of railway, and that the requirement that such a station should be constructed and maintained is unnecessary, unreasonable, and arbitrary, and if executed would cause the defendant to incur large expense without any corresponding benefit to it or the public. The result is it should not be enforced, and the confession of error of the Attorney General should be sustained.

Judgment reversed, and cause remanded, with directions to the court to dismiss the indictment.

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CRAWFORD v. SAWYER & AUSTIN LUMBER CO.

(Supreme Court of Arkansas. July 12, 1909.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—DIRECTION OF VERDICT.

In determining whether the court erred in directing a verdict for defendant, the Supreme Court will give the testimony in plaintiff's favor its strongest probative force, and accept the view thereof most favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, the superintendent of defendant's factory, while walking along defendant's railroad track to the office passed the engine room, and was suddenly enveloped in steam turned on across the track by an employé in the power house, in violation of the rules, and by reason thereof was run over by an approaching train, plaintiff was entitled to go to the jury on question of defendant's negligence in failing to provide for plaintiff's safety under such conditions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 287*)—INJURIES—FELLOW SERVANTS—QUESTION FOR JURY.

Whether plaintiff and a co-employé were fellow servants *held* a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 287.*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by Thomas D. Crawford against the Sawyer & Austin Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. F. Coleman and Murphy, Coleman & Lewis, for appellant. Austin & Danaher, for appellee.

BATTLE, J. Thos. D. Crawford brought this action against the Sawyer & Austin Lumber Company to recover damages for personal injuries sustained by him as a result of the negligence of the defendant. The substance of the contents of his complaint are correctly stated in the abstract of appellant, as follows:

"The defendant is a corporation owning and operating a sawmill plant at Pine Bluff, Ark. West of its principal sawmill, and separated from it by a large mill pond, the defendant operates a sash and door factory. Extending from the sash and door factory, and running in an easterly direction and curving around the northern boundary of the mill pond, was one of the railroad tracks of the Pine Bluff & Western Railway Company. This track passed in close proximity to the principal sawmill, and also near the machine shop, the track passing just north of both. This track was generally used by the employés of the company in going from the sash and door factory to the principal sawmill, the machine shop, and the office of the company.

"Plaintiff was the superintendent of the sash and door factory, and was earning a salary of $2,000 per year. On the morning of the 23d of October, 1905, he started from the door factory to the machine shop, and proceeded over the track mentioned. When opposite the sawmill, defendant negligently opened a valve to blow out the boilers, which so enveloped the plaintiff in steam and vapor as to prevent him from seeing in any direction, thereby confusing him and blinding him as to his surroundings, and preventing him from getting off the track with safety, as the track at this point was on a high embankment with a ditch on both sides. The blowpipe was negligently constructed, in that it directed the steam immediately across the track. While plaintiff was trying to get out of the steam, he was negligently struck by a flat car propelled by the defendant's engine, and knocked down upon the track, the wheels of the car so bruising and mutilating his left foot as to cause the loss of all his toes on that foot, and to render him a cripple for life. By reason of the enormous quantity of steam and vapor enveloping the plaintiff he was prevented from seeing the train, and the operators of the train were prevented from seeing him. The damages were laid at the sum of $15,000."

Defendant answered, and denied material allegations of the complaint, and alleged that plaintiff was guilty of contributory negligence.

After hearing all the evidence adduced by the parties, the court instructed the jury to sustain a verdict in favor of the defendant, which they did, and plaintiff appealed.

The only question for us to decide is: Was the evidence adduced by the plaintiff legally sufficient to support a verdict in his favor? In deciding this question we should give the testimony in his favor its strongest probative force, and accept that view of it most favorable to him. Catlett v. Railway Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; Rodgers v. Choctaw, Oklahoma & Gulf Railroad Co., 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; Wallis v. St. Louis, Iron Mountain & Southern Railway Co., 77 Ark. 556, 95 S. W. 446; Scoot v. St. Louis, Iron Mountain & Southern Railway Co., 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67; Evans v. St. Louis, Iron Mountain & Southern Railway Co. (Ark.) 113 S. W. 642.

Pursuing this course, we find the facts in this case as follows:

"The Sawyer & Austin Lumber Company operates a large sawmill plant near the city of Pine Bluff. Some distance west of this plant and separated from it by a mill pond was a sash and door factory belonging to the same company, but operated as an entirely distinct and separate business, except as hereinafter stated. The employés of the door

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factory had nothing in common with the employés of the sawmill, and, so far as the record shows, the respective service of the two sets of employés never brought them in any kind of personal contact or relationship. The sawmill was in charge of one superintendent and the door factory was in charge of another; and, while both superintendents were under a common master, there was no co-service between them, and neither had anything whatever to do with the employés under the other.

"According to the testimony of the defendant, the company had established a roadway and walk from the door factory around the southern end of the pond to the company's office, which was located east of the sawmill. As a matter of fact, a railroad track extended from the office and curved partially around the sawmill plant and the north end of the pond. It was known as the pond track. Various employés, especially those of the door factory, often used this track as a walkway in going to and returning from their work, and in going from the door factory to the office of the company, with the full knowledge and acquiescence of the company." Plaintiff testified that he invariably used it two and sometimes three and four times a day, as the occasion demanded. "The company operated its log trains on this track.

"The sawmill was run by steam, while the door factory was operated by electricity. The boiler and engine rooms of the sawmill were located north of the sawmill plant, and in close proximity to the railroad track. Electricity was generated in the engine room by the same power which ran the sawmill, and was conducted through wire cables to the door factory. Except for this connection between the two, the door factory was as separate from and independent of the sawmill as it would have been if located in another city or in a different part of Pine Bluff.

"A blow-off pipe extended from the boiler room to within five or six feet of the track, and pointed directly across the track." The location and direction of this pipe when blowing off "menaced the safety of any one passing along the railroad track, for in blowing off the steam it went with great force directly across the track." To avoid danger, the superintendent of the sawmill, "who had absolute power in the premises, contented himself by giving positive instructions and establishing a rule that the boilers were not to be blown off in the daytime, unless it was imperative, and that they were never to be blown off until the man in charge of the boilers had first looked to see if any person was in a position to be injured. The superintendent himself testified to these instructions and to this rule, and the testimony of Henry Washington, the employé in charge of the boilers, was to the same effect. This testimony not only established the fact of the existence of a dangerous agency which threatened the safety of the employés, but it showed a knowledge and appreciation of the danger on the part of the company.

"The plaintiff was the superintendent of the door factory, and often used the railroad track in going from the factory to the company's office. In doing this he" passed directly in front of the blow-off pipe. "He testified, however, that he had never noticed the blow-off pipe, and did not know that it was there, and had never seen the steam blown off.

"On the 5th of October, 1905, about 8:30 o'clock in the morning, the plaintiff started from the door factory to the machine shop and to the office, and went by way of the railroad track because it was a shorter route. As he passed the corner of shed No. 4, which was on the western shore of the mill pond, he noticed defendant's log train moving east on the scales track on the south side of the sawmill plant. This track extended in a northeasterly direction to a junction with the other track referred to; the connecting switch being near the company's office. The train was moving in the same general direction that the plaintiff was going, and, as it was the invariable custom to weigh the cars as they passed over the scales, the plaintiff reasonably supposed that it would be 10 to 15 minutes before the train could pass the switch and come back on the track on which he was walking, even if it was the intention of the train crew to bring it back on that track. As the plaintiff continued on his way, he lost sight of the train, which passed on the other side of the sawmill plant from him. When the plaintiff reached a point about opposite the blow-off pipe, the valve was suddenly opened without any warning, and the plaintiff was immediately enveloped in steam and vapor. Henry Washington testified that he opened the valve without first looking to see if the way was safe, and that he violated the company's orders in doing so." It enveloped him so completely that he could not see in any direction. "He was feeling around trying to get off the track, exercising the best care he could in his confusion, and making special effort to avoid stumbling and falling, because the track at this place was on an embankment six or seven feet high with a ditch on each side. While groping his way to the north side of the track, which was away from the steam and afforded the best avenue of escape, a puff of wind lifted the steam, and he saw the end of a log car about two feet from him. He reached out his hand, and it struck the end of the log. He tried to catch hold of it, but missed, and grabbed the end that hung down. He threw his foot against the break beam, and, when he lost his hold, he fell with his back on the north rail. As his foot was pressed against the brake beam, the train pushed him a few feet along the rail, when he tried to throw himself off the rail on the north side of the track. In doing this

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his left foot was run over, and he was injured in such a way as to make him a cripple for life.

"If it had not been for the steam, plaintiff would have seen the train, for he was keeping a lookout for it, and the train operatives would have seen the plaintiff, for they were looking down the track."

These facts presented at least two questions that should have been submitted to the jury: First. Was appellee guilty of negligence in failing to provide for the safety of appellant and thereby liable for his injury? Second. Were appellant and Henry Washington fellow servants—were they so related in their labor performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence? Snellen v. Kansas City Southern Railway Company, 82 Ark. 334, 337, 102 S. W. 193. They should have been submitted with appropriate instructions. The court erred in instructing the jury to return a verdict in favor of the defendant.

Reverse and remand for a new trial.

ROBINSON v. VAN VLEET.

(Supreme Court of Arkansas. July 12, 1909.)

1. WORK AND LABOR (§ 14*)—IMPLIED CONTRACT.

Plaintiff, a minor, became a member of defendant's family under a contract to work for defendant until he reached majority, in return for necessaries and a horse, bridle, saddle, and 80 acres of land. Plaintiff and defendant disagreed before plaintiff reached majority. It was then agreed that defendant should pay plaintiff $100, that his services should then terminate, and that he should abandon his right to the horse, etc., which was done. *Held* insufficient to raise an implied promise by defendant to pay plaintiff the reasonable value of his services.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 14.*]

2. INFANTS (§ 49*)—CONTRACT FOR SERVICES—EXECUTION—CONCLUSIVENESS.

An infant is bound by his contract for services which he has executed without dissent, and which is not so unreasonable as to show fraud or undue advantage.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 112, 113; Dec. Dig. § 49.*]

Appeal from Circuit Court, Greene County; Frank Smith, Judge.

Action by William Robinson against B. E. Van Vleet. Judgment for defendant, and plaintiff appeals. Affirmed.

This was a suit instituted by the plaintiff as next friend of John Hots, a minor, for the value of services performed by the minor for the defendant. Defendant has a verdict. In December, 1899, shortly before he became 13 years old, Hots was taken into the home of defendant, where he was almost constantly employed in hauling, farming, and clearing in the service of the defendant until September 4, 1907, when he left as the result of a disagreement between him and defendant. Suit was brought for $900, balance alleged to be due for value of the services. Defendant's answer alleged, and his proof tended to show, that Hots practically became a member of defendant's family. The court gave among others the following instruction: "No. 1. One of the defenses to any recovery by the plaintiff in this suit is that the plaintiff entered and became a member of the family of the defendant, and as such was entitled to no compensation other than the common benefits enjoyed by the family. You are instructed that, if you find from the evidence that the plaintiff occupied the position of and became a member of defendant's family, and received the common benefits enjoyed by the family, you will find for the defendant, unless you further find that there was an express agreement to compensate the plaintiff." Appellant excepted to the giving of this instruction. The court also gave the following: "No. 3. You are instructed that in order to find for the plaintiff it will not be necessary for you to find that there was any contract made or existing between the parties; but, if the defendant permitted the plaintiff to work for him, and if he received the benefits of his labor, and made no objections to plaintiff's working for him, then under these circumstances the law implies a promise to pay plaintiff a reasonable sum for such labor."

Huddleston & Taylor, for appellant. J. D. Block, for appellee.

WOOD, J. (after stating the facts as above). The appellant contends that, notwithstanding a family relationship may have existed between him and the appellee, he was entitled to recover if the facts show an implied agreement to pay him for his services, and he contends that the conduct of the parties as shown by the evidence raises an implied agreement, which rebuts the presumption that his services were gratuitous. He further contends that instruction No. 1 takes away from the consideration of the jury any evidence of an implied agreement. There is really no evidence of any implied agreement in the record. The agreement, according to the testimony of both appellant and appellee, was express, and the effect of it was that appellee should receive appellant into his household as a member of his family, and that if appellant remained until he reached his majority, he should receive a horse, bridle, and saddle and 80 acres of land. After this, when the parties differed about some work, and agreed to sever the quasi family relationship before appellant reached his majority, the agreement was that appellee should pay appellant $100 in cash for the services already rendered, which appellant accepted, and thereupon left appellee's home, thus abandoning the contract

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as to horse, bridle, and saddle and the 80 acres of land. These facts are established by the uncontroverted evidence, and the court, therefore, did not err in giving instruction No. 1, even if it was meant by it to ignore any implied contract. But instruction No. 3, given at the request of appellant, did submit to the jury the question as to whether there was an implied contract to pay for appellant's services. Taking the two instructions together, their purport was to tell the jury to find for appellant if they believed from the evidence that there was either an express or implied contract to pay for his services. Instruction No. 3, given at the request of appellant, gives him the benefit of an implied agreement, if there was one, and was more favorable to him than the evidence warranted.

There was really no evidence to justify the court in submitting to the jury the question of the right of appellant to recover upon a "quantum meruit"; for the uncontroverted evidence shows an express contract for services which had been fully executed. The appellant had done the work, and had received the $100, in addition to the necessaries and other valuable considerations given him by appellee. There is no allegation of fraud against appellee in dealing with appellant, and there is no evidence that the amount paid by appellee for the services of appellant was not reasonable under all the circumstances of his employment. Certainly there was no evidence to show that the amount in necessaries and money received in consideration for his services was so unreasonable as to be evidence of fraud or undue advantage. Appellant did not even ask that such question be submitted to the jury. An infant is bound by the terms of his contract for services which he has executed without dissent, provided such contract, under all the circumstances of his employment, is reasonable, or not so unreasonable as to be evidence of fraud or undue advantage. Judge Cooley, in Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152, quoting an earlier case, used the following language: "It is essential to the protection of infants that they should be bound by contracts of this kind after they have been executed, and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven perhaps to vagrancy and crime." Wilhelm v. Hardman, 13 Md. 140; Hobbs v. Godlove, 17 Ind. 339; 22 Cyc. p. 648.

In view of these principles, which are applicable to the facts of this record, there was no error in any of the rulings of the court prejudical to the rights of appellant, and the judgment is therefore affirmed.

CAPITAL FIRE INS. CO. v. KAUFMAN.

(Supreme Court of Arkansas. July 12, 1909.)

1. INSURANCE (§ 335*) — FIRE INSURANCE — IRON-SAFE CLAUSE—VALIDITY.

An iron-safe clause in a fire insurance policy is valid, and must be complied with in order to entitle the insured to recover on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.*]

2. INSURANCE (§ 668*) — FIRE INSURANCE — IRON-SAFE CLAUSE — COMPLIANCE — QUESTION FOR JURY.

Where, in accordance with the custom of the stores in a rural community, insured on Saturday nights closed his store between 10 and 11 o'clock, and took his books upstairs to his room to post them, and he was doing so at the time of the fire, the books being otherwise kept in an iron safe at all times, when the store was closed, whether insured's acts constituted a sufficient compliance with an iron-safe clause in his policy was for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

3. CUSTOMS AND USAGES (§ 5*)—EXTENT OF PRACTICE.

Where there were only two stores in a negro community in the country several miles from a railroad, the custom of those stores as to the hours of business constituted the custom of the community.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 4; Dec. Dig. § 5.*]

4. INSURANCE (§ 335*) — IRON-SAFE CLAUSE — CONSTRUCTION — CUSTOMS—APPLICATION TO CONTRACT.

Where an insurance company insured one of the two stores in a negro rural community by a policy requiring the insured to keep a set of books in an iron safe during closing hours, the insurance company was bound by the custom of the community as to what constituted the usual and customary hours of business.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 335.*]

5. INSURANCE (§ 669*) — IRON-SAFE CLAUSE — CUSTOM—INSTRUCTIONS.

Where, in an action on a fire policy containing an iron-safe clause, there was evidence that it was the custom of the stores in the community to keep open until 10 or 11 o'clock, and then for the proprietor to take his books upstairs to his room, and post them before returning them to the safe in the store, as plaintiff was doing on the night of the fire, the court properly charged that the jury should consider such custom in determining whether there had been a substantial compliance with the iron-safe clause.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

6. INSURANCE (§ 335*)—FIRE POLICY—INVENTORY.

A policy required insured to keep all inventories in an iron safe during closing hours. Plaintiff's inventories taken just before and after the policy was issued were kept in a book in which was also kept the accounts of the store and other data of the business at the time of the fire. In accordance with the custom in the community, plaintiff had taken the book upstairs after closing hours in order to post it, and it was burned. There were other books in the safe from which a history of the business could

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be ascertained. *Held*, that the court properly charged that, if the jury found that plaintiff took inventories as required which were destroyed without plaintiff's fault or negligence, then the jury should find that plaintiff had complied with the policy, though a portion of the inventories had been destroyed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 335.*]

7. APPEAL AND ERROR (§ 1066*)—PREJUDICE—INSTRUCTIONS.

Where insured was entitled to recover on a policy both as to his household goods and furniture and on his stock of goods, the court's error, if any, in charging that the policy was divisible, and that plaintiff could recover for loss of the household goods as a matter of law, was not prejudicial to the insurer.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.*]

Appeal from Circuit Court, Pulaski County, First Division; Robert J. Lea, Judge.

Action by R. Kaufman against the Capital Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee sued appellant on a policy of fire insurance issued February 15, 1907, insuring for the lump sum of $52 a stock of merchandise and household goods. The insurance on the stock of goods was $1,000, and on the household effects $500. It was alleged that the fire and total loss of the property insured occurred during the life of the policy. The complaint asked judgment for the full amount of the policy, with 6 per cent. interest and penalty and attorney's fees. The answer set up in defense the application which was made a part of the contract and the following stipulations in the policy, to wit:

"Sec. 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year; and unless such inventory has been taken within twelve calendar months prior to the date of this policy, and is on hand at the date of this policy, one shall be taken complete in detail, within thirty days after the date of this policy or this entire policy shall be null and void from such date.

"Sec. 2. The assured will make and prepare, in the regular course of business, from and after the date of this policy, a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and on credit, or this entire policy shall be null and void. By the term 'complete record of business transacted,' as used above, is meant a complete record of all the property which shall go into the premises and be added to the stock, and of all property taken from the stock, whether by the assured or by others, even though not technically purchased or technically sales.

"Sec. 3. The assured will keep and preserve all inventories of stock taken during the current calendar year, and also all those taken during the preceding calendar year, which are on hand when this policy is issued, and will keep and preserve all books which are then on hand, showing a record of business transacted during the current calendar year, and the preceding calendar year. The assured will also keep and preserve all inventories taken after the issuance of this policy, and all books made and prepared after the issuance hereof, showing record of business transacted. The books and inventories, and each of the same, shall be by the assured kept securely locked in a fireproof safe at night and at all times when the building mentioned in the policy is not actually open for business, or, failing in this, the assured shall keep such books and inventories, and each of them, in some secure place not exposed to a fire which would destroy said building; and, in the event of a loss by fire to the personal property mentioned herein, said books and inventories, and each of the same, must be by the assured delivered to this company for examination, or this entire policy shall be null and void, and no suit or action shall be maintained thereon for any such loss. It is understood and agreed that this clause and the requirements thereof is one of the inducing causes to the acceptance of the risk herein assumed and the issuance of this policy, and that the terms and requirements hereof are material to the risk, and to this insurance, and to any fire loss happening to the property described in this policy. It is further agreed that the receipt of such books and inventories, or the request for them, or either of them, and the examination of same, shall not be an admission of any liability, under this policy, nor a waiver of any defense to the same."

It was alleged "that the plaintiff did not preserve inventory referred to in his application, nor books and invoices referred to therein, in an iron safe at night and at all times when not open for business, and that the same were destroyed in violation, not only of the terms and agreements in his said application, but in violation of the terms and agreements in the policy as quoted, whereby the conditions of said policy contract were violated, and the defendant was released from liability." Appellee was a merchant at Wampoo. She and her husband, who was her business manager (and whom we will hereafter in the statement designate as the appellee for convenience), lived over the storeroom. The fire occurred February 8, 1908, first in an adjoining building. It then destroyed the building occupied by appellee and its contents. The stock of goods at the time of the fire were valued at $7,000, and the household effects were valued at $1,100 or $1,200. Appellee's counsel further states the facts correctly as follows: "Every Saturday night appellee posted his books.

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The storehouse was cold and uncomfortable, and a stairway led from the store up to the living rooms of appellee. After the active business of the day was over, he turned out the loafers, locked his door, left his lights burning in the store, and took his books up the short flight of stairs into his bedroom, where he had a good light and warm fire, and a comfortable place in which to work. He generally closed about 10 o'clock, but was in the habit of coming down to wait on customers until he finally put out his light, and in case of an urgent call for medicines or necessaries would come down later. At the time of the fire he had not extinguished the lights in the store, and had not replaced his books and cash in the iron safe. This was the custom of appellee, and also the custom of the only other store at Wampoo. The owner of the other store closed about 10 or 11 o'clock, according to the weather, on Saturday nights, and then left for his home, about a mile, or a mile and a half away from his store. The population around Wampoo is pretty nearly all negroes. They get paid off on Saturday, and generally sit around appellee's store, talking, eating peanuts, and chewing tobacco until appellee told them he wanted to close up. After appellee finished writing up his books, he would take his cash and his books downstairs into the store, and put them in the iron safe, lock up the safe, and extinguish the lights for the night. The policy of insurance was taken out February 15, 1907. Appellee took an inventory January, 1907, and August, 1907, between the 1st and 5th of the month. These inventories were copied into a large book, in which were kept the accounts of the store and other data of the business. This book was upstairs, and was burned. There were other books in the iron safe at the time bringing the business down to 1906, and a credit book bringing the business down to the date of the fire. These books appellee had no occasion to have upstairs. There was also a credit ledger in the safe which was saved. Appellee had been at work on the books about an hour before the fire broke out. It was his habit to put the books in the iron safe at night, except on Saturday night, when he took them to his room to post them, leaving the light burning in the store until he finished posting his books. He testified that he intended carrying them downstairs and putting them in the big, combination lock iron safe after he had finished work on them. He would then put out the light in the store. The lights were still burning in the store at the time the fire broke out. The store was 40 feet by 22 feet, and the stairs ran straight up from the inside of the store in the rear to the bedroom. Wampoo is six miles from the railroad. The post office is in appellee's store, and he is the postmaster. The invoices had been entered in the book that was destroyed by fire, and the invoices themselves were wrapped up and put away in pigeon holes in the store. When the invoices came in, appellee put them in the safe until Saturday night, when he took them with his book up to his room to copy them. He did not copy the items in detail, but only entered on his book the footings or aggregate amount shown by each invoice."

The court over the objection of appellant gave the following instructions:

"(1) The court instructs the jury that the insurance on the household effects and upon the stock of merchandise mentioned in the policy sued on are divisable, and that plaintiff is entitled to recover the amount of the policy on the household goods with 6 per cent. interest from the 29th day of April, 1908, together with a penalty of 12 per cent. on said amount.

"(2) The court instructs the jury that they have a right to take into consideration the custom or mode of doing business such as the opening and closing of the store, the time and manner of writing up the books that was incident or prevailing at Wampoo, Ark., the place where the goods insured were located.

"(3) The court instructs the jury that if they find from the testimony that plaintiff kept a set of books suitable for the business he was carrying on, and which are ordinarily kept for such business, and that he kept an iron safe such as is provided for in the policy sued on, and that he was in the habit of placing said set of books in such safe after closing up his business, but that on the night of the fire he did not close up his store for the night, but did retire to his room with his books for the purpose of posting the same, and did leave a light burning in the store with the intention of returning to the store with his books when he had finished working on the same for the purpose of placing the same in his safe for the night, but that, while the said books were in his manual possession in his private room near the store, the alarm of fire was suddenly given, and plaintiff was unable to replace them in his safe, and the said books were then and there burned, then in that event, if the jury so find, the court instructs you that such acts on the part of the plaintiff were a substantial compliance with the terms of the policy in reference to keeping his books in his safe, and you will find for the plaintiff upon that point.

"(4) The court instructs the jury that if they find from the testimony in the case that plaintiff took an inventory such as is contemplated in the policy sued on in January, 1906, and again in January, 1907, and such inventory was so taken and kept, but was destroyed by fire without the fault or negligence of the plaintiff, then in that event the jury will find that plaintiff complied with the terms of the policy in reference to the inventory, and you will find for the plaintiff upon this branch of the case, although a por-

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tion of said inventories was destroyed by the fire."

The appellant duly excepted to the ruling of the court in giving the above instructions.

The court refused to give the following prayers of appellant:

"(1) The jury are instructed that if the inventory of January, 1907, and the subsequent invoices and the books, were destroyed by the fire at about 11 o'clock Saturday night when they were not in the fireproof safe, but elsewhere on the premises, this was a breach of the contract, and you will find for the defendant.

"(2) The jury are instructed that if the assured failed to keep and preserve the set of books stipulated and provided for in the policy sued on, and the same were destroyed upon the premises and by the fire which destroyed the stock of goods, and the same were not at the time in a fireproof safe, but upstairs and exposed to the fire, this was a breach of the contract, and you will find for the defendant.

"(3) The jury will find for the defendant."

The appellant objected and duly excepted to the rulings of the court in refusing its prayers. The jury returned a verdict for the full amount of the policy with interest and penalty. A motion for new trial assigning as errors the rulings of the court to which appellant had excepted was presented and overruled. Judgment was entered for the amount of the verdict, which this appeal seeks to reverse.

C. S. Collins and Ratcliffe, Fletcher & Ratcliffe, for appellant. Joseph Loeb and J. W. Blackwood, for appellee.

WOOD, J. (after stating the facts as above). The policy provides that "the books and inventories and each of the same shall be by the assured kept securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy is not actually open for business." It has often been held by this court that a clause in a fire insurance policy similar to the above and generally designated as the "iron-safe clause" is valid, and that a compliance with its terms by the assured is essential to recovery. Western Assurance Co. v. Altheimer, 58 Ark. 575, 25 S. W. 1067; Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507; Germania Ins. Co. v. Bromwell, 62 Ark. 43, 34 S. W. 83; Sun Mut. Ins. Co. v. Dudley, 65 Ark. 240, 45 S. W. 539. In the case at bar the evidence was ample to warrant the court in submitting to the jury the question as to whether the appellee had complied with the provisions of the iron-safe clause. The facts in this case bring it clearly within the rules of law announced by this court in Sun Insurance Co. v. Jones, 54 Ark. 376, 15 S. W. 1034, and the trial court, on the question under consideration, followed closely the doctrine of that case in its instructions numbered 2 and 3.

Wampoo was situated in a country district where the great majority were negroes, who, being paid off on Saturday nights, visited the stores at that time, and remained for some time in making their purchases. It was proper to prove what the custom of these stores was in that district or place to accommodate the trade there, and appellant effecting insurance on a store in such territory must take notice of the custom of such stores as to their hours of trade as affecting the risk incident to the insurance of such property. There were only two stores in the country district of Wampoo where the people gathered for trade and to get their mail. The custom of these two stores as to the hours of business and trade was therefore necessarily the custom for that territory; and appellant, insuring one of these stores, must be held to have taken the usual or customary hours of business into consideration in consummating its contract with appellee. "A usage of trade may have a greater or less territorial extent or a more general or restricted one according to the circumstances which give rise to it." 12 Cyc. p. 1041, and cases cited in notes. There was no error in admitting the evidence of the custom of the two stores in keeping open on Saturday nights, nor in instruction numbered 2. So far as the preservation of the inventories was concerned, they fall under the same clause and the same rule for the preservation of the books; and the court properly submitted the question as to whether appellee had been negligent in preserving these according to the provisions of the policy in its instruction numbered 4. Conceding that the contract of insurance was indivisible under the doctrine announced in McQueeny v. Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. Rep. 179, and Planters' Ins. Co. v. Lloyd, 71 Ark. 292, 75 S. W. 725, we do not see how the court's instruction No. 1 was prejudicial to appellant. The verdict shows that the jury found that there was no breach of the conditions of the iron-safe clause and no forfeiture of the policy upon any other ground. Hence the question of the divisibility of the contract did not arise. So appellant is not prejudiced by the erroneous instruction. This disposes of the instructions given by the court.

The prayers of appellant 1 and 2, which the court refused, in effect told the jury that upon different phases of the undisputed evidence in the case appellant was entitled to a verdict. Prayer No. 3 was in form a peremptory direction for appellant. All these prayers were properly rejected.

Finding no reversible error, the judgment is affirmed.

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BLOOM v. HOME INS. AGENCY et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. CONTRACTS (§ 117*)—RESTRAINT OF TRADE.
Where a restraint of trade is limited as to time and place, and is reasonable, the contract is not against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554–569; Dec. Dig. § 117.*]

2. CONTRACTS (§ 117*)—RESTRAINT OF TRADE.
If an enterprise sold is disconnected with any plant or tangible property, and is a business with a good will and custom, it is valid to agree that the seller will discontinue such calling, and abstain from such business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554–569; Dec. Dig. § 117.*]

3. GOOD WILL (§ 1*)—DEFINITION.
"Good will" is the probability that old customers will resort to the old place for the purpose of trade, and is recognized as a thing of value which may be sold.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3128–3130; vol. 8, p. 7673.]

4. CONTRACTS (§ 117*)—SALE OF GOOD WILL—INSURANCE EXPIRATIONS — RESTRAINT OF TRADE.
Insurance "expirations," consisting of custom and trade which would ordinarily be renewed in and held by an agency, are of value, and subject to sale, and the seller may protect the purchaser by agreeing to refrain from engaging in the business within a certain county for five years.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554–569; Dec. Dig. § 117.*]

5. MONOPOLIES (§ 18*)—RESTRAINT OF TRADE—SALE OF INSURANCE AGENCY.
Where several insurance agents sold their agencies to a corporation formed by them, and the sale did not in any way affect the premiums for insurance, reciprocal agreements by the sellers to abstain from soliciting the same kind of insurance business, except in behalf of the company, were not in violation of Act Jan. 23, 1905, known as the "Anti-Trust Law" (Laws 1905, p. 1).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 18.*]

6. CORPORATIONS (§ 448*) — CONTRACTS—MUTUALITY—PARTIES—EXISTENCE OF CORPORATION.
Where a corporation after its organization adopts the original agreement made between the corporators, such agreement is not void for want of mutuality; and, where all the parties, after such organization, ratify it, they are bound thereby.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1790, 1791; Dec. Dig. § 448.*]

7. CORPORATIONS (§ 389*) — CONTRACTS — IMPLIED POWER.
Where it was within the implied power of corporations to dispose of an insurance agency, it will be presumed that a contract with the purchaser not to engage in a competing business was not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1568; Dec. Dig. § 389.*]

8. CORPORATIONS (§ 388*)—CONTRACTS—ULTRA VIRES—ACCEPTANCE OF BENEFITS.
Where a contract of a corporation has been so carried out that the corporation has received the benefits thereof, it cannot violate the contract on the ground that it had no power to make it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556–1558; Dec. Dig. § 388.*]

9. PARTIES (§ 6*)—REAL PARTIES IN INTEREST—THIRD PERSONS.
Under Kirby's Dig. § 5999, providing that every action must be prosecuted in the name of the real party in interest, where a contract is entered into for the benefit of the third person, such third person may maintain an action for breach.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 6.*]

10. PARTIES (§ 51*)—NEW PARTIES—DISCRETION OF COURT.
Under Kirby's Dig. § 6145, authorizing the amendment of the complaint by adding or striking out the name of a party at any time in furtherance of justice, the question when and whether parties should be brought in as necessary to a complete determination of the controversy is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77–82; Dec. Dig. § 51.*]

11. CONTRACTS (§ 312*)—BREACH.
Where one sold a business, and agreed to refrain from competition for a certain term, it was a breach for him, either individually or as a partner of a firm, to engage in the competitive business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. § 312.*]

12. INJUNCTION (§ 192*) — DECREE—SCOPE OF RELIEF—PERSONS RESTRAINED.
In an action to restrain the seller of a business from engaging in a competing business, in violation of his contract of sale, the decree should enjoin defendant only, and not the other members of the firm of which he is a partner.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 192.*]

Appeal from Jefferson Chancery Court; Jno. M. Elliott, Chancellor.

Action by the Home Insurance Agency and others against E. B. Bloom. From a decree for plaintiffs, defendant appeals. Modified and affirmed.

The Home Insurance Agency, one of the plaintiffs below, instituted this suit against the defendant, E. B. Bloom, and in its complaint prayed for an injunction restraining the defendant, either for himself or for others, from soliciting insurance in Jefferson county, Ark., for five years from November 1, 1905. Subsequently W. Z. Tankersley, F. M. Rosenberg, George M. Wells, and Russell Hollis were made parties plaintiff to the action. Prior to September 16, 1905, W. Z. Tankersley, the Bell-Vernon Company, represented by F. M. Rosenberg, George M. Wells & Co., a firm composed of said Wells and Hollis, and the Travelers' Insurance Company of Pine Bluff were the owners of four separate local insurance agencies in the city of Pine Bluff, Ark., and were engaged in the business of soliciting insurance as agents for general insurance companies that wrote and executed policies of insurance. The defendant was the secretary of the Travelers' Insurance Company of Pine Bluff, Ark., which

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ed, and which he partly owned, had been a partnership instead of a corporation. The contract which he thus executed was binding on him in all its terms.

The various parties to the contract were agents whose business consisted in soliciting insurance for insurance companies throughout the United States and other countries that actually wrote insurance and issued policies. Under the evidence in this case and the finding of the chancellor these agencies did not fix or regulate the price or premium to be paid for insuring property. The sale of these agencies to the company did not, under the evidence, affect that price in any way. The object of associating themselves together was to decrease the expenses of the several agencies, and the object of requiring an agreement that all the parties would abstain from soliciting the same kind of insurance business was to keep the good will of the various agencies, and thus retain the total volume of business of all the agencies. There was no evidence that showed that this was a combination for the purpose of fixing or regulating the price of insurance or that this agreement could have that effect. The contract was therefore not invalidated by the act of the General Assembly of Arkansas approved January 23, 1905, and commonly known as the "Anti-Trust Law." Acts 1905, p. 1. The purpose and aim of this contract was not to stifle competition. Its object was to sell and transfer a business and the good will of that business. To maintain that good will in its integrity as a thing of value it was essential that the vendor should not solicit and thus destroy that custom and trade which he had sold. It was therefore not invalid for the vendor to agree, for the purpose of protecting the vendee in his purchase of that good will, to abstain from engaging in the business within a limited space and for a limited time.

It is urged that because the Home Insurance Agency was not incorporated, and therefore not in existence, at the date of the contract there was a lack of mutuality, and the contract is not effective on that account. But a promise that lacks mutuality at its inception becomes binding on the promisor after performance by the promisee. Where, therefore, a corporation after its organization makes the original agreement its own contract by adopting and acting on it, the original contract becomes binding on it; and, where all the parties after such organization recognize and act on the original contract, all parties to it are bound by its terms. 9 Cyc. 329; 10 Cyc. 263; Perry v. Little Rock, etc., Ry. Co., 44 Ark. 383. In the case at bar the Home Insurance Agency was duly organized on November 1, 1905, and it then accepted and adopted the contract, which was in legal effect a proposal to the future corporation. All the parties thereafter recognized the contract as effective, and acted on it. The Home Insurance Agency in conformity with the contract issued its stock to the various parties, and took over the books, papers, expirations, and good will of the various agencies. The defendant in conformity with the contract then received and accepted the stock. The contract thus became mutual and binding on all the parties.

It is also urged that the Bell-Vernon Company and the Travelers' Insurance Company were corporations, and it was beyond the powers of these corporations to enter into the contract to refrain from engaging in the business of a local insurance agency, and on this account the contract was not mutual, and therefore not binding on the defendant. But the contract was but an incident to a sale of property, and it was within the implied power of these corporations to make any disposition of their property which in their judgment was for the benefit of the corporations. It is not shown that the contract was without the scope of the purposes of their creation; and, within that scope, these corporations had the same power to make and take contracts which natural persons have. The presumption is that this contract made by these corporations was not ultra vires. But if it should be considered that this contract was in excess of the powers of these corporations to enter into, yet, as has been said above, the contract has been so carried out that these corporations have received the benefits thereof. They would not therefore be permitted to violate the obligations of that contract upon the ground that they did not have the power to make it, after having thus received the fruits and benefits thereof. Bloch Queensware Co. v. Metzger, 70 Ark. 238, 65 S. W. 929; Minneapolis F. & M. Ins. Co. v. Norman, 74 Ark. 190, 85 S. W. 229, 109 Am. St. Rep. 74; Arkadelphia Lbr. Co. v. Posey, 74 Ark. 377, 85 S. W. 1127; Ark. & La. Ry. Co. v. Stroude, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; White River L. & W. Ry. Co. v. Star R. & L. Co., 77 Ark. 128, 91 S. W. 14; 5 Thompson, Corp. § 6021; 10 Cyc. 1156. The defendant cannot, therefore, on this account claim that the contract so lacked the requisite of a mutuality that it was not binding on him.

This suit was originally instituted by the Home Insurance Agency as the sole plaintiff, and on the same day of, and before, the trial below the other plaintiffs were made parties to the suit over defendant's objection. It is urged that the Home Insurance Agency had no cause of action under the contract, because it was not in existence at the time of the execution thereof, and that therefore the complaint could not be amended by making other parties plaintiff who may have had a right of action thereon. By section 5999, Kirby's Dig., it is provided that every action must be prosecuted in the name of the real party in interest, with certain exceptions, which do not apply here. The beneficial owner is the real party in interest within the meaning of this provision of the Code. 30 Cyc. 45. Where a contract is en-

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tered into for the benefit of a third person, the latter is the real party in interest; and a majority of the American courts have adopted the rule that such person may maintain an action for the violation of the contract. Lawrence v. Fox, 20 N. Y. 268; Brewer v. Dyer, 7 Cush. (Mass.) 337; 30 Cyc. 65. The contract which is the foundation of this suit was executed for the benefit of the Home Insurance Agency; and later, when the Home Insurance Agency came into existence, it was recognized, adopted, and acted upon by all the parties as the contract of that company. It was therefore the real party in interest, and a proper party plaintiff. There was therefore a cause of action with a proper plaintiff set forth by the complaint. The court had then the right to amend the complaint by adding to or striking out the name of any party, at any time, in furtherance of justice. Kirby's Dig. § 6145. And the question as to when and whether such parties should be brought in as necessary to a complete determination of the controversy is within the sound discretion of the trial court. And in this case we do not think that discretion has been abused. 31 Cyc. 477.

In the decree the chancellor also enjoined the firms of Banks, Bloom & Co. and Bloom, Hanf & Bloom, for said period, from engaging in or conducting any insurance business, save life, within Jefferson county as long as defendant was interested in, or connected with, said companies. It is true that if the defendant engaged in such business during the term and within the territory specified, either individually or as a partner in a firm, or if he caused it to be believed, among the customers of the agency transferred, that he was a partner or member of the competitive companies, this would be a breach of the contract by him. Daniels v. Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81. But the above firms or companies were not parties to the contract, and were not parties to this suit, and could not be bound by this decree. The decree should enjoin the defendant only from engaging in said business for said period and within said territory either for himself individually, or as a partner of any firm or member of any corporation engaged in said business, and from holding himself out to the customers of the insurance business in that territory that he was a member of such firms or companies.

To the extent that the decree enjoins the above-named firms or companies it is erroneous, and it should be modified so as to enjoin only the defendant. And, so modified, the decree will be affirmed.

GRIFFIN et al. v. ANDERSON TULLY CO.

(Supreme Court of Arkansas. July 12, 1909.)

1. LOGS AND LOGGING (§ 3*) — CONTRACTS — CONSTRUCTION.

A contract for the sale of growing timber, stipulating that the grantee may cut and remove the timber within a specified period, gives the grantee the timber cut during the period, and he may, for a reasonable time thereafter, remove the same.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 19*)—QUESTIONS REVIEWABLE—EXISTENCE OF CONTROVERSY.

Where, in a suit involving the right of the grantee of standing timber to remove logs cut, the grantee, before final decree, removed the logs, an appeal from the decree, so far as it relates to such logs, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63–80; Dec. Dig. § 19.*]

3. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—ACTIONS.

A cross-complaint, in a suit by a grantee of standing timber, which alleges that the grantee violated the contract by cutting and carrying away trees not included in the contract, and prays for an accounting, is sufficient to raise the issue of the grantee's violation of the contract.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

4. APPEAL AND ERROR (§ 889*)—DISPOSITION OF CASE ON APPEAL — AMENDMENTS TO PLEADINGS.

Where evidence on an issue was received without objection, the court on appeal will consider the pleadings as amended to conform to the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

5. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

A contract for the sale of standing timber, fixing the time for the cutting of the timber, and describing the timber as "all * * * trees 20 inches in diameter and up at the stump now standing," on premises described, only conveys the trees which measure the required size at the date of the contract, and not at the date of severance.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. § 2.*]

6. APPEAL AND ERROR (§ 1017*)—FINDINGS—CONCLUSIVENESS.

The findings of the master, appointed to determine the issues and to summon witnesses and take necessary proof to ascertain the same, are as conclusive on appeal as the verdict of a jury, or the findings by the court sitting as a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3996–4005; Dec. Dig. § 1017.*]

Appeal from Chicot Chancery Court; Zachariah T. Wood, Chancellor.

Suit by the Anderson Tully Company against J. W. Griffin and others. From the decree, defendants appeal, and plaintiff files cross-appeal. Affirmed.

J. R. Parker, for appellants. Brown & Anderson, for appellee.

HART, J. The foundation of this suit is the following contract: "For and in consideration of the sum of three thousand five hundred ($3,500) dollars, cash in hand paid to us by L. W. Snyder, agent for Anderson Tully Co., the receipt whereof is hereby acknowledged, we, T. K. Lee and J. P. Alexander, described herein as parties of the first part, bargain, sell, convey, transfer and war-

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rant unto Anderson Tully Company, known herein as parties of the second part, all of the cottonwood trees twenty inches in diameter and up at the stump now standing or located on the following described property, what is known as the Florence Plantation, Chicot county, state of Arkansas, commencing at west line of the Tecumseh plantation, running to Adams place on the east, the levee is the north line, Mississippi river and Waller place is the south line. The party of the second part, or assigns, shall have the full, free and undisturbed right of entry on and into said lands for the term of five years from this date to cut, raft and carry away said trees sold to them. Parties of the second part shall have the right with their employés to go in and upon said land and to use and occupy same for such necessary and useful purposes, in order to cut and carry away said cottonwood timber. Also small trees necessary for rafting timber for towing. All the rights herein granted to said Anderson Tully Company shall include their heirs and assigns. In witness whereof, the parties have hereunto signed their names, this 8th day of May, 1902. Anderson Tully Company, parties of the second part, agree and bind themselves not to hire any of T. K. Lee and J. P. Alexander's parties of the first part, plantation laborers, without first consulting parties of the first part, or their agents, and securing their consent thereto. [Signed] T. K. Lee. J. P. Alexander. Witnesses: John Parker. H. W. Langer." A complaint was filed by the Anderson Tully Company, a Michigan corporation, in the Chicot chancery court against J. W. Griffin, T. K. Lee, and J. P. Alexander Company, Ltd., a Louisiana corporation; it being alleged that these defendants had purchased the lands mentioned in the contract since the date of its execution. On the 8th day of May, 1907, a large number of the trees from said land had been felled and cut into logs, but the logs had not been removed from the land. The amount was estimated to be 400,000 feet. The plaintiff alleged that it had not been able to remove the same on account of high water, and the object of this action was to enjoin the defendants from interfering for a reasonable time with its servants and employés in removing the logs. A temporary injunction was granted, which by the final decree was made perpetual. The defendants answered, denying the title of the plaintiff to the logs remaining on the land at the date of the expiration of the contract, and by way of cross-complaint alleged that the plaintiff had cut a lot of timber which was under the size of the trees conveyed. They asked that the plaintiff be enjoined from removing any of the timber until their rights could be determined, and that a master be appointed to take an account of the amount of timber cut which was under the size mentioned in the contract. By agreement of the parties to the suit R. D. Chotard, the clerk of the court, was appointed special master to ascertain the amount of cottonwood timber cut on said land by plaintiff and appropriated to its use which was not embraced in the terms of the contract above set forth. He was given power to summon witnesses and take all necessary proof to ascertain that matter. The master reported that 250,683 feet of cottonwood logs, less than 20 inches in diameter at the stump at the date of the execution of the contract, were cut upon the land described in the contract, and that the price of said logs was the sum of $877.39. The report was confirmed by the court, and a decree was entered in accordance with the report against the plaintiff in favor of said defendants for said sum of $877.39, with 6 per cent. interest per annum thereon from the date thereof, viz., April 10, 1909, until paid. Both the plaintiff and defendants introduced evidence tending to sustain their respective contentions, and both have appealed from that part of the decree against them.

This court decided in the case of Indiana & Arkansas Lumber & Manufacturing Co. v. Eldridge, 116 S. W. 1173, that under a contract for the sale of growing timber, whereby the grantee is authorized to cut and remove timber within a certain period of time, the title to timber, cut by the grantee within such period, but not removed from the land, passes to such grantee. Under this decision the plaintiff owned all the trees embraced within the terms of its contract which had been severed from the soil and cut into logs at the date of the expiration of its contract, and had a right, for a reasonable time thereafter, to remove them. The evidence shows that at the time the final decree was entered that these logs had been removed. Hence the question of whether the court was right in its decree as to the injunction passes out of the case. The logs belonged to the plaintiff, and it removed them before the final decree was entered. The appeal from that part of the decree is therefore fruitless, and the court will not consider whether it was right or wrong. Wilson v. Thompson, 56 Ark., at page 115, 19 S. W. 321.

Counsel for plaintiff urges that no issue was raised by the cross-complaint as to a violation of the contract by cutting timber under 20 inches in diameter. The following paragraph appears in the answer and cross-complaint: "Defendants charge that said plaintiff has violated said contract with the defendants by cutting and carrying away about 400,000 feet of cottonwood trees that were less than 20 inches in diameter, on the 8th day of May, 1902, the day of their contract; that said 400,000 feet of cottonwood timber is worth $3,000." The prayer of the answer and cross-complaint is as follows: "Wherefore defendants pray that the writ of injunction heretofore granted be dismissed, set aside, and for naught held, and that defendants be granted an injunction against plaintiffs from removing any of said cottonwood logs until the title of said logs is adjudicated by this court. Defendants pray that if the court

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refuses to dissolve said injunction granted to the plaintiffs, and also refuses to grant an injunction enjoining the plaintiffs from removing said logs, then the defendants pray the court to appoint a receiver or master to take an accounting of said logs, and report the same to the court at its November term, 1907. Defendants further pray that, if the court refuses to dissolve said injunction granted to the plaintiffs, the court require the said plaintiffs to give an additional bond in the sum of $10,000. Defendants pray, upon a final hearing of this cause, that all of said cottonwood logs be turned over to them, or the plaintiffs be made, by the judgment of this court, to pay full market value for same to defendants, the sum of $6,000." The defendants and cross-complainants asked for an accounting of the logs taken in violation of the contract, and for judgment for the amount so found. We think this was sufficient to raise the issue. Moreover, proof on this issue was introduced by both sides without objection. In such cases it is the uniform holding of this court that the pleadings will be considered as amended by us to conform to the proof. Roach v. Richardson, 84 Ark. 37, 104 S. W. 538, and cases cited; White River R. Co. v. Batesville & Winerva Telephone Co., 81 Ark. 195, 98 S. W. 721; Hurley & Ross v. Oliver (this day decided) 121 S. W. 920.

Counsel for plaintiff earnestly insist that the question of the size of the trees should be determined as of the date of the cutting, and not as of the date of the contract. In short, they urge that no regard should be taken of the growth of the trees from the time of making the contract until the time of cutting. In support of their contention they cite the case of Bryant v. Bates (Ky. App.) 39 S. W. 428. In that case, without any discussion, the court said that plan of measurement was proper because there was no practicable way to ascertain the growth of the tree from the time of the contract and the time it might be cut under the contract. In that case the trees were oak, gum, and ash, trees of slow growth, and the time of removal three years. In the present case the time of removal was five years, and the trees were cottonwood, which grow at the rate of 1 or 1½ inches each year. The language of the contract describing the trees sold is as follows: "All of the cottonwood trees, 20 inches in diameter and up, at the stump now standing or located on the following described property: [Here follows description of land.]" Thus it will be seen that the title passed, according to the plain and express terms of the contract, only to those trees which measured the required size at that date, and not at the date of their severance. The identification of the trees by specifying their size tends to show that the intention of the parties was to include such only as at the time the contract was made answered the description. Their diameter at that time was capable of definite ascertainment. The parties, being timbermen, knew that cottonwood was of quick growth, and no doubt knew what would be its probable growth in five years. The soil was extremely rich, and on that account the growth would be quicker. It is not to be presumed that the owner intended to convey that growth unless he expressly did so by the terms of his conveyance. If the purchaser wished to be saved the trouble and expense of measuring and marking the trees at the time of the sale, it should have secured a clause in the contract fixing then the measurement at the time when cut or severed from the soil. This is in accordance with the well-established general rule of the construction of contracts, as well as with the majority of adjudicated cases, on this particular subject. 28 Am. & Eng. Ency. Law (2d Ed.) p. 542, and cases cited; note to case of McRae v. Stillwell, 55 L. R. A. at page 524.

The record shows that at the April term, 1908, of the Chicot chancery court, by consent of all parties, R. D. Chotard was appointed master to determine what amount of cottonwood timber under the size specified in the contract had been cut by the plaintiff on the lands described therein. He was directed to summon witnesses, and to take all necessary proof to ascertain that fact. Under such circumstances his findings of facts are entitled to the same conclusiveness as is given the verdict of a jury, or the findings of fact by a court sitting as a jury. Paepcke-Leicht Lbr. Co. v. Collins, 85 Ark. 414, 108 S. W. 511; Greenhaw v. Combs, 74 Ark. 338, 85 S. W. 768.

It is next objected by counsel for plaintiff that there is no evidence to sustain his findings as to a part of the timber. In other words, they contend that some of the timber was estimated twice. G. F. Horner was one of the witnesses for the defendants. He testified that he made estimates of the amount of cottonwood under 20 inches in diameter on the land described in the contract twice. He said that the first time he only made an estimate of the timber on the north part of the land, because at that time he thought the timber on that part was all that was in dispute. The second time he only measured the timber on the remainder of the land. The findings of the master as to the amount of timber on the land under 20 inches in diameter at the stump is warranted by his testimony, and by the testimony of other witnesses tending to corroborate it. Of course this evidence is contradicted by the witnesses for the plaintiff. But because the finding of the master in this regard must be sustained under the rule above announced, it will not be necessary for us to set out the evidence on this point.

We find no prejudicial error in the record, and the decree is therefore affirmed.

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CAPE GIRARDEAU & T. B. T. R. CO. v. ST. LOUIS & G. RY. CO.

(Supreme Court of Missouri, Division No. 2. June 29, 1909.)

1. EJECTMENT (§ 82*) — SOURCE OF TITLE — PROOF.

Where, in ejectment, defendant recognized plaintiff as the owner, and admitted that defendant's rights, whatever they were, had been derived from plaintiff, plaintiff was not bound to deduce title from the government.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 223; Dec. Dig. § 82.*]

2. LICENSES (§ 58*) — REVOCATION—CONSIDERATION.

While a mere license is revocable under all circumstances and at any time, a license may become an agreement on valuable consideration, as where its enjoyment must necessarily be preceded by the expenditure of money, and where the grantee has made improvements and invested capital in consequence thereof, and has become a purchaser for a valuable consideration, in which case it is not subject to revocation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 120; Dec. Dig. § 58.*]

3. EJECTMENT (§ 23*)—LICENSEE.

Where defendant railroad company entered on plaintiff's land, and laid tracks under a written agreement granting permission to do so, and offering later to come to an amicable agreement with reference to a transfer of the land satisfactory to both parties, plaintiff could not recover the land thereafter in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 85; Dec. Dig. § 23.*]

4. ESTOPPEL (§ 110*)—EQUITABLE ESTOPPEL—PLEADING.

Equitable estoppel, or an estoppel in pais, is not available as a defense, unless pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

5. APPEAL AND ERROR (§ 197*)—FAILURE TO PLEAD—OBJECTIONS IN TRIAL COURT.

Where, in ejectment, evidence raising an equitable estoppel or an estoppel in pais was admitted without objection, it was too late for plaintiff to raise on appeal the objection that the defense was not pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197;* Pleading, Cent. Dig. § 1432.]

6. EJECTMENT (§ 127*)—RENTS AND PROFITS—DAMAGES.

Rents and profits by way of damage were not recoverable in ejectment at common law; plaintiff's remedy after recovery in ejectment being by trespass for rents and profits.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438–443, 453; Dec. Dig. § 127.*]

7. EJECTMENT (§ 127*) — JUDGMENT — RENTS AND PROFITS.

Where in ejectment, and for damages as an incident thereto, as authorized by Rev. St. 1899, §§ 3058, 3066, 3068 (Ann. St. 1906, pp. 1758, 1764, 1765), the petition did not allege the relation of landlord and tenant, and plaintiff did not recover possession, a judgment in his favor for mesne rents and profits as damages was unsustainable.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438–441; Dec. Dig. § 127.*]

Appeal from Circuit Court, Scott County; H. C. Riley, Judge.

Ejectment by the Cape Girardeau & Thebes Bridge Terminal Railroad Company against the St. Louis & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. F. Evans and Moses Whybark, for appellant. Giboney & Houck and Jno. A. Hope, for respondent.

GANTT, P. J. This is an action of ejectment begun in the circuit court of Scott county on March 2, 1904, in which judgment was rendered for the plaintiff for possession of the premises and $3,000 damages. From that judgment the defendant has appealed to this court.

The land involved in the litigation is described as follows: "A strip of ground 100 feet wide out of United States private survey No. 794, in townships 29 and 30, range 14 east, 50 feet on either side of the following described center line, to wit: Beginning at a head block on the main line track of the St. Louis & Gulf Railway, which head block is about 900 feet south of the intersection of the center line of said main track with the division line between townships 29 and 30; thence in a northerly direction on a 7 degree and 30 minute curve 40 feet to the point of curve of said curve; thence north 6 degrees east 2,480 feet to the point of tangent of a 2 degree curve; thence in a northerly direction on said 2 degree curve 900 feet to the southern boundary line of the Hobbs land; excepting from said strip so much thereof as is now occupied by the main line track of said St. Louis & Gulf Railway, leaving 7.2 acres, more or less, involved in this suit." Ouster was laid as of the ——— day of ———, 1902. Plaintiff averred damages by reason of injury and waste by digging of the soil and making excavations and embankments thereon, and for the wrongful detention of the property to the amount of $10,000. Monthly rents and profits were alleged to be of the value of $2,000. An amended answer, filed at the October term, 1905, was a general denial.

The evidence on the part of the plaintiff was, first, a deed from John H. Crowder, Louis B. Houck, and Giboney Houck to the plaintiff railway company, of date April 28, 1902, for the tract of land which includes the land involved in this suit. Plaintiff also introduced in evidence, without objection, a deed from John H. Crowder, Louis B. Houck, and Giboney Houck to the plaintiff railway company, of date September 15, 1902, and recorded on September 19, 1902, to a tract of land described as all that parcel of said tract of land lying east of Houck's Missouri & Arkansas Railroad now the St. Louis & Gulf Railroad, which has heretofore not been conveyed to the said Cape Girardeau & Thebes Bridge Terminal Railroad Company, and extending from the north line of survey 794 to the land now owned by Matthew Rose in section 2, Scott county, Mo., and which said land is nereby conveyed to the

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said railroad company to establish, maintain, and operate railroad yards, and for railroad purposes, and for any other purposes whatever, and with the right of changing water courses, and with the right of cutting trees that may stand outside of the said land hereby conveyed, and which might endanger said railroad tracks built on said land, or the train operated thereon, and all of which land is situated in and a part of survey 794, township 30 N., range 14 E., fractional section 2, township 29 N., range 14 E. Plaintiff next introduced in evidence a notice dated the 1st day of July, 1905, signed by the St. Louis, Memphis & Southeastern Railroad Company and St. Louis & Gulf Railway Company, by Moses Whybark, their attorney, which said notice is in words as follows: "Cape Girardeau & Thebes Bridge Terminal R. R. Co., Plaintiff, v. The St. Louis & Gulf R. R. Co., Defendant, and Cape Girardeau & Thebes Bridge Terminal R. R. Co., Plaintiff, v. The St. Louis, Memphis & Southeastern R. R. Co., Defendant. Actions of ejectment in the circuit court of Scott county, Missouri. To the Above-Named Plaintiff in the Above-Entitled Causes: You are hereby notified that the condemnation suit instituted by the St. Louis, Memphis & Southeastern Railroad Company in the circuit court of Scott county, Missouri, against you, and wherein commissioners were appointed by that court at the last regular term, was dismissed by the plaintiff on the 9th day of June, 1905. And you are further notified that the defendants in the above-entitled causes now pending in the circuit court of Scott county, no longer having use for the possession of so much of the premises sought to be condemned in the condemnation suit aforesaid, and which land so sought to be condemned is a portion of the premises sued for by you in the said ejectment suits, hereby surrender to you the possession of the same, and release to you all the rights they required to the possession thereof under the permissions, licenses and agreements heretofore granted by you to said defendants, or either of them." Said notice bore the following indorsement: "I hereby certify that I served the within notice on July 3, 1905, in the city of Cape Girardeau, Cape Girardeau county, Missouri, by delivering to Giboney Houck, president of Cape Girardeau & Thebes Bridge Terminal R. R. Co., and to John A. Hope, attorney for said railroad company, each a true copy of the same. Willis Martin, Marshal of the City of Cape Girardeau."

Mr. Giboney Houck testified that he knew the Cape Girardeau & Thebes Terminal Railroad Company, which owned the Cape Girardeau & Thebes Terminal Railroad, in course of construction, from Cape Girardeau to a point where the Southern Illinois and Missouri bridge terminates on the west side of the river, and knew the land sued for, and this defendant entered upon it in November, 1902, and it was notified on November 1, 1902, not to go on the land, or, if it had begun work, to discontinue it. This notice was given to Mr. Joshua Elder, vice president and general manager of the defendant railroad company, and also to Major Brooks, its chief engineer, and was signed by John H. Crowder, plaintiff's president. The notice was served by Mr. L. B. Houck, and himself and his father, Louis Houck, had no connection whatever with the plaintiff railroad company. On cross-examination he stated that the plaintiff company began the construction of this road immediately after it was organized. That it commenced to buy right of way and survey the land from Cape Girardeau to the terminal of the western point where the bridge terminated on the west side of the river, and the road was located immediately where the western approach of the Thebes bridge is located, but they did not locate the line where the bridge was to be located, nor locate any road where the land sued for is situated, as that was required for yards, and it was expected to get over this land to the elevation of the bridge by principles of engineering, but they had put nothing in there. That the defendant was in possession, and crossed this property diagonally. He found out afterwards that the bridge company expected to construct its approach over the same land that it had originally surveyed and laid out for railroad, but at the time they made the survey for the plaintiff the bridge company, so far as he knew, had not located any land nor filed a profile in Scott county. That he and Mr. Crowder and L. B. Houck bought the land from Stone and filed their profile on the 27th of April, 1902, but had purchased it on the 23d or 24th of April. They were morally certain that the bridge was going to be located at the point where it is now located on the west side, and they bought the land because of that fact. They have been in litigation with the bridge company ever since then. They understood the bridge terminated on the west side of the river, because the act of Congress located it, but did not know it was going to build its approaches to connect with the Cotton Belt. He testified that no survey was made by the plaintiff company on the bank of the river where the connecting track of the defendant is located, and this land plaintiffs claim in this suit is about 3,000 or perhaps 4,000 feet in length, and 100 feet in width, and plaintiff is claiming so much of the said land as is occupied by the Thebes bridge on the west side. It says nothing about the claim of the bridge company in this petition, but plaintiff claims that said company has no right on certain land it is occupying on the west bank of the river, and plaintiff claims to be the owner of the 200 feet under the bridge approach. He testifies that the bridge company was not building the approach when plaintiff and its immediate grantors bought the land, but thinks

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that the bridge was in process of building when this suit was brought. Plaintiff had bought its right of way from Cape Girardeau to Gray's Point, and begun to buy in April, 1902. He testified he did not know how much they bought in April, 1902; that they bought the land extending 3,000 or 4,000 feet from the bank to the river west. Part of it was the land involved in this suit. The witness stated that Mr. Crowder became president of the plaintiff company when it was first organized in the latter part of April, 1902, and was re-elected in 1903. The witness Mr. Houck succeeded Mr. Crowder as president in the beginning of the year 1905. Mr. Crowder died in 1904. L. B. Houck was president in the interim between the death of Mr. Crowder and the election of Mr. Giboney Houck, the witness. Witness further stated that, while this strip of land was bought for railroad purposes, it had in fact never been used by plaintiff thereafter. The land sued for runs across their tracks diagonally. The land north of the land sued for is owned by Mrs. Hobbs and the Cotton Belt Railroad, and the connecting track built by the defendant has been torn up, but it formerly made connection with the Cotton Belt Railroad. Witness does not know whether it made connection with Manning's Landing or not, but from the north end of the land in suit to to the connection of the defendant's track with the Cotton Belt is about two miles, and the part of the track on the plaintiff's land is 3,000 or 3,500 feet, and this land is not subject to overflow. The connecting track runs several hundred feet south of the 300 feet claimed by the bridge. Over the objection of the defendant, Mr. Houck was permitted to testify that defendants admitted that plaintiff was entitled to $3,000 and to use a single track, and that this was a reasonable value for the use of the railroad track across the land. He had never had any personal conference with Mr. Yoakum, the president of the defendant railroad company, about the rental value of this property. When he says he got the admission from Mr. Yoakum, he meant the company. Mr. Yoakum never said he would pay $3,000, and never wrote a letter that he would pay it. Mr. Houck further stated that the negotiations with reference to the desire of the defendant to get the use of the property were carried on from the beginning with Mr. Yoakum and Mr. Hammond, vice president and general manager of the Chicago & Eastern Illinois Railroad, and also of the defendant.

The plaintiff then offered in evidence the following notice directed to J. F. Elder, vice president and general manager of the St. Louis & Gulf Railway Company and J. F. Brooks, chief engineer, dated Cape Girardeau, November 1, 1902: "Gentlemen: As I am informed that your agents and employés are constructing, or about to construct, a railroad track over the property of the Cape Girardeau & Thebes Bridge Terminal Railroad Company, situated in survey 794, township 30 north, range 14 east, and fractional section 2, township 29 north, range 14 east; and as no agreement has been made as to the said property between said company, you, your agents or employés, you are hereby notified to cease work if begun on said property, and, if not begun, not hereafter to enter upon the same to construct a railroad track. Respectfully, J. H. Crowder, President," etc. Plaintiff next read a letter from Mr. Hammond dated January 22, 1904. This letter is as follows: "Mr. J. H. Crowder, Cape Girardeau, Missouri—Dear Sir: Referring to your letters of January 8th and 20th, beg to advise that the question raised is one that I personally know nothing about. I have taken the matter up with President Yoakum in order that I may hear his side of the case, and will write you as soon as I can get necessary information. Yours truly, [Signed] R. R. Hammond, per Hitt." Plaintiff then offered in evidence a letter signed by L. B. Houck to Mr. Yoakum of date November 17, 1902, as follows: "Your favor dated November 14th came to hand and I return agreement signed by Mr. Guy, president of the Gulf Railway, sent to us because the same is not in accordance with my agreement with you. In answer to your telegram of the 17th of October, on the next day I wired you as follows: 'Answering your telegram of yesterday. Will give permission to lay a track from the south boundary line of Mrs. Hobbs' to a connection with the existing St. Louis & Gulf Railway track. We are not in a situation now to either sell or make you a grant of right of way, and a revocable permit or license to lay a track is all we can give you, but as soon as matters to which you refer in your telegram are settled we will come to an amicable agreement with you and one I know that will be entirely satisfactory to you as we feel very friendly to your interests.' Afterwards I reported to the Cape Girardeau & Thebes Bridge Terminal Railroad Company the telegram I had wired you and advised them of the permit I had given you to lay a railway track as therein set out, and accordingly was authorized to send an agreement giving you this permit for company to lay a track as aforesaid, leaving, however, the amount of annual rental that was to be paid by the Gulf Company blank, in case after the track should be laid by the Gulf Company the company should refuse to remove the same. This agreement we sent you is the only agreement we can sign at present. Agreement you sent us dated 10th of November, 1902, we must refuse to sign because not in accordance with our agreement. We could not let you have a strip of ground 100 feet wide for a single track, and I never agreed to give you such a strip, and I never agreed that you should

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have fifty feet on each side of the center line of the St. Louis & Gulf Railway as same is located, or otherwise, and all of which is stated in agreement that you propose for us to sign. We cannot admit, and do not admit, that the St. Louis & Gulf Railway has been located through our terminal property. Why this peculiar phraseology which is in no wise warranted by my telegram and the permit I gave you personally should have been used, I cannot understand. Furthermore, we, under the circumstances now, will have to insist that in case the tracks are not removed within sixty days after notice, that the Gulf Railway shall pay an annual rental of three thousand ($3,000.00) until track is so removed. All we desire is to protect our interests. We cannot afford to jeopardize our interests. As stated in my telegram, we feel very friendly to the Frisco Railroad, and, of course, I have no doubt that you feel friendly to our interests, but at the same time it would be absurd for us to let our property be held against our will at an annual rental of twenty-five dollars. You do not expect us to be so foolish. Have no doubt that as soon as the bridge litigation is settled that our company and the Frisco will be able to make a very satisfactory arrangement with you, but until that matter is settled we cannot give away any rights, privileges or advantages we now hold and which are important to us. Very truly yours, [Signed] Louis B. Houck."

Mr. L. B. Houck testified that he was president and one of the stockholders of the plaintiff, and the letter just read in evidence to Mr. Yoakum was written by him, and the defendant never made any objection to the charge of $3,000 as fixed as the annual rental of the property, and the witness considered that reasonable. The defendant used the property for connecting track between its incline and its railroad; also for yards and a general storage of cars to be transferred across the river from Thebes to the Missouri side. The property in question is a strip 4,000 or 5,000 feet wide, and is the only place south of Gray's Point to below Commerce that could be used for transfer purposes, and he considered it very valuable for those purposes. Defendants first put down one track and then another track, and, if he remembered correctly, two or three side tracks. Witness fixed the rental value of the property at $3,000 per annum for the construction of the track over their line, as plaintiff only gave them the privilege of putting down one track, and for the use of the land on account of the other three tracks a reasonable rental would be between $10,000 and $12,000. On cross-examination he stated that they had 15 or 20 acres, and the land in suit was worth over $100,000. He did not know how much it was assessed for. Plaintiff never had any tracks on the land, but intended to have them. They had never yet operated their railroad, but they had constructed several miles, and secured the right of way; only a few miles of the track had been laid down. The rails on plaintiff's railroad are laid down about 2½ miles south of Cape Girardeau. These were laid about three or four months before the trial. Plaintiff had only run construction trains on this said road. Had located the yards on the land in suit before they bought it, but had never made a profile and filed it. He stated that they had paid $15,000 for the land purchased from Stone and Finley. He testified that his company had never had any written agreement with the defendant to pay rent. He did testify in the condemnation suit in the case of the bridge company against Stone, and says that he swore that he had a contract with the defendant to pay him $3,000 per year, but does not remember the exact language, and he based that upon the letter in which he had stated the price, and on the bills rendered for the same, to which the defendant had never made objection.

Mr. Giboney Houck, being recalled, identified certain letters, and then stated that the railroad track was put down on this land by the defendant in December, 1902, and he says it was not completed until February, 1903, so that they could run cars thereon. On this the connecting track extended upon their land about one-fourth of a mile, and this would make the connecting track from the railroad of the defendant to the Cotton Belt nearly a mile long. Plaintiff or its immediate grantors had bought this land before the Frisco bought the Chicago & Eastern Illinois Railroad. The St. Louis Valley & Illinois Central Railroad terminate on the Illinois side opposite this land. On the Missouri side the Cotton Belt and the Gulf Railroad, which is a part of the Frisco System, and the Iron Mountain approach this bridge. The whole river front on the west side is owned either by the bridge company or by one of these railroads, except a little piece that is owned by the plaintiff. All the other land available for railroad purposes is owned by the St. Louis, Memphis & Southwestern or the Gulf or Cotton Belt. The land is level, and can be used for putting in yards, and the defendant company entered upon it in the face of plaintiff's notice not to do so, and the defendant filed its condemnation suit to condemn this strip of land, and the St. Louis, Memphis & Southwestern also filed a condemnation suit. Witness thought the land ought to earn the interest on $100,000 or $150,000. On cross-examination he stated that when he fixed this value he had in view the whole tract, which was destroyed for railroad purposes by the construction of defendant's tracks diagonally. The bridge was completed and cars ran over the Thebes on May 28, 1905. He does not know when defendant took up these tracks over this land. The defendant's railroad runs parallel with the Mississippi river most of the way from Thebes bridge to Commerce, 4½ miles. If

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the connecting track had not been built, the Gulf Railroad could have run beyond this track to Fremsdorf, and then ran to the river and had the same facilities for crossing, but that would have depended on the management of the Cotton Belt Railroad.

Plaintiff then introduced the following letter addressed to R. R. Hammond, general manager of the Chicago, Eastern Illinois Railway Company, dated January 8, 1904, and marked as received January 11, 1904: "Dear Sir: The St. Louis & Gulf Railroad at the request of Mr. Yoakum was given a license to put a temporary track on certain property belonging to the Cape Girardeau & Thebes Bridge Terminal Railroad Company and located just below what is known as Manning's Landing or West Bank, rent to be on the basis of $3,000.00 a year for a single track. Since this the St. Louis & Gulf Railroad has put in more than one track without permission from any one. Therefore rental based on $3,000.00 a year will no longer be satisfactory and some other arrangements should be made. I have noticed that for some time past the St. Louis & Gulf Railroad has been furnishing the Southern Illinois & Missouri Bridge Company, by means of the track above mentioned, material to facilitate the construction of the bridge. When the Cape Girardeau & Thebes Bridge Terminal Railroad Company agreed to give to the St. Louis & Gulf a license to lay temporary track across its property it was mentioned and understood that the track should not be used to furnish the Southern Illinois & Missouri Bridge Company with material, etc., because the company is now and has been in litigation with this bridge company, which is without authority of law as we claim, in doing business in Missouri and endeavoring to condemn terminal land belonging to us. Before your track was laid, contractors of bridge company applied to us for facilities our land affords to construct bridge and we declined to rent these facilities at any price. Under the circumstances we think it hardly right your company should furnish these facilities when it was understood your track on our land should not be used for that purpose. Yours truly, [Signed] J. H. Crowder."

Plaintiff also introduced as a witness Frank Oliver, section foreman for the St. Louis & Gulf Railroad in 1902. His section ran up the river past Manning's Landing, and he says it was about November 1, 1902, that the defendant company entered on the river front north of the bridge. He put in the side tracks there running from the main line under where the bridge is now. The abutment of the bridge must be about 30 feet, and at that time he had laid 1,900 feet. The incline was at Manning's Landing, and must have been about 400 feet long. Plaintiff next offered petition in the case of St. Louis & Gulf Railroad v. Cape Girardeau & Thebes Terminal Railroad Company, filed in the office of the Scott county circuit court March 31, 1904. This was a suit brought to condemn the land sued for in this case, except the portion under the bridge approach, which was 200 feet in length and 100 feet in width, and was instituted after this ejectment suit was brought. The petition alleges in a general way the various railroads on the Illinois side, and the others on the Missouri side, of the Mississippi river, and it was needful for it to make connection in order to carry through passengers and freight to and from said railroads, and that it had entered on the land sought to be condemned by consent of plaintiff and constructed its tracks, and could not agree with plaintiff for compensation, and asked for the appointment of commissioners.

Plaintiff then offered the record of the said court made October 17, 1904, of the dismissal of this case by the plaintiff therein. Plaintiff then offered a condemnation petition brought by the St. Louis, Memphis & Southeastern Railroad Company against it, filed April 19, 1905. This petition was in practically the same form as the other petition, and was to condemn the same property, but alleged that the St. Louis & Gulf had by deed dated June, 1904, conveyed all of its property to the said St. Louis, Memphis & Southeastern Railroad Company. The answer set forth various reasons why the suit for condemnation should not be allowed. Plaintiff then introduced the dismissal of this last case on June 9, 1905.

Defendant then introduced various witnesses, landowners in the vicinity of this land, who testified that this land was worth all the way from $20 to perhaps $40 or $50 per acre for agricultural purposes. Several of these witnesses testified that they did not see how land could be purely valuable for terminal purposes, for the reason that the bridge was 40 or 50 feet above it. Other witnesses thought for railroad purposes the strip 100 feet wide would be worth $150 per acre, and that $100 per month would be the proper rental for railroad purposes. On cross-examination he fixed the rental value anywhere from $50 to $200 per month. Judge Albrecht testified that he had lived near the land for many years, and that this connecting track was about 3,000 feet on this land, and it was reasonably worth $45 per acre, and for farming purposes land will not bring over $3 per acre in that neighborhood, but in his opinion, the value of the land covered by the railroad tracks beginning November, 1902, up to July, 1905, was worth more than that for farming purposes, and that he thought $75 per acre for a year for the portion covering the right of way would be reasonable, and that it could be restored to its farming condition for $150, and that he would place it back in that condition for that sum. Defendant read in evidence a deed from the St. Louis & Gulf Railroad Company to the St. Louis, Memphis & Southern Railroad Com-

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pany of date June, 1904, and recorded in Scott county on June 16, 1904. Defendant then read in evidence an agreement between J. H. Crowder and Giboney Houck, transferring all of Mrs. Crowder's property in the plaintiff railroad for $6,500. Defendant also introduced the clerk, who produced the assessment books showing that this land had never been assessed to the plaintiff, but had been assessed to J. H. Crowder, L. B. Houck, and Giboney Houck, and there was 303 acres in the tract, and it was assessed for 1904 and 1905 at $2,400, and the same in 1903 and 1902. The defendant also read in evidence the deed from Richard Finley and Houck of date April 24, 1902, conveying the land on which the connecting track is laid, and other lands, for $15,000.

Defendant also read in evidence the final judgment of condemnation in the case of the Southern Illinois & Bridge Company v. Stone and Finley, showing that plaintiff had no title to the 200 feet of land under the bridge. Defendant then offered a telegram to L. B. Houck from B. F. Yoakum dated St. Louis, October 17, 1902: "Louis B. Houck, Cape. We need for construction of track to new incline we are now building, which is south of Manning's Landing, a strip of land one hundred feet wide, commencing at the south boundary of the land owned by Mr. Hobbs; thence practically parallel with the river and about three hundred feet inland to connect with the existing St. Louis & Gulf track, a total distance, I should say, of about three thousand feet. Important. This is well known to your uncle, and I wish you would confer with him at once, and wire so work can be pushed as fast as possible. Material is now being received. [Signed] B. F. Yoakum." And also answer of L. B. Houck to that telegram, dated October 18, 1902, as follows: "Mr. B. F. Yoakum, St. Louis, Mo. Answering your telegram of yesterday. Will give you permission to lay track from south boundary line of Mrs. Hobbs' to a connection with existing St. Louis & Gulf Railway track. We are not in a situation now to either sell or make you a grant or right of way, and a revocable permit or license to lay a track is all we can give you, but as soon as matters to which you refer in your telegram are settled, we will come to an amicable agreement with you, and one that I know will be entirely satisfactory to you, as we feel very friendly to your interests. [Signed] L. B. Houck." Also telegram from Louis Houck to B. F. Yoakum dated Cape Girardeau, Mo., October 18, 1902, as follows: "Mr. B. F. Yoakum, St. Louis, Mo. Replying to your telegram of the 17th. Talked to my nephew and he agreed to give permit to lay a track as you indicate to the St. Louis & Gulf. Claims that he cannot grant you right of way or sell you right of way, but as soon as legal matters are adjusted to which you refer, he will come to an agreement with you that will be entirely satisfactory, and all that he feels satisfied can be in reason asked. Individually I will do all I can to assist you in this matter. [Signed] Louis Houck."

1. In so far as the title to the strip for which this action of ejectment was brought we think plaintiff was not required, as against defendant, to deduce title from the government for the reason that defendant recognized plaintiff as the owner, and derived its right of possession from plaintiff. In a word, plaintiff was the common source of title as to the parties to this action. Neither is there room to doubt that defendant was in actual occupancy of this strip on March 2, 1904, when this action was commenced. An exceedingly important question is presented on this record, and that is, can plaintiff maintain ejectment in view of the undisputed and conceded facts in evidence? On the 17th day of October, 1902, B. F. Yoakum, the president of the defendant railroad company, sent the following message of that date to L. B. Houck, vice president and general manager of the plaintiff railroad company: "We need for construction of track to new incline we are now building, which is south of Manning's Landing, a strip of land one hundred feet wide, commencing at the south boundary of the land owned by Mr. Hobbs; thence practically parallel with the river and about three hundred feet inland to connect with the existing St. Louis & Gulf track a total distance, I should say, of about three thousand feet. Important. This is well known to your uncle and I wish you would confer with him at once and wire so work can be pushed as fast as possible. Material is now being received. B. F. Yoakum." On the next day, L. B. Houck answered that telegram by another, in these words: "Answering your telegram of yesterday. Will give you permission to lay a track from south boundary line of Mrs. Hobbs' to a connection with existing St. Louis & Gulf Railroad track. We are not in a situation now to either sell or make you a grant of right of way, and a revocable permit or license to lay a track is all we can give you, but as soon as matters to which you refer in your telegram are settled we will come to an amicable agreement with you and one that I know will be entirely satisfactory to you as we feel very friendly to your interests. L. B. Houck." Under this authority defendant company entered upon this strip. Clearly it was not there as a trespasser or without the consent of plaintiff. The law is settled in this state that, while mere license is revocable under all circumstances and at any time, a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money, and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for valuable consideration. Baker v. C., R. I. & P. R. Co., 57 Mo., loc. cit. 271; Rerick v. Kern, 14

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Serg. & R. (Pa.) 267, 16 Am. Rep. 497; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484.

While plaintiff insists it revoked the license it gave defendant by the notice given by Mr. Crowder to Elder, the vice president of defendant, and J. F. Brook, chief engineer, on November 1, 1902, it is obvious that Mr. Crowder was mistaken in regard to defendant not having an agreement with plaintiff to enter, but, more than this, plaintiff did not rely upon this notice. The letter of January 8, 1904, from Mr. Crowder to Mr. Hammond is utterly inconsistent with the claim that plaintiff had the right to oust defendant from this right of way without further consideration. That letter is simply a protest against defendant's hauling material for the Southern Illinois & Missouri Bridge Company because said company was in litigation with the plaintiff, and was intended to foreshadow the claim for large rentals. There is a plain admission that defendant had a license to put its tracks upon this strip of land, long after the tracks had been laid, and traffic was being carried thereon. Now a license to construct a railroad track necessarily involves the expenditure of money by the licensee. In this case Mr. Yoakum advised the plaintiff that the demand by defendant for a right of way over this strip was urgent; that the material was being received, and requested an answer by wire. The license or permission to lay the track was given by telegram, and the section foreman testified that by the 10th or 15th of November he had 1,900 feet of the 3,000 feet of rails laid down, and at that time plaintiff was considering and rejecting the agreement sent by Mr. Guy. In that communication Mr. L. B. Houck says to Mr. Yoakum: "Furthermore we, under the circumstances now, will have to insist that in case the tracks are not removed within sixty days after notice, that the Gulf Railway shall pay an annual rental of three thousand ($3,000.00) dollars until track is removed." If this statement refers to the notice given by Mr. Crowder, it is a modification of the peremptory order to get off the strip to a conditional demand for $3,000 a year rental if defendant remained on the land, but, at all events, this rental was not to be paid save as the price of the occupation of this strip by a railroad track laid down by the defendant company, a condition not to be performed until after the roadbed was graded, the ties and rails laid down—in a word, until after the expenditure had been made by defendant; and thus the facts bring the case directly within the principles of the well-considered case of Baker v. C., R. I. & P. R. R. Co., 57 Mo. 265, and the cases therein mentioned and approved, and Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484. But while this is unquestionably the law of this state, plaintiff invokes the rule of pleading that this defense of equitable estoppel is not open to defendant, for the reason that it is not pleaded. That an estoppel in pais should be pleaded in order to be available is true. Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235, but in Price v. Hallett, 138 Mo., loc. cit. 574, 38 S. W. 455, this court said: "It seems to us this doctrine has peculiar weight when invoked against the admissibility of evidence when no issue of estoppel has been tendered in the pleadings, or when an estoppel in pais is urged for the first time in this court; but, where parties have permitted an issue of the kind to be raised by the evidence without objection, and have had full opportunity to try the issue, we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies, and this court has held that it was too late, after trying the case as if a reply had been filed, to claim that the answer was admitted."

An examination of the record will disclose that much of the testimony in regard to this license came from the plaintiff in the first instance, and that no such objection as this was urged when the telegrams between Mr. Yoakum and Mr. L. B. Houck were offered in evidence. Indeed we find no objection of any kind in the abstract before us. With these telegrams in evidence, and the proof that by the permission therein granted defendant entered and constructed its tracks, we think the facts were before the court, whether formally pleaded or not, and it is too late to raise the question of pleading for the first time; and, following the rule announced in Provolt v. Ry. Co., 57 Mo. 256, and Baker v. R. R. Co., 57 Mo. 265, we think the plaintiff could not maintain ejectment against defendant, as it had entered upon the strip by the consent and permission of plaintiff, and constructed its track upon the assurance that later it would be granted a perfectly satisfactory arrangement. Having expended its money on the faith of that license, it could not be ousted of its privilege by an action of ejectment.

2. That plaintiff is entitled to compensation for the use of its land by defendant there can be no sort of doubt. We have so far simply held that, under a long and unbroken line of adjudications in this state, its remedy was not ejectment. The question now arises, can the verdict and judgment for the $3,000 of damages be so dissociated from the judgment of recovery of the land that it may be affirmed notwithstanding the judgment of ejectment must be reversed? The petition counts in ejectment, and for damages as an incident thereto, as provided by our statutes. Sections 3058, 3066, 3067, 3068, Rev. St. 1899 (Ann. St. 1906, pp. 1758, 1764, 1765). There is no allegation of the relation of landlord and tenant, and hence fails to state the essentials of a cause of action for use and occupation, as was clearly pointed out in Young v. Downey, 145 Mo., loc. cit. 267, 268, 46 S. W. 962. The right to

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recover rents and profits by way of damages in an ejectment suit did not exist at common law, but after the recovery in ejectment trespass for rents and profits was the remedy. Stump v. Hornback, 109 Mo. 272, 18 S. W. 37; Young v. Downey, 145 Mo. 261, 46 S. W. 962. It follows that, as the verdict and judgment for damages depend upon the judgment in ejectment, and as ejectment will not lie under the facts in the record, the judgment for damages and mesne rents and profits is without any legal basis, and must fall along with the judgment in ejectment upon which it must rest under our laws. That plaintiff is entitled to relief in another form we have no doubt, but, as was said in Provolt v. R. R. Co., 57 Mo., loc. cit. 264: "The only question that we are called upon to decide is whether, under all the facts and circumstances of this case, ejectment will lie, and we think it will not."

The judgment must therefore be reversed, and the cause remanded, in order that plaintiff may take such other steps as it may be advised are necessary.

BURGESS and FOX, JJ., concur.

REINEMAN et al. v. LARKIN et al.

(Supreme Court of Missouri, Division No. 1. July 1, 1909.)

1. APPEAL AND ERROR (§ 334*) — DEATH OF PARTY PENDING APPEAL—NECESSITY OF REVIVAL.

On the death of one of a number of appellants, a cause may proceed on appeal without a revival.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1848; Dec. Dig. § 334.*]

2. APPEAL AND ERROR (§ 73*)—DECISIONS REVIEWABLE — INTERLOCUTORY JUDGMENT FOR DOWER.

Under Rev. St. 1899, § 806 (Ann. St. 1906, p. 769), authorizing any party to a suit aggrieved by any judgment in any civil case, from which an appeal is not prohibited by the Constitution, to appeal from any order granting a new trial, or in arrest of judgment, or in refusing to revoke, modify, or change an interlocutory order appointing a receiver, or dissolving an injunction, or any interlocutory judgment in actions of partition which determines the rights of the parties, or from any final judgment in the case, or from any special order after final judgment in the cause, an appeal does not lie from an interlocutory judgment decreeing dower.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 73.*]

3. EXCEPTIONS, BILL OF (§ 24*)—NUMBER OF BILLS.

Rev. St. 1899, § 728 (Ann. St. 1906, p. 720), provides that exceptions to the opinion of the court in any civil suit may be filed at the time or during the term of the court at which they are taken, or within such time thereafter as the court may by order allow, or within the time the parties to the suit or their attorneys may thereafter agree upon, and that all exceptions taken during the trial of a cause before the same jury shall be embraced in the same bill of exceptions. *Held*, that an appeal from a final judgment in an action for dower does not bring up the evidence at the trial at a former term resulting in an interlocutory judgment and the exceptions saved to the admission of such evidence, unless both such evidence and exceptions were transferred by timely term bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 31; Dec. Dig. § 24.*]

4. DOWER (§ 109*)—ACTIONS—JUDGMENT.

Under Rev. St. 1899, § 2963 (Ann. St. 1906, p. 1706), providing that, when any report assigning dower shall be approved, the court shall award a writ of possession according to the report of commissioners, the writ should issue only for the part of the land set off as dower by the report, and it is error to award a writ for the whole tract.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 109.*]

5. DOWER (§ 109*)—ACTION—EXECUTION.

Under Rev. St. 1899, § 2977 (Ann. St. 1906, p. 1710), providing that, in all cases of judgments for damages in proceedings to have dower set aside, "execution thereof shall be awarded only against the estate in which dower shall have been assigned," personal judgment in dower proceedings for damages and execution awarded against defendants personally are erroneous.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 109.*]

6. APPEAL AND ERROR (§ 1075*)—HARMLESS ERROR—JUDGMENT—WAIVER OF DEFECT.

An error, in proceedings to set aside dower, in failing to direct a special judgment and award execution responsive thereto, is not reversible error, where the error is waived by counsel for defendants.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1075.*]

7. INFANTS (§ 81*) — ACTIONS—APPOINTMENT OF GUARDIAN AD LITEM—ACCEPTANCE.

Under Rev. St. 1899, §§ 558–560 (Ann. St. 1906, pp. 589, 590), providing that a suit against an infant shall not be prosecuted beyond the service of process until a guardian be appointed, and that such appointment shall be made on the request of the infant defendant, or of a relative or friend of an infant, and on the written consent of any competent person as a guardian, which consent shall be filed with the clerk before answer by such infant shall be filed, and that if the infant neglect, for one day after the first day of the term at which he is bound to appear, to procure the appointment of a guardian, the court shall appoint some competent person to serve, in the defense of such suit, a suit against an infant cannot proceed without the appointment of an adult person of mature judgment to defend his rights, which appointment must be made at the very beginning of the proceeding after service of process and before answer, and the person appointed must be notified of his appointment and accept in writing, and waiver of the acceptance of "Hon. W. S. Anthony," appointed guardian ad litem, is not shown by the subsequent filing of an answer by "Smith & Anthony," a firm of attorneys who had appeared in the case before the appointment of the guardian, and whose answer, filed subsequently, was for all the defendants.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 81.*]

8. EVIDENCE (§§ 5, 9–11*)—JUDICIAL NOTICE—HISTORICAL, GEOGRAPHICAL, AND SCIENTIFIC FACTS.

Courts take judicial notice of facts of current history and of geographical and scientific facts and those commonly known by all mankind.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 4, 8–16; Dec. Dig. §§ 5, 9–11.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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9. INFANTS (§ 112*) — ACTIONS — JUDGMENT — COLLATERAL ATTACK.

A judgment against an infant, being voidable only, and not void, is not subject to collateral attack.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 320; Dec. Dig. § 112.*]

10. JUDGMENT (§ 518*)—COLLATERAL ATTACK —NATURE OF PROCEEDINGS.

An appeal from a judgment is not a collateral attack upon it, but is in the nature of a direct attack.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 518.*]

11. APPEAL AND ERROR (§ 544*) — RECORD — BILL OF EXCEPTIONS—DECISION NOT OTHERWISE REVIEWABLE.

In an appeal from a judgment against an infant, the failure to secure the written acceptance of the person appointed as guardian ad litem is an error manifest on the face of the record and does not depend on the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2417; Dec. Dig. § 544.*]

Appeal from Circuit Court, St. Francois County; Robert A. Anthony, Judge.

Action by Etta M. Reineman and another against Mamie Larkin and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

W. H. Clopton and W. S. Anthony, for appellants. D. L. Rivers, for appellees.

LAMM, P. J. The plaintiff Etta, whose name appears as Etta Larkin Renneman and as Etta Reineman (and in several other forms) in this record, is the wife of Isaac Renneman, or Reineman, and, claiming to be the widow of Andrew Larkin, sues for dower in certain real estate in St. Francois county of which Andrew died seised of an estate of inheritance—lot 1, N. W. ¼, section 6, township 35, range 4, being the locus in quo. At a certain term of the St. Francois circuit court she was adjudged such dowress and entitled to have assessment of damages, and commissioners were appointed to admeasure dower. At the next term the commissioners reported setting off to her 5 $^{8}/_{10}$ acres as dower land; said parcel being described by metes and bounds and as part of lot 1 of the N. W. ¼ of section 6, aforesaid. Said report was approved at the next term, and thereupon evidence was heard on the question of damages and the issues found for plaintiff, assessing her damages at $100. The concluding part of the final judgment reads: "It is therefore adjudged by the court that the plaintiff have and recover of and from the said defendants the said sum of one hundred dollars, her damages so assessed, and that she have execution therefor; and it is further ordered and adjudged that the plaintiff be and she is hereby awarded writ of possession according to the report of the commissioners, and that is to say that she is put in possession of the following part of said lands assigned by said commissioners as her dower, to wit: Lot one of the northwest quarter of section six (6) township 35, range 4 east." There was a sharp issue as to whether plaintiff was entitled to dower, and proof was put in pro and con. Defendants filed no motion to arrest the judgment rendered on that issue, and no motion for a new trial, nor did they preserve (in a bill of exceptions filed during the term, or afterwards by leave then granted) the evidence introduced on the issue of dower or no dower, or the exceptions saved at that trial. At a subsequent term, when judgment was rendered for the damages, and execution was ordered for them, and a writ of possession was awarded, defendants did file unsuccessful motions for a new trial and in arrest, took due leave to file a bill of exceptions, and in due time filed one. In that bill of exceptions they undertook to preserve the evidence introduced and the exceptions saved at the first trial at a former term.

Defendant Mamie is a minor and only child of Andrew Larkin, deceased. Defendant Moran seems to be in possession of the locus in quo; but how he holds—whether as tenant, purchaser, or under some other claim of right—does not clearly appear in the pleadings or in the proof. While the pleadings are silent on the point, we gather from the testimony that defendant J. S. Larkin was a brother of Andrew. There is some faint evidence that he acted somewhat in loco parentis in and about taking charge of and renting the real estate for and on behalf of his niece; but in what legal capacity, if any, is dark. At a certain time after the cause was appealed here, the death of J. S. Larkin was suggested. Thereat scire facias issued to one McLaran, administrator of his estate, for the purpose of revivor. The matter was not pursued, no order of revivor was made, and the case was argued and submitted with the record in that condition.

Going back to the early stages of the case below, it appears that on a certain day plaintiff, by motion filed, suggested that Mamie was an infant served with process, that she had neglected to procure the appointment of a guardian to defend the suit, and prayed the court to appoint some competent person as guardian for her, as by statute provided. On that same day an order was entered, viz.: "That Hon. W. S. Anthony be and is hereby appointed guardian ad litem for the minor defendants herein." No notice to such appointee is shown, nor was his written consent filed, and no separate answer was filed on behalf of the minor. Neither did the guardian ad litem at any time or stage appear in person or by counsel and take any step in the case, so far as disclosed by the record. On that same day a general answer was filed for all the defendants, not naming them severally, but using a plural form. After a denial of each and every allegation, the answer con-

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cludes as follows: "Further answering, defendants say that plaintiff was never lawfully married to Andrew Larkin. That at the time plaintiff claims to have married Andrew Larkin she was a married woman and incapable of contracting marriage. Wherefore defendants pray to be dismissed hence with their costs. [Signed] Smith & Anthony, Wm. H. Clopton, for Defts." To that answer plaintiff replied denying "each and every allegation, intimation, and allusion therein."

With the pleadings in this fix, the trial came on on the dower issue, the evidence was heard, and, while the matter was in the breast of the court, plaintiff filed an amended petition, reading: "Plaintiffs state that coplaintiff Etta M. Renneman was at the date of her intermarriage with Isaac Renneman the widow of Andrew Larkin, deceased, who departed this life on the ——— day of February, 1900, seised of estate of inheritance in the following lands, to wit: Lot No. one (1) of the northwest quarter of section six (6), in township thirty-five (35), north of range 4 east, containing about one hundred acres, lying, being and situate in the county of St. Louis (sic) and state of Missouri. Plaintiffs state that Mamie Larkin is the only daughter of the said Andrew Larkin, and that J. S. Larkin and David Moran are in possession of said premises. Plaintiffs state that more than two years have elapsed since the death of the said Andrew Larkin, and dower in said land has not been assigned to coplaintiff Etta M. Renneman, formerly Etta M. Larkin, the widow of said Andrew Larkin, although she has never released said dower nor done any act to bar the same. Wherefore plaintiffs pray that coplaintiff's Etta Renneman's dower in said land be admeasured, that she be put in possession of the part assigned to her, and that she have and recover damages by reason of being deforced of her dower therein and for her costs in this behalf expended." There was no answer whatever to this amended petition, and no leave asked to file one or to refile the former.

On such record defendants assign error, viz.: (a) In that the petition does not state a cause of action. (b) In that there was no guardian ad litem appointed as required by statute, and the infant Mamie was at no time represented by such guardian. (c) In that the judgment is erroneous because it decrees that the widow be put into possession of all the land described in the petition. (d) In that the evidence shows that plaintiff was not the lawful wife of Andrew Larkin. (e) There is a preliminary question, not raised by counsel, viz., whether the cause may proceed on appeal after the suggestion of the death of one of the appellants and without a revivor in the name of the administrator. Of these in reverse order.

1. It has been ruled that, on the death of one of a number of appellants, a cause may proceed on appeal without a revivor. Reed v. Colp, 213 Mo., loc. cit. 581, 112 S. W. 255.

2. At the hearing leading up to the interlocutory judgment for dower, one main issue was whether plaintiff was ever the lawful wife of Andrew Larkin, deceased. It seems Andrew was entangled in an alleged executory contract to marry, and had breached the contract. For that breach he was sued. Pending such suit, he went from his home in Missouri to Illinois, preceded or followed there by plaintiff, who had been his handmaiden. In Illinois, under cover of a disguised name, viz., "Melvin A. Larkin," he married plaintiff, then Miner. She was born Miner, had married one Clinton, had procured a divorce, and had resumed her maiden name. The twain, Andrew and Etta, returned separately to Andrew's home in Missouri. There they lived as man and wife for a month, and then, on pretense that it would injure him in his defense of the breach of promise case if the fact of marriage leaked out, he put her away from him, sending her to her sister's in Reynolds county. She saw him no more. Once she heard from him; but the letter is not accounted for and its contents not shown. Presently Andrew died, leaving the child, Mamie, by a former wife, and admittedly seised as owner of the locus in quo. When plaintiff came to show her divorce from Clinton, she introduced a transcript of a judgment of divorce on personal service in the Reynolds circuit court. Thereupon defendants introduced an exemplification of the whole record in that suit, and it is upon the showing there made that they contend the Reynolds circuit court had no jurisdiction of the divorce suit. This, because neither did the petition allege, nor did the decree find, the residence of plaintiff to be in Reynolds county, or that she had resided in the state of Missouri one whole year next before the filing of the petition. Rev. St. 1899, §§ 2922, 2924 (Ann. St. 1906, pp. 1681, 1682).

The point is interesting and grave; but the questions raised are reserved, since the evidence introduced at the first hearing is not properly preserved in the bill of exceptions, nor is any exception thereto preserved for review. Defendants were not entitled to an appeal from the interlocutory judgment decreeing dower. This is so because an action to assign dower is not within the class of cases wherein interlocutory judgments are appealable. Rev. St. 1899, § 806 (Ann. St. 1906, p. 769). They were entitled to appeal from the final judgment; but such appeal does not bring up the evidence at the trial resulting in the interlocutory judgment at a former term and the exceptions saved to the admission of such evidence, unless both such evidence and exceptions were preserved by a timely term bill of exceptions. Rev. St. 1899, § 728 (Ann. St. 1906, p. 720). That was not done in this case, and, on the authority of Richardson v. Schuyler County Agr. & Mech. Ass'n, 156 Mo. 407, 57 S. W. 117, neither the

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evidence nor exceptions thereto is here for consideration. That case but applies the elementary rule that an exception dies with the term, unless its life is preserved by a bill. On such showing, we put from us any consideration of the assignment of error in hand.

3. The judgment is self-evidently erroneous in awarding a writ of possession for the whole tract. If she was entitled to a writ, it was only for the part of the land admeasured and set off to her as dower by the report of the commissioners, as approved by the court. Rev. St. 1899, § 2963 (Ann. St. 1906, p. 1706). It is further erroneous in giving a personal judgment against defendants for the damages and in awarding execution against them personally. Section 2977 (page 1710), ordains that: "Execution thereof [viz., on the judgment for damages] shall be awarded only against the estate in which dower shall have been assigned." Griffin v. Regan, 79 Mo. 73. The judgment should have been special and the award of execution responsive; but we would not reverse on this score, as the point is waived by counsel for defendants.

4. Is there reversible error to be predicated of the failure of the guardian ad litem to consent to his appointment whether by filing his acceptance in writing, and thereafter acting for his ward by filing answer and participating in the defense, or by filing such answer, and so participating in the defense without filing a written consent?

The right determination of those questions can only be reached by considering our statutes and keeping in view the remedy advanced and the mischief to be retarded thereby. Sections 558, 559, and 560, Rev. St. 1899 (Ann. St. 1906, pp. 589, 590), follow:

"Sec. 558. After the commencement of a suit against an infant defendant, and the service of process upon him, the suit shall not be prosecuted any further until a guardian for such infant be appointed.

"Sec. 559. Such appointment shall be made by the court in which the suit is pending, or by the judge thereof in vacation, upon the written request of the infant defendant, if of the age of fourteen years or more, or, if such infant be under said age, on the written request of a relative or friend of the infant, and on the written consent of any competent person proposed as a guardian, and such request and consent shall be filed in the office of the clerk of the court before any answer by such infant shall be filed.

"Sec. 560. If such infant defendant neglect, for one day after the first day of the term at which he is bound to appear to the suit, to procure the appointment of a guardian to defend the suit, the court shall appoint some competent person to be guardian for such infant in the defense of such suit."

The three sections are strictly in pari materia, and have been the law for 75 years. The first and last have descended as live law without variation or shadow of turning from Rev St. 1835. The middle section (now 559) originally read as follows: "Such appointment shall be made upon the request of the defendant, and on the written consent of any competent person proposed as guardian by the court in which the suit is pending, or by a judge thereof in vacation, and shall be filed in the office of the clerk of the court, before any plea by such infant shall be filed." Rev. St. 1835, p. 456, § 25. Sections 558, 559, and 560 of our present statutes appeared in the Revised Statutes of 1835 as sections 24, 25, and 26 (page 456), save that in 1879, section 25, Rev. St. 1835, was amended to read as it now does. The amendment obscures the sense a trifle; but we think there is no escape from the conclusion that the amended section retains the sense and purpose of the old one, and that all these statutes had a common purpose, and must be construed together to effectuate that purpose. Those sections must be held to prescribe that a suit against an infant should not proceed without the appointment of an adult person of mature judgment to defend his rights. The appointment should be made at the very beginning of the proceeding after service of process and before answer. The statute says so. Section 558.

Such, too, is the general doctrine, and the reasons for the rule are obvious, 10 Ency. of Pl. and Pr., 638. We know the appointment of a guardian ad litem has not infrequently been looked upon in practice as a bare technicality, and that the office of such guardian has been deemed to involve perfunctory and shadowy duties; but such theory is unreasoned and such practice indefensible. The reason of the thing and the office and duties of a guardian ad litem are set forth with precision and felicity by Hays, president of the court, and received the sanction of no less an oracle of the law than Chief Justice Gibson in the case of Mercer v. Watson, 1 Watts, loc. cit. (Pa.) 348-349, viz.: "What then is meant by an appearance and defense in an action, and particularly, when it is said that an infant shall appear and defend by guardian? This is considered as an important privilege of the infant. Justly so, for it is evident that his privileges with regard to contracts and other transactions would be of slight utility, if he were liable to be dragged into court and exposed there; unprotected in his ignorance, to contend with skill and business, with learning and experience. There is no imaginable situation in which an infant would be likely to suffer more from imbecility of understanding. It may easily be seen that, under these circumstances, he would soon be stripped of his all. It is to protect him against such danger that the law assigns him a guardian in the suit. This guardian is to do for him what with riper judgment he would do for himself. He is to appear for him in his proper person, employ competent

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attorneys and counsel to prepare and plead his cause. He is to collect testimony, summon witnesses, and at the trial to afford such aid to his counsel as may be necessary in unexpected difficulties. It is only by exercising that attention and vigilance in the cause of the minor, which he would exert in his own, that he fairly discharges his duty. When all this has been done, everything in point of privilege has been secured to the infant which the law contemplates, or justice demands. It is something more than a mere technical defense, which is required by the guardian. For these he might furnish, and yet abandon the essential interests of his ward, by coming in at the return of the writ and entering a plea, and afterwards wholly neglecting the cause. An appearance in general is either by the suitor in proper person, or by his attorneys; but the infant cannot appear in his own person, nor can he authorize an attorney to appear for him. He can only appear by his guardian, who derives his authority, not from the infant, but from the court by which he is appointed."

Keeping in mind the significance of the office and appointment of a guardian ad litem and the live and important duties in respect to the infant's rights devolving upon such appointee, our present statutes (as did the earlier) require his consent to serve. He should be notified of his appointment and accept the office in writing. We do not hold that an acceptance in writing might not be waived by the guardian, if he in fact accepted office and the record showed that he entered upon the performance of his duties and performed them under the eye of the court. In this case there is no record showing that Hon. W. S. Anthony ever heard of his appointment, or acted under it in any step in the case. It seems that a firm of attorneys, "Smith & Anthony," filed an answer to the first petition before the appointment of any guardian ad litem. It seems that after the appointment the same firm filed an answer for all the defendants, uniting with themselves Mr. Clopton in the defense; but such record facts do not aid us. It would be audacious, absent light from the answer itself or elsewhere from the record, to take judicial cognizance that the "Anthony" of the firm of Smith & Anthony was the identical Hon. W. S. Anthony appointed guardian ad litem by the court. There may well be more than one person bearing the honorable name of Anthony in that region, and quite learned in the law. Courts take judicial notice of facts of current history, of geographical and scientific facts, and of facts commonly known to all mankind. This, because courts should not admit themselves more ignorant than the rest of mankind. We might, if enlightened by subject-matter or context in a document held in judgment, assume that the surname of a given Washington was George, or a given Lincoln, Abraham. This because the subject-matter or context pointed to George Washington or Abraham Lincoln. But no court has ever arrogated to itself such all-pervading and all-embracing knowledge of the facts of local history as would be assumed in taking judicial notice of the surname of an individual member of a partnership in the practice of law at any particular time in any given town in the state of Missouri. Not only so, but, if we were to assume that the guardian ad litem was in fact the junior member in Smith & Anthony, attorneys, yet we would be unwilling to hold that the mere appearance of that firm in answering generally for the defendants (without proof absent here) took the place of notice of the appointment as guardian ad litem, effected an appearance as such guardian, fulfilled the statutory requirement of consent to serve, or waived notice of the appointment and evidenced consent to serve by actually taking on his shoulders the burden of defending the infant.

The general doctrine is announced in the work last cited (10 Ency. Pl. & Pr. pp. 662, 663, 664) to be that a guardian ad litem must consent to act under his appointment in order to render the appointment complete and effective. To quote: "There must, however, in all cases be either an express assent to the appointment or some action taken by the guardian denoting his assent. Thus he may manifest his acceptance by appearing in the suit, and filing an answer for the infant. The acceptance of the appointment should appear of record, and where acceptance is not shown a judgment against the infant will be reversed. * * * As a general rule, no person can appear as guardian ad litem unless he has been in fact appointed by the court, and the appointment should appear of record. An answer or defense interposed by one acting without appointment will not support a judgment against the infant." It has so been ruled, in effect, by the St. Louis Court of Appeals in a memorandum opinion, Creech v. Creech, 10 Mo. App. 586. An entirely different question would be here if the judgment had been in favor of the infant. In such case an appearance by attorney, blest by success in maintaining the infant's cause, would put the matter on another basis. Rev. St. 1899, § 672 (Ann. St. 1906, p. 686); Padgett v. Smith, 206 Mo., loc. cit. 313, 103 S. W. 943, and cases cited. So, if this was a collateral attack on the judgment, another question would be here. A judgment against an infant (as is his contract or deed), being voidable only, and not void, would not be subject to collateral attack. Townsend v. Cox, 45 Mo. 401; Charley v. Kelley, 120 Mo. 134, 25 S. W. 571; Weiss v. Condrey, 102 Mo. App., loc. cit. 69, 76 S. W. 730; Shaffer v. Detie, 191 Mo., loc. cit. 388–389, 90 S. W. 131.

This being an appeal from the judgment, it is in the nature of a direct attack upon it. Accordingly, we rule: First, that the premises considered, the judgment is erroneous and must be reversed; second, that the er-

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ror is manifest on the face of the record and does not depend on matter brought here in the bill of exceptions.

5. The remaining question is the sufficiency of the amended petition in stating a cause of action. It is scant in allegation. It does not directly allege that the infant inherited the locus in quo as the only heir of Andrew, her father. There is no averment that Andrew died intestate. There is no averment as to the interest or estate of Moran, nor how he holds, nor any averment of similar import as to J. S. Larkin. The statute contemplates that under certain contingencies and circumstances damages for the deforcement of dower do not begin to run until demand is made. Rev. St. 1899, § 2955 (Ann. St. 1906, p. 1703). But shadowy and vague as the petition is in direct allegation, it is aided by reasonable inferences, and we shall not hold it bad after verdict.

As the judgment must be reversed, and the cause remanded for another trial, plaintiff might better amend, and may do so if she elect.

In view of conclusion reached and legal propositions ruled, the judgment is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

It is so ordered. All concur.

McKEE v. RUDD et al.

(Supreme Court of Missouri, Division No. 1. July 1, 1909. Rehearing Denied July 12, 1909.)

1. FRAUD (§ 21*)—MISREPRESENTATION—RIGHT TO RELY.

A judgment creditor of an insolvent corporation suing incorporators for fraud and deceit could not rely on their statements in the articles of the association for false statements on which he predicated his action, as such statements were not made to him to procure credit, but to the Secretary of State to procure a corporate charter.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 9, 10, 23; Dec. Dig. § 21.*]

2. FRAUD (§ 58*)—ACTION—EVIDENCE—SUFFICIENCY.

In a suit by a judgment creditor of an insolvent corporation against incorporators for fraud and deceit, evidence *held* insufficient to show that defendants pointed to its charter, and thereby made its representations their own.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 58.*]

3. FRAUDS, STATUTE OF (§ 38*)—MISREPRESENTATIONS—WRITING—NECESSITY.

Rev. St. 1899, § 3422 (Ann. St. 1906, p. 1965), provides that "no action shall be brought to charge any person by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." *Held*, that this statute applied to the representations of incorporators of a corporation, made to one extending it credit, and prevented recovery thereon when not in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 60; Dec. Dig. § 38.*]

4. FRAUD (§ 48*)—ACTION—PLEADING.

Where, in an action by judgment creditors against incorporators of an insolvent corporation, based on representations made by them as to its solvency, the answer, in addition to a general denial under which defendants could show that the alleged representations were not in writing, as required by Rev. St. 1899, § 3422 (Ann. St. 1906, p. 1965), to render defendant liable, in a following separate paragraph denied the making at any time, either directly or otherwise, of any representation to plaintiff, with reference to the solvency of the corporation, it was not sufficient to rob defendants of the full benefit of their general denial.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 48.*]

5. TRIAL (§ 79*)—OBJECTIONS TO EVIDENCE—REPETITION.

When on the first appearance of improper testimony counsel raised the statute of frauds, and his objection on that ground is overruled, he need not continuously interpose a like objection to all similar testimony in order to preserve the point once clearly made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 192; Dec. Dig. § 79.*]

6. TRIAL (§ 412*)—WAIVER OF OBJECTION TO ORAL PROOF BY SUBSEQUENT TESTIMONY.

Where defendants, basing their objection on the statute of frauds, urged that plaintiff was not entitled to make proof of his allegations by parol evidence, and the objection to oral proof is overruled, they did not afterwards waive the objection by voluntarily testifying to the alleged conversations as understood by them.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.*]

7. WORDS AND PHRASES—"WAIVER."

"Waiver" is a voluntary act, and is not an act forced on a party by the court.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375–7381; vol. 8, pp. 7831–7832.]

8. TRIAL (§ 412*) — STATUTE OF FRAUDS — WAIVER BY REQUESTING FINDING OF FACTS.

The statute of frauds raised by defendants' general denial was not waived by requesting a finding of facts based on all the testimony, a part of which had been admitted, over their objection, based on the statute.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.*]

9. TRIAL (§ 412*) — STATUTE OF FRAUDS — WAIVER BY REQUEST FOR DECLARATIONS OF LAW OR MOTION FOR NEW TRIAL.

Neither was the statute waived by reason of a request for declarations of law, nor by motion for a new trial which failed to mention it, but which did allege that the court admitted improper and incompetent evidence over objections.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.*]

10. CORPORATIONS (§ 30*) — ACTION AGAINST INCORPORATORS FOR FRAUD AND DECEIT—SUSTAINING JUDGMENT ON LIABILITY OF OFFICERS AND STOCKHOLDERS.

A judgment against incorporators of an insolvent corporation in favor of a judgment creditor, in an action for fraud based on oral representations of solvency, which were required to be in writing to render them liable, cannot be sustained on the ground that the judgment is righteous because defendants were officers and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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stockholders, and had not paid for their stock in money or its equivalent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

11. Appeal and Error (§ 1173*)—Determination on Appeal—Reversal—Dismissal as to One Party.

Where, on appeal by two defendants, it appears from the record that no case was made against either, the judgment will be reversed as to both defendants, and the appeal will not be dismissed as to the one who failed to prosecute it, where this would render the other liable on the appeal bond for the sum of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562–4572; Dec. Dig. § 1173.*]

Appeal from Circuit Court, Jackson County; Frank P. Walsh, Special, and Jno. G. Park, Regular, Judge.

Suit by D. G. McKee against J. F. Rudd and another. From a judgment for plaintiff, defendants appeal. Reversed.

Francis C. Downey and Chas. W. Webster, for appellants. W. W. Calvin and Bruce Barnett, for respondent.

GRAVES, J. Defendants were the incorporators of a Missouri business corporation styled the American Sand & Supply Co. Defendant Rudd had filed application in the United States patent office for letters patent for a certain mechanical device and process by which to remove sand from a river and load the same onto cars. To demonstrate the feasibility of his invention, and pending his application for patents thereon, he contracted to build a plant at Topeka, Kan., for the Kaw River Sand Company, equipped with his invention or device, for the price and sum of $10,000. Rudd seems to have had no means, and he induced plaintiff, McKee, to go in with him and furnish money to the extent of $5,000, with the understanding that McKee should be repaid out of the contract price, and to share the profits of the venture, which went to the construction and operation of the plant. McKee furnished in fact $5,025. These two parties also had a further written agreement, by the terms of which Rudd was to organize a $200,000 corporation to take in the "Rudd Sand Handling Apparatus and the Rudd & Meyers Portable Sand Plant" at the price and sum of $100,000, in full paid-up stock, and in which proposed corporation the said McKee, in consideration of $2,000, was to have a $^4/_{25}$ interest in the said inventions, which interest was to be taken in said corporation for 160 shares of full-paid stock of the par value of $100 per share. McKee was also to purchase 5 shares at $100 per share. McKee was to pay both the $2,000 and the $500, when the plant to be constructed at Topeka was in successful operation. Rudd did not organize the $200,000 corporation, but instead he and his codefendants organized the corporation first herein named, having a capital stock of $300,000. It appears that for some reason they did not want McKee in the corporation, and it was finally determined that they would buy him out, so accordingly it was agreed between the officers of the new corporation that such corporation should take over all of McKee's interest at the price of $5,500. The final culmination of the deal was a written contract of date January 13, 1904, although there had been a previous written contract on December 23, 1900, which was destroyed upon the execution of the January contract. By this last-named contract McKee sold and assigned his interest in both of the written contracts which he had with Rudd to the American Sand & Supply Co. The Topeka plant was only then partially constructed, but McKee had therein $5,025. McKee and Rudd both signed the contract, and as to the consideration to be received by McKee, who was in the contract designated as party of the second part, the contract reads: "First party as a part of the consideration passing from it has this day paid to second party in cash the sum of five hundred dollars ($500) and has executed and has delivered to second party its two (2) promissory notes, one for five hundred dollars ($500) dated January 12, 1904, payable thirty (30) days after date, without interest, and one for forty-five hundred dollars ($4,500), dated January 12, 1904, payable on or before sixty (60) days after date, with interest at six per cent. per annum from date until maturity, and eight per cent. per annum after maturity." The party of the first part was the American Sand & Supply Co., and Rudd was the third party, as the parties to the contract were designated. McKee was paid the $500 in cash, and upon maturity was paid the $500 note. The $4,500 was never paid. McKee sued the corporation and got judgment, but an officer with an execution failed to find property. Thereafter McKee filed a petition which was the origin of this suit. The petition upon which trial was had is an amended petition, and the corporation is not a party. Under the first petition it was a party, and a receiver was appointed, who qualified, but was later discharged. The receiver found no assets, and upon the dropping out of the defendant corporation from the case was likewise dropped out and directed to return what he had to the corporation.

Omitting caption the petition upon which the cause was tried reads: "Plaintiff states that on or about the ——— day of December, 1903, defendants filed with the Secretary of State of Missouri duly authenticated articles of incorporation under the name and style of American Sand & Supply Co., and represented to said Secretary of State and the state of Missouri that said company had a capital stock of $300,000, and further rep-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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resents to said Secretary of State and to the state of Missouri that of said capital stock $150,000, or one-half thereof, was actually paid up in cash in good and lawful money of the United States; that upon the strength and belief of said representations articles of incorporation were issued to said company; that in truth and in fact all of said representations were false, fraudulent, and untrue, and defendants and each of them then and there well knew that the same were false, fraudulent, and untrue; that said pretended corporation was insolvent at that time, and said capital stock was not paid up, nor any part thereof, which facts defendants, and each of them, well knew; that said pretended corporation never had any legal existence, and no legal authority to do business as a corporation in this state, for the reason that said articles of association were procured by false and fraudulent representations, knowingly made by defendants as aforesaid, and that said pretended corporation had no assets, and was insolvent from its inception, as defendants and each of them well knew; that defendants and each of them falsely and fraudulently represented to this plaintiff that said pretended corporation was a duly and legally organized corporation; that one-half of its capital stock, amounting to $150,000, was actually paid up in good and lawful money; that said company was solvent, and was ready to comply with any and all contracts it might make and that it was amply able to meet any and all liabilities it might incur; that plaintiff, believing said representations to be true, and relying upon them as true, and further relying upon the articles of association of said company and the statements therein, was induced to extend credit to said pretended corporation, and did loan to said pretended corporation the money for which the judgment hereinafter mentioned was obtained, and sued said company as a corporation, as they purported and pretended to be; that plaintiff is a creditor of said company and pretended corporation, and has judgment against it in the sum of $4,570, with interest from the date of its rendition, and the same is still unpaid, and cannot be collected; that plaintiff contracted with said company, pretended corporation, in good faith, believing it to be what its articles of association warranted it was, viz., solvent, and as so held out and represented to plaintiff by defendants, and each of them. Wherefore, in consideration of the acts, defaults, and representations, knowingly, fraudulently, and falsely made by defendants as herein set out, plaintiff says he is damaged in the sum of $4,570, with interest from the ——— day of ———, 1904, he therefore asks judgment against defendants, and each of them, jointly and severally and as partners, in the sum of $4,570, with interest and costs."

To this amended petition the defendant Wear (1) moved to strike it from the files for reasons in a motion stated; (2) moved to strike out certain redundant and irrelevant matter from the petition; and (3) moved to make the petition more definite and certain. All these motions were overruled, and thereupon the following answer was filed by Wear: "Comes now the defendant F. E. Wear, answering for himself alone the amended petition herein by the plaintiff filed: Protesting against the order of the court entered in this cause on the 14th day of January, 1906, ordering and directing this defendant to answer to the said amended petition, and objecting and excepting to said order compelling this defendant to answer a pleading so manifestly insufficient to be answered unto, as is the said amended petition herein filed by said plaintiff, and waiving no objection or exception that might be taken to said amended petition, though so answering, this defendant denies each, all, and every the matters and things in said amended petition contained. Defendant admits, however, that the Secretary of State of Missouri issued to the American Sand & Supply Co. a certificate of incorporation, and states that said American Sand & Supply Co. now is, and at all times in said petition referred to was, a corporation duly incorporated and doing business under and by virtue of the laws of the state of Missouri. Defendant specially denies that at any time he made any representations whatsoever to said plaintiff, either directly or indirectly, as to the legality of the organization of said American Sand & Supply Co. or as to the payment up of one-half of its capital stock, or any part thereof, in good and lawful money, or otherwise, and denies that at any time, either directly or indirectly, he made any representation to said plaintiff with reference to the solvency of said American Sand & Supply Co. Defendant further specially denies that said plaintiff at any time extended any credit to said American Sand & Supply Co., or loaned any money to said American Sand & Supply Co., or that said plaintiff ever relied upon any representations made by this defendant with reference to the solvency of said corporation, and, so relying, reloaned any money or extended any credit to said corporation. Whether plaintiff is a creditor of said corporation, and has a judgment against it in the sum of $4,570, or from any other sum, this defendant has no knowledge sufficient whereon to found a belief, and this defendant does not know whether any such judgment, if the same exists, is unpaid and cannot be collected. Wherefore defendant asks that if such allegation be material to the issues in this cause, plaintiff be compelled to prove the same. Wherefore, this defendant prays that he go hence without day, and recover his costs herein incurred."

Neither of the three motions hereinabove mentioned have found a place in the bill of exceptions, so far as the abstract shows.

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The abstract shows no answer for the other defendants, nor does it show a reply to the answer of defendant Wear. The trial, which was before Hon. Frank P. Walsh, as special judge, proceeded as if reply had been filed. No jury was used. Trial resulted in judgment for plaintiff in the sum of $4,570, from which defendants, Wear and Rudd, appealed, after unsuccessful motions for new trial and in arrest of judgment.

The only abstract of record before us is labeled, "Abstract of Record, with Complete Bill of Exceptions by Appellant F. E. Wear," and this perhaps accounts for the absence of Rudd's answer in the record. No brief is filed here for Rudd, and we have filed in the case a motion to dismiss the appeal of Rudd for the reason of his failure to file abstract of record and brief within the time prescribed by law and our rules. Rudd acknowledges receipt of a copy of such motion. This motion we took with the case.

As usual the evidence was conflicting as to whether any statements or representations were made to plaintiff by the defendants concerning the solvency of the corporation. When the plaintiff sought to make this proof the following occurred: "Q. Now, just state to the court what was said at that time by the defendants, or any of them; state what was said by each defendant, if you remember, regarding this company. I am talking about what was said regarding the company, the American Sand & Supply Co. Mr. Downey: Defendant Wear objects to the question because it is incompetent, irrelevant, and immaterial, and because, under the statute of frauds in this state, any statement of that description would be wholly inadmissible, and appeals to call for parol testimony concerning the credit and financial standing of the American Sand & Supply Company and its ability to pay its debts. Mr. Webster: Defendant Rudd makes the same objection. (Objection overruled by the court. To which action and ruling of the court the defendant Wear and the defendant Rudd at the time duly excepted.)"

Plaintiff it appears wanted the cash rather than the notes prior to the execution of the contract of date, January 13th. The strongest evidence in the record for the plaintiff we shall quote. Plaintiff in describing the representations made to him, among other things, said: "Q. (Interrupting) State his language, Mr. McKee. A. Well, as I stated to his honor a while ago, when Mr. Hutchings made the statement, Mr. Rudd acquiesced, and said: 'Yes; that's so'—and Mr. Wear— The Court: That is, nodded his head up and down? A. Yes, sir. Q. State what Mr. Rudd said, if anything? A. He didn't say anything in language, any more than that. He said: 'Yes; that's so.' Q. Well, state all Mr. Hutchings said; state all that he said. A. Well, Mr. Hutchings said that the company was solvent; that he had $15,000 in stock in the company, in the treasury, and Mr. Rudd said that he had sold $1,600 to Mr. Armstrong; that they had at that time $16,500 in cash in the treasury, and Mr. Wear had taken $10,000 worth of stock, and Mr. Beckham had taken 20,000, subscribed for 20,000, and Mr. Waltner, I believe it was, 10,000, and there was some other names, but I can't remember them, that were stated as having subscribed, taken stock in this company, and that this money would all be paid in, and by the time this note would mature it would all be in to meet the note, but as they had these other plans in contemplation in these two cities, to erect the sand plants, they wanted to use this money that was already on hand for to start those plants and start their business going, and if they paid me, they would have to borrow money to carry on these other operations, and they might as well give me a note and pay me interest on it as to pay interest to any one else. The Court: Now, let me understand. Who did you claim said that? A. Mr. Hutchings. The Court: Who was present? A. Mr. Rudd and Mr. Wear. They were all present, and they all acquiesced in it. The Court: That is stricken out as not responsive. Q. State what they did or said. A. They nodded their heads in approval, and said: 'Yes; that's so.' * * * Q. Now, Mr. McKee, just state to the court what conversation you had with Mr. Wear. If you had any conversation with him, state what that was, at this time. A. The conversation with Mr. Wear was in regard to my taking this note, this note for the claim, and, as I stated, I wished them to pay me in cash, instead of taking the note, and Mr. Wear says to me, he says, 'McKee, why don't you take that note?' and he says furthermore, 'You are a damned fool if you don't take that note.' He says, 'That note is all right, and will be paid.' And he says, 'You take that note, and I will see that it is paid.' And I should have stated that we went out of his office at that time, and he made that told me that in the—I believe it was in the safe—in the safe room. We stepped out into that, I believe, and he made that statement to me there. Then we came back into the office again, and Mr. Hutchings says, 'Well, what are you going to do?' and I says I would like to have my cash, and Mr. Wear says: 'McKee, you take that note; I will see it is paid, sabe?' and he looked me straight in the eye, and I looked him straight in the eye, and I says: 'All right, I will take the note; you put the seal of the corporation on the notes.' They put the seal of the corporation on the notes, and I took the notes. Mr. Downey: Now, I desire to move that all that portion of this answer which tended to show or prove that Mr. Wear orally said that he would see that note was paid be stricken out. The Court: That motion is sustained. That will be stricken out; I will not consider that." Later, in explaining the portion stricken out, the

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court said: "The Court (interrupting): I have stricken out that portion of the testimony where he stated he stepped into the vault part of the office with Mr. Wear, and where Mr. Wear assured him individually that he would see the note paid. I mean that part of the conversation. I do that so you will know what I am taking into consideration to base my finding on, whatever it is."

Then the plaintiff proceeds: "Q. I want to ask you this question: Whether or not anything was said to you regarding the articles of incorporation at all? A. Yes, sir. Q. By these defendants? A. Yes, sir. Q. State which one of them said it, and what he said. A. Why, they all told me that they were incorporated. Q. Did you know for what amount? A. $300,000. Q. How did you know that? A. They said so. Q. What further was said about this money or stock being paid up, if anything? * * * Q. What was said by any of these defendants regarding the amount of stock paid up, what was said by any one of them, and who it was, and what he said? A. Well, Mr. Hutchings said that he had paid for $15,000 of stock, and Mr. Rudd said that Mr. Armstrong had paid for—had paid $1,600 for 3,000 shares of stock, and that these other parties had subscribed for stock, and that it would be paid, and to assure me of the positiveness of the note being paid, he said, 'Why, Mr. Wear has—' The Court (interrupting): That will be stricken out. Q. Just state what he said, and leave out the other part. A. Mr. Wear says—Mr. Hutchings says, 'Why, Mr. Wear has taken $10,000 of stock, and that is as much again as your claim amounts to, and that is a perfect guaranty to you that the note will be met when it is due; Mr. Wear, president of the Wear Coal Company, you are not afraid of him, are you?' Q. Was Mr. Wear present at that time? A. Mr. Wear was present at that time when Mr. Hutchings made that statement, 'You are not afraid of him, are you?' and Mr. Wear looked at me and smiled, as much as to say, 'Why, Mr. McKee—' Q. Never mind about that. Just state what was said. A. 'Mr. Wear's stock alone is as much more as your note, and is amply sufficient to meet your obligation.' Q. Now what was said, if anything, respecting what he had in it? A. He said that he had $15,000, and he had that in—had subscribed $5,000 more. Q. What had you to do with organizing this corporation? A. I had nothing at all."

A witness, McCoy by name, describes the talk thus: "Q. Now, Mr. McCoy, just state what you heard there between the parties, plaintiff and defendants, and who said it. A. Mr. Hutchings made the proposition to Mr. McKee to purchase his interest by the giving him of a note for $500, $500 in cash, the note for $500 due in 30 days, and a note for $4,500 due in 60 days, for the purchase of his interests in the contract he had with Mr. Rudd. Mr. McKee asked them if they had intended to give him the money instead of the notes, and they said that they had the money— Mr. Downey: Wait a minute. We object to that as incompetent, irrelevant, and immaterial. Q. Who? A. Mr. Hutchings said that they had the money, but, owing to their obligations, which they expected in the construction of other plants, and the finishing of this plant at Topeka, which they expected to take over, that they had not the money then on hand, and with the extension of 60 days' credit by Mr. McKee they would have time to get the money to meet his obligation when due. Q. Mr. McCoy, what did they say—what was said by these defendants, or any of them? State what each one of them said, if they did say anything, with respect to this corporation that was about to purchase this interest from Mr. McKee. A. Mr. Hutchings told Mr. McKee that the note that he would take was perfectly good; that the note they had offered him was good for the simple reason they had the money, but he said—then Mr. McKee asked him in case he took his note, if they would put their personal indorsement upon it, and they says no; that it wouldn't increase the value of the notes at all; that the note as given by the corporation with the signature of Mr. Hutchings as treasurer and secretary and Mr. Wear as president would make it just as good as though it had their personal indorsements. Q. What was said, if anything, regarding this corporation? That is, its paid-up stock, or capital stock, or whatever it was? A. Mr. Hutchings said that he had subscribed for $15,000 of the stock, and had paid for it, and it was his intention to subscribe for another additional $5,000; that Mr. Beckham had subscribed for $20,000. Q. Was there anything said regarding Mr. Beckham, about who he was at that time, do you remember? A. No, I don't think—not that I know of. Q. Now, what else did Mr. Hutchings say, if anything, that you remember? A. He said that—Mr. Hutchings said that this stock being subscribed as it was, that the money was ready for them whenever they had the stock ready to deliver to these parties and demanded the money; that it was the same as cash to them, but it would take a few days for them to get that money in for the stock, consequently they didn't wish to spend out all the money they had at that time for payment of Mr. McKee in cash. Q. Was there anything else that Mr. Hutchings said that you recall now at this time? A. At the taking of these notes? Q. Anything else that he said concerning this corporation, its ability, etc., anything further than you have stated? A. Only that it was perfectly solvent and able to take care of any obligation that it would make. Q. Can you recall the language that he used? A. That is the language that he used: 'This corporation is

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perfectly solvent and capable of taking care of any obligation that they might make.' Q. Was there anything said by Mr. Hutchings—Mr. Downey (interrupting): I understand, if your honor please, of course, that all this goes in subject to the objection we made to the same class of testimony that Mr. McKee testified to. The Court: No, I didn't understand that. Mr. Downey: Then we move to strike out all the testimony of this witness which has reference to any verbal statements made by any of these parties at the meeting in the office of Mr. Wear with reference to the solvency of the corporation. We move to strike it out for the reason that it is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case, and for the further reason that the petition does not state any cause of action predicated upon statements of that kind. The Court: I can't rule on this until he finishes the cross-examination. Let the record show that all the proper objections were made to all this testimony, and I will let the ruling go back. (To which action and ruling of the court the defendants at the time duly excepted.) Q. Was that all that Mr. Hutchings said, Mr. McCoy, that you can recall? A. That is all that Mr. Hutchings said that I recall. , Q. Was there anything said about this corporation, about its capacity; that is, the size of the corporation and the number of shares, or things of that kind, capitalization? A. Why, he stated that they were incorporated for $300,000, was all the statement about the corporation. Q. Did he state where they were organized, under the laws of what state they were incorporated? A. That they were organized under the laws of the state of Missouri for that amount. Q. Now, do you recall anything that Mr. Rudd said at that time? A. No; I don't. Mr. Rudd didn't have anything to say. Q. I will ask you who was present when these representations were being made? A. Mr. Wear, Mr. Rudd, Mr. Frank Wear, Mr. Rudd, Mr. Hutchings, Mr. Armstrong, and Mr. McKee. Q. I will ask you if anything was said there at that time about one Mr. Armstrong having paid in some money to the corporation? A. Mr. Armstrong was issued a stock certificate at this meeting. The Court: I will sustain Mr. Downey's objection to all that testimony, except the statements that were said to have been made there that the company was solvent, and that it was capitalized for $300,000. Q. Do you recall the circumstances, Mr. McCoy, of Mr. McKee and Mr. Wear going into a nearby room? A. Mr. Wear got out of his chair, and says: 'Mac, step out; I want to speak to you'—and they went out of the door. I don't know where they went. Q. Do you remember of them coming back? A. Yes, sir. Q. What was said when they came back, if anything? Mr. Downey: That is objected to as incompetent, irrelevant, and immaterial. (Objection overruled by the court. To which action and ruling of the court the defendants at the time duly excepted.) A. Mr. Wear said, 'Mac, you'd better take that note,' and then following up on the objection of Mr. McKee, he says, 'Well,' he says, 'I'll take the note if you'll indorse it personally.' Mr. Wear says, 'Mac, that wouldn't add one iota's value to the note, because it is just as good as though we indorsed it personally.' He says, 'You will be a fool if you don't take that note.' He says, 'You take it, and I will see that it is paid.' Mr. Downey: We move to strike out all this answer for the reason it is incompetent, irrelevant, and immaterial. The Court: Let that last be stricken out."

The evidence for the defendant was to the effect that no statements were made as to the solvency of the corporation, and no statements as to stock purchases, except that Hutchings had bought and paid for $10,000 worth of stock, and was going to take $5,000 more, and that one Armstrong had bought some and paid $1,600 thereon, and that others had spoken of buying. This sufficiently states the case for a disposition of the questions raised, with the exception of some matters which can be more appropriately noted in the course of the opinion.

1. Taken in the broadest sense the proof, which we have purposely quoted at some length, tends to show, as plaintiff claims: (1) That the incorporators of the American Sand & Supply Co. imposed upon the Secretary of State in procuring their charter, and that plaintiff, relying upon the representations of the charter, was deceived, and extended credit to said corporation, by reason of which he lost his money and was defrauded; (2) that defendants pointed to the charter, and thereby made the representations of the charter their own representations; and (3) that defendants knowingly and falsely misrepresented the standing and condition of the corporation to which plaintiff was induced to extend credit. Of these in their order.

In this paragraph we shall take the first, and in separate paragraphs follow with the other contentions. Under the proofs the charter of the corporation showed that two or three of the capital stock thereof had been "actually paid up in lawful money of the United States," whilst the records of the corporation show that it was paid up by assignment of patents then applied for, but not yet granted. Now, segregating this proof from all other proof which goes to the other questions suggested, was this sufficient to take plaintiff's case to the jury? It must be borne in mind that defendants interposed demurrers to the testimony, both at the close of the plaintiff's case and at the close of the whole case. The question, then, is under this branch of our inquiry: Can a creditor rely upon statements made in the articles of association filed by a business corporation, and upon proof of the falsity thereof be permitted to recover against the parties siguing the articles of in-

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corporation, in an action for fraud and deceit? Defendants in this case were all signers of the articles of association, which recited that two-thirds of the stock—i. e., $200,000—had been paid in actual cash. As a fact, it had not been so paid, but had been paid as above indicated. The value of the assigned patents, which had only been applied for at the time, is a question of dispute by the evidence. Nor does it appear that patents were ever issued, except by the naked statement of counsel.

These representations, whether false or true, were not made to the plaintiff. These were representations made to the Secretary of State to procure a certificate of corporation, and not to the plaintiff to secure credit. This whole matter has been so thoroughly gone over by this court that it would be useless to review the case law. It has been fully reviewed in Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. (N. S.) 872, which case disapproves of Hyatt v. Van Riper, 105 Mo. App. 664, 78 S. W. 1043, on this question. The Webb Case was passed upon March 29, 1906, and this case was tried prior thereto. The learned trial judge was evidently trying to follow the Hyatt Case, supra, and was thereby led into error. So that, in view of the Webb Case, it must be held that the plaintiff could not rely upon the bare statements of the articles of association for false statements upon which to predicate an action for fraud and deceit. This, for the reason that such statements were not made to him for the purpose of securing credit, but to the Secretary of State to procure a corporate charter. The cases are reviewed in the Webb Case, and we shall not go further here. The case of Hunnewell v. Duxbury et al., 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733, elaborates the question, and might be read with interest.

2. Passing now to the second question in our paragraph 1 suggested, how stands plaintiff's case? In discussing the question which we have just disposed of in our first paragraph the Supreme Court of Massachusetts, in Hunnewell v. Duxbury, 157 Mass. 1, 31 N. E. 700, reached the same conclusion that this court reached in the Webb Case, supra, but at page 6 of that opinion the court, in speaking of what was and what was not said in a conversation out of which grew an extension of credit, uses this language: "Assuming that the statement of Dowd 'that they had filed a declaration, and were now prepared to go on and push the business of advertising,' referred to the certificate of August 11, 1885, the statement was not of such a nature or made under such circumstances, as to justify a finding that it was intended, or designedly allowed by him or by the other defendants, to influence or deceive the plaintiff into accepting the notes. If he had said, in substance or in terms, 'If you wish to know the standing of the corporation, it has filed a declaration at the state house, which you can examine,' the case might have stood differently, at least as to Dowd. But the subject of the conversation was not the financial standing of the corporation, or the amount of the capital stock, or the manner in which it had been paid in or invested, but the nature and operation of its mechanical devices and the probability of their successful use. The evidence discloses no other reference to the certificate on the part of any of the defendants, and to draw from this incidental mention of the fact that it has been filed an intention on the part of Dowd, or of any of the defendants, to induce or allow the plaintiff to be influenced by its statements as to the amount and payment of the stock would be unreasonable. The jury would not therefore have been justified, by all the circumstances which the evidence tended to show, in finding that the defendants intended by means of the representations contained in the certificate to influence the conduct of the plaintiff with reference to his claim against the corporation; and, under the rule laid down in the former opinion, the presiding justice was correct in not allowing this contention of the plaintiff to be passed upon by the jury." It will be noted that the language here used was largely arguendo, and really dictum, because the question was not involved. Upon this case plaintiff clings with tenacity, and especially to that portion of the remarks, "If you wish to know the standing of the corporation, it has filed a declaration at the state house, which you can examine." He overlooks paragraph 2 of the same opinion, which we shall quote and comment upon in our succeeding paragraph.

But applying the evidence in the record to the sole question we now have in hand, it is altogether insufficient. Plaintiff had never read the articles of association. The most he says is that he saw some papers on the table, which he took to be the articles of association. He does say that he understood that the corporation was a Missouri corporation, and that it had a capital stock of $300,000, but at no place does he say that defendants, or either of them, told him that the stock had been subscribed and paid as in the articles of association stated; no claim by plaintiff that defendants said, "Here are our articles of association, and the statements therein made as to the payment of the capital stock are true." We are not saying that such statement, had it been made and proved to be false, would have been actionable, in view of what shall follow herein, but make the suggestion to show that the case at bar does not fall within the supposed case made by the Massachusetts court. In fact in view of the conclusion finally reached by that court in the Hunnewell Case we do not deem it material whether the statements were made one way or the other. In this case, however, the proof does not point to the fact

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that defendants, or either of them, said: "Here are the articles of association. They speak the truth as to our financial ability. You read them." Nor does the proof tend to show that they, or either of them, used words to that effect. The whole conversation was as to what had been subscribed and paid in by different parties, which strongly tended to show an adverse condition from that shown by the articles of association. Upon this point we hardly think the plaintiff was entitled to go to the jury.

3. Casting aside the articles of association, all the representations as to the present ability of the company to pay its debts were oral statements. Not a line was in writing nor signed by either of the defendants. Our statute (Rev. St. 1899, § 3422 [Ann. St. 1906, p. 1965]) reads: "No action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." This statute is of English origin, and has found its way into the statutes of many of our states. Its purpose is a beneficial one. It withdraws from the public the temptation of saying that we would not have credited A., except for the fact that B. said he was solvent, unless the representation of B. was in writing.

Phillips, P. J., speaking for the Kansas City Court of Appeals in Weil v. Schwartz, 21 Mo. App., loc. cit. 385, has well said of this statute: "The history of the first enactment of this statute by the English Parliament furnishes most persuasive proof that its designs and purpose were to cut up by the roots the great evil of the frequency and success of such actions based on mere loose verbal representations, by requiring the action to depend exclusively on the written undertaking, duly signed, by the party sought to be held. See Lyde v. Branard, 1 M. & W. 101, Parke B.; 1 Smith's Lead. Cas. (4th Ed.) 144–146; Savage v. Jackson, 19 Ga. 305. As said by Benning, J., in the case last cited: 'When a statute says that a promise to answer for the debt of another shall not bind, does it not say that any less things shall not bind?' I cannot understand how under this statute, if a part may rest upon a verbal representation, why the whole may not. If a part may be verbal and a part in writing, how much of ease is essential to make the sum total of the causa injuria? Where shall the dividing line be drawn? The tendency of such a rule would be to invite the substitution of judicial discretion, and the caprice of the triers of the fact, for the more certain and explicit rule of the statute, until by imperceptible strokes of the keen blade of judicial construction, in ready hands, the purpose of the statute would either be whittled away altogether, or so weakened as to afford little protection against the very evil Lord Tenderden sought to uproot."

Nor is the rule different as to the officers of a corporation, under the terms of this statute. The representations of such parties are upon the same basis as others. Massachusetts has a similar statute, and in Hunnewell v. Duxbury, 157 Mass., loc. cit. 6, 31 N. E. 700, upon a record appeal of that case, the court said: "It is well settled that representations made by officers of a corporation with reference to its financial standing or means are made with reference to the credit or ability of another person within the meaning of Pub. St. 1882, c. 78, § 4. Kimball v. Comstock, 14 Gray (Mass.) 508; Wells v. Prince, 15 Gray (Mass.) 562; Mann v. Blanchard, 2 Allen (Mass.) 386; McKinney v. Whiting, 8 Allen (Mass.) 207. The plaintiff does not deny the correctness of this proposition, but contends that a statement that another person is possessed of certain specific property does not come within the provisions of the section, and need not be in writing in order to be actionable. We cannot accede to this proposition. The statute is a general one, purposely broad in its terms, and intended to prevent an understood mischief. It is to be so construed as to make it effectual to prevent the fraud at which it was aimed. To exclude from its operation statements as to the ownership of specific property, if made concerning the 'credit, ability, trade, or dealings' of another who is said to be the owner of the specific property would deprive it of force. The statements of the defendants, except the certificate, were all oral, and all related either to the assets and property of the corporation, or to its prospects of success. The latter were under no circumstances actionable, being necessarily matters of opinion. To the former the statute of frauds applies, and prevents the plaintiff from recovering, because they were merely oral, and not in writing." See, also, the case of Koch v. Sumner, 145 Mich. 358, 108 N. W., loc. cit. 725, 116 Am. St. Rep. 302.

A statute could not be broader in terms than is ours. It was enacted for the purpose of relieving parties from uncertainties of litigation which might follow loose language, by requiring all statements to be in writing before the same should be actionable. In this case counsel recognize the extent of the statute as fully as we have done, but undertake to argue that there has been a waiver thereof. At this point suffice it to say that, unless there has been a waiver of the statute, no case was made by the plaintiff, because none of the alleged representations were in writing. The question of waiver we take next.

4. There is no plea of the statute of frauds, or of that section claimed to be a protection to the defendants. It is not claimed, however, that the statute of frauds has to be pleaded, but it is admitted that a general denial is sufficient to raise the statute. The

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plaintiff urges that there was a waiver of the statute, and this he says occurred in several ways: (1) By the peculiarity of the answer filed; (2) by the failure to make proper objections to the testimony offered in the course of the trial; (3) by the defendants voluntarily testifying to the conversations; (4) by requesting a finding of facts upon their testimony; (5) by requesting declarations of law not including the statute; and (6) a failure to mention the statute of frauds in the motion for new trial.

(a) In the answer is a general denial, and this it is admitted is sufficient to raise the statute, but for other language used later in the answer. The language relied upon is: "And denies that at any time, either directly or otherwise, made any representation to said plaintiff with reference to the solvency of said American Sand & Supply Co." We are not of opinion that this language, following in a separate paragraph of the answer, is sufficient to rob the defendants of the full benefits secured to them by the first paragraph of the answer, which was a general denial pure and simple.

(b) At the first appearance of a witness, the plaintiff McKee, to testify to oral statements the defendants objected, and planted themselves behind the statute. We have set out the objection in the statement, and will not repeat. The objection was again renewed when witness McCoy was on the stand, but after much of his testimony was in; but the trial court said: "I can't rule on this until he finishes the cross-examination. Let the record show that all the proper objections were made to all this testimony, and I will let the ruling go back." So that from the record the point was well preserved. When upon the first appearance of improper testimony the counsel raises the statute of frauds, and his objection on that ground is then overruled, he is not required to continuously interpose a like objection to all similar testimony. A point once clearly made should stand for the whole trial. To continuously object to the same character of testimony after the trial court has said it was proper approaches disrespect for the ruling of the court. The defendants at the first opportunity made clear their position, and were not bound to continuously worry the trial court with objections which had once been overruled.

(c) Nor did they waive the objection to such oral proof by afterward voluntarily testifying to the alleged conversations. Defendants had urged that plaintiff was not entitled to make proof of his allegations by parol evidence, but their objections to oral proof were overruled. It will not do to say, because after this ruling of the court they then testified to their understanding of the same conversation, they thereby waived the question as to the validity of oral proof. Waiver is a voluntary act, and is not an act forced upon a party by the court. After the court ruled that parol evidence was proper, then it would be unfair to say that defendants could not give their version of the conversation without waiving their rights under the objection first interposed.

(d) Nor was there a waiver by requesting a finding of facts based upon all the testimony. If the court by wrong and adverse rulings forced the defendants to put in testimony that they would not have put in but for the adverse ruling, and which they were in justice to themselves forced to put in by reason of such adverse ruling, then there is no waiver by the mere fact that the defendants asked a finding of facts based upon the whole evidence. By wrong and adverse rulings the court had fixed the plane upon which the battle was to be waged, and it illy becomes one who has received the benefits of such rulings to cry waiver.

(e) What we have just said applies with equal force to the next contention that there was a waiver by reason of requests for declarations of law.

(f) Lastly, it is said that the motion for new trial fails to mention the statute of frauds. Grant this to be true, but the motion does allege that the court admitted improper and incompetent evidence over the objections of the defendant, which is sufficient without seeking further for other grounds. As we are impressed by this record, there is nothing waiving the statute of frauds.

5. Finally the plaintiff urges that, inasmuch as the defendants were officers and stockholders of the corporation, and had not paid their stock in money or anything equivalent thereto, his judgment is a righteous one, and should be sustained. In support of this we are cited to the following cases: Steam Stone Cutter Co. v. Scott et al., 157 Mo. 520, loc. cit. 525, 57 S. W. 1076; Van Cleve v. Berkey, 143 Mo., loc. cit. 135, 44 S. W. 743, 42 L. R. A. 593; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; Fogg v. Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144. All of these cases were discussed and reviewed in Webb v. Rockefeller, supra. The two Missouri cases were actions against stockholders of a corporation by creditors; the gravamen of the charge being that they had not paid up their stock. They were not actions for fraud and deceit as is this case, if in fact the petition herein states a good cause of action at all. In this case the defendants are not sued as stockholders who had not paid up their stock, for Wear had only one share of the par value of $100, and now has a judgment against him for nearly $5,000. There may be some language in Steam Stone Cutter Co. v. Scott, 157 Mo., loc. cit. 525, 57 S. W. 1076, wherein this court made some remarks which were beyond the scope of the case, and as such should be con-

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sidered obiter dicta. The whole matter is so thoroughly, and to our mind properly, covered in the Webb Case, supra, that we dismiss it without further comment. Under these views the judgment as to the defendant Wear must be reversed. This leaves but one question, and that is what should be the action of the court upon the motion to dismiss the appeal of defendant Rudd. That question we take next.

6. As suggested in the statement, the defendant Rudd does not appear here by brief. The abstract of record is here, but under the name of F. E. Wear, appellant. This abstract prints the bill of exceptions in full. The action is one in tort, wherein in law one or all might be found liable. The record is such, however, that if a jury found against one defendant, it would be hard to find in favor of the other. Under the evidence all the talk as to the condition of the corporation was by one Hutchings, and it is claimed that Rudd and Wear assented to what he said, either by gesture or word of mouth. When the judgment was entered, both Rudd and Wear appealed, filing a joint affidavit of appeal. During the whole trial each of them by their respective counsel made the same objections and preserved the same exceptions. When they came to appeal, they jointly appealed, and each of them signed the appeal bond, with two sureties thereon. To affirm this judgment as to Rudd, or to dismiss his appeal as prayed, which would amount to the same thing, would work a great injustice. From what we have indicated no case was made either against Rudd or Wear, yet if we dismiss Rudd's appeal, Wear and the other parties would be liable on the bond for the sum of this judgment. Wear could in no way have compelled Rudd and his counsel to follow up their appeal, but when we have all the facts before us, as we have, should we, after finding that there is no liability upon either defendant, yet leave the case in such condition that the successful defendant would be liable for the full judgment? We think not. Rudd's act in failing to prosecute his appeal amounts to a fraud in law upon Wear. If Rudd is so anxious to have judgment go as against him, he can yet submit to such a judgment in the lower court, at a time and in a manner that will not work grave injustice to another.

There might be drawn from the facts before us other reasons for refusing this motion, but we prefer to put it upon the broad ground that we will not permit a legal fraud to work an injustice in this court, where we have full control of the case, as well as of our own rules. The judgment as a whole is therefore reversed. We feel better satisfied with this result each time we read the petition and the evidence. It is extremely doubtful whether or not the petition states facts sufficient to make it good in an action for fraud and deceit, and under the whole evidence we are convinced that plaintiff was not seriously misled as to the character of corporation with which he was dealing. Further, whilst he had a judgment against the corporation for the full amount of his note, it is not clear that the corporation received value received for the note. Plaintiff's money had been expended long before he dealt with the corporation, and at the time he only parted with his equity in the sand plant at Topeka, and his right to go into a corporation of the character of the one we now have under consideration. Just what these rights parted with by plaintiff were worth is not made wholly clear by the record.

Let the judgment as to both defendants be reversed. All concur.

SAWYER et al. v. BURRIS.

(St. Louis Court of Appeals. Missouri. July 20, 1909.)

1. COURTS (§ 159*)—JURISDICTION.

Inferior tribunals, not proceeding according to the course of the common law, are confined strictly to the authority given them by the statutes, and the grounds of the jurisdiction of such tribunals must appear affirmatively on the face of their proceedings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 404; Dec. Dig. § 159.*]

2. JUSTICES OF THE PEACE (§ 48*)—JURISDICTION.

Courts of justices of the peace in this state are of inferior and limited jurisdiction, and, when dealing with matters of attachment under the statute, do not proceed in accordance with the course of the common law, but under and by virtue of the statute.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 177; Dec. Dig. § 48.*]

3. JUSTICES OF THE PEACE (§ 48*)—ATTACHMENT—JURISDICTION.

Under Rev. St. 1899, § 3840 (Ann. St. 1906, p. 2130), providing that every action by attachment shall be brought before a justice of the township wherein the property, etc., of the defendants, etc., may be found, or in any adjoining township thereto, etc., where the situs of the property is relied on to confer jurisdiction on the justice, the record must show that the property was found in the township in which the suit was instituted, or in an adjoining township; and, in the absence of such facts so appearing, the judgment in the attachment suit is void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 177; Dec. Dig. § 48.*]

4. ATTACHMENT (§ 201*)—SALE UNDER VOID JUDGMENT.

Where an attachment judgment is void, a sale thereunder is also void.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 654; Dec. Dig. § 201.*]

5. PARTIES (§ 80*)—DEFECT OF PARTIES PLAINTIFF—WAIVER.

Rev. St. 1899, § 598 (Ann. St. 1906, p. 624), provides that defendant may demur to the petition when it appears therefrom that there is a defect of parties plaintiff. Rev. St. 1899, § 602 (Ann. St. 1906, p. 628), provides that, when the matters enumerated in section 598 do not appear on the face of the petition,

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the objection may be taken by answer, and that if no such objection be taken, either by demurrer or answer, defendant shall be deemed to have waived the same. *Held* that, where nothing appeared on the face of the petition showing that a party not named as plaintiff had any interest in the property involved, and defendant failed to refer to the matter in his answer, he waived the objection that there was a defect of parties plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123–131; Dec. Dig. § 80.*]

6. PARTNERSHIP (§ 5*) — ELEMENTS — AGREEMENT TO SHARE PROFITS.

The absence of profit sharing is conclusive that a partnership does not exist.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

7. PARTNERSHIP (§ 44*)—EXISTENCE OF RELATION — SHARING PROFITS — EVIDENCE—PRESUMPTION.

While participation in the profits of a business raises the presumption of the existence of a partnership, such presumption may be rebutted by a showing of facts to the contrary.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 61–63; Dec. Dig. § 44.*]

8. PARTNERSHIP (§ 5*)—EXISTENCE OF RELATION—SHARING PROFITS.

The mere fact that one received one-fourth of the net profits of a business conducted by another did not of itself constitute him a copartner with such other as between themselves.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

9. PARTNERSHIP (§ 17*)—EXISTENCE OF RELATION—INTENTION.

If it is obvious as between the parties that no partnership was intended, then the partnership relation does not obtain as between them, whatever arrangements they may have had for conducting business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 3; Dec. Dig. § 17.*]

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by Charles H. Sawyer and others against L. Burris. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

Robt. L. McLaren, Wammack & Welborn, and Rudolph Houck, for appellants. Mozley & Woody and E. F. Williamson, for respondent.

NORTONI, J. This is a suit in replevin. The issue was tried before the circuit court without a jury. The finding and judgment were for the defendant, and plaintiffs prosecute the appeal. The property sought to be recovered is a number of sawlogs and a considerable quantity of sawed lumber, which defendant removed from plaintiffs' millyards. There is no controversy over the fact that the lumber and sawlogs belonged originally to the plaintiff Sawyer. They were sold, however, by the constable under an execution on a judgment in attachment against Sawyer at the suit of one Price against him. The defendant purchased at the execution sale. After having purchased the logs and lumber, defendant removed the same from plaintiffs' millyard. Thereupon plaintiffs instituted this suit in replevin in the circuit court, seeking to recover the logs and lumber on the theory that the execution sale under which defendant purchased was of no avail, for the reason the judgment in attachment, on which the execution was issued, was void.

The pertinent facts, showing such features of the controversy as are relevant, are as follows: Plaintiff Sawyer, who resided in the city of St. Louis, owned and operated a sawmill in Stoddard county. The mill and property were mortgaged to his coplaintiff herein, but that is not important. This mill Sawyer conducted under the trade name of Mingo Mill & Lumber Co. One F. N. Price instituted a suit by attachment in the court of W. W. Monk, a justice of the peace of Duck creek township, in Stoddard county, against the Mingo Mill & Lumber Co. and Sawyer. In this suit a writ of attachment was levied upon the sawlogs and lumber involved in the present controversy. Upon a trial of the issue, both on the plea in abatement and on the merits in that suit, the finding and judgment were for the plaintiff. Afterwards the justice issued an execution on such judgment, and placed the same in the hands of the constable of Duck creek township. Acting under this execution, the constable sold the sawlogs and lumber theretofore attached at a constable's sale. The defendant, Burris, purchased at this sale, and, as before stated, took possession, and removed the logs and lumber from plaintiffs' millyard. Plaintiff thereupon instituted this action in replevin. To support his action of replevin plaintiff relied upon the proposition that the judgment in the attachment suit against him, under which the defendant claims the title and right of possession to the property involved, is absolutely void. On this question the entire record in the attachment suit of Price v. Mingo Mill & Lumber Co. and all of the docket entries to be found in the justice's docket in that case were introduced in evidence. It appears therefrom that W. W. Monk, the justice before whom the attachment suit was instituted and tried, is a justice of the peace in and for Duck creek township in Stoddard county, Mo.; that one F. N. Price instituted the attachment suit before him; that a writ of attachment was sued out thereunder, and levied upon the property involved in this suit. There is not a word, however, in the entire record, nor to be found in the docket entries, of the justice indicating that the property attached was situate at the time of the institution of the suit, or at any other time for that matter, in either Duck creek township or in a township adjoining thereto in Stoddard county.

The fact relied upon to confer jurisdiction on the justice in the attachment suit is the locus in quo of the property. Our statute (section 3840, Rev. St. 1899 [Ann. St. 1906,

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p. 2130]) provides that: "Every action by attachment shall be brought before a justice of the township wherein the property, credits or effects of the defendants, or either of them, may be found, or in any adjoining township thereto, or in the township wherein the defendant resides, or in any adjoining township thereto." The rule of law is well established to the effect that inferior tribunals not proceeding according to the course of the common law are confined strictly to the authority given them by the statutes, and the grounds of the jurisdiction of such tribunals must appear affirmatively on the face of their proceedings. State v. Metzger, 26 Mo. 65. It is certain that courts of the justice of the peace in this state are of inferior and limited jurisdiction, and when dealing with matters of attachment under our statute such courts do not proceed in accordance with the course of the common law, but, on the contrary, proceed under and by virtue of the statute solely, for the reason that the statute alone confers the remedy by attachment.

In keeping with the general principle stated our Supreme Court, in State v. Metzger, 26 Mo. 65, declared a judgment of conviction, entered by a justice of the peace for assault and battery, to be absolutely void; it failing to appear affirmatively from any portion of the record that the offense was committed within the county with the boundaries of which the jurisdiction of the justice of the peace was concurrent. Our statute (section 3839, Rev. St. 1899 [Ann. St. 1906, p. 2128]), touching the jurisdiction of a justice of the peace over actions for killing stock by railroad companies, requires such actions as are cognizable in that court to be instituted in the township where the injury happened, or in any township adjoining thereto. Under this grant of jurisdiction in respect of these matters our Supreme Court has held that the fact the animal was killed within the township of the justice of the peace or the adjoining township is jurisdictional, and that, inasmuch as such court is of limited and inferior jurisdiction, the facts conferring jurisdiction upon it to proceed must affirmatively appear on the face of the record in the proceeding; otherwise the judgment will be void. Hansberger v. Pacific Ry. Co., 43 Mo. 196; Haggard v. Railroad, 63 Mo. 302. The same doctrine has been declared by this court touching the court of a justice of the peace and a proceeding therein under the statute with respect to the enforcement of an agister's lien. The doctrine asserted in that case is that the court of a justice of the peace is of inferior and limited jurisdiction, and in a proceeding under the statute wth respect to the enforcement of an agister's lien, it proceeds by virtue of the statute only, and not in accordance with the course of the common law. Under such circumstances all of the facts conferring jurisdiction upon the court to proceed and give judgment therein must appear affirmatively on the face of the record. Patchen v. Durrett, 116 Mo. App. 437, 92 S. W. 721.

When, as in this case, the situs of the property is the fact relied upon to confer jurisdiction upon the justice of the peace to entertain and enforce an attachment under our statute, the same doctrine has been several times declared in respect of that matter. That the doctrine of the cases above referred to is relevant as well to proceedings by attachment before a justice of the peace is said to be clear. The material facts which invoke its application are that the justice's court is of limited and inferior jurisdiction, and that in respect of attachments it does not proceed according to the course of the common law, but on the contrary, proceeds under the statute solely. In such circumstances, if the situs of the property is relied upon for the purpose of conferring jurisdiction upon the justice, this fact is jurisdictional, and it is not sufficient that such fact actually exists, but it must affirmatively appear on the face of the record in such proceedings. That is to say, such facts, aside from being lodged in the case by proof, must appear affirmatively on the face of the record. It must appear that the property of the defendant attached was found in the township in which the suit was instituted, or in an adjoining township thereto. In the absence of such facts so appearing, the judgment in the attachment suit is void. Rocheport Bank v. Doak, 75 Mo. App. 332; Belshe v. Lamp, 91 Mo. App. 477; State ex rel. Castleman v. Cunningham, 106 Mo. App. 58, 79 S. W. 1017. Of course, if the judgment is void in such circumstances, and the authorities so declare, it is without avail even against a collateral attack. Indeed, the courts have so treated such judgments when assailed collaterally, as will appear by reference to State ex rel. Castleman v. Cunningham, 106 Mo. App. 58, 79 S. W. 1017, and Belshe v. Lamp, 91 Mo. App. 477. It seems, however, where the judgment of the justice has been attacked for this reason in a direct proceeding, as by an appeal therefrom, the courts have said the record may be amended in the circuit court, so as to supply such jurisdictional fact, if such fact exists. Daniel v. Atkins, 66 Mo. App. 342; Rocheport Bank v. Doak, 75 Mo. App. 332. These rulings, when considered together, present something of an anomaly, for it results that when such judgment is directly attacked, as by an appeal therefrom, it will be treated as not absolutely void, and the facts giving it life and vigor may be supplied by amendment to the record in the circuit court. However, when the judgment is attacked in a collateral proceeding, as here—that is, when no appeal therefrom has been taken, and the judgment of the justice of the peace in the attachment suit is relied upon as the basis of the right asserted by the party—it will be treated as

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entirely void and ineffectual against a collateral attack. State ex rel. Castleman v. Cunningham, 106 Mo. App. 58, 79 S. W. 1017; Belshe v. Lamp, 91 Mo. App. 477. Be this as it may, if such amendments are allowable at all, it is because of the very liberal statutory provision to be found in section 4079, Rev. St. 1899, authorizing amendments in the circuit court of the statement of the cause of action or counterclaim, etc., filed before the justice. Under this section the Supreme Court held that a defective statement of the cause of action filed before the justice of the peace could be amended in the circuit court, so as to show facts which were jurisdictional. Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489. Upon the authority of that case, this court afterwards expressed the opinion, in a direct proceeding by appeal, that jurisdictional facts omitted from the record of an attachment proceeding before a justice of the peace could be supplied by amendment in the circuit court. Daniel v. Atkins, 66 Mo. App. 342. Although the relevancy of section 4079, Rev. St. 1899, authorizing amendments of the statement of the cause of action and counterclaim in the circuit court, under which Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489, was decided, may not be entirely clear, the proposition that amendments may be had in the circuit court on appeal, so as to show the jurisdictional facts which are absent here, seems to be established by the ruling in Daniel v. Atkins and Rocheport Bank v. Doak, supra.

It appears the plaintiff owned and was in possession of the sawlogs and lumber involved in this suit, and that the defendant took possession thereof under and by virtue of his purchase at the execution sale. He claimed no other right thereto. Therefore, unless the judgment in attachment on which the execution was issued was valid, the defendant had no right or title whatever to the lumber. Of course defendant's right in the first instance under the execution must depend upon a valid judgment to support the same. If the attachment judgment is void, then the sale thereunder is void as well. State ex rel. Castleman v. Cunningham, 106 Mo. App. 58, 61 79 S. W. 1017. The result is the defendant had no right or title whatever to the property involved, and the judgment should have been given for the plaintiff, unless another question to be considered should influence the matter otherwise.

It is said the plaintiff ought not to recover in this action because he is not the sole owner of the sawlogs and lumber involved; that is, that one J. T. St. Louis is a partner therein, and that St. Louis is not a party plaintiff. The petition avers plaintiffs are the owners of the property involved. There is nothing whatever stated therein from which it appears J. T. St. Louis is interested in the same in any manner. This action in replevin originated in the circuit court, and our statute (section 598, Rev. St. 1899 [Ann. St. 1906, p. 624]), prescribing the rule of practice for that court, provides that the defendant may demur to the petition when it appears therefrom that there is a defect of parties plaintiff. Section 602, Rev. St. 1899 (Ann. St. 1906, p. 628), provides that when the matters enumerated in section 598 do not appear upon the face of the petition, the objection may be taken by answer. This section further provides in effect that, if no such objection be taken with respect to a defect of parties plaintiff, either by demurrer or answer, the defendant shall be deemed to have waived the same. It is certain that nothing appears on the face of the petition with respect to J. T. St. Louis having any interest whatever in this property. It is certain, too, that the defendant failed to refer to that matter in any manner whatever in his answer. In such circumstances the matter is waived, and defendant will not be permitted to assert any claim to the contrary at this stage of the proceeding. Anderson v. McPike, 41 Mo. App. 328; Donahue v. Bragg, 49 Mo. App. 273; Mills v. Carthage, 31 Mo. App. 141; Reugger v. Lindenberger, 53 Mo. 364; Dunn v. Railway, 68 Mo. 268, 279. However that may be, it appears conclusively from the record that the partnership relation did not exist inter sese between the plaintiff Sawyer and J. T. St. Louis. Sawyer himself testified that he was the sole owner of the sawlogs and lumber involved, subject only to the rights of his coplaintiff, who has a mortgage thereon, and that J. T. St. Louis had no interest whatever in the property involved. Plaintiff's testimony is to the effect that St. Louis was his manager and superintendent at the mill, and as compensation for his services, received one-fourth of the net profits of the business. St. Louis himself, a witness, did not claim any interest whatever in the sawlogs and lumber involved. The written contract between plaintiff Sawyer and J. T. St. Louis introduced in evidence shows that St. Louis was acting as general manager and superintendent of the mill for plaintiff, and that he was to receive one-fourth of the net profits from the mill and logging interests. Now it is very true that an agreement to share profits is an essential element in every partnership, and that the absence of profit sharing is conclusive that a partnership does not exist. Meinhart v. Draper, 133 Mo. App. 50, 112 S. W. 709. It is very true, also, that the participation in the profits of a business raises the presumption of the existence of a partnership. However, this presumption is not conclusive. It may be rebutted by a showing of fact to the contrary. Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823. Now we are not concerned here with what may be sufficient to constitute individuals partners in business when viewed from the standpoint of a third party who has treated with them, relying upon that relation, but on the contrary, the precise question for decision re-

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lates to a partnership inter sese. That is, unless it appears that plaintiff Sawyer and J. T. St. Louis were actually partners between themselves in the property involved, this action could properly be maintained in the name of the present plaintiffs; that is, in the name of plaintiff Sawyer and his coplaintiff, the mortgagee, even if the question were properly raised by the answer. The mere fact that J. T. St. Louis received one-fourth of the net profits of the mill and logging business in and of itself did not constitute him a copartner with plaintiff Sawyer, as between themselves. Men are frequently employed by others on such a basis, and it is certain that such an arrangement alone is not sufficient to constitute them partners, although it may afford a presumption to that effect. Nugent v. Armour Packing Co., 208 Mo. 480, 106 S. W. 648. Indeed, the relation of partnership lies in contract, and is to be determined always as between the alleged partners by reference to the matter of intention. If it is obvious as between the parties that no partnership was intended, then the partnership relation does not obtain as between them, whatever arrangements they may have had for conducting the business. McDonald v. Matney, 82 Mo. 358; Nugent v. Armour Packing Co., 208 Mo. 480, 106 S. W. 648. It is entirely clear from the facts appearing in this record that the partnership relations did not exist between plaintiff Sawyer and J. T. St. Louis. The intention of the parties to the contrary is clearly expressed in the written contract between them, to the effect that St. Louis was to serve Sawyer as general manager and superintendent for a compensation of one-fourth of the net profits of the business.

The judgment should be reversed, and the cause remanded, with directions to the trial court to make a finding and judgment for plaintiffs according to law. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

DICKMANN v. HESPOS.

(St. Louis Court of Appeals. Missouri. July 20, 1909.)

1. APPEAL AND ERROR (§ 933*)—PRESUMPTION.
Every presumption is to be indulged in favor of an order granting a new trial, without the ground therefor being assigned of record as directed by Rev. St. 1899, § 801 (Ann. St. 1906, p. 764), so that, being authorized on any of the grounds of the motion, it will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3772; Dec. Dig. § 933.*]

2. APPEAL AND ERROR (§ 933*)—REVIEW—ORDER FOR NEW TRIAL.
There being substantial evidence to support a theory of the case contrary to the verdict, the order granting a new trial generally, and so presumptively on the ground of the motion that the verdict was against the weight of evidence, will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3775; Dec. Dig. § 933.*]

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Action by Joseph F. Dickmann against Louis H. Hespos. From an order granting a new trial, plaintiff appeals. Affirmed.

Edward N. Robinson and James C. Shaner, for appellant. Sterling P. Bond, for respondent.

NORTONI, J. In this action plaintiff, a real estate agent, seeks to recover commissions alleged to have accrued to him on account of real estate sold. On a trial before the jury in the circuit court, plaintiff recovered. Afterwards the court sustained defendant's motion and granted a new trial. Plaintiff prosecutes the appeal from the order of the court granting the new trial.

The evidence is more or less conflicting on the material issues involved. Indeed, there is a substantial proof in the record tending to support the defendant's theory that the plaintiff has no claim whatever against him. Although our statute (section 801, Rev. St. 1899 [Ann. St. 1906, p. 764]) directs the court to enter of record the grounds on which every new trial is granted, this rule was not observed in the present instance. The fact is, the court merely sustained defendant's motion to that effect and granted a new trial thereon. For aught we know, it was of opinion that each and every ground assigned in the motion therefor was well taken. It is the rule, where the appeal is from an order granting a new trial, and the court has sustained a motion therefor and granted a new trial without assigning a reason of record, to indulge every presumption in favor of the action of the court in that behalf. Therefore, if the action of the court in granting a new trial may be sustained upon any of the grounds alleged in the motion, the judgment should not be reversed. First Nat. Bank v. Wood, 124 Mo. 72, 27 S. W. 554; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440. Among others, one of the grounds set forth in the motion for new trial, and upon which the new trial was urged, is that "because the verdict is against the weight of the evidence." Now, by sustaining this motion and granting the new trial thereon, without assigning any special reason therefor, the trial court affirmed that in its opinion the verdict of the jury was against the weight of the evidence in the case. The law affixes the duty upon the trial court to supervise the verdict of the jury. It is the peculiar function of that tribunal to pass upon and decide as to whether or not the verdict is supported by, or contrary to, the evidence. That the action of the trial judge, in passing upon the weight of the evidence after the verdict is rendered,

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is one of the matters within his judicial discretion, is a proposition too well established to require discussion. First Nat. Bank v. Wood, 124 Mo. 72, 27 S. W. 554; State ex rel. Stewart v. Todd, 92 Mo. App. 1; Secrist v. Eubank, 104 Mo. App. 113, 78 S. W. 315. It has been many times decided in this state that the discretion of the trial judge in thus supervising the verdict by either sustaining or overruling the motion for new trial, on the ground that it is either supported by or is against the weight of the evidence, will not be reviewed by the appellate court, unless it appears the discretion of the court has been abused or exercised in an arbitrary manner. Indeed, where the verdict is set aside, as in this case, for the reason that in the opinion of the court it is contrary to the weight of the evidence, the judgment should always be affirmed, if there is substantial evidence in the record tending to establish a theory of the case contrary to the verdict. First Nat. Bank v. Wood, 124 Mo. 72, 76, 77, 27 S. W. 554; Secrist v. Eubank, 104 Mo. App. 113, 78 S. W. 315; Iron Mountain Bank v. Armstrong, 92 Mo. 265, 280, 4 S. W. 720; State ex rel. Stewart v. Todd, 92 Mo. App. 1; Thompson v. Met. Street Railway, 140 Mo. 125, 41 S. W. 454; Taylor v. Kansas City, etc., Ry. Co., 163 Mo. 183, 63 S. W. 375.

We find the evidence in the record to be more or less conflicting. As stated before, there is substantial proof tending to support the theory of the case presented by the defendant. It is obvious that the court did not abuse its discretion in granting the new trial, and the judgment, therefore, should be affirmed.

It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

HILLERBRAND v. MAY MERCANTILE CO.

(St. Louis Court of Appeals. Missouri. July 20, 1909.)

1. NEGLIGENCE (§ 23*)—DANGEROUS PREMISES—CHILDREN.

Though leaving uncovered the box through which ran the hand rail of a moving stairway in a store was not dangerous to adults, a three year old child, who, while in the store with her mother, got her hand into the opening, was entitled to recover of the proprietor for the injury, if leaving the hole uncovered was an omission by it of its duty to use ordinary care to have its premises reasonably safe as a place where children were expected to come, depending on whether the opening and the rail running in it were dangerous to a child who meddled with them, and so likely to excite the curiosity of children and induce them to meddle that a person of ordinary prudence would have anticipated and guarded against the risk; and this even if the child would have to stoop to get her hand into the hole.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

2. NEGLIGENCE (§ 134*)—EVIDENCE—COMMON KNOWLEDGE.

The jury from common knowledge of the nature of children without any evidence that other children had been so allured could find that an opening in a box and a hand rail of a moving stairway in a store passing through it were likely to excite a child's curiosity, and induce it to put its hand thereto, so that, being dangerous, it was the proprietor's duty to guard it.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

3. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

Where the negligence is leaving uncovered, an opening into which a child got its hand, resulting in injury, it is immaterial whether it intentionally or accidentally got its hand therein, it being only three years old, and so incapable of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121–129; Dec. Dig. § 85.*]

4. NEGLIGENCE (§ 17*)—EVIDENCE.

That the moving stairway in defendant's store was of the usual pattern is immaterial on the question of its liability to plaintiff, a child three years old who got her hand into the opening of the box into which the hand rail ran, the negligence charged being the leaving of such opening uncovered and the evidence that such openings in well-managed establishments were usually screened.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 22; Dec. Dig. § 17.*]

5. DAMAGES (§ 208*)—FUTURE SUFFERING—EVIDENCE.

Leaving to the jury the question whether plaintiff, three years old at the time of the injury to her hand, would endure future pain or suffering therefrom, was justified by testimony that even to the time of the trial, when an article was put in the hand, she would act like she was hurt, and transfer the article to the other hand, and that she had acted ever since the injury as if she was suffering.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.*]

6. DAMAGES (§ 131*)—PERSONAL INJURY—EXCESSIVE DAMAGES.

A verdict of $700 for injury to a hand of a child not involving the bones or ligaments, but an extensive superficial laceration, causing severe pain for weeks, and so affecting the hand as to change the child from a normal right-handed one to a left-handed one, and requiring portions of the skin or flesh to be cut away, and treatment by a physician for four weeks, during the daily dressing of which she would scream loudly from pain, she having little use of the hand at the time of the trial and acting as though it hurt her, was not so unreasonable as to require interference.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357–371; Dec. Dig. § 131.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by Dorothy Hillerbrand against the May Mercantile Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones, Jones, Hocker & Davis, for appellant. Christian F. Schneider and Kurt Von Reppert, for respondent.

GOODE, J. This action was instituted to recover damages for an injury to the plaintiff, a minor suing by next friend. Defendant conducts a large retail department store

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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several stories high in the city of St. Louis. One of the means provided for patrons to pass between the first and second floors is a moving stairway or escalador. This device consists of two flights of stairs of easy slope, extending parallel to each other from the first to the second floor, kept in motion by machinery, one ascending as the other descends, and transporting passengers from one floor to the other. The banisters or hand rails on either side of the stairs move as the stairs do, and are composed of a rubber casing around an endless interior chain. On the first floor these hand rails and the endless chains they cover run into boxes some six or eight inches square, and projecting above the surface of the floor from six inches to a foot. Inside the boxes the chains and their rubber coverings run over sprocket wheels, and then up again to the second story. There is evidence to prove the top of one of these boxes was open at the time of the accident in question, and that the aperture was large enough for a grown person's two hands to be inserted. One day plaintiff, who was then a child three years old, was taken by her mother to defendant's establishment, and while the mother was engaged in making a purchase in close proximity to the foot of the descending stairway in some way plaintiff's right hand became inserted in the box into which a hand rail descended, was clamped by the hand rail, and gradually drawn farther into the opening, and, before it could be extricated, her hand and arm were severely lacerated. No witness saw the child's hand get in the opening, as attention was first directed to her plight by her screams. Some moments elapsed before the machinery could be stopped and her arm drawn out, and meanwhile the arm was pulled in farther as the rail continued to revolve. After describing the construction of the stairway, the petition alleges defendant knew, or by the exercise of ordinary care would have known, the public, including the child, might visit their store and ride on the stairway, knew the stairs were alluring to children, and particularly that the opening in the box was likely to attract them, and induce them to put their hands in the hole where the rail was running; that nevertheless defendant carelessly failed to cover the opening and allowed it to remain unguarded; that the plaintiff's right hand was caught suddenly in said hole between the box and the belt used in propelling the stairway, and her hand was thereby torn and lacerated, causing her great and excruciating pain of both body and mind, and mangling her so she was crippled permanently. The damages demanded were $4,500. Defendant answered by a general denial.

The main instruction given for plaintiff required the jury to find in addition to certain undisputed facts as follows: The moving stairway suddenly caught plaintiff's right hand; that said hand was caught by the belt in propelling the stairway, and was drawn through the hole in the frame of it, and thereby injured; that plaintiff was about three years old at the time; that the stairway was attractive to children as defendant knew, or by ordinary care would have known, and that children were apt to put their hands into the hole or opening, and be injured; that defendant failed to cover or guard the hole, and therein failed to exercise ordinary care for the safety of persons lawfully about the stairway, and plaintiff's injuries were thereby caused. If the finding was for plaintiff, damages were authorized to compensate her reasonably for the pain of body and mind she had suffered since the injury, and for such pain and suffering as the jury might believe from the evidence she would endure in the future. For defendant the court instructed that if the jury believed the hole in which plaintiff put her hand was necessary to permit the passage of the hand rail or banister, and was the usual and ordinary opening maintained by persons who exercised ordinary care, through which hand rails like the one mentioned in the evidence ran, and such an opening was in general use, the verdict should be for the defendant; that defendant was not liable for plaintiff's injury if it resulted from a cause which defendant by the exercise of ordinary care would not reasonably anticipate, and, if the jury found defendant could not reasonably have anticipated the injury by the exercise of ordinary care, the verdict should be in its favor. The last two instructions were in the form requested by defendant, except slight and immaterial changes. The court also instructed that, if the jury believe the escalador and its appliances were constructed in the usual and ordinary way and guarded so far as practicable, defendant was not guilty of any negligence, and the verdict must be for it. An instruction was given correctly defining negligence and ordinary care, and also an accurate instruction regarding the credibility of witnesses, and how their testimony should be weighed. A request to direct a verdict in defendant's favor was refused, and one was returned for plaintiff in which her damages were assessed at $700. Judgment having been entered accordingly, defendant appealed and assigns as errors that the verdict is excessive, should have been for defendant, instead of plaintiff, and wrong rulings on the request for instructions.

1. Plaintiff was entitled to recover if leaving uncovered the hole in the box wherein the hand rail ran was an omission by defendant of its duty to use ordinary care to have its premises reasonably safe as a place where children were expected to come. Whether or not defendant discharged its duty in this regard depends upon whether the aperture and the rail running into it were dangerous to a child who meddled with

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them, and so likely to excite the curiosity of children and induce them to meddle that a person of ordinary prudence would have anticipated and guarded against the risk. The contrivance was not unreasonably dangerous, if dangerous at all, to persons of full discretion, and counsel for defendant say it was not to children in its ordinary operation, and that there was no evidence it tended to attract them into playing with it. It is true no testimony was given that other children had been allured by the stairway or the rail running into the box; but the jury might say from their knowledge of the instincts of childhood that the construction and movement of the machinery was likely to excite a small child's curiosity, and allure it into thrusting its hand into the box, or into laying its hand on the banister and permitting it to be carried in by the banister's motion—might say, too, the opening was a place of danger for an inserted hand. An expert witness introduced by defendant said a person's hand might get into the hole, but could only do so if the person stooped. No doubt a grown person would need to bend down to thrust his hand into the box, and maybe a child of three years of age would need to do this. That matter is unimportant; for, considering the ways of children, we hold it was so likely some child would be attracted into playing with the rail and getting its hand caught in the hole as to render the question of whether defendant should have anticipated such an incident one for the jury. The notion that because it was not proved other children had been allured by the contrivance the jury had no evidence from which to infer the likelihood of such an occurrence is unsound. By that reasoning, if the first child who visited the machinery got hurt, then no matter how dangerous the device was, there could be no recovery because it would be impossible to prove children had been attracted before. In our judgment common knowledge of the nature of children sufficed as evidence for the jury that due care was omitted in failing to cover the box. Some of the testimony tended to prove the aperture was a foot above the floor, and, if this was true, a small child would not have to stoop much to put its hand in the box. The gravamen of the petition is negligence in failing to screen or guard the opening, and it is immaterial whether plaintiff intentionally thrust her hand in the box or got it in accidentally, for she was too young to be guilty of contributory negligence. Proprietors of premises who invite children on them must use care to keep them reasonably safe, not omitting precautions against injury from childish impulses. Nagel v. Railroad, 75 Mo. 653, 42 Am. Rep. 418; 1 Beven, Neg. (3d Ed.) p. 161 et seq.; 1 Thompson, Comm. on Neg. §§ 1024–1051, inclusive, and citations. When extended in favor of trespassing children, the rule has been criticised on the ground that the proprietor is under no duty to keep his premises safe for trespassers, whether they be children or adults. This criticism does not concern us in the present case, as plaintiff was in the store by invitation, and it is unquestioned law that a person who invites children on his property is liable if he has not used due care to provide for their safety. As a standard treatise says: "In such an instance the rule is clear because the child is not a trespasser, but the owner of the property, by inviting him to come on the premises, has assumed the duty of exercising reasonable care to the end that he sustain no injury in consequence of dangerous pitfalls, attractive nuisances, or the like." 1 Thompson, Neg. § 1050. This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them—an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends on the degree of danger to be apprehended. Bowen v. Railroad Co., 95 Mo. 268, 8 S. W. 230; Quirk v. Elevator Co., 126 Mo. 279, 28 S. W. 1080. Because children are more heedless and have less discretion and capacity to avoid danger than adults, more care must be exercised by others for their safety. This rule was declared in another aspect, but without weakening the decision as an authority applicable to the present case, in Boland v. Railway Co., 36 Mo. 484, wherein our Supreme Court, speaking through Judge Wagner, said it would be unjust to require of a child with little capacity and discretion the same precaution and prudence which reasonably may be expected of older persons, and therefore one using dangerous instruments, machinery, or vehicles, when he knows infants, idiots, or others of imperfect discretion are in close proximity is compelled to use a degree of caution, skill, and diligence not required of him in the case of mature persons.

2. We agree the testimony shows the stairway in defendant's establishment was similar to those in general use, but this circumstance does not exonerate defendant. The complaint is not of the pattern or kind of stairway or that it or its appliances were needlessly dangerous if arranged and operated in a proper manner, but that the opening of the box into which the handrail revolved was left uncovered when, out of proper regard for the safety of children, it should have been covered. Instead of the evidence showing it was usual in well-managed establishments to leave the box open, defendant's own witnesses testified the other way, and that these openings, and indeed the very one in which plaintiff was hurt, were usually screened by a wire gauze which encircled the hand rail without quite touching it, the purpose being to prevent anything getting into the opening—"dirt, handkerchiefs, um-

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brellas," etc. As to whether there was any screen over the aperture the day of the accident, or, if not, when it had been removed, or pushed down so as to be ineffective, or whether plaintiff herself pressed it down, the evidence would support different inferences. One of the employés in the store testified the wire gauze had been torn, but he did not know whether this happened before or after the accident. It was clear defendant was not entitled to a verdict as a matter of law on the ground that the stairway and its appliances were in the condition justified by common use or that the box was properly screened. These matters were for the jury, and were submitted in accurate instructions.

3. The court is said to have erred in the main instruction for plaintiff, in leaving it to the jury to say whether her hand was caught suddenly "by the belt used in propelling the stairway," since there was no evidence it was so caught. The witnesses used the words "belt," "hand rail," and "banister" interchangeably to designate the endless chain and its covering which ran into the box and around the sprocket wheel. Though no one saw how plaintiff's hand got into the box or was caught, the evidence warranted an inference that it was suddenly caught by the moving rail in consequence of having been thrust into the opening in childish play or accidentally. The main instruction was substantially correct, and we find no reversible error in it.

4. Complaint is made of the second paragraph in the instruction on the measure of damages; counsel insisting there was no evidence tending to prove plaintiff would endure future pain or suffering. It is to be observed the court did not authorize damages for permanent injury or suffering, but only for such past and future suffering as the jury might find from the evidence plaintiff had endured or would endure. There was testimony that when a knife, spoon, or other article was put into her injured hand she would act like she was hurt, and transfer the article to her left hand; that she continued to do this to the date of the trial. Her father testified she had acted ever since the injury as if she was suffering. These items of testimony justified the court in leaving it to the jury to say whether she would suffer pain in the future.

5. The verdict is challenged as excessive, but we think it was not. Plaintiff's injury did not involve the bones or ligaments of her hand, but, though the laceration was superficial, it was extensive, and caused severe pain for weeks, and so affected the hand as to change plaintiff from a normal right-handed girl into a left-handed one. Portions of the skin, or, as one witness said, the flesh, had to be clipped away with scissors. She was under treatment by a physician for four weeks, and, when her hand was dressed day after day, would scream so loudly from the pain as to be heard a block away. At the time of the trial she seemed to have but little use of the injured member, and handled articles with it awkwardly. She still acted as though it hurt her. The amount of the verdict was not so unreasonable as to call for interference by us against the opinion of the jury and the trial judge.

Judgment will be affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

WAGNER v. EDISON ELECTRIC ILLUMINATING CO. OF CARONDELET.

(St. Louis Court of Appeals. Missouri. July 20, 1909.)

WORK AND LABOR (§ 30*)—RIGHT OF RECOVERY—INSTRUCTIONS.

Plaintiff, representing certain electric companies, and other persons, representing other companies, organized a joint conduit committee to construct conduits for their wires, of which plaintiff was elected chairman. The committee appointed plaintiff engineer to supervise the underground work. In an action against defendant, one of the companies other than those which plaintiff represented in the organization of the committee, for its proportional part of the value of his services as such supervising engineer, the court instructed that, though plaintiff may have intended, when he was selected as such engineer, to charge defendant for such services as he might render it, yet if he did not disclose said intention to defendant at or before his selection, and defendant did not then know, or have reason to believe "from the committee's employment of him as engineer," that it was expected to pay him, and did not intend to pay him for such services, and defendant notified him, as soon as it learned that he intended to charge for said services, that it did not intend to pay him, he could not recover. *Held*, that the instruction, so far as it touched on the subject of constructive contract, was erroneous in authorizing a finding for defendant if it did not know, or have reason to believe from the committee's employment of plaintiff, that it was expected to pay him, and in not authorizing a finding for plaintiff if the character of the services and the circumstances attending the employment were such as to lead a reasonable person to believe that compensation would be expected from him therefor, though plaintiff by reason of his position as chairman of the committee owed duties to defendant, making the presumption otherwise than though the services were rendered to a stranger.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 30.*]

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Herbert A. Wagner against the Edison Electric Illuminating Company of Carondelet. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

This is a suit quantum meruit, in which plaintiff seeks to recover the reasonable value of his services as engineer, rendered the defendant in supervising the construction of a conduit in the city of St. Louis. Upon a

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trial before a jury the finding and judgment were for defendant, and the plaintiff appeals. The facts out of which the controversy arises are highly complicated, and require an extended statement. The counsel for respondent concede the statement of facts as prepared and printed by appellant's counsel in the briefs to be entirely fair and just. Upon investigating the case, we believe no more accurate statement thereof can be made than that referred to. We, therefore, adopt appellant's statement of facts, as follows:

"Ordinance No. 18,680 of the city of St. Louis, known as the 'Keyes' ordinance, required that all the electric lighting and power companies doing business within the district bounded by the river and Twenty-Second street, Wash and Spruce streets, to bury their wires underground, and forbids the use of poles, etc., above ground within said territory after December 31, 1898. This ordinance provided for certain privileges to persons and companies complying with its terms, and the defendant and the several companies hereinafter named qualified under the ordinance. The general plan of construction contemplated by the ordinance was for conduits, through which passed ducts, or pipes to be built under the surface of the city streets, under the superintending control, as to location, etc., of the board of public improvements. Where the plans presented by different companies to the board of public improvements contemplated a use by all of the same streets or alleys, the board had the power to compel the applicants to build and maintain joint conduits, with the right, if the companies disagreed, to apportion the cost. Under a contract dated April 17, 1897, providing for the joint construction of underground conduits, as required by the Keyes ordinance, and entered into between the following companies and the National Conduit Company of St. Louis, viz.: The Missouri Electric Light & Power Company, the St. Louis Electric Light & Power Company, the Phœnix Light, Heat & Power Co., and the Edison Electric Illuminating Company of Carondelet—it was provided, among other things, for the formation of a construction committee to be composed of one representative of each of the above companies. In accordance with said provision the following gentlemen met by appointment at the office of the Laclede Gaslight Company, on April 30th, at 3 o'clock p. m.: Herbert A. Wagner, the plaintiff herein, representing the Missouri Electric Light & Power Company; D. W. Guernsey, representing the St. Louis Electric Light & Power Company; A. Ross, representing the Phœnix Light, Heat & Power Company; E. V. Matlack, representing the Edison Electric Illuminating Company of Carondelet, the defendant herein—and, having shown that they were duly authorized to represent their respective companies, organized by electing Mr. Wagner chairman, and Mr. Ross secretary of the committee. This committee was known as 'The Joint Conduit Construction Committee.' One of the rules adopted by this joint conduit construction committee provided that no motion should be carried unless it received three votes in the affirmative. At a meeting of this committee, held on May 7, 1897, Mr. Ross moved that Mr. Wagner, the plaintiff, be appointed engineer to supervise the underground work, as provided in the contract entered into on April 17, 1897, between the National Conduit Company of St. Louis and the companies represented on the committee. The motion was seconded by Mr. Guernsey. All voted aye except Mr. Matlack, the secretary of the defendant, who voted no. Mr. Wagner was declared duly appointed engineer.

"In the meeting of the joint conduit construction committee held on May 8, 1897, a motion providing for the appointment of a subcommittee to report upon a plan of defining the duties of the engineer was passed. Mr. Guernsey, temporary chairman, appointed Matlack, Wagner, and Ross. Wagner and Ross submitted a majority report, and Matlack submitted a minority report at the same meeting at which they were appointed. On May 11, 1897, the subcommittee withdrew the majority and minority reports, and presented the following report: 'St. Louis, May 11, 1897. The engineer shall provide all plans and submit same for the approval of the committee, may obtain all necessary permits from the board of public improvements after acceptance by the companies of the finding of the board and shall make requisition upon the other companies for their proportion of the deposit to be made with the city and for their proportion of the cost of preparing plans. He shall have general supervision of the work as provided in the contract entered into April 17, 1897; he shall make a detailed weekly report in triplicate to the committee which shall show the amount of joint work accomplished; he shall consult freely with the engineers of the companies and all disputes between them shall be referred to the committee for adjustment. He shall certify all contractors bills in ample time for the committee to draw same for payment as provided in the contract; each company shall appoint, subject to the approval of the committee, its pro rata of inspectors or draftsmen as may be required for the general engineering force, who may be removed upon complaint of the engineer and the action of the committee. Each company shall pay its inspectors, but they shall be subject to the direction of the engineer. The pro rata of inspectors, etc., to be furnished by each company shall be approximately as follows: The Missouri Electric Light & Power Company, seven-twelfths; Phœnix Light, Heat & Power Company, two-twelfths; Edison Illuminating Company of Carondelet, two-twelfths, and this proportion may be changed by the action of the committee should it be deemed advisable. Herbert A. Wagner. E. V. Mat-

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lack. A. Ross.' This report was unanimously adopted.

"On motion of Mr. Matlack, made in a meeting of the joint conduit construction committee held May 11, 1897, the following letter was sent to the board of public improvements, and by it received in due course: 'St. Louis, Mo., May 11, 1897. To the Honorable Board of Public Improvements of the City of St. Louis—Gentlemen: The undersigned companies have appointed Mr. Herbert A. Wagner, engineer, for the construction of their conduits under authority of Ordinance No. 18,680. You will please deliver permits for conduits to him or his order. Very respectfully, Missouri Electric Light & Power Co., Edison Illuminating Co. of St. Louis, The Electric Light, Power & Conduit Co., S. P. Pike, Secretary. Phœnix Light, Heat & Power Co., A. Ross, President. Edison Electric Illuminating Company of Carondelet, E. V. Matlack, Secretary. St. Louis Electric Light & Power Co., E. W. Guernsey, President.'

"The contract heretofore mentioned, and entered into on the 17th day of April, 1897, between the National Conduit Company of St. Louis, the National Conduit & Cable Company, and the Abbott-Gamble Contracting Company, as contractors, and the Missouri Electric Light & Power Company, the Phœnix Light, Heat & Power Company, the St. Louis Electric Light & Power Company, and the Edison Electric Illuminating Company of Carondelet, provided that all disputes between the parties to the contract should be referred to the joint conduit construction committee, and the committee's decision was to be final. The contract also provided that many questions regarding the policy to be followed in laying and constructing the conduits and material to be used therein, the way in which it was to be used, and many other details of the work, were to be done under the direction of the engineer, and according to his directions, and were to meet with his approval. Before acceptance of the work, or any section thereof, the condition of all work and material was to be ascertained by the engineer, and any conduit which should be found defective by the engineer was to be replaced at once with perfect work by the contractors at their expense. The money to be paid under the contract was paid under the direction of the committee.

"Under authority of the letter to the board of public improvements, dated May 11, 1897, heretofore set out, the supervisor of city lighting delivered to Mr. Wagner, or his representatives, permits for the building of conduits on various streets and alleys. These conduits were being built by the companies signing this letter. The method which was followed by these companies before the supervisor of city lighting issued the permit was as follows: The first act was the filing of general plans by the different companies, showing the route and the number of ducts they wished to construct, and the several streets within the underground district. Then, following that, the board of public improvements prepared and issued plans, giving the number of ducts that would be required for each company in the construction of a joint conduit on certain designated streets or alleys within the underground district. The companies were required within a certain limited time, to file an acceptance of those findings, and make certain deposits with the city treasurer covering the cost of the excavation permits, and guaranteeing the restoration of the surface of the streets. Following that, detailed plans were submitted and adopted by the board as the joint conduit plans. Following that, the permits were issued.

"Plaintiff is a consulting engineer for electrical construction. Previous to 1897 he had been for a number of years with the Missouri Electric Light & Power Company, and also for some time with the Edison Electric Illuminating Company of St. Louis, as electrical engineer and as superintendent. After the motion was made and voted on in the joint committee for conduit construction, appointing Wagner engineer for supervision of the underground work, he accepted that position, and thereafter acted as supervising engineer for joint conduit work for the interests represented in the conduit construction committee. In such capacity he prepared plans for all conduit work after the findings of the board of public improvements had been made. These plans showed the size of the conduits, and all details as to size and location of manholes, service boxes, depth of conduits below the streets, distance from curbs, and methods of avoiding obstructions in the streets, such as sewer and water pipes and gas pipes. These plans were then submitted by plaintiff to the board of public improvements, and permits were issued. He or his representative obtained these permits from the board of public improvements, and the contractor was ordered by him to begin work on the part of the street covered by the permits. He supervised this work, and directed all of it personally or through representatives. He made weekly reports to the conduit construction committee, and monthly estimates of the amount of work done for each company by the contractor and the proportionate cost to each company for the work done, and estimates based on these reports were made upon each after their approval by the committee, on which the contractor based his bills for the work to the various companies. He represented the companies in all their dealings in connection with the contractors, and gave all orders to the contractors. The inspectors were under his charge, as were also the draftsmen.

"The drafting force consisted of a number of draftsmen, who made the detailed plans after the findings of the board of public improvements, and permits were issued on

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those detailed plans. There were a great many plans made, and each company had to have a copy of each plan made. The blanket plans which were filed by the companies showed the streets on which the company expected to build conduits, and the probable maximum number of ducts which each company would require on each street. The conduits actually built differed very considerably from the number of ducts shown in the blanket plans. In the actual construction work, the location of the conduits in the street and the depth to which they would be sunk was supervised by plaintiff, or done under his direction. These details were not shown in the blanket plans prepared by the board of public improvements. These details were worked out by plaintiff, and in doing so it was necessary first to consider the findings of the board of public improvements to determine the number of ducts allotted to each company, and the side of the street on which the conduits were to be constructed. After that it was necessary to determine as nearly as possible the obstructions which were liable to be encountered under the surface of the streets. For that purpose it was necessary to consult all the records in the street department and sewer department to determine the location of sewer, gas, and water pipes, and very often it was necessary to make plans to show these locations. From these plans the draftsmen, in making plans for the conduits, would determine about what part of the street to put the conduit in. Test holes often had to be dug in the street to determine the location of obstructions which were not accurately shown by the maps. In all there were prepared under plaintiff's direction about 8,000 plans. The estimation and measurement of the work was done under his direction. Before the contractors could be paid, it was necessary for him to measure the conduit work completed, and determine its cost, and apportion the cost between the different companies, in proportion to the number of ducts which each company was entitled to in the conduit in question.

"There were weekly and monthly reports. The estimates of the cost were made monthly. The weekly reports referred to details of construction, and the size of manholes and the location of service boxes to connect customers with the conduit. This work took practically all of plaintiff's time during the period of construction, it was outside of his duties as chairman of the joint conduit construction committee, and required his presence a great deal of the time on the trench. Besides the work on the trench there was a great deal of office work connected with the drafting. The drafting was done in the rooms of the Missouri Electric Light Company. There were between five and seven draftsmen under plaintiff's direction. As a rule, there were about 3 inspectors to each gang of men which the contractor was working, and the number of gangs varied from time to time, and the number of inspectors probably varied from 18 to 20. Besides making reports plaintiff discussed very frequently in the presence of Mr. Matlack the work that was being done by himself and under his supervision. The cost of the work done by the companies represented on the conduit construction committee from May 7, 1897, to May 7, 1898, amounted to between $200,000 and $250,000. Almost all of the time the defendant was interested in the work done under plaintiff's supervision. Of course there were times when there was more work being done than at others, but during the entire period in question there was always work in the drafting room, or on the construction of conduits being done by the engineering force of the Edison Electric Illuminating Company of Carondelet, which plaintiff supervised. The defendant did, during the time in question, about $50,000 worth of work.

"Plaintiff represented on the committee three companies: The Missouri Electric Light & Power Company, and the Missouri-Edison Electric Company, which were practically one at that time, and then there was a third company, which was frequently mentioned, the Electric Light, Power & Conduit Company. The stock in all these three companies was held by the same interests, and the amount of work done by the companies plaintiff represented on the committee was, prior to the 7th day of May, 1898, about one-half of the total amount done. Eventually it was more than one-half, but during the year in question it was about one-half. These three companies were consolidated shortly after this work commenced. They were consolidated under the name of the Missouri-Edison Electric Company, and in that consolidation the company represented on the committee by Mr. Guernsey was not taken in, until about a year afterwards. The company represented by Mr. Guernsey did a small amount of work, having constructed a conduit on Lucas avenue. This company was the St. Louis Electric Light & Power Company.

"Previous to the time this joint construction work commenced, plaintiff had held the position of general superintendent with the Missouri Electric Light & Power Company and the Edison Electric Illuminating Company of St. Louis. He held this position with the Missouri company for a number of years, and for a year or more with the other company. At the beginning of the year 1897 he was receiving $250 a month from one company, and $200 from the other company. He received the same salary from these companies during the period of joint construction, but for quite different duties. Nominally his position did not change, but the work that they had been doing prior to the time of the joint construction—that is, the erecting and reconstruction of two large electric light

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plants—required the most of his time. During the period of joint construction he did not render any bill to these companies for services, because they simply paid him a salary on an understanding he had with the president of the company. He did not make any specific charge against those companies that he represented on the committee for services rendered them as engineer of joint construction, because he had a definite understanding with their president that he was to receive so much a month for his work, and he was to receive, as their proportion of the work done on the conduit the same amount he had received for other work that he had done prior to this period. Plaintiff received nothing as engineer of joint construction from the St. Louis Electric Light & Power Company, represented by Mr. Guernsey. He never presented any bill to that company, but he rendered Mr. James Campbell some other services, and in payment of this bill the other service to this company was included. That was about the time he rendered his bill to the defendant company, and after it was known that Mr. Campbell controlled the St. Louis Electric Light & Power Company.

"Plaintiff rendered a bill to the Phœnix Company for $1,000 covering the same period as that covered by the bill which is the basis of this suit, and it was paid promptly. The amount of work that he did for the Phœnix was less than he did for the Edison Electric Illuminating Company of Carondelet. Plaintiff testified that he always intended to charge defendant for his services as supervising engineer. He made such a statement at several meetings of the joint conduit construction committee, at which Mr. Matlack, the secretary of defendant, and its representative on that committee, was present.

"The following letter was sent by the defendant's president to the supervisor of city lighting: 'Edison Electric Illuminating Company of Carondelet. St. Louis, July 24, 1897. Hon. A. J. O'Reilly, Supervisor of City Lighting, City Hall—Dear Sir: In answer to yours of the 20th instant, please return to me my communication of July 19, 1897, and consider same as withdrawn. We understand your suggestion that in work of an engineering nature the board will recognize the engineer. The engineer was appointed by this company in conjunction with other companies doing conduit work jointly for the purpose of preparing for the company's approval detailed plans of the work to be done and of supervising the actual work. A joint letter was sent to the board of public improvements May 11, 1897, by the companies, informing the board of this appointment and requiring the board to deliver permits for conduits to the engineer or his order. This appointment does not carry with it any power to the engineer to represent the companies at the board. This company for various reasons, reserves to its president or secretary, the right to represent its interests before the board. Yours truly, Henry C. Scott, President.'

"Matlack testified that, at the time of the discussion in the joint conduit committee as to the appointment of an engineer, there was nothing said by anybody in reference to the engineer making a charge against the interested companies. The matter was discussed in the presence of Mr. Wagner, and it was suggested by him [Matlack] that in order to get a man who would not be interested in any of the competing companies, and who would occupy an unbiased position, they employ some one outside, but objection was made that it would cost some money to do that, and that they might save that expense. Matlack testified also that he told Mr. Wagner, in response to some proposition of his, that the Missouri-Edison Company would do certain parts of this work, that defendant would not agree to the Missouri-Edison doing any work for it without a written order, and that in doing that work it would do its share of it in service, but would not pay anything whatsoever, but would do its proportion of the work, but would not employ a competitor to do its work and pay him for it. Matlack testified that his company engineered and supervised this joint conduit construction work just as though there had been no other ducts in it except its own; that it had a special engineer who was constantly on the work; that he was on the work frequently, and his company had the corps of inspectors which were paid by it, but as a matter of convenience the work was nominally under the control of Mr. Wagner or under the control of the Missouri-Edison people. He inspected the plans, and a number of them were changed by reason of his inspection of them, and they were all signed by him personally for his company, approving of them, and these matters which were brought out in the committee were all passed upon, and the different engineering features necessary, which were very slight, were gone over in that way. Matlack testified that his company did not rely upon the supervision and inspection of Mr. Wagner to any extent whatever. Defendant did as much inspection as if he had not been there; in fact, a little more, for the reason that where interests of the different companies conflicted in a given conduit or service box or manhole, it could not be sure that its interests would be safeguarded. Matlack testified also that whenever the matter of Wagner charging for his services came up for discussion before the committee, he always stated plainly that his company would not pay anything; that it would furnish its pro rata of the services; that it did not need any engineer or inspector; that it would not pay any bill whatever for anything that the other companies did for it, and if they did anything of the kind, it was because they considered it part of their work, and not

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part of defendant's work. The plaintiff and three or four electrical and consulting engineers testified that the charge made by plaintiff, to wit, $100 per month, was reasonable. No evidence to contradict this was offered by defendant."

Lyon & Swarts and Dwight D. Currie, for appellant. Campbell & Ryan, for respondent.

NORTONI, J. (after stating the facts as above). Among others, the court gave the following instruction on behalf of the defendant: "The court instructs the jury that, although they believe from the evidence that plaintiff may have intended, at the time he was selected as supervising engineer, to charge defendant for such services as he might render it, yet if the jury further believe from the evidence that he did not disclose said intention to this defendant at the time or before his selection by the committee as engineer, and the defendant did not then know or have reason to believe from the committee's employment of him as engineer that it was expected to pay him, and did not intend to pay him, for such services, and that defendant notified plaintiff that it did not intend to pay him for said services as soon as it learned that plaintiff intended to charge therefor, plaintiff is not entitled to recover." The jury having found the issues for defendant, plaintiff prosecutes the appeal, and assigns the giving of this instruction as the only error complained of.

The evidence shows that plaintiff was appointed as engineer by the committee on joint conduit construction. That this appointment, originally made by the committee, was subsequently ratified or confirmed by the defendant company is obvious from the letters hereinbefore set out and other uncontroverted facts in proof. However this may be, throughout the case the defendant has insisted that the plaintiff did not intend to charge it for his services; that although plaintiff's services were to be compensated by the two companies he represented, they were gratis to this defendant. Defendant's theory of the case is that, as plaintiff was in the employ of two other companies, and represented them on the committee for joint conduit construction, he merely performed such services as were incident to that employment by the two companies which he represented, and that therefore he is not entitled to recover from the present defendant any more than Mr. Matlack, the representative of this defendant on the joint committee, would be entitled to recover from the other companies for his services rendered in that behalf. The instruction referred to submitted to the jury that, although they found from the evidence plaintiff may have intended to charge for his services at the time of his selection by the committee, yet if it also found that plaintiff had not disclosed his intention to charge to this defendant, and the defendant did not know, or have reason to believe, from the committee's employment of him that it was expected to pay, and further found that defendant in fact did not intend to pay for his services, and that it notified plaintiff of such intention on its part, as soon as it discovered he intended to charge, then plaintiff should not recover.

The first criticism leveled by the plaintiff against this instruction is that it authorized the jury to find the issues for defendant if it did not know, or have reason to believe from the committee's employment of plaintiff as engineer that it was expected to pay for such services. It is argued, although defendant may not have known from the committee's employment of the plaintiff as engineer that it was expected to pay him for his services, nevertheless plaintiff is prima facie entitled to a verdict on that score, if, by looking to all of the facts and circumstances of the case and the amount and character of the services rendered, the defendant, as a reasonable person, should have known that it was expected to pay therefor. That is, by looking at the character of the services rendered by the plaintiff, defendant might have known that such services were not those incident to plaintiff's office as a member of the committee alone, and were of such a character that a reasonable person who receives the benefit thereof would expect to be called upon to compensate. There can be no doubt the instruction pointing the jury to what the defendant knew, or had reason to believe alone, from the committee's employment of plaintiff as engineer was inaccurate, for the reason the defendant's conduct in respect of this matter should be determined rather by reference to the character of the services rendered than to the mere fact of appointment by the committee to perform the services. This for the reason that in respect of such matters the law presumes certain services are to be furnished gratis; that is, as an officer of the joint committee on conduit construction, plaintiff owed to defendant, as well as to all the other companies who were parties to the arrangement, certain services free of charge, for they were all acting together. In respect of these matters each company furnished a man on the joint committee. The services of the several members of the joint committee were furnished to all of the companies in consideration of the services of every other member of the committee. Therefore this defendant had the right to expect the services of plaintiff on the joint committee to be performed gratis to it as a recompense for the services of its agent, Mr. Matlack, on the same committee. However, this may not be true in respect of those more arduous services performed by plaintiff, which were different and distinct from those of a member of the joint committee. If the character and amount of those services were such as to lead a reasonable person to believe they were not being performed gratis and that compensation would be expected

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therefor, then the law will imply a promise to pay the reasonable value of the services rendered. The question should be determined by reference to the character and amount of the service, rather than from the mere employment of plaintiff by the committee, and in this respect the instruction was inaccurate.

It is said the instruction is erroneous for the further reason that it required the jury to find, among other things, either that the defendant intended to pay plaintiff, or that the services rendered by him were of such a character that defendant should have had reason to believe that it was expected to pay for them. The argument advanced is that, if the plaintiff performed valuable services for the defendant, and intended at the time to charge therefor, defendant having voluntarily accepted the same, the law implies a promise on the part of the defendant to pay the reasonable value thereof; and this, too, notwithstanding the matter of its intention in that behalf. Now Sir William Blackstone, in speaking of this matter generally, says the law implies a promise in such circumstances to pay, and raises a presumption which proceeds from reason and justice to that end. "And if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserved. If I take up wares from a tradesman without any agreement on prices, the law concludes that I contracted to pay their real value." 2 Blackstone, Comm. 443. The rule just quoted from Blackstone is that which obtains between strangers; that is, where no relation exists affording a presumption to the contrary. Of course there can be no actual contract in any case, except there be present the intention of both parties. That is to say, there must be a mutual meeting of the minds, in order to constitute an actual contract. Therefore, on principle, a contract which the law implies is one which the parties have not made; for, if they have made an actual contract, by each intending and agreeing upon the same proposition, there is no room for implication by the law. Weinsberg v. St. Louis Cordage Co. (Mo. App.) 116 S. W. 461; Hertzog v. Hertzog, 29 Pa. 465; 7 Am. & Eng. Ency. Law (2d Ed.) 91, 92; Fitzpatrick v. Dooley, 112 Mo. App. 165, 86 S. W. 719. Now one person may render valuable services to another, intending at the time to charge therefor. The other person, for whom the services are rendered, may accept them, and at the same time intend not to pay. Of course, in such circumstances, there is no actual contract between the parties, for the reason there is a want of mutual intention. However, the law will presume in those circumstances, between strangers, that the person receiving the services shall pay the reasonable value thereof. This presumption is dictated, of course, by reason and natural justice. Such is an appropriate and typical case of a contract implied by law for the sake of the remedy it affords. Weinsberg v. Cordage Co. (Mo. App.) 116 S. W. 461. The presumption afforded by the law under such circumstances obtains only between strangers, however; that is to say, it is not present in those cases where the peculiar relations of the parties are sufficient to dictate that, in accordance with the principles of reason and justice, the presumption should be otherwise. 1 Beach, Modern Law of Contracts, § 650; Smith v. Myers, 19 Mo. 434; Fitzpatrick v. Dooley, 112 Mo. App. 165, 86 S. W. 719. When the relationship of the parties is such as to lead a reasonable person to believe that the services are performed gratis, then the presumption is that they are not to be paid for, and the burden rests with the party asserting the claim to overcome the presumption. For instance, in the family relation, the services rendered by a child to the parent are presumed, on account of the ties of filial affection, etc., to have been rendered gratis. And although the services were requested and received by the parent, and of great value, the presumption of law obtains to the effect that no recompense is to be made therefor. The presumption, of course, is disputable, and may be overcome by a showing of fact to the contrary. Fitzpatrick v. Dooley, 112 Mo. App. 165, 86 S. W. 719; Smith v. Myers, 19 Mo. 434; Cowell v. Roberts, 79 Mo. 218; I Beach, Modern Law of Contracts, § 653. The principle is not confined to the family relation. It finds appropriate application as well in all cases where the relations of the parties are sufficient, according to the experience and customs of men, to invoke its influence as a result of reason and natural justice. For instance, the officers of incorporated companies, such as bank presidents and cashiers, are expected, of course, to perform all necessary services to the bank, incident to the office they hold, in consideration of the salary they receive for executing such offices. In view of this relation, the law presumes generally that all services performed by such officers are performed by them in the capacity, and as within the duties, of the particular office they occupy. Sawyer v. Pawners' Bank, 6 Allen (Mass.) 207; Taussig v. Railway, 166 Mo. 269, 85 S. W. 378; Pfeiffer v. Lansberg Brake Co., 44 Mo. App. 59. Now in view of this presumption, which attends the services rendered to an institution by one who is an officer thereof, it is not sufficient for such officer to show merely that he performed valuable services other than those pertaining to his particular office at the request of the defendant, and that he intended to charge therefor at the time, and the defendant received the services; for the law presumes such services are rendered gratuitously, or at most, for the same compensation received in respect of his particular office, and the defendant has the right to re-

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ly upon such presumption, unless plaintiff shows more. That is to say, in such circumstances it is incumbent on the plaintiff to show, not only that he intended to charge, but he must show as well a state of facts which will overcome the presumption referred to, and sufficient to lead a reasonable person to believe that he would be expected to pay for the services. Although upon such a showing the court or jury may not be authorized to find that defendant actually intended to pay, it may find that the party thus receiving the benefit is estopped to deny that he intended to make reasonable compensation, for to the extent mentioned, in the spirit of justice, the law implies a promise to pay the reasonable value of the services rendered.

Of course, what has been said in no manner curtails the right of the plaintiff to show, if possible, that he intended to charge, and that the defendant intended to pay; that is, to show an actual contract as contradistinguished from one implied by law. In cases circumstanced as this one the result of the authorities is that it is incumbent upon the plaintiff to show that he performed the services; that he intended to charge for them at the time, and that the defendant either intended at the time to pay for them (in which case, of course, there is an actual contract arising from the mutual intention of the parties), or that the services were of such a character, and were performed under such circumstances, as to raise the presumption that the parties intended they were to be paid for, or at least that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by the services, ought to understand and know that compensation would be expected from them. This is the doctrine of our Supreme Court asserted in this identical case on a former appeal. Wagner v. Edison Electric, etc., Co., 177 Mo. 44, 63, 64, 75 S. W. 966. For the leading and best-considered authorities on the subject, see Sawyer v. Pawners' Bank, 6 Allen (Mass.) 207; Pew v. Gloucester Nat. Bank, 130 Mass. 391; Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98, 112, 11 Sup. Ct. 36, 34 L. Ed. 608; Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611; Taussig v. Railway, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674. Now it is true that plaintiff was not an officer of the defendant company in the first instance. Nevertheless, as a member of the joint committee on conduit construction, he assumed certain duties and obligations to this defendant and all the other companies whose interests converged in that committee; that is to say, the relation of plaintiff to defendant and each of the other companies, except the particular company which he represented because of his committee assignment, was such as to afford a presumption upon which the different companies, other than the companies which he particularly represented, may rely that such services as were rendered by the plaintiff were performed gratis to them, in consideration of such services as were being rendered by the particular agent of each other company on the same committee. In other words, the defendant had the right to presume that the services rendered by the plaintiff were gratis to it, unless it knew plaintiff intended to charge, and it intended to pay him, for the same, in which case there was, of course, an actual contract, because there was a meeting of the minds to that effect, or unless the plaintiff intended to charge for his services, and the services rendered as engineer, aside from his office as a member of the committee, were rendered under such circumstances as to raise the presumption that the parties intended and understood they were to be paid for, or that the character of the services and the circumstances under which they were rendered were such that a reasonable man in the same situation would and ought to understand that compensation was to be made for them.

The instruction above set out treated with the matter of defendant's actual intention well enough, but it failed to express the true rule touching the constructive contract or promise to pay implied by law; that is, it did not authorize a finding for the plaintiff if the character of the services and the circumstances attending the employment and service were such as to lead a reasonable person to believe that compensation would be expected from him therefor. Besides, the rule declared by this instruction is entirely inconsistent with other instructions given on behalf of the plaintiff.

For the reasons above pointed out, the judgment will be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

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ST. LOUIS, I. M. & S. RY. CO. v. SANDERS et al.

(Supreme Court of Arkansas. June 7, 1909.)

1. RAILROADS (§ 72*)—RIGHT OF WAY CONTRACTS—LEVEES.

The owner of certain land conveyed a railroad right of way across it for a nominal consideration; the railroad's assistant right of way agent and assistant engineer agreeing, in a separate paper executed at the same time, that the railroad company would construct a sufficient levee at the crossing of a creek on the land described to fully protect the field of the grantor. *Held*, that such agreement should be construed in conection with the deed, and, when so construed, constituted an enforceable contract by which the railroad company, in consideration of the right of way, contracted to construct the levee.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

2. RAILROADS (§ 64*) — AGREEMENTS AS TO RIGHT OF WAY—EVIDENCE.

Where a railroad's assistant right of way agent and division engineer contracted to construct a levee in consideration of a conveyance of a right of way, letters written by the railroad's assistant engineer to the landowner in his lifetime, in which the engineer promised on the railroad company's behalf to repair or rebuild the levee which had been constructed, was admissible to show authority of the railroad company's original representatives to make the contract, or to show ratification thereof.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 64.*]

3. APPEAL AND ERROR (§ 1051*)—ADMISSION OF EVIDENCE—PREJUDICE.

Admission of incompetent evidence of a fact otherwise shown by undisputed evidence is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

4. RAILROADS (§ 72*)—RIGHT OF WAY CONTRACT—BREACH—PERSONS ENTITLED TO SUE.

The widow of a landowner, party to a contract for the conveyance of a right of way to a railroad in consideration of the railroad company's agreement to construct a levee, after her husband's death conveyed an undivided half of the remaining land which was to be benefited by the levee to her daughter. *Held*, that there was sufficient privity of estate to entitle both the widow and daughter to recover damages sustained by the railroad's breach of the contract.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

5. RAILROADS (§ 72*)—RIGHT OF WAY CONTRACT—BREACH—DAMAGES.

The measure of damages for a railroad company's breach of contract to construct a proper levee in consideration of a conveyance of a right of way is what it would reasonably cost to build the levee the railroad company contracted to construct; plaintiffs not being entitled to recover, in addition, damages sustained by loss of crops due to the railroad company's failure to properly construct the levee, since, if plaintiffs wished to avoid such loss, they might have done the work themselves.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

Action by Nancy Hampton Sanders and another against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed in part, and reversed in part.

E. B. Kinsworthy, Lewis Rhoton, and Horton & South, for appellant. Jones & Seawell and Hamlin & Seawell, for appellees.

BATTLE, J. During the year 1904 A. F. Hampton and his wife, Nancy, owned the E. ½ of the N. E. ¼ and S. W. ¼ of the N. E. ¼ of section 5, in township 18 N., and in range 17 W., in Marion county, in this state, as an estate in entirety, and on the 15th day of April, 1904, R. X. De Graw and W. P. Smith procured from them a deed conveying to the railway company a right of way over these lands, and executed to them an instrument of writing as follows:

"April 15, 1904.

"It is hereby agreed by the St. Louis, Iron Mountain & Southern Railroad Company that it will construct a good, sufficient levee at the crossing of Crooked creek in the S. W. N. E. qr. of Sec. 5—18—17, to fully protect the field owned by A. F. Hampton. Said levee to be constructed within 30 days from date hereof.

"R. X. De Graw, Asst. R. of Way Agt.

"W. P. Smith, D. E."

The sole consideration expressed in the deed for right of way was $1. Crooked creek flowed along by the lands of Hampton and his wife, and the levee mentioned in the contract was to protect the lands against overflow. The railway company constructed its roadbed on the right of way conveyed to it by Hampton and his wife, and at the same time built a small levee at the place stipulated in the contract; but it proved insufficent, and in the year 1906 Crooked creek overflowed the field of the Hamptons, and washed away the soil, growing crops, and fences thereon. Hampton then notified A. W. Jones, assistant engineer of the railroad company, of the condition and deficiency of the levee, and he (Jones) promised to build a new, or repair the old, levee; but before the work was completed Hampton died, in December, 1906, intestate, leaving Nancy, his widow, and his daughter, Harriet, his only heir. The last work undertaken after it was completed also proved insufficient. In 1908 Crooked creek again overflowed the lands, and washed away the soil, crops, and fences. No other levee was constructed or rebuilt. The widow of Hampton married Robert Sanders, and his daughter, Harriet, married Lee Estes. Nancy Sanders conveyed one undivided half of these lands to her daughter, Harriet, and they brought an action against the railway company to recover damages caused by the failure to construct a levee according to its contract, including the damages from overflows.

The defendant answered, and admitted that, on or before the 15th day of April,

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1904, the plaintiff Nancy Hampton Sanders, then Nancy Hampton, and A. F. Hampton, her then husband, owned the land mentioned in the plaintiffs' complaint as joint tenants, with the right of survivorship, having an estate therein by entireties, and that on said day they conveyed to the defendant by a proper deed therefor a right of way on which to build its railroad across the lands, and that A. F. Hampton departed this life on the 19th day of November, 1906.

It denied that it executed the foregoing instrument of writing, or authorized any one to execute it; that it had notice of its existence at the time the railroad company accepted the deed for right of way over the lands mentioned; and, if it was made with A. F. Hampton, denied that he was acting for himself and plaintiff Nancy.

It alleged that, if the foregoing instrument of writing was a valid contract, "it was personal to A. F. Hampton, and binding the defendant only to protect his field, and did not require it to build a levee to protect the property of the plaintiffs, and the said A. F. Hampton having since departed this life, and his estate in said field having ceased, and plaintiffs not holding title to said lands under him, denied that it is liable to plaintiffs in any sum whatever for any breach of said contract, if the same has been broken."

The defendant moved to strike out the instrument in writing sued on, and said that it is void as evidence of a contract, because:

"(1) Said contract is void for uncertainty in the description of the persons between whom and for whose benefit it was made, for uncertainty as to the subject-matter, and does not show that the plaintiffs had any interest therein.

"(2) Said pretended written contract does not show with whom the defendant contracted.

"(3) Said complaint shows on its face that the plaintiffs do not hold under A. F. Hampton, the only name used therein, because, they say, said complaint alleges that said A. F. Hampton had an estate in entirety in said lands, with the plaintiff Nancy Hampton Sanders as his joint tenant.

"(4) Said pretended contract purports only to be for the interest of the field owned by A. F. Hampton, whose title and interest in said field ceased with his death, and did not descend to the plaintiffs.

"(5) That said pretended contract is void as to the description of the field of said A. F. Hampton. That for these reasons said Exhibit A is void as evidence of a contract inuring to the benefit of the plaintiffs, and is void as evidence of any contract whatever."

The motion was overruled.

Evidence was adduced on the trial by the parties, and instructions were given by the court. The jury returned a verdict in favor of the plaintiffs for $1,040 for breach of contract, for $70 for damages by overflow of 1906, and for $40 for damages by overflow of 1908, amounting in the aggregate to $1,150, for which the court rendered judgment; and the defendant appealed.

So much of the evidence and instructions as is necessary to state will be set out in the opinion.

Appellant insists that the writing sued on is insufficient to constitute a valid contract. It contends that it is uncertain as to the parties and subject-matter, and does not show that either of the plaintiffs has any interest therein or right to maintain an action for a breach of the same.

The deed for right of way executed by A. F. Hampton and his wife and the contract sued upon were executed on the same day and form a part of the same contract; each writing containing the undertaking of only one party, and both being necessary to constitute a complete contract. The contract was made in the name of appellant; the language of the contract being: "It is hereby agreed by the St. Louis, Iron Mountain & Southern Railroad Company," etc. They refer to the same land. Crooked creek, mentioned in the contract, flows along the lands mentioned in deed for right of way and the contract. The railroad was constructed on the right of way over these lands and across the creek. The levee was required by the contract to be constructed at this crossing to protect the field of A. F. Hampton against floods. The field to be protected was evidently that exposed to these floods, which was the field on the lands owned by A. F. Hampton and his wife as an estate in entirety, and it is thus shown that the contract was made for their benefit. When the railroad was constructed on the lands of the Hamptons, a levee was built at this crossing, which proving insufficient to protect their lands against overflows, another was built at the same place, which also failed in the same manner. The consideration expressed in the deed for the right of way was only $1. The instrument of writing, construed in connection with the deed as a part of the same contract, furnishes the true consideration of the latter, and each furnishes the consideration of the other. The language of the instrument of writing and of the deed, read in the light of these facts, shows that the appellant, in consideration of the right of way, contracted with the Hamptons to build a levee at the crossing of Crooked creek by its railroad sufficient to protect the field on their lands. Thus interpreted it is a valid contract. The facts do not add to or vary the contract, or change it, but show the crossing and field meant by the contract, and the parties thereto are necessarily implied by the deed and contract.

There was evidence tending to prove that R. X. De Graw, assistant right of way agent, and W. P. Smith, division engineer, had authority to make the contract entered into by

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them on behalf of the appellant, or, if they did not have, it was ratified by their principal by attempting to perform it.

Letters of A. W. Jones, assistant engineer of appellant, directed to A. F. Hampton, in his lifetime, in which he promised in behalf of appellant to repair or rebuild the levee at the crossing of railroad on Crooked creek, admitted as evidence over objections of appellant, were admissible to show authority or ratify the contracts of De Graw and Smith.

Lee Estes, the husband of one of the plaintiffs, was allowed to testify, against the objection of appellant, as to the contract with appellant. But that related to his being in possession of such contract, and was not prejudicial, as the existence of such a contract was shown by undisputed evidence. He did not pretend to say that it was entered into by authority of appellant. He was allowed to testify as to letters of A. W. Jones, assistant engineer of appellant, being in possession of the plaintiffs. We hardly think that this was prejudicial. He never saw Jones write, and did not know his writing. He knew only that the letters were in possession of Hampton, and after his death in the hands of plaintiffs. That is not a disputed fact.

Mrs. Sanders, being a party to the contract sued on, is entitled to sue and recover damages. She conveyed one undivided half of the land to Mrs. Estes, and this establishes a privity of the estate between them, and the latter by virtue thereof is entitled to recover. St. Louis, Iron Mountain & Southern Railway Company v. O'Baugh, 49 Ark. 418, 5 S. W. 711. And the measure of the damages they are entitled to recover is what it will reasonably cost to build the levee that appellant undertook to construct. Varner v. Rice, 39 Ark. 344; Plunkett v. Meredith, 72 Ark. 3, 77 S. W. 600.

Appellant contends that a different rule of damages was established by St. Louis & North Arkansas Railroad Company v. Crandell, 75 Ark. 89, 86 S. W. 855, 112 Am. St. Rep. 42, and St. Louis, Iron Mountain & Southern Railway Company v. Berry, 86 Ark. 309, 110 S. W. 1049. But that proves nothing. The measure of damages is not the same in all cases, but it is intended to be compensatory for losses sustained and varies according to the facts and circumstances of each case. For a breach of contract the damages recoverable should "be such as may fairly and reasonably be considered as arising naturally therefrom—that is, according to the usual course of business—or such as may reasonably be supposed to have been in the contemplation of both parties at the time that the contract was made, and as a probable result of the breach." In the first case cited Crandell, in consideration that the railroad company would locate and build a depot on a certain tract of land, purchased a part of the tract for the railroad and gave it to the company, and also gave the right of way over his own land. The grantee constructed its road on the right of way given, and built a depot on the tract purchased, and, after it had been established and maintained for a short time over a year, erected a passenger station 500 yards distant, and abandoned it as a passenger depot. Before the abandonment "Crandell erected various improvements upon his property suitable to its then location close to the station." He recovered the amount paid for the tract, the value of the right of way through his land, and the loss in value of the property built by him near the depot. Such was the loss sustained by him by the breach of his contract. He could not recover the value of the depot, for it was not built or intended for him, but for the public. In the second case cited a right of way across certain land was conveyed to a railroad company in consideration of its placing a depot on the land, and the company failed to do so. It was held that the grantor was entitled to recover the value of the land so taken and appropriated as damages. That was the loss he sustained by reason of the breach of his contract. He was not entitled to the value of a depot for the reason given in the first case. In the case at bar the appellee was entitled to a certain levee under his contract, and the reasonable cost of constructing it was what he lost by the breach of his contract.

The court instructed the jury, over the objections of the appellant as follows:

"(3) If you find for the plaintiffs on the second paragraph of their complaint, and further find that a part of the crop of the year 1906 was injured or destroyed, the measure of damages would be the actual value of the interest of plaintiff Nancy Hampton Sanders in the crop at the time of said injury, if any, with 6 per cent. interest from the date thereof.

"(4) If you find for the plaintiffs on the third paragraph of their complaint, and further find that a part of the crop of 1908 was injured or destroyed as alleged, the measure of damages would be the actual value of the interest of plaintiffs in the crop, if any, at the time of the injury, with 6 per cent. interest from the date thereof."

"(6) Even if you should find for the plaintiffs, yet the measure of damages to crops would be only the rental value of the land upon which crops were growing and were destroyed, plus the reasonable value of the labor in planting and cultivating such part of such crops as were damaged, provided such crops at time of the damage were so immature that they did not have a market value at the time."

The court erred in giving these instructions. The reasonable cost of constructing the levee is a full compensation for the failure to construct the same. If the appellees wished to avoid other damages from the same source,

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they could have done so by constructing the levee and putting themselves in the condition a performance of the contract would have placed them. Varner v. Rice, 39 Ark. 344.

Appellant insists that the damages assessed by the jury were excessive. It failed to construct a levee according to its contract, and one witness testified that cost of such a levee would be $2,000. The jury returned a verdict for $1,040 for that damage.

The judgment of the trial court for that amount is affirmed, and is reversed as to damages awarded for overflows.

EAGLE et al. v. BOARD OF COM'RS OF FENCING DIST. NO. 2, LONOKE COUNTY.

(Supreme Court of Arkansas. July 12, 1909.)

1. APPEAL AND ERROR (§ 671*)—QUESTIONS PRESENTED—SCOPE OF RECORD.

Where the facts relied on by appellant are not set out in his abstract, the court will not explore the transcript to ascertain them.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.*]

2. FENCES (§ 4*)—FENCING DISTRICTS—PROCEEDINGS TO ENFORCE LIEN.

Under Kirby's Dig. § 1397, providing that in the complaint in an action to enforce a lien for fencing assessments it shall be necessary to state only the fact of the assessment and the nonpayment thereof as required by law, the allegation that the assessment was levied by a board of commissioners and approved by a county court was unnecessary, and the presumption was in favor of the validity of the assessment, as against the objection that it was void because made by the board, and not by the county court, as provided by section 1388.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 4.*]

3. FENCES (§ 4*)—FENCING DISTRICTS—ASSESSMENT.

It being the duty of the board of fencing commissioners to construct a fence, and the district being liable for the cost thereof, that the cost in the first instance was paid out of money borrowed by the commissioners on their individual account did not invalidate an assessment levied to pay the cost of the fence.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 4.*]

4. FENCES (§ 4*)—FENCING DISTRICTS—SUITS TO ENFORCE LIEN—COSTS.

Kirby's Dig. § 1399, providing that a suit to enforce the collection of fencing assessments shall proceed in the same manner as is provided by law in case of suits for the collection of assessments for local improvements, has reference only to the mode of procedure, and does not give the right to attorney's fee.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 4.*]

Appeal from Lonoke Chancery Court; J. E. Martineau, Chancellor.

Action by the Board of Commissioners of Fencing District No. 2, Lonoke County, against E. L. Eagle and others. Judgment for plaintiff, and defendants appeal. Modified, and, as modified, affirmed.

T. C. Trimble, Joe T. Robinson, and T. C. Trimble, Jr., for appellants. J. H. Carmichael and Jas. B. Gray, for appellee.

HART, J. On October 27, 1906, fencing district No. 2 of Lonoke county, Ark., filed separate complaints against R. E. L. Eagle and 26 others in the Lonoke chancery court. All of the complaints were in the same form, and were proceedings in equity under the statute to have the lands of the defendants sold for the payment of taxes assessed against them for fencing district No. 2 of Lonoke county. The suits were consolidated, and the defendants filed their answer, in which they denied that the district had been legally formed. They denied that the commissioners had ever been appointed or qualified. Further answering, they aver that, at the time the assessments which the suits were brought to enforce were made, the said fencing district had ceased to exist, and that it owed no debts. Upon the final hearing of the cause, the chancellor found in favor of the plaintiff. An attorney's fee of $250 was allowed plaintiff's solicitors, and the same was ordered to be prorated among all the defendants and to be charged against their lands respectively. A decree was entered, in which the amount of tax, penalty, and cost against each tract of land was declared to be a lien on it, and in default of payment thereof by the owner of the land within the time specified the lands were ordered sold for the payment thereof. The defendants have appealed.

The proceedings under which the fencing district was established are not set out in defendants' abstract, and we have no means of ascertaining whether or not the record shows that the district was legally formed, except by exploring the transcript, which, under a familiar rule of practice, we are not required to do. Hence the objection that the district was not legally formed and that the commissioners were never appointed may be considered as waived or abandoned.

Counsel for defendants insist that the levy or assessment was void because it was made by the board of commissioners, and not by the county court, as provided by section 1388 of Kirby's Digest. To sustain their contention they rely upon the following language in the complaint: "That the third assessment of five mills on the dollar was levied on the lands hereinafter mentioned by the said board of commissioners and approved by the county court," etc. The answer denied this allegation. This allegation in the complaint was unnecessary. Section 1397 of Kirby's Digest provides that in the complaint in such cases it shall not be necessary to state more than the fact of the assessment and the nonpayment thereof in the time required by law, without any other further statement of any step required to be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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taken by the court or the board. The plaintiff meant to allege that the board of commissioners ascertained the cost of fencing and reported the same to the county court and that the court assessed said cost. See Kirby's Dig. § 1388. In any event, as was said in the case of Board of Improvement Dist. v. Offenhouser, 84 Ark., at page 262, 105 S. W., at page 266: "The court has held, in levee district and drainage district cases, that regularity of the proceedings in forming the districts will be presumed, in the absence of evidence to the contrary" (citing cases). Here the record does not show that any evidence on that question was introduced, and the presumption is in favor of the assessment.

Counsel for defendants also contend that "the commissioners could not borrow money on their personal responsibility and bind the district for it." We do not think this question is presented by the record. The fencing district in question was organized in the fall of 1902. The board of commissioners were appointed and began the work of erecting the fence. Twenty-three miles were contemplated, and the wire for it was purchased. The district did not have any money, and the members of the board on their individual responsibility borrowed $6,000, and used it in constructing the fence. The Legislature at its 1903 session passed an act making a four-wire fence lawful in that part of Lonoke county which was south of the Choctaw Railroad and this included the territory embraced in fencing district No. 2. The act went into effect April 25, 1903. Acts 1903, p. 312. Because of the passage of this act, many of the landowners in the fencing district wished to abolish it. On account of this, and because the district did not have the money with which to do so, the fence has never been completed as originally planned, and that part of the fence which was built has not been kept up. The object of the collection of the assessment sued on is to reimburse the commissioners for the money which they had paid out for the purpose of constructing the fence. It is not a suit by the holders of the note against the district for money alleged to have been borrowed by it. True, the money used in constructing the fence was borrowed by the commissioners. But it was borrowed by them on their individual account, and as the matter now stands the commissioners built the fence and paid the cost thereof out of their own funds. In short, the taxes collected will be applied to the actual cost of erecting the fence. It was the duty of the board to erect the fence, and the district was liable for the cost of it. Althiemer v. Board, etc., Plum Bayou Levee Dist., 79 Ark. 232, 95 S. W. 140. The district is liable for the actual cost of constructing the fence, and it was proper to levy the assessments which are the foundation of this action for the purpose of paying for it.

Counsel for defendants also urge that the court erred in making the allowance of $250 to the solicitors for the plaintiff. In this they are correct. In the case of improvement districts in cities and towns, an attorney's fee is expressly allowed by statute. Kirby's Dig. § 5695. In the case of fencing districts, the statute provides that suits to enforce the collection of assessments shall proceed in the same manner as is provided by law in cases of suits for the collection of assessments for local improvements; but this does not give the right to tax an attorney's fee. It has reference only to the mode of procedure. Kirby's Dig. § 1399.

The allowance of the attorney's fee of $250 was error, and to that extent the decree is modified; otherwise, it will stand affirmed.

MOORE v. SHARPE et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. DEEDS (§ 168*)—CONDITIONAL FREEHOLDS—FORFEITURE FOR CONDITION BROKEN—RE-ENTRY.

At common law to forfeit a conditional freehold estate for condition broken, a re-entry was essential.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–529; Dec. Dig. § 168.*]

2. DEEDS (§ 168*)—FORFEITURES—ASSIGNMENTS.

The right of re-entry for condition broken is not assignable at common law, and could only be exercised by the grantor or by his privies in blood.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–529; Dec. Dig. § 168.*]

3. CHAMPERTY AND MAINTENANCE (§ 3*)—COMMON-LAW RULE—APPLICABILITY.

The English Statute (St. 32 Hen. VIII, c. 9), against the sale of pretended titles to lands not in possession, is not a part of the common law of Arkansas, having been abrogated by the statutes extending the right of alienation.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 53; Dec. Dig. § 3.*]

4. DEEDS (§ 3*)—LIVERY OF SEISIN—NECESSITY.

The common-law rule of livery of seisin is not in force in Arkansas.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 8; Dec. Dig. § 3.*]

5. DEEDS (§ 168*)—FORFEITURES OF CONDITIONS BROKEN—CONVEYANCES BY GRANTOR—EFFECT.

Under Kirby's Dig. §§ 736, 737, authorizing one claiming title to real estate in the possession of another to sell his interest in the real estate, a grantor in a conditional deed may, on condition broken, declare a forfeiture by conveying the land to another, thereby vesting title in such grantee, divesting the defeasible title conveyed by the conditional deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–533; Dec. Dig. § 168.*]

Hart, J., dissenting.

Appeal from Circuit Court, Phillips County; H. N. Hutton, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Action by Alberta J. Sharpe and another against J. R. B. Moore. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jno. I. Moore, for appellant. Rose, Hemingway, Cantrell & Loughborough (W. H. H. Miller and Augustin Boice, of counsel), for appellees. Julian Laughlin, Murphy, Coleman & Lewis, and Jno. B. Jones, amici curiæ.

McCULLOCH, C. J. This is an action instituted by plaintiffs, Alberta J. Sharpe and Augustine Boice, against J. R. B. Moore in the circuit court of Phillips county, to recover possession of 40 acres of land situated in that county. The plaintiffs recovered judgment below, and the defendant appealed.

Each party deraigns title from the same source, viz., from Edmund McGehee, who owned the land at the time of his death during the year 1865 under a patent from the state of Arkansas. The plaintiffs claim title to the lands under a deed executed in 1881 by the widow and devisees of Edmund McGehee. The defendant claims title under a deed executed in 1873 by the executors, including the widow, of Edmund McGehee, to the St. Louis & Memphis Railroad Company. This deed purported to convey a large body of land, including the tract in controversy, all of which was wild, timbered land, without any clearing or habitation on it. The will of Edmund McGehee conferred no power upon the executors to execute the deed, and it was executed pursuant to an order of a Mississippi court, and no order was made by the Arkansas probate court. It is conceded that on this account the deed was ineffectual as a conveyance of the testator's title, and conveyed nothing except the undivided interest of the widow as one of the devisees under the will.

The deed was executed on the condition, expressed therein, that the grantee should build and complete a railroad within three years from the date thereof. Whether this was a condition precedent or subsequent we need not now decide, since, conceding it to have been a condition subsequent, which is essential to the strength of defendant's claim of title under the deed, the conclusion we have reached on another controlling question is adverse to the defendant. The condition of the deed, treating it as a condition subsequent, was not performed. No considerable amount of work in building the railroad was done, and after the condition was broken, the grantor, without re-entering upon the land, or by any other overt act declaring a forfeiture, subsequently executed the deed under which plaintiffs claim title. The question we propose to decide is, then, whether or not re-entry upon the land, suit, or declaration of forfeiture by the grantor before conveying the land to a third party was essential in order to effect a forfeiture, and whether any interest or estate was conveyed by the subsequent deed under which the plaintiffs claim title. We pretermit a discussion of the numerous other questions presented and argued in the case.

The doctrine of estates upon condition is of feudal origin, of which system the doctrine of title by livery of seisin formed an essential part, on account of the condition of real property at that time, and the only practical method of conveying it. This was, then, a doctrine of necessity, for in that day no system of registration of conveyance existed. Indeed lands were not generally conveyed by writings, and the only practical method of giving notice of a change of title was either by actual delivery of possession or by symbolic delivery in sight of the land. At common law, the only method whereby a forfeiture could be effected for breach of condition was by re-entry upon the premises, or by a public attempt to re-enter, with a declaration of forfeiture. This, too, grew out of the doctrine of livery of seisin, the reason being that the forfeiture for condition broken must be accomplished by acts of equal dignity and notoriety with those which created the condition, viz., delivery, either actual or symbolic. "As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, 'an estate of freehold cannot begin nor end without ceremony.'" 1 Jones on Conveyancing in Real Property, § 715. "The entry, moreover, in the language of the Touchstone, should be 'an open and notorious act, equivalent to investiture of land by livery of seisin, that notoriety might be given to the change of title.' It is not necessary, however, that the party entering should declare at the time for what purpose he enters. The act speaks for itself." Id. § 716. In his recent work on Real Property, Professor Minor (volume 1, p. 532) says: "It is an established rule of the common law that, if the conditional estate be a freehold, the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because as a freehold can, at common law, only be created by livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs. * * * No actual re-entry is necessary to determine an estate for years on condition; 'for, as a term of years may begin without ceremony, so it may end without ceremony.'"

It must also be conceded that at common law the right of re-entry for condition broken was not assignable, and could only be exercised by the grantor who created the condition, or by his privies in blood. It could not be exercised by one who was only the grantor's privy in estate. This, under the maxim that, in order to discourage main-

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tenance, "nothing which lies in action, entry, or re-entry can be granted." The same rule prohibited the conveyance of lands held adversely, or any interest therein. This rule was created under the English statute (St. 32 Hen. VIII, c. 9) against selling pretended titles, and Sir Edward Coke states the reason therefor as follows: "To prevent maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry, or re-entry can be granted over; for under color thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth." Coke on Littleton, 214–a. In many of the states of the American Union this English statute against the sale of pretended titles to lands not in possession has been re-enacted, and in a few states the doctrine has been recognized and enforced as a part of the common law. But this court in Lytle v. State, 17 Ark. 674, held that "the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this state, have been met hereby by directly conflicting legislation in the several provisions touching the sale of real estate held in adverse possession, whereby the right of 'alienation and purchase' of every interest, title, and estate therein 'has been enlarged almost to an unlimited extent.'"

This rule has long since been changed in England by statute. By the wills act of 1837 (St. 1 Vict. c. 26, § 3) all rights of entry for condition broken were made devisable, and in 1844 another statute (St. 7 & 8 Vict. c. 76, § 5) made them assignable. At common law there was a distinctive reason for the rule of inhibition against the assignment of a grantor's rights before and after breach of condition. Judge Hare, in his note to Dumpor's Case (Smith's Leading Cases, p. 112) says: "When it is said, in general terms, that a condition cannot be taken advantage of, save by the grantor and his heirs, and, of course, that it is not assignable, two very distinct points of law, resting on different reasons, are involved in the assertion. Before breach, the reason why an assignee cannot take advantage of a condition really depends upon the want of capacity for transfer of the condition itself. But after breach the condition itself is gone, and there arises in its stead, whatever may be its terms, in the case of freehold estates, at all events when created by a common-law conveyance, a right or title of entry, which is as little capable of assignment as the condition, although the obstacles to its assignment are of a different nature, arising out of the policy of the common law, and the provisions of the statute of maintenance, which forbade the sale or transfer of all claims or demands unsustained by possession, and resting solely in entry or action." However, the same learned author states his opinion to be that the abrogation of the rule or statute against maintenance does not alter the rule as to the nonassignability of the grantor's right before re-entry. On that subject he says: "It does not necessarily follow that the right to enforce the forfeiture of a condition is equally susceptible of assignment. The right to enter for a breach of condition is a bare right or remedy, which differs essentially from the right to clothe the title to land with possession by expelling a disseisor or intruder; for, while the right of property and right of possession belong in the one case to the person who enters, they are vested in the other, in him on whom the entry is made, and continue in full force, although liable to be defeated, down to the last moment before that at which the grantor enters."

The contrary view was expressed by the New Jersey Court of Errors and Appeals, in a learned and exhaustive opinion, in which all the judges concurred. Bouvier v. B. & N. Y. Ry. Co., 67 N. J. Law, 281, 51 Atl. 781, 60 L. R. A. 750. In the opinion in that case it was said: "A distinction not always clearly made, should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter: 4 Kent, Com. 11n; Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121. After breach there is a vested right." At another place in the opinion, after referring to the statute of that state declaring the assignability of estates in expectancy, it is said: "It is suggested, also, that the proviso in the act that no chose in action shall thereby be made assignable at law excepts rights of entry after breach from its operation; but I do not take that view. Some judges have spoken of the right after breach as a mere chose in action, but the designation is inaccurate. A right of entry is an interest in land. * * * But although it may be that the statute only authorizes a transfer before breach, I think a transfer after breach is also valid, for the reason that moved the Superior Court of Pennsylvania to a like decision. I would not say, as did that court, that a right of entry can be levied on and sold at execution, but I think that in this state it may be transferred at the will of the holder."

The Pennsylvania Supreme Court in McKissick v. Pickle, 16 Pa. 140, where, under a deed which created a condition subsequent, and the grantor reserved therein for himself, his heirs, and assigns, the right of re-entry, the question was whether or not a purchaser of the grantor's interest at execution sale could exercise the right, said: "The law against maintenance has never been adopted in this state. The reason assigned why a condition in England could not be assigned is because no title could be made to land held by another adversely, as that was against the law, which forbids maintenance. And hence the rule that none but the grantor, or his heirs, can enter for condition broken. This reason does not apply here, where the

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grantor expressly reserves the right (citing authorities). In the last case Chief Justice Gibson says none but the feoffer or his heirs can enter, and the reason why a right of entry cannot be assigned is that a contrary doctrine would favor maintenance and promote litigation. This is a fair case for the application of the maxim, 'Cessante ratione cessat ipsa lex.'"

We perceive no distinction by reason of the grantor having expressly reserved the right of re-entry to his assignee. The common-law doctrine of livery of seisin, and the law against maintenance or the sale of pretended titles, have never found lodgment in this state. The former is contrary to our whole scheme of laws, and especially the system of registration of land titles, which has existed in this state from the beginning. Before the statute was passed (December 9, 1837) putting in force in this state the common law of England so far as applicable to our form of government, the following statute was passed, which undoubtedly worked an entire change, and swept away every vestige of the feudal doctrine concerning alienation of real estate and interests therein: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof. The term 'real estate' as used in this act, shall be construed as co-extensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real." Sections 736, 737, Kirby's Dig. Of this statute the court, in Cloyes v. Beebe, 14 Ark. 489, said: "It is true that at common law, if a man had in him only the right of possession of property, he could not convey it to another, lest, in the language of the ancient law, 'pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed.' But this was for the feudal reason that possession was an indispensable element of alienation. * * * But every vestige of this feudal doctrine, which thus restrained the alienation of real estate, has been swept off by our statute, which enacts that, 'Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.'"

It is insisted by learned counsel for appellant that the statute accomplished no more than an abrogation of the rule against maintenance, and that, notwithstanding the statute, the title does not revert to the grantor nor his heirs until after re-entry, and that without entry neither he nor they have anything to convey. Conceding, as they contend, that the statute only abrogates the rule against maintenance, that, in our opinion, is sufficient. For we conceive the rule, stated by the New Jersey and Pennsylvania courts, to be correct that, after condition broken, the grantor or his heirs have a vested right or interest, which is assignable. But the statute accomplishes more than a mere abrogation of the rule against maintenance. It declares that the grantor, notwithstanding an adverse possession, may sell his interest in the real estate, and gives the broadest definition to the term "real estate." Of this part of the statute our court has said, quoting from Sir Edward Coke, that the word "hereditaments" "is by far the largest and most comprehensive expression, because it included, not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed." Proceeding further, the court said: "And thus it appears that, although at common law there were certain rights to, and interests in, real estate, that for want of possession, either actual or constructive, could not be alienated to a stranger, although they could be released or devised by will, or would pass to the heir or executor as contingencies and mere possibilities, such is the comprehensiveness of our statute in embracing hereditaments in the term 'real estate' that that distinction is also annihilated, and therefore in this state whatever interest in real estate may be inherited may be bargained, sold, and conveyed." Cloyes v. Beebe, 14 Ark. 489.

There is very little conflict, if any, among the text-writers and lexicographers as to the meaning of the word "hereditaments." It is "anything that may be inherited, be it corporeal or incorporeal, real, personal, or mixed. The word is almost as comprehensive as 'property.'" Anderson's Law Dictionary; 1 Coke, Inst. 6; 3 Kent, Comm. 401. "Whatsoever may be inherited is an hereditament. In other words when a right is of such a nature that on the death of its owner intestate it descends to his heir, it is an hereditament. The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds." Rapalje & Lawrence, Law Dictionary. We do not deem it necessary, however, to resort to any technical meaning of the word "hereditaments," for it is obvious that the Legislature, by the first section quoted above, intended to make interests of every kind whatever in lands alienable. This court has placed the same construction on the statute in another class of cases not differing, we think, in principle from the present case. Bagley v. Fletcher, 44 Ark. 153. In that case the question was as to the right of a minor to disaffirm by the execution of a quitclaim deed, without having re-entered or manifested a disaffirmance by any other overt act. The court held that the infant's deed vested in the grantee a defeasible estate in fee, subject to be defeated by disaffirmance, and that the execution of the quitclaim deed was effectual for the purpose of conveying the minor's interest, and was of such a hostile

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character to the original deed as amounted to a revocation of the former grant. That decision was rendered by a divided court, but there was no disagreement among the judges on the point which is pertinent here. Judge Eakin, dissenting, conceded that a deed with covenants of warranty, executed by a quondam infant, would operate as a disaffirmance and revocation of the former deed; but he held that a similar effect should not be given to a quitclaim deed. In his dissenting opinion he said: "In other states, as here, where lands adversely held may be transferred by the owners, the entry is dispensed with as an overt and solemn act of disaffirmance, and the deed, if incompatible with any supposed recognition of the outstanding title, is taken as a manifestation of an intention to do what would, under the common law, have been actually necessary." The decision in Bagley v. Fletcher was recently followed in the case of Beauchamp v. Bertig, 119 S. W. 75, where the land conveyed by the minor was held adversely by his original grantee. So it may be said here with equal force, as in the case just cited, that the grantor in a conditional deed, by the execution of another deed to a third person after breach of the condition, manifests, in the most unmistakable manner, his intention of declaring a forfeiture. It is equivalent to an actual reentry or a declaration of forfeiture. The execution of his subsequent deed, being in hostility to his former grant, necessarily works a forfeiture. The execution and registration of the deed is an act of the highest degree of hostility, and one which the original grantee on condition must take notice of, because it is in the line of his title. The statement of a condition in the deed puts the grantee, and those in privity with him, on notice as to any subsequent deed executed by the grantor in hostility to the title thereby conveyed.

The Virginia statute (Code 1904, § 2418) declares that "any interest in or claim to real estate may be disposed of by deed or will." It was held under this provision that a right of action for land in the adverse possession of another, or a right of entry thereon after condition broken, by analogy to contingent remainders and conditional limitations, which are also mere possibilities, may be assigned by deed or will. Carrington v. Goddin, 13 Grat. 587; Young v. Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; Wilson v. Langhorn, 102 Va. 639, 47 S. E. 872. In Wilson v. Langhorn, 102 Va. 639, 47 S. E. 872, supra, the court, referring to a former decision construing the statute said: "The court in that case indulges in no refinement of construction. It is content to give plain words their usual and everyday meaning, and the interpretation there placed upon the statute did away forever with the niceties by which the devolution of property had theretofore been embarrassed and hindered, and made capable of disposition by deed or will any interest in or claim to real estate." Kentucky has a statute identical in language with the Virginia statute, and the Court of Appeals of Kentucky, in construing it, said: "The effect of this statute is to obviate at once all the difficulties growing out of the distinction which had been established by judicial construction between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in, or claim to, real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by will or deed." Nutter v. Russell, 3 Metc. (Ky.) 163. In Kenner v. Amer. Cont. Co., 9 Bush, 202, the Kentucky court held that the right to enter for condition broken could be devised. The Supreme Court of the United States in Schlesinger v. K. C. S. R. Co., 152 U. S. 453, 14 Sup. Ct. 651 (38 L. Ed. 507), said: "In the case of a private grant entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required." In that case the forfeiture was declared in a subsequent conveyance to another grantee, and the court said that the grantor had manifested his intention to forfeit the former grant. Reliance is placed by learned counsel on New York cases, principally Upington v. Corrigan, 79 Hun, 488, 29 N. Y. Supp. 1002, a decision by the appellate division of the Supreme Court of that state. That decision leaves out of account the distinction between the rights of a grantor before and after condition broken. But in that case (which was one concerning the effect of a devise of lands previously granted away by deed on condition subsequent) the devise was made before breach of the condition. The effect of that decision was merely to hold that before condition broken the grantor had no interest which could be devised by will.

We think it clear, both upon reason and authority, that where, as in this state, the common-law doctrine of livery of seisin is abolished by a statute authorizing a conveyance of land, whether held in possession or not, a subsequent deed, executed by an original grantor on condition, is equivalent to re-entry, and is effectual for the purpose of declaring a forfeiture, and vesting the title in the subsequent grantee. A hostile deed after condition broken serves to divest the defeasible title out of the grantee on condition, and to convey the title. This is, as said by the Pennsylvania court, a proper application of the maxim that, the reason of the law ceasing, the law itself ceases.

The judgment of the circuit court is therefore affirmed.

HART, J. I dissent in this case. For the reason that a dissenting opinion is of little

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or no practical value, I shall not attempt an exhaustive discussion and review of the numerous adjudicated cases bearing upon the principles involved in the action. Suffice it to say that I have read and considered the cases cited by the able attorneys who have filed briefs in behalf of all parties interested in the decision, and their briefs as I believe exhaust the subject.

The opinion of the court does not decide whether the condition in the deed in question is precedent or subsequent, I think it a condition subsequent. It is necessary for me to state my conclusion on this point. If I thought it was a condition precedent, I would concur in the judgment and not dissent. "Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as, when they do happen, defeat an estate already vested." Cooper v. Green et al., 28 Ark., at page 54. This is but a reiteration of the rule announced by Washburn, Blackstone, and Coke. It will be borne in mind that the opinion of the court has treated the condition in the deed as a condition subsequent. That is to hold that the estate was vested in the railway company by the execution of the deed. It is a rule of the common law that none may take advantage of a condition but grantors and their privies in blood, or, in the case of corporations, their successors. The right to forfeit an estate for breach of condition subsequent is confined to the grantor and his heirs, and cannot be transferred by alienation. 4 Am. Dig. (Cent. Ed.) p. 1142. Note case of Cross v. Carson, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742; authorities cited in the brief of Murphy, Coleman & Lewis, amici curiæ. This proposition has been so long established, both by the text-writers and by adjudicated cases, that there is no quarrel or dispute between my Brother Judges and myself as to it. They have decided that this rule has been changed by our statute, and that our former decisions have recognized the change. I maintain the contrary view. They declare that sections 736 and 737 change the common-law rule.

Section 736 reads as follows: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he were in possession thereof." At common law the owner of land could not convey it unless it was in his possession. To obviate this difficulty the statute in question was passed. The statute simply means that, if A. and B. both claim title to land, and B. is in possession thereof, A. may convey his claim of title, and his grantee may bring suit to recover the land. I think that was the only issue involved in the case of Cloyes v. Beebe, 14 Ark. 493, cited by the court to maintain its position that the statute has changed the rule of the common law on the subject. I think the court has confused the right of entry or bringing suit for possession of one who has been unlawfully dispossessed of his real estate with the right of entry, or taking advantage of a condition in a deed which has been broken. The statute was enacted for the purpose of enabling the claimant of real estate, who has been unlawfully deprived of his possession, to convey it. It is essentially different from the right to take advantage of a forfeiture, or breach of a condition. In the latter case the title is vested in the grantee, and the grantor has no claim of title, but only the right to claim a forfeiture or breach of condition. This is not a claim of title, but only a right, or personal privilege, which the grantor may either waive or assert. As we have already seen by the rules of the common law, in a condition subsequent the title is vested in the grantee by the execution of the deed. This is the difference between a condition precedent and a condition subsequent. See Cooper v. Green, supra. It is plain that if the title is vested by the execution of the deed, it must be revested in the grantor in some way before he can be one "claiming title," as expressed in sections 736 and 737 of Kirby's Dig., supra. If I am correct in the views I have expressed, the case of Lytle v. State, 17 Ark. 608, only holds that the common-law doctrine of maintenance is not in force in this state as applied to the case of one "claiming title to any real estate," and that such person may convey whatever title thereto he may possess.

I think a careful reading of the opinion in the case will show that this was the only issue raised by the pleadings and the evidence, and, if so, it is all that was decided. Section 737 reads as follows: "The term 'real estate' as used in this act, shall be construed as co-extensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real." Obviously this refers to the preceding section; and, if my construction of the preceding section is right, section 737 only means that one claiming title to a hereditament which is held adversely by another may convey it. In short, if section 736 has no reference to a conveyance of right to reenter, or take advantage of a breach of a condition, the word "hereditament" as used in section 737 has no reference thereto. The difference between a right of entry of one unlawfully dispossessed of his real estate and the right of entry for breach of condition is clearly explained in the case of Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657, and the distinction is recognized in the case of Hooper v. Cummings, 45 Me. 359. In the state of New Jersey previous to the passage of the act of March 14, 1851 (P. L. p. 282) a right for a condition broken was not assignable, and the condition of a deed could only be taken advantage of by a party to the deed,

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or by his privies in blood, or by his personal representatives. The case of Southard v. Railroad Co., 26 N. J. Law, 13, holds that it takes an express statutory enactment to make so important a change in the common law.

The court has sought to strengthen its opinion by citing the case of Bagley v. Fletcher, 44 Ark. 153, and Beauchamp v. Bertig, 119 S. W. 75, to the effect that a deed executed by an infant may be avoided by him after becoming of age by any act unequivocally manifesting an intention to avoid it, and that a reconveyance to a third person constituted such an act. I can see no analogy between the two questions. Nothing is said in the cases mentioned about the doctrine of re-entry, the assignability of a right to re-enter. It is well settled at common law that a conveyance by the grantor of his right to avail himself of a breach of a condition in a deed operates as a discharge of the condition. Such conveyance constitutes a waiver of the condition by the grantor, and does not transfer it to his grantee. There is no room for dispute about the common law on the subject. The sole question is, Has the statute changed it? It is conceded that the Legislature has the power to change the rule. If it has done so, that settles the matter. If it has not, courts have no right to encroach upon the common law, for this would be judicial legislation.

To continue the discussion would be fruitless. As above stated, my only purpose is to enter my protest against what I conceive to be a marked encroachment by the judiciary upon a long-established and well-defined rule of the common law. In 1816, while Arkansas was a part of the Missouri territory, a statute was passed adopting and recognizing the common law as a part of its system of laws. This statute remained to govern the subsequently formed territory of Arkansas, and, with some change of phraseology, was reenacted as a part of the laws of this state, and remains in our statutes to-day. Horsley v. Hilburn et al., 44 Ark. 458; Kirby's Dig. § 623.

MORRIS et al. v. FONTAINE.

(Supreme Court of Arkansas. July 12, 1909.)

Appeal from Crittenden Chancery Court; Edward D. Robertson, Chancellor.

Suit between R. S. Morris and another and Noland Fontaine, trustee. From a decree for the latter, the former appeal. Affirmed.

L. P. Berry and A. B. Shafer, for appellants. Geo. B. Rose and D. E. Myers (R. C. Brown and T. E. Hare, of counsel), for appellee.

McCULLOCH, C. J. One of the controlling questions in this case has been decided to-day in the case of Moore v. Sharpe, 121 S. W. 341. Decree affirmed.

HURST v. LUND.

(Supreme Court of Arkansas. July 12, 1909.)

Appeal from Circuit Court, Pulaski County, Second Division; Edw. W. Winfield, Judge.

Action between W. W. Hurst and Alfred M. Lund. From a judgment for the latter, the former appeals. Reversed and remanded.

Rose, Hemingway, Cantrell & Loughborough, for appellant. J. W. & M. House, for appellee.

McCULLOCH, C. J. This is an action at law to recover possession of a lot in the city of Little Rock. The defendant claims title under a deed containing a condition subsequent, which said condition he has broken. The plaintiff claims title under a deed from the same grantor, executed after the conditions in defendant's deed were broken. The sole question in the case is whether or not the plaintiff's grantor, after the condition was broken, had an interest which could be assigned to the plaintiff. This question is decided in the case of Moore v. Sharpe (of this date) 121 S. W. 341.

The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

REICHARDT v. HOWE et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. FRAUDS, STATUTE OF (§ 129*)—PART PERFORMANCE.

Where the lessee of land took actual possession and made valuable and extensive improvements, the case was thereby taken out of the operation of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 322–324; Dec. Dig. § 129.*]

2. INJUNCTION (§ 52*)—REMOVAL OF TIMBER.

Where an insolvent lessee, under the lease, was permitted only to cut timber so far as necessary for clearing the land, and for lumber and fence posts to be used on the land, his cutting the timber for the purpose of selling it should be restrained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

Appeal from Saline Chancery Court; Alphonzo Curl, Chancellor.

Action by Louis Reichardt against C. W. Howe and another. From a decree for defendants, plaintiff appeals. Reversed.

W. L. Cooper and Mehaffy, Williams, Cockrill & Armistead, for appellant. W. R. Donham, for appellees.

McCULLOCH, C. J. The heirs of Nick Kupferle, deceased, owned a tract of land in Saline county containing 120 acres, and appellant, Reichardt, had possession and control of it as their agent. Reichardt as such agent entered into the following written contract with appellee Howe: "Little Rock, Ark., Jan. 18, 1908. Contract for Three Years' Lease. Party of the first part, Louis Reichardt, agent for the Nick Kupferle estate, and C. W. Howe, party of the second part, hereby agree to fence the following land, to wit: With a four foot barb and woven wire fence and build thereon a four

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room box and ceiled house, barn and all outhouses, and dig well, and also agrees not to cut any timber except where he clears and improves the land only for lumber and fence posts to be used on said land, said lease to expire December 31, 1910. C. W. Howe. Louis Reichardt, Agt. Nick Kupferle Est." The description of the land was omitted at the time, with the understanding that it should be supplied later, but this was never done. Howe took possession of the land, and built a wire fence, inclosing about 65 acres. He then entered into a written contract with appellee Craine for the sale of all the merchantable timber on the tract, and Craine located a sawmill on the place for the purpose of sawing up the timber. Howe proceeded to cut timber on the land, and deliver it to Craine at his mill. He cut and removed a considerable portion of the timber from the land, delivering it to Craine under his contract of sale, and appellant instituted this suit in equity against both Howe and Craine to restrain them from continuing to cut timber. A temporary injunction was granted by the chancellor at the commencement of the suit, but was dissolved on the final hearing, when the complaint was dismissed for want of equity.

Appellant contends, and so alleges in his complaint, that he only intended to lease 30 acres of the land to Howe. There is an old clearing of about 10 acres on the tract, and appellant claims that this, together with 20 acres more, was only to be included in the lease. On the contrary, appellee Howe insists that the whole tract of 120 acres was embraced in the lease. The testimony is, we think, about evenly balanced on this issue. It consists mainly of testimony of appellant and Howe, with very little corroboration of either. Both of them are in a measure interested; and, as the chancellor accepted the testimony of Howe, we cannot say that the preponderance is against the conclusion reached.

It is insisted that, as the writing failed to describe the land, it was insufficient to constitute a contract between the parties, and that the whole transaction amounts to no more than a verbal contract, and the statute of frauds is pleaded against it. We conclude, however, that as there was actual possession taken by Howe under the contract, and valuable improvements made by him at considerable expense, the case was thereby taken out of the operation of the statute. The lessee under those circumstances is in equity entitled to specific performance of the contract. Brockway v. Thomas, 36 Ark. 518; Pledger v. Garrison, 42 Ark. 246; Ry. Co. v. Graham, 55 Ark. 294, 18 S. W. 56; Phillips v. Jones, 79 Ark. 100, 95 S. W. 164. If the version of appellee Howe be accepted as to the transaction in question, he took possession of the whole tract of 120 acres under the agreement, and with the consent of appellant. The reason why the operation of the statute of frauds is avoided by part performance is that it would be fraud to deny the benefits of the contract to the party who has in part performed it; and, where there has been performance of a part, he is entitled in equity to require the other contracting party to perform the whole contract. Justice could not be done by giving the party the benefit of that part of the contract only which he has performed. Proof that the contract has been partly performed is sufficient to prevent the operation of the statute of frauds, and to supply the omitted description; but the remaining part of the contract stands for itself, and the rights of the parties must be controlled by it.

The contract does not purport to convey the timber, nor to confer upon Howe the right to sell it. His right to use the timber is expressly limited to so much of it as is needed "for lumber and fence posts to be used on said land." He is by the terms of the contract permitted to cut timber upon the lands so far as it is necessary to remove it for the purpose of clearing the land, but only to that extent; and this does not give him the right to cut the timber where it is not done for the purpose of clearing the land; nor does it give him the right to sell the timber, even after he has cut it for the purpose of clearing the land. The title to the timber never passed to Howe. He was not permitted to use any part of it, except so much as was necessary for lumber and fence posts on the land. The owners of the land had the right at any time after they had entered into this contract, to cut and remove the timber themselves, except so much as was necessary for lumber and fence posts for improvements to be made by Howe on the land. Of course, the provision of the contract giving Howe the right to cut the timber for the purpose of clearing the land implied the right to destroy it in order to get it out of the way, so that the land might be cleared if the owners refused to take it off. But he had no right to cut the timber for the purpose of selling it, or to refuse to turn it over to the owner after he had cut it in order to clear the land. The testimony in this case convinces us that Howe cut the timber for the purpose of selling it, and not for the purpose of clearing the land. The evidence does not show that he was proceeding with any degree of diligence to clear the land, after he had cut the timber, but on the contrary, it shows that the matter of clearing the land was a secondary one with him. The testimony establishes the fact that Howe was insolvent, and unable to respond to appellant in damages. We are therefore of the opinion that the chancellor erred in dismissing the complaint.

The decree is reversed, and the cause remanded, with directions to enter a decree in favor of appellant, enjoining the appellees from removing any more timber from the land, except for the purposes indicated in the contract as construed in this opinion.

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SIDLE v. MICHARK MFG. CO.

(Supreme Court of Arkansas. July 12, 1909.)

1. LOGS AND LOGGING (§ 3*)—TIMBER RIGHTS—CONVEYANCES—DEEDS.

Where certain deeds to timber contained a provision that the grantee, and its successors and assigns, should have free right of ingress and egress to and from the land over any other land owned by the grantors, except land in cultivation, to remove the timber to a railroad, or to operate a logging or manufacturing business on the land, the grantees or their assigns were entitled to dam a slough, so as to raise the water sufficiently to float the logs to a point where they could be conveniently loaded on cars, provided defendant was not injured thereby.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS.

A chancellor's finding of fact will be sustained, unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

3. APPEAL AND ERROR (§ 193*)—EXCEPTIONS NOT RAISED AT TRIAL—WAIVER.

An objection that the complaint did not state facts entitling plaintiff to the relief demanded cannot be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1240; Dec. Dig. § 193;* Pleading, Cent. Dig. §§ 1355–1374.]

Appeal from Crittenden Chancery Court; E. D. Robertson, Chancellor.

Suit by the Michark Manufacturing Company against W. M. Sidle. Decree for complainant, and defendant appeals. Affirmed.

J. P. Holt, for appellant. J. F. Gautney, for appellee.

HART, J. M. C. Townley, Geo. C. Peters, and E. L. Pierce, partners under their firm name of Michark Manufacturing Company, filed their complaint in the Crittenden chancery court against W. M. Sidle to enjoin him from further injuring or attempting to destroy a temporary dam they had erected on the real estate described in the complaint. The complaint was filed on the 10th day of March, 1908, and in substance alleges: That the Pierce-Williams Company, a Michigan corporation, had purchased from the defendant and other landowners all the timber on the lands described in the complaint and had received deeds therefor. That the Pierce-Williams Company had conveyed by deed all their right and interest to the plaintiffs. The deed, omitting the formal parts, contains, among others, the following covenant: "We further grant to the said Pierce-Williams Company and to their successors and assigns the free right of ingress and egress to and from said land over any other land owned by us or either of us (except land in cultivation) for the purpose of removing said timber or the products thereof to the railroad to the St. Louis & San Francisco Railroad Company, or for the purpose of operating a logging or manufacturing business on said land." That, pursuant to the terms of said timber contract, plaintiffs had cut about 300,000 feet of cypress logs. That they had constructed in a slough or water course upon said lands a temporary dam, for the purpose of enabling them to float said logs to a point where they could be conveniently removed and loaded upon the cars. That on the 29th day of February, 1908, the defendant cut and destroyed said dam, thereby disabling plaintiff from further floating said logs. That defendant has threatened to again cut said dam if it is rebuilt, and unless he is restrained from so doing he will completely demolish and destroy said dam. A temporary injunction was granted, restraining defendant from further interference with the dam. The defendant admitted cutting the dam, but interposed, as set out by his counsel in his abstract, the following defenses, viz.: First. That the dams in question were a nuisance, both of a public and private nature. Second. That the plaintiffs had no right, by contract or otherwise, to erect said dams or maintain them. That said dams were not temporary dams, as alleged, but were intended to stand either permanently or long enough to inflict irreparable injury upon defendant. Third. That the dams flowed the water back upon him and rendered his lands unfit for cultivation. Upon final hearing of the cause the chancellor found the issues in favor of the plaintiffs, and a decree was entered perpetually restraining defendant from destroying or attempting to destroy the temporary dams of the plaintiffs on the real estate described in the complaint and set forth in the decree. The defendant has appealed.

By the terms of the deeds the title to the timber on the lands in controversy became vested in the plaintiffs. In express terms they were given the free right of ingress and egress for the purpose of removing said timber or the products thereof. The only exception made to this grant was that they should not for this purpose use the cultivated lands. The clause in the deed above quoted, we think, gave plaintiffs the right to float the logs out upon the water courses upon the lands, as well as to haul them away by land. The only restriction would be that they must not injure the defendant in so doing. It is claimed by the defendant that the dam caused the water to rise in the slough, and that it was thus backed over his adjoining lands, overflowing those in cultivation and preventing him from clearing other land, for which he already made a contract. On the other hand, the plaintiffs claim that the dam was so constructed that it could only raise the water five inches, and that when it rose higher than five inches, it would flow over and around the edges of the dam. They

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claim that it was necessary for them to raise the water in the slough five inches in order that they might at all times have sufficient water to float the logs.

They adduced testimony tending to establish their contention, and to show that they had carefully measured the stage of the water before and after the dam was constructed, and that after the dam was constructed the water was never raised more than five inches; that the openings left at the ends were sufficient to carry away all water in times of flood in excess of that. Their evidence also tended to show that they had examined the lands of the defendant after the erection of the dam, and that the water had not been raised sufficient to overflow or to injure them. The evidence for the defendant contradicted their testimony; but the chancellor found the issue in this respect in favor of the plaintiffs, and we cannot say that his findings are against the weight of the evidence. It has been so often held that a chancellor's finding of fact will be sustained on appeal, unless against the preponderance of the evidence, that a citation of any adjudicated cases on that point is not necessary. No useful purpose could be served in setting out in detail the evidence on the facts. It is sufficient to say that we have carefully examined it.

No objection to the jurisdiction of the court on the ground that the complaint did not state facts sufficient to entitle plaintiffs to the relief prayed for was made in the court below, and it is now too late to raise that question.

We find no prejudicial error in the record, and the decree is affirmed.

NASHVILLE LUMBER CO. v. ROBINSON et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER—ELECTION—EVIDENCE.
In an action by a conditional seller of furniture, etc., against the buyer and his surety on the conditional sale note given for the price, evidence *held* to sustain a verdict, finding that plaintiff had elected to retake the property in cancellation of the debt.
[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

2. SALES (§ 479*)—CONDITIONAL SALES—ACTION FOR PRICE—INSTRUCTIONS.
Where, in a suit by a conditional seller to recover the price on the sale note, defendant's answer admitted execution of the note, and alleged that the buyer purchased the property to operate a boarding house, and, on ascertaining that it was not paying, surrendered the goods to the seller, who accepted, retained, and afterwards used them, a requested charge that the seller claimed the return had been accepted "in satisfaction of said notes," and that the burden was on him to show that plaintiff accepted the return "in satisfaction of the notes," was properly refused as misstating the issues, the defense being not payment but election of the conditional seller to retake the property.
[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

3. SALES (§ 479*) — CONDITIONAL SALES — RIGHTS OF SELLER—ELECTION.
A conditional seller of goods may elect to retake the property and cancel the debt, or he may sue to recover the debt, waiving his reservation of title at his election, but he cannot, after retaking the property, maintain an action on the debt.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418–1422; Dec. Dig. § 479.*]

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Action by the Nashville Lumber Company against G. W. Robinson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This was a suit by appellant against the appellees on an instrument evidencing the sale and purchase of certain household and kitchen furniture and utensils. The instrument, omitting the description of the articles sold, is as follows: "Nashville, Ark., November 1, 1907. $224.30. On or before the 30th day of November, 1907, for value received we promise to pay to the Nashville Lumber Company store or order at Nashville, Arkansas, $224.30 with interest at ten per cent. per annum from date until paid. The express condition of the sale and purchase [here follows the description of the articles sold] for which this note is given, is such that the title, ownership and possession does not pass from the said Nashville Lumber Company store, until this note and interest is paid in full, and the said Nashville Lumber Company store has the power to declare this note due and take possession of the above property whenever they deem themselves insecure, even before the maturity of this note and sell the same at public or private sale without notice. The proceeds (after the expenses and interest are paid) to be applied on this note and any balance unpaid shall, in consideration of the use and rent of the property, be a valid and subsisting claim against the vendee. G. W. Robinson. E. A. Williams."

Appellant alleged that the "note" had not been paid, and prayed judgment for the amount thereof. The answer was as follows: They admit that they executed the "note." They allege that appellee E. A. Williams received no benefit for said note or the purchase of said property. That he merely signed said note as surety for the said G. W. Robinson, and further alleged that said note was given for the purchase of certain property described in said note, and that it was agreed between plaintiff and defendant that the title and possession of the property described in said note should remain in the plaintiff, Nashville Lumber Company store, until said note and interest

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thereon was fully paid. That said furniture was purchased by the defendant Robinson for the purpose of furnishing and running a boarding house in the town of Nashville, Ark., for the plaintiff. That said defendant Robinson run said boarding house for said plaintiff until about the 1st day of February, 1908, when he discovered that he was running said boarding house at a loss, and thereupon quit said house, and packed up all of said furniture and turned it over to the plaintiff, Nashville Lumber Company, stating at the time that he was unable to pay for said furniture, and that the Nashville Lumber Company accepted said property, and has since used it and has sold, leased, or in some way disposed of, said property to parties who are now running said boarding house, and by virtue of its acceptance and use of said property it is now estopped from maintaining a suit given for the purchase money thereof against either of the defendants. The appellees thus assumed the burden of proof, and the testimony in their behalf tends to prove that on the 1st day of November, 1907, the appellee Robinson rented a boarding house from the appellant at the price of $40 per month, under an arrangement that he was to board the laborers of the appellant, with a guaranty on the part of the appellant for the payment of their board. In order to run the boarding house it became necessary for Robinson to buy quite a lot of furniture, which he purchased from the appellant, and executed to appellant the note in suit, with E. A. Williams as his security. That the property purchased was removed from appellant's store to its boarding house, under the management of Robinson, and after running said boarding house at a loss for three months, on the 1st day of February, 1908, Robinson threw up his contract, quit the boarding house, and packed all the furniture and locked it up in the house, and surrendered it, together with keys of said house, to appellant, who accepted it, and retained it, and afterwards used it, or permitted its tenants to do so. There is no evidence to warrant the conclusion that appellant in accepting the property, if it did so, meant to receive it as a payment on the debt. But the evidence shows that appellant accepted it, if at all, as its own property, and not as the property of Robinson. It is unnecessary to set out in detail the evidence of appellant. It suffices to say that it shows that the furniture was never tendered to or accepted by it; that it had nothing more to do with the furniture after same was sold to appellee Robinson.

The court gave at the request of appellees the following instruction: "(1) When property is sold upon condition that the title thereto shall remain in the seller until the purchase price is paid, the seller, upon maturity of the debt may pursue either of two remedies: First, he may retake possession of the property, and thus in effect cancel the debt; or he may bring his action to recover the debt, and thus affirm the sale and waive the reservation of title. So in this case, if you believe from the evidence that the plaintiff agreed to sell the furniture described in the note to the defendant, and reserved the title and possession therein until purchase price thereon was paid, and that the note sued on in this case was given for the purchase price of said property and that after maturity of said note the defendants turned over to the plaintiff the possession of all of said property, and that it accepted said property or disposed of it, then the plaintiff could not bring this suit to collect the purchase price of said property, and you will find for the defendants as to the larger of the two notes."

Appellants asked the court to instruct the jury as follows: "(1) The court instructs the jury that this is a suit upon two promissory notes, executed by the defendants to the plaintiff, for the purchase price of certain personal property of which plaintiff retained title, and the defendant Robinson claims that all of said property was returned to the plaintiff, and was accepted by it in satisfaction of said notes, and the burden of proof is on the defendant to establish their defense by a preponderance of the testimony; and, if they fail to satisfy your minds that they are either of them turned over or delivered to the plaintiff or its authorized agent the property mentioned in the notes, and that the plaintiff accepted the same in satisfaction of said notes, then your verdict will be for the plaintiff. (2) The court tells the jury that the mere fact that the defendant Robinson leaving the personal property mentioned in the notes in the house of the plaintiff with or without its consent would not be such a delivery as would satisfy the notes, unless the plaintiff agreed to accept the same in satisfaction thereof. (3) That the court tells the jury that one who sells the personal property on a credit, and takes notes, retaining title until paid, has two remedies: To either sue on the contract for the purchase price; or to retake the property—and if you believe from the evidence in this case that the property was never turned over to the plaintiff or its authorized agent by the defendant, or either of them, in satisfaction of the notes, and that the same was accepted by the plaintiff in full satisfaction thereof, and that plaintiff never at any time elected to insist on the return of the property, then your verdict will be for the plaintiff." The court modified the above prayers by striking out the words: "in satisfaction of said notes," "in satisfaction thereof," "in full satisfaction thereof," and gave the prayers as thus

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modified. The appellant objected to the rulings of the court, and duly saved its exceptions. The verdict was for the appellees. The appellant in its motion for new trial assigned as errors the rulings of the court, which it urges here as grounds for reversal. The court overruled its motion, and it prosecutes this appeal.

Sain & Sain, for appellant. W. P. Feazel, for appellees.

WOOD, J. (after stating the facts as above). 1. There was evidence to sustain the verdict.

2. It will be observed that the note sued on contained the stipulation "that the title, ownership and possession does not pass from the Nashville Lumber Company's store until this note and interest is paid in full, and the Nashville Lumber Company store has the power to declare this note due and take possession of the above property whenever they deem themselves insecure," etc. The appellant does not sue for the property, but for the purchase money. The only defense was that appellant had elected, before the institution of the suit, to retake the property. The question of satisfaction of the note was not raised by the answer. The legal effect of the facts set up in the answer, if such facts were proved, was to show an election on the part of the appellant. Appellees introduced evidence tending to prove the allegations of its answer, and the court submitted the question to the jury under the proper instructions. Appellant's prayer No. 1 incorrectly states the defense set up by appellees. For it says: "Robinson claims that all of said property was returned to the plaintiff and was accepted by it 'in satisfaction of said notes.'" The words "in satisfaction of said notes" were not used in the answer, and none of its allegations would warrant the conclusion that appellee Robinson was setting up the defense of payment or satisfaction based upon a contractual relation between appellant and appellees. But the allegations of the answer and the evidence adduced by the appellees shows that their defense was a cancellation of the debt by the election on the part of appellant to retake the property. The words "in satisfaction of the notes" introduced an issue not in the case, and were well calculated to confuse and mislead the jury. For if the appellant elected to retake the property, and thus in effect to cancel the debt before this suit was brought, then it could not thereafter sue to recover the purchase money also. When this debt became due and was unpaid, the vendor, having reserved the title until the purchase price was paid, had its election to take either of two courses: It could elect to retake the property, and thus in effect cancel the debt; or it could bring its action to recover the debt, and thus affirm the sale and waive reservation of title. Butler v. Dodson, 78 Ark. 569, 94 S. W. 703. But appellant having taken the former course, as appellees allege, could not thereafter pursue the latter, and hence is barred of the right to recover in the present suit.

The judgment is affirmed.

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CONAWAY et al. v. NEWMAN MILL & LUMBER CO. et al.

(Supreme Court of Arkansas. July 12, 1909.)

1. PARTNERSHIP (§ 183*)—MORTGAGES—INDIVIDUAL DEBT—PREFERENCES.

An insolvent firm may mortgage its partnership property to secure individual in preference to partnership debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 331; Dec. Dig. § 183.*]

2. FRAUD (§ 12*)—FRAUDULENT REPRESENTATIONS—FUTURE ACTS—PROMISES.

A promise on behalf of a partner that, if the firm would execute a mortgage to secure his individual debt, he would advance more money to the firm, was a promise as to future acts, and insufficient to sustain a charge of deceit in obtaining the mortgage, on his refusal to perform.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

Appeal from Monroe Chancery Court; Jno. M. Elliott, Chancellor.

Suit by J. A. Conaway and another against the Newman Mill & Lumber Company and others. From a decree in favor of defendant Greenwald, and awarding to him priority of payment out of the assets of the insolvent firm, complainants appeal. Affirmed.

Thomas & Lee, for appellants. Manning & Emerson, for appellees.

HART, J. This is an action in equity, instituted in the Monroe chancery court by J. A. Conaway and Goldman & Co. against the Newman Mill & Lumber Company, R. L. Newman, J. D. Atkinson, and H. Greenwald. Goldman & Co. is a partnership composed of J. D. Goldman, W. L. Jeffries, and S. Bacharach. The Newman Mill & Lumber Company is a partnership composed of the plaintiff J. A. Conaway and the defendants R. L. Newman and J. D. Atkinson. They were engaged in operating a sawmill in Monroe county, Ark., during the year 1907. Their assets consisted chiefly of the sawmill outfit complete and 21 head of oxen, wagons, etc. On the 30th day of September, 1907, the members comprising the firm of the Newman Mill & Lumber Company executed a mortgage on their partnership property in favor of H. Greenwald to secure an indebtedness of $3,000. The indebtedness secured was the individual debt of R. L. Newman, one of the partners. During the course of operating the mill the Newman Mill & Lumber Company became indebted to various creditors, among whom were the plaintiffs Goldman & Co.

On the 18th day of December, 1907, Goldman & Co. brought suit against them for the sum of $755.89 in the Monroe circuit court, and sued out a writ of attachment against their property. The object of the present suit was to have the partnership of the Newman Mill & Lumber Company dissolved and its affairs wound up on account of insolvency, and to have the debt of Greenwald postponed until the partnership debts were settled. The appointment of a receiver was asked for, and J. B. Hagin was appointed receiver. He at once qualified and took charge of the property and assets of the firm. The complaint was filed December 30, 1907, and, in addition to the matters above set forth, alleged that the mortgage to Greenwald was procured by deceit and fraud. Greenwald answered the complaint, and denied that he had procured the execution of the mortgage by deceit and fraud. He also denied that the debt secured thereby was the individual debt of Newman, but averred it to be the debt of the partnership. Newman and Atkinson, although duly summoned, failed to answer. The chancellor found the issues in favor of the defendant Greenwald, and declared that his mortgage was a prior lien on the property embraced in it. A decree was therefore entered in his favor, in which the property was ordered sold and the proceeds applied, first, to the payment of his debt and interest, and the remainder, if any, to the other creditors of the Newman Mill & Lumber Company. Judgment was also rendered in his favor for his debt of $3,000 and the accrued interest. The plaintiffs have duly prosecuted an appeal to this court.

The Newman Mill & Lumber Company was insolvent at the time the mortgage to Greenwald was executed; but in the case of Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124, it was held that an insolvent firm may mortgage their partnership property to secure individual, in preference to partnership, debts. Counsel for plaintiffs urge us to overrule this case, and contend that it is against the weight of authority. The two lines of decisions were discussed in that opinion, and the rule above announced was deliberately adopted. It has been followed ever since by this court. It has become a rule of property, and we decline to disturb it.

It is also contended by counsel for plaintiffs that the mortgage of the Newman Mill & Lumber Company to Greenwald was procured by deceit. The testimony for the plaintiffs shows that, when the firm of the Newman Mill & Lumber Company was formed, Newman put in $1,500, Atkinson put in $500, and Conaway nothing; that the agreement between them was that Newman should be first paid back the amount paid in by him, with interest, and then that Atkinson in like manner should receive back the amount paid in by him; that at the time the mortgage in question was executed the amount, principal and interest, owed to Newman was $1,600; that to induce them to sign the mortgage Greenwald told them that Newman would draw out of the firm if they did not execute the mortgage, but that if they did execute it he would advance the firm more money; that Newman had traded with Mrs. Green-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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wald for some hotel property, and the mortgage was in part payment of it; that Newman afterwards denied that he had authorized I. Greenwald, the husband and agent of H. Greenwald, to represent to plaintiff Conaway that he would advance the firm more money.

Greenwald denied that he made the statement about Newman making further advances to the Newman Mill & Lumber Company, or withdrawing from the firm if the mortgage was not executed. This was not a false statement upon which fraud may be predicated. Such fraud must be of existing facts, or facts which previously existed, and cannot consist of mere promises as to future acts, although such promises are subsequently broken. The facts adduced in evidence by plaintiffs could only establish a breach of contract, but they do not sustain an action for fraud or deceit. The representations here complained of relate solely to promises as to matters in futuro. 20 Cyc. 20, and cases cited.

We find no prejudicial error in the record, and the decree will stand affirmed.

ARNOLD v. WATSON.

(Supreme Court of Arkansas. July 12, 1909.)

1. MORTGAGES (§ 342*)—TRUST DEED—SUBSTITUTED TRUSTEE—APPOINTMENT.

A trustee cannot be substituted for the trustee named in a trust deed, unless the conditions authorizing the substitution exist.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1041; Dec. Dig. § 342.*]

2. MORTGAGES (§ 342*)—TRUST DEED—SUBSTITUTED TRUSTEE—APPOINTMENT.

A deed of trust authorized the beneficiary, on the death of the trustee or his neglect to carry out the trust, to appoint a substitute. The beneficiary appointed a substituted trustee, and indorsed on the deed of trust the statement of the appointment, because the trustee named had neglected to execute the trust. The trustee was at the time a nonresident, and not in a position to act. *Held*, that the appointment was valid, in the absence of a showing that the original trustee had not neglected to enforce the trust, especially since the indorsement implied that the beneficiary had requested the trustee to act, and that he had neglected to do so.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1041; Dec. Dig. § 342.*]

3. MORTGAGES (§ 342*)—TRUST DEED—SUBSTITUTED TRUSTEE—APPOINTMENT.

While the recitals in a deed by a substituted trustee in a trust deed cannot, prima facie, prove the validity of the appointment of the substituted trustee, yet where the validity of the appointment has been established by other evidence, the recitals showing substantial conformity to the trust deed are prima facie true, and the burden of showing their falsity is on the person attacking the deed.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 342.*]

4. MORTGAGES (§ 369*)—FORECLOSURE—SALE—APPRAISEMENT—VALIDITY.

In an action to set aside a deed on foreclosure of the trust deed, evidence *held* not to show that the land was appraised at a grossly inadequate value.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.*]

5. EVIDENCE (§ 83*)—PRESUMPTIONS—CONDUCT OF AFFAIRS.

The presumption is that appraisers of land to be sold under foreclosure of a trust deed have performed their duty by actually viewing the property, and otherwise, as the law requires.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

6. MORTGAGES (§ 369*)—TRUST DEEDS—SALE BY TRUSTEE—EVIDENCE.

In a suit to set aside a deed by a substituted trustee in a trust deed to the beneficiary, evidence *held* not to show that the beneficiary by fraud and collusion prevented other bidders from participating in the sale.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.*]

Appeal from Lawrence Chancery Court, Eastern District; Geo. T. Humphries, Chancellor.

Suit by Ludie Arnold against Elizabeth J. Watson. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

This is a suit by appellant against the appellees to set aside a deed executed by J. A. Watkins as trustee to Elbert L. Watson. The complaint alleged that Thomas Arnold died in Lawrence county in 1889, the owner in fee of certain lands, which are described in the complaint, that appellant was one of four heirs, that Elbert L. Watson claimed to have a mortgage on the lands to secure an indebtedness of $2,818, that after the death of Arnold, Watson probated his claim and received a payment, leaving a balance due him of $2,000 on the original claim. The grounds alleged for setting aside the deed are that: "Elbert L. Watson fraudulently discharged Thos. J. Watson, the duly appointed trustee, and without right or authority appointed the defendant J. A. Watkins to act in his stead, and caused the said substituted trustee to make a fraudulent sale of said lands on the 10th day of November, 1893. That the substituted trustee fraudulently neglected to cause the lands to be appraised according to law, that he fraudulently sold for $2,950 when there was in fact only $2,000 due. That at said sale, Elbert L. Watson, after causing the same to be made at a time and place to suppress free competition in bidding and fraudulently agreeing with other parties present who might have bid on the lands that he would grant them certain favors and immunities provided they would forbear to bid against him at the sale, purchased all the lands for the sum of $2,993.50, which was far below its real value." The complaint then alleged that: "On the 11th day of December, 1893, without waiting for the time for redemption to expire, the substituted trustee executed to Elbert L. Watson a deed purporting to convey to him said lands, all of which was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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a fraud upon the rights of plaintiff, who was then a minor of the age of 9 years. That since the execution of said deed, Elbert L. Watson died, leaving a will by which he is informed and believes that defendants have become the owners of the rights of Elbert L. Watson in the lands. That the rental value of the lands is $1,000 per year, that there was a sawmill and cotton gin on the lands when Elbert L. Watson took possession of it of the value of $1,000 which defendants have removed." The prayer was: Prayer for an accounting, charging defendants with machinery removed and rents for the year 1894 and each year since that time and for the value of machinery removed and that the balance due on the mortgage be paid out of said sum, and that he have judgment for one-fourth interest in said land as one of the four heirs at law of Thomas Arnold, deceased, and for one-fourth of whatever balance may be due from rents and profits after paying the mortgage, and all other proper relief. The answer denied the material allegations of the complaint, and set up title as the heirs of Watson, who had died after obtaining the deed from Watkins, which they allege was duly executed in pursuance of the power contained in the deed of trust. The decree dismissed the complaint for want of equity.

W. A. Cunningham and Smith & Blackford, for appellant. Campbell & Suits, for appellee.

WOOD, J. (after stating the facts as above). Appellant urges the following grounds for reversal: (1) Because the substituted trustee had no power to sell, the contingency never having arisen giving the beneficiary the right to appoint a substituted trustee. (2) Because there was no real appraisement of the lands as contemplated by the statute; the appraisement being fixed by the agent of the beneficiary, who was also the purchaser, and not by the appraisers. (3) Because the purchaser by fraud and collusion prevented other bidders from participating at the sale. We will dispose of these in the order named.

1. Thos. J. Watson was the trustee named in the deed of trust. The deed of trust contained the following provision: "But should said Thomas J. Watson die or neglect to carry out this trust, then said Elbert L. Watson, or the holder of said notes, may by indorsement hereon, or on the margin of the record of this deed, name and appoint any other suitable person to act as such trustee, and such person when so appointed shall have all the authority herein given to said Thomas J. Watson." The deed of trust is indorsed on the margin as follows: "I Elbert L. Watson, hereby appoint and designate J. A. Watkins as trustee to execute the within trust, and confer upon him all the power and authority for such purpose as the within deed of trust confers upon Thomas J. Watson, the trustee herein named, who has neglected to execute this trust. Newport, Arkansas, September 27, 1893, E. L. Watson." This statement of the beneficiary in the deed of trust is certainly evidence to be considered by the chancellor in determining whether the contingency arose which gave the beneficiary the right to substitute a trustee. Who could better determine than the beneficiary whether the trustee had neglected to carry out the trust? This statement of the beneficiary shows that he did determine that the trustee had neglected to carry out the trust, and that should end the matter, especially in the absence of any evidence to the contrary. Such evidence as the record discloses tends to confirm the statement of the beneficiary that the trustee had neglected to execute the trust. For it appears that prior to September 27, 1893, and "soon after the opening up of Oklahoma, he (the trustee) went over there"; that "he was out of the state, and not in a position to act." The evidence is almost conclusive that the condition had arisen that authorized the beneficiary to appoint J. A. Watkins trustee.

In the case of Stallings v. Thomas, 55 Ark. 326, 18 S. W. 184, the contingency that authorized the substitution had not arisen. The mortgage provided in that case that the beneficiary might substitute another trustee in case the trustee named in the mortgage "should die, be absent from the county or fail or refuse to execute it." The opinion states that the trustee "was alive and in the county at the time of the sale; he was not requested to execute the power, and did not refuse or fail to do it." The case is authority for the position that a trustee cannot be substituted for the trustee named in the mortgage unless the conditions which authorize the substitution are found to exist. Here it is clearly shown that they did exist. In Stallings v. Thomas, supra, it appears affirmatively that the trustee named in the mortgage was not requested to execute the power, and that he was in the county where he could have executed it if the request had been made. But here the facts are different. The trustee named in the deed "was out of the state, and not in a position to act." That being true, a request to act could not have been complied with, and its necessity, therefore, was eliminated. Moreover, there is no affirmative showing here that the beneficiary, Watson, proceeded to substitute a trustee "without requesting" the trustee named in the deed "to act." The language of the indorsement "who has neglected to execute this trust" implies that the beneficiary had done whatever was necessary for him to do under the circumstances. Otherwise he could not have said that the trustee "had neglected to execute the trust."

2. To be sure the recitals in the deed of J. A. Watkins as trustee could not be taken as prima facie evidence of the validity of his

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own appointment; that being the subject-matter of the inquiry. But the validity of such appointment being established by evidence aliunde, as we have shown, then the recitals of his deed showing substantial conformity to the requirements of the deed of trust are prima facie true, and the burden of showing their falsity is upon the party assailing the deed. McConnell v. Day, 61 Ark. 464, 33 S. W. 731; Ingle v. Jones et al., 43 Iowa, 286; Beal v. Blair, 33 Iowa, 318; James T. Tartt et al. v. Clayton, 109 Ill. 579. See, also, 28 Am. & Eng. Ency. L. 825, notes 10 and 11; Naugher v. Sparks, 110 Ala. 572, 18 South. 45; Tew v. Henderson, 116 Ala. 545, 23 South. 128. See note to Ehrman v. Hoskins, 19 Am. St. Rep. 297. Where the trustee's deed is the subject-matter of attack, the same rule should apply in equity as at law. The doctrine is applicable generally only to the grantor of the power in the mortgage or deed of trust and his privies, and there can be no good reason why it should apply at law and not in equity.

The trustee's deed contains the following recital: "And whereas, the said J. A. Watkins, at the request of said E. L. Watson, did prior to said day of sale, to wit, on the 17th day of October, 1893, cause said lands to be duly appraised by W. T. Blackford, S. W. Howard, and H. H. Munsel, three householders of said Lawrence county, Arkansas, who were duly appointed by D. S. Jasper, a justice of the peace in and for said county, as the law directs, at which appraisement [then follows a description of the lands by legal subdivisions, as called for in the deed of trust, together with a separate appraised value as to each subdivision], which appraisement totalled $3,600.00." According to the rule above announced the foregoing recitals must be taken as prima facie true. The appellant has undertaken to show that the lands were not "duly appraised" by John Arnold, who testified on this point as follows: "Appraisers never went to look at the farms. John Glass stated to the appraisers that they wanted it appraised so it would bring the debt, so it would sell, and to appraise it down so they could have it." And by William Crane, who testified: "I heard John Glass tell the appraisers they wanted it appraised so it would bring the debt and expenses so the boys could buy it in." It was also shown by appellant that Glass was E. L. Watson's agent. It was in evidence that John Arnold lived upon the lands in question at the time the alleged appraisement was made, and that the appraisers met at his house. So, when the witness says they never went to look at the farms, he must have meant that they did not ride or walk over the farms to look at them. The testimony does not show that the appraisers could not and did not view the lands from John Arnold's house, where they met.

In Merryman v. Blount, 79 Ark. 4, 94 S. W. 715, we said: "The object of the appraisement was to ascertain the true value of the land, and to insure, as far as possible, the sale of the land at a fair price, to prevent the possibility of the land being sacrificed at a grossly inadequate price. The report of the appraisers is, of course, made after they are sworn, and the presumption is that they will do their duty and ascertain the value of the land as the law requires, and that this shall be done, not by report or hearsay, but by actually viewing the property. While the statute contemplates an actual view of the property, it does not require an actual entry on the land in order to view it. A reasonable construction of the statute is that the appraisers must have viewed the property before they place a value upon it. If this view can be had so as to ascertain the true value of the property without entry on the land as well as by actually going upon it, then actual entry is not necessary." There is nothing in the evidence to show that Glass, the agent of Watson, did not have the appraisers duly appointed, as shown by the recitals of the trustee's deed. Having been duly appointed the presumption is they did their duty, and ascertained the value of the land as the law required. What John Glass may have said to the appraisers was not material if the appraisers were not influenced by it to make a fraudulent appraisement. The evidence does not show that the lands were appraised at a grossly inadequate value. The preponderance of the evidence does not warrant the conclusion that the lands were appraised at less than their true value. It is certain that the evidence as to the value of the land at the time of the appraisement does not justify a finding of fraud on the part of the appraisers. The appraisement, for aught shown to the contrary, comes well up to the requirements of the law as declared in Merryman v. Blount, supra.

8. To support his contention that E. L. Watson practiced fraud in suppressing bidding at the trustee's sale, appellant relies upon the following testimony: John Arnold testified: "The morning we went to Walnut Ridge to buy it in we saw Mr. Watson, and he said: 'Let me bid it in, and don't you bid on it, and at the end of 12 months you come in and I will make you a deed to it. The estate can't claim it against you.' During the time Abe Phelps wanted to bid on it, and came to me and asked me if I was going to bid on it, and I told him the arrangement I had made, and he said if we boys were going to get it, he would not bid, but if Watson was buying it, he wanted it. Scarborough wanted it sold in 40-acre blocks, and Watson said it was fixed so the boys would get it." Henry Arnold testified: "I heard a conversation between John and E. L. Watson. John told Watson that he wanted to bid the land in, and Watson said, 'Let me bid it in, and I will make you a deed to it, and it will hold the other heirs off, or they will come in against it.' We were down at Newport aft-

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erward and Watson said he had not gotten a deed. When he got the deed he would make us a deed. There was only one bid, and Watson made that." A. P. Brown testified: That he knew Watson and the Arnold boys, and that he heard a conversation between them on the day of the sale of the lands at Walnut Ridge, and from the conversation he understood they were talking about arranging the land matter so that the Arnold heirs could get it at some future date. "As I understood it, they were to have it back by paying what was due at the end of the year." W. H. Crane testified that he heard a conversation between E. L. Watson and John Glass, his agent, in which Glass told him that he (Watson) would have to buy the land in again, and Watson said: "I won't if you keep your damn mouth shut." J. A. Watkins testified that after the sale Watson said to the Arnold boys: "Boys, if you want to take it up, I would be glad if you would do so."

It was shown that Judge Scarborough, mentioned in the testimony of John Arnold, was the attorney for the administrator of the Arnold estate, and was present at the sale. This suit was begun January 31, 1906, a little more than 13 years after the sale. Glass, whose conduct in connection with the appraisement is assailed, died in 1898, and E. L. Watson, whose conduct in connection with the sale is attacked, died in 1901. Appellant is not responsible for the delinquencies of his guardian. But it is nevertheless true that if the facts with reference to the conduct of Glass and Watson were as John Arnold testified, he, as guardian of appellant, should have brought suit to set aside the sale long before Glass and Watson died, and was most remiss in duty for not having done so. Again, according to the testimony of John and Henry Arnold, arrangements had been made for money with which to purchase the land at the sale, but they did not make the purchase because of the understanding they had with Watson that he was to bid it in, and let them have it afterwards. If they could have raised the money to buy at the sale, they could have also redeemed before the time expired. If the land was worth between $6,000 and $10,000, as they testify, it does not seem reasonable that they would have let the opportunity pass, but would have insisted on Watson's carrying out his promise to make them a deed before their legal rights to redeem had passed forever. John and Henry cross each other in their testimony as to the arrangements that had been made to secure the money before the sale with which to purchase the land. John testified that he had made arrangements with the Lawrence County Bank to borrow the money. Henry testified that John told him that the arrangement to get the money was with one James Turner. Learned counsel for appellant say in their brief "that appellant was at the time of the sale a minor of the age of 9 years, and that the scheme to have the lands sacrificed was a fraud upon his rights, whether John and Henry Arnold got the benefit of it or E. L. Watson." But doubtless the question with the chancellor was, as it is with us, whether a sale which, from the recitals of the deed and the testimony of the trustee, appears to have been conducted according to law should be set aside upon the testimony alone of witnesses who confess that they were in the "scheme of fraud, if it be such, upon the rights" of their brother. The testimony of Brown, who was unrelated to the parties and disinterested, shows that as he understood the conversation between John and Henry Arnold and E. L. Watson on the day of the sale, it was that the "Arnold heirs could get it at some future time. They were to have it back by paying what was due at the end of the year." This corroborates what O. D. Watson, the son of E. L. Watson, who was with his father on the day of the sale, says that his father told the Arnolds, to wit: "The law gives you 12 months to redeem this land, if you want to take advantage of it. All I want is my money. I won't want the land." It corroborates also the testimony of the trustee, who testifies that Watson said to the Arnold boys, "Boys, if you want to take it up, I would be glad if you would do so," which could mean nothing more nor less than that he would be glad if the boys would take up the land; i. e., redeem it. The testimony of Crane is shown not to have been consistent and free from suspicion all the way through, and his testimony of the purported conversation between E. L. Watson and John Glass, Sr., after the sale, is not sufficiently definite to show what the parties to the conversation meant by it. It is in the nature of hearsay evidence.

Giving all the testimony in the record careful consideration and scrutinizing the sale with that scrupulous care required to protect all the rights of the minors, who are ever the special wards of chancery, we are unable to find any warrant in this record for setting aside the decree and finding of the chancellor. The law imputes good, and not evil, notions to the sayings and doings of men that appear upon their face to be regular and free from any suspicion of fraud. We are unwilling from the testimony in this record, after this great lapse of time, to put the "trail of the serpent" over the conduct of those who were not assailed until death had closed their mouths. The law does not justify us in doing so. Naugher v. Sparks, supra.

Decree affirmed.

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CROSSETT v. CROSSETT.

(Court of Civil Appeals of Texas. March 21, 1908. On Rehearing, May 16, 1908.)

DIVORCE (§ 93*)—CRUELTY—PETITION.

A petition for divorce, charging the wife with a series of acts extending over a period of six years, alleged to constitute outrage and cruelty of a nature rendering living together by the parties insupportable, the acts being the charging of plaintiff by defendant with infidelity to his marital vows and with dishonesty and acts of personal violence, is sufficient, though showing frequent condonations.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 300; Dec. Dig. § 93.*]

Appeal from District Court, Potter County.

Action by W. A. Crossett against S. E. Crossett. Judgment for defendant, and plaintiff appeals. Reversed.

C. B. Reeder, for appellant. Gustavus, Bowman & Jackson and Cooper & Peury, for appellee.

On Rehearing.

CONNER, C. J. This is a suit for divorce, in which the appeal is from a judgment of dismissal after a ruling of the trial court that appellant's petition was subject to a general demurrer. On a former day of the term a majority of us, as the court was then constituted, affirmed the judgment; Justice SPEER dissenting. The majority of the court as now constituted, however, have finally concluded that there was error in the trial court's ruling on demurrer, and that the judgment should be reversed and the cause remanded.

Appellant's petition is that of a husband, which, in substance and in so far as now deemed material, charges the wife, appellee, with a series of acts extending from January, 1900, to October, 1905, that are alleged to constitute outrage and cruelty of a nature rendering their longer living together insupportable. The acts of cruelty alleged are specified instances where the wife charged appellant with infidelity to his marital vows, with dishonesty, and acts of personal violence. The petition further charged frequent abandonment on appellee's part for short periods, with consequent denial of the comforts of the marriage state. The majority are of opinion that, notwithstanding the frequent condonations exhibited by the petition, it should have been left for the jury to say whether the charges of cruelty made were true, and, if so, whether they were such as to render the living longer together of the parties insupportable under our statute on the subject. While the writer yet inclines to the view expressed on the original hearing, the question of the sufficiency of the petition is very close, and he does not feel sufficiently confident of the original view to feel justified to incumber the record with a full copy of the lengthy petition, or to now dissent.

The motion for rehearing will therefore be granted, and the judgment reversed, in accordance with the conclusion of the majority as above indicated.

POSTAL TELEGRAPH CABLE CO. OF TEXAS v. HARRISS.

(Court of Civil Appeals of Texas. May 19, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 57*)—CONTRACTS FOR TRANSMISSION OF MESSAGES—CONSTRUCTION.

The blanks furnished by a telegraph company for messages recited that it transmitted and delivered messages subject to the conditions on the back thereof. One using a blank requested the company to send a message subject to such conditions. The company accepted the message for an agreed consideration. The conditions were not shown. *Held*, that the company agreed to transmit and deliver the message to the addressee, and it was liable for the negligence of any company it employed in the performance of the contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 38; Dec. Dig. § 57.*]

2. PLEADING (§ 93*)—INCONSISTENT PLEAS.

A party may file inconsistent pleas.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

3. PLEADING (§ 177*)—REPLICATION—ACTION FOR DELAY OF MESSAGES—ISSUES.

Under Rev. St. 1895, art. 1193, providing that special matter of defense shall be regarded as denied unless expressly admitted, plaintiff suing a telegraph company for negligent delay in the delivery of a message, who, in the replication to the answer setting up a contract limiting the liability of the company to its own line, stated the facts substantially as set forth in the answer, without filing a general denial, did not expressly admit the special contract, and the company, to avail itself thereof, must prove it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 354; Dec. Dig. § 177.*]

4. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—EVIDENCE.

In an action against a telegraph company for delay in delivering a message, received at a city in Texas for transmission to a person in a sister state, thereby depriving the sender of the privilege of buying stock of a bank in such city, the sender may prove the value of the stock at such city, and may recover, though there is no proof of the value of the stock at the residence of the sendee.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

5. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—EVIDENCE.

A sender of a message, suing for the negligent delay in the delivery thereof because he was thereby deprived of the privilege of buying bank stock, need only show that he would have obtained the stock if the message had been promptly delivered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

6. TELEGRAPHS AND TELEPHONES (§ 73*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—EVIDENCE.

Whether the sender of a message, suing for the negligent delay in the delivery thereof be-

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cause he was thereby deprived of the privilege of purchasing bank stock from the sendee, would have obtained the stock had the message been promptly delivered, is for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 73.*]

7. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—EVIDENCE.

In an action against a telegraph company for negligent delay in the delivery of a message, thereby depriving the sender of the privilege of buying bank stock of the sendee, a telegram sent by the sendee, and a letter written by him, to the effect that the message was received too late; that had it been received earlier, the sender could have bought the stock—were material to show that, if the message had been delivered in time, the sender would have acquired the stock.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

8. TRIAL (§ 58*)—EVIDENCE—OBJECTIONS.

Where no tenable objection is presented to the introduction of testimony, a request to withdraw the same is addressed to the discretion of the trial court, and the party making the request must excuse himself for not presenting his objection on the introduction of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 137; Dec. Dig. § 58.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Langdon Harriss against the Postal Telegraph Cable Company of Texas and another. From a judgment for plaintiff, the Postal Telegraph Cable Company of Texas appeals. Affirmed.

A. P. Wozencraft and D. A. Frank, for appellant. W. B. Carrington and Eugene Williams, for appellee.

KEY, J. Langdon Harriss brought this suit against two defendants, one designated the Postal Telegraph Cable Company, and the other designated the Postal Telegraph Cable Company of Texas, seeking to recover damages on account of alleged delay and negligence in transmitting and delivering a telegram sent by the plaintiff from Waco, Tex., to E. P. Dismukes at Columbus, Ga. The Postal Telegraph Cable Company filed no answer, and judgment by default was rendered against it. The Postal Telegraph Cable Company of Texas filed an answer to the effect that, by the terms of the contract under which it received the message, it was stipulated and agreed that if it was to be transmitted over any other line, defendant would act as agent for the plaintiff in delivering it to the other line, and was not liable for default or negligence on the part of such other line. It was also alleged that the defendant's line did not extend all the way to Columbus, Ga., and that the message was delivered by the defendant Postal Telegraph Cable Company of Texas to its codefendant, Postal Telegraph Cable Company at Memphis, Tenn., and transmitted from there by the latter company. The plaintiff filed a replication to the defendant's answer, consisting of a general demurrer and a special plea, setting up certain facts which he alleged rendered the Texas Cable Company liable for the negligence of the other defendant. There was a jury trial, which resulted in a judgment in favor of the plaintiff for $350, and the Postal Telegraph Cable Company of Texas has appealed.

Though not constituting all the testimony, the following agreed facts were put in evidence:

"It is agreed between the plaintiff herein and the Postal Telegraph Cable Company of Texas that a statement of a part of the facts in this case is made as follows:

"That on January 28, 1907, Langdon Harriss, the plaintiff herein, at Waco, Tex., and W. B. King & Company at Houston, Tex., were each in possession of an offer on the part of E. P. Dismukes, at Columbus, Ga., to sell 35 shares of the stock of the First National Bank of Waco, Tex., at $230 per share; that said Langdon Harriss was in possession of this offer to sell him the said 35 shares at the price aforesaid on January 28, 1907, at an hour as early as 10 o'clock a. m. That at 10 o'clock a. m. on January 28, 1907, the said Langdon Harriss delivered to the Postal Telegraph Cable Company of Texas, a defendant herein, a telegram addressed to E. P. Dismukes, care of the Georgia Manufacturing Company, Columbus, Ga., stating: 'Offer accepted. Send stock First National Bank. Please wire confirmation'—and signed 'Langdon Harriss.' That said telegram was correctly sent from Waco, in the order of its receipt, to Dallas at about 8 minutes past 10 o'clock on January 28, 1907. That said telegram was correctly received in the Dallas office of the Postal Telegraph Cable Company of Texas at about 10:10 a. m. January 28, 1907, and sent from said Dallas office in the order of its receipt by said Postal Telegraph Cable Company of Texas at about 10:50 a. m. on the same day, and correctly delivered to the Postal Telegraph Cable Company in Memphis, Tenn., on the same day at 10:51. That said telegram was forwarded by the Postal Telegraph Cable Company from Memphis, Tenn., to Birmingham, Ala., at 2:13 p. m. January 28, 1907, and correctly delivered there to the Postal Telegraph Cable Company. That said telegram was forwarded from Birmingham, Ala., by the Postal Telegraph Cable Company at 2:20 p. m. January 28, 1907, to Columbus, Ga., and was correctly received at 2:25 p. m. on the same day by the Postal Telegraph Cable Company, at Columbus, Ga., and thereafter by it, on the same day at 2:30 p. m., was delivered to said Dismukes. That the said telegram related to the said 35 shares of stock.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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"That on January 28, 1907, the said Wm. B. King & Co. delivered to the Postal Telegraph Cable Company of Texas, at Houston, Tex., a telegram addressed to said E. P. Dismukes, Columbus, Ga., care Georgia Manufacturing Company, in these words: 'Letter received. Accept. Forward stock draft attached. Answer confirm sale. [Signed] Wm. B. King & Co.' That the said telegram referred to the said 35 shares of stock. That the said last-named telegram was so delivered at 10:40 a. m. January 28, 1907. That said Postal Telegraph Cable Company of Texas correctly, in the order of its receipt, transmitted the said telegram to New Orleans, La., on the same day it was received, and there delivered it at 11:03 a. m. to the Postal Telegraph Cable Company. That on the same day the Postal Telegraph Cable Company at 12 o'clock noon, forwarded the said telegram, and correctly delivered the same at Birmingham, Ala., to the Postal Telegraph Cable Company. That said telegram was correctly received by the Postal Telegraph Cable Company at Birmingham, Ala., about 12:11 o'clock p. m. January 28, 1907, and on the same day at 12:42 o'clock p. m. correctly forwarded the same from Birmingham to E. P. Dismukes at Columbus, Ga., where it was received in its office at about the hour of 12:46 p. m., and was delivered by it to the said E. P. Dismukes at the hour of 1 o'clock p. m., who answered, confirming sale to King & Co.

"That neither the servants nor employés of the Postal Telegraph Cable Company of Texas, who handled or were cognizant of the said telegram from Langdon Harriss, knew on January 28, 1907, anything of the said telegram from W. B. King & Co.; nor did the servants or employés of the Postal Telegraph Cable Company of Texas, who handled or were cognizant of the said telegram from W. B. King & Co., know anything on January 28, 1907, of the said telegram from Langdon Harriss.

"It is further agreed that either party may introduce other evidence upon the trial of this case."

There was testimony sufficient to show that, if Dismukes had received the plaintiff's telegram before he received the one from King & Co., he would have obtained from Dismukes his bank stock, and that, as a result of his failure to do so, he has been damaged to the extent of $350, the amount awarded him by the verdict.

The trial judge, after explaining to the jury the nature of the case, and telling them that the burden of proof rested upon the plaintiff, among other things, gave the following instructions:

"(3) The defendant Postal Telegraph Cable Company has failed to answer herein, and plaintiff has taken an interlocutory judgment by default against said company, and you will find for the plaintiff against said defendant, and assess his damages as hereinafter instructed.

"(4) As to the defendant the Postal Telegraph Cable Company of Texas, you are instructed that the relation between the two defendants was such, on January 28, 1907, that when plaintiff contracted with A. E. Steele to transmit the message to Dismukes, it became the duty of the defendant Postal Company of Texas to use ordinary care—that is, such care and diligence as a person of ordinary care and diligence would have used under the same or similar circumstances—to transmit the message with reasonable promptness from Waco to Columbus, Ga., and there deliver same to said Dismukes, and it became the duty of the other defendant to use ordinary care to transmit the message with reasonable promptness from Memphis to Columbus; and a failure, if any, on the part of either defendant to use such ordinary care to transmit and deliver said message with reasonable promptness would render the Postal Telegraph Cable Company of Texas liable to plaintiff for whatever damages, if any, he may have suffered by reason of such failure, if any.

"(5) Now, if you believe from the evidence that the defendants, the Postal Telegraph Cable Company and the Postal Telegraph Cable Company of Texas, or either of them, failed to exercise ordinary care to transmit and deliver said message to said Dismukes with reasonable promptness, and that by reason of such failure, if any, plaintiff failed to secure from said Dismukes the purchase of said stock, and that defendants exercised such ordinary care in the transmission and delivery thereof that said Dismukes would have sold said bank stock to plaintiff, and that by reason of such failure, if any, on the part of the defendants, or either of them, to so transmit and deliver the same, plaintiff has suffered any damage, then if you so find, you will find for the plaintiff against the Postal Telegraph Cable Company of Texas also.

"(6) If you find for the plaintiff, the measure of his damage would be the difference, if any, in the price at which he could have purchased said stock from said Dismukes and the reasonable market value thereof at that time; and, if you find for plaintiff, you will assess his damage at the difference, if any, between the price at which he would have purchased said stock, if at all, from said Dismukes and the lowest price at which he could have gone into the market and bought said amount of stock for by the exercise of reasonable diligence."

The first assignment of error assails the fourth paragraph of the charge, the contention being that in this case appellant, the Postal Telegraph Cable Company of Texas, was under no obligation to transmit the telegram further than its own line extended, which was to Memphis, Tenn., and that it was not responsible for delay or negligence

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on the part of the other defendant in transmitting the telegram from Memphis, Tenn., to Columbus, Ga. A contract relating to traffic arrangements between the two defendants was introduced in evidence, and it is insisted by counsel for appellant that it does not disclose a partnership, or such other relations between the two companies as would justify the fourth paragraph of the court's charge. Counsel for appellee controvert this contention, but we find it unnecessary to decide the point. We are of opinion that the uncontroverted testimony shows that appellant made a through contract, by which it was obligated to transmit and deliver the message to Dismukes at Columbus, Ga. The telegram was introduced in evidence, and reads as follows:

"Telegram.

"The Postal Telegraph Cable Company of Texas.

"This company transmits and delivers messages subject to the terms and conditions printed on the back of this blank.

"S. M. English, General Manager.

"Counter Number. Time Filed. Check.
15 Da S O. 10 A. M. 10 X Due.

"Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

"10.08 A. Waco, Texas, 1/28, 1907.

"To E. P. Dismukes, % Georgia Manufacturing Co., Columbus, Ga.: Offer accepted. Send stock First Natl. Bank. ~~It is a big price.~~ Please wire confirmation.

"Langdon Harriss.

"The Postal Companies reach all important points in the United States and British America, and via commercial cables, all the world."

While this document indicates that there may have been certain stipulations printed on the reverse side of it, the statement of facts does not show what such stipulations were. In fact, it does not show that anything was printed or written on the reverse side. Hence we conclude that appellant's acceptance of the message for the consideration agreed upon constituted a through contract, and obligated appellant to transmit and deliver the message to Dismukes at Columbus, Ga.; and, if it employed the services of any other company or person in the performance of the contract, it is liable for the negligence or default of such other company or person. It is true that appellant pleaded a contract alleged to limit its liability to its own line, and it is also true as to that plea that the plaintiff did not file a general denial, and it is likewise true that in his replication to the plea he stated the facts substantially as set up in the defendant's answer. This, however, did not dispense with proof of the stipulations referred to. In this state it is permissible for a litigant to file inconsistent pleas (Bauman v. Chambers, 91 Tex. 108, 41 S. W. 471), and it is provided, by article 1193 of the Revised Statutes of 1895, that: "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted." In Brown v. United Moderns, etc., 39 Tex. Civ. App. 343, 87 S. W. 357, it was held, by the Court of Civil Appeals for the Second District, that a plea by the plaintiff, setting up the same facts that had been alleged by the defendant, did not constitute an express admission of such facts. Of course such a plea does admit the existence of the facts therein stated, but the admission is an implied, and not an express, admission. By reason of the statute referred to the case must be considered as though the plaintiff had filed a general denial, and he not having expressly admitted the special contract pleaded by the defendant, and the statement of facts failing to contain proof of such contract, the case must be disposed of by this court upon the assumption that no such contract existed. This disposes of the assignments of errors extending from 1 to 8.

Under several assignments, and in various forms, appellant urges the contention that appellee was not entitled to prove the value of the bank stock at Waco, Tex., and was not entitled to recover, because there was no proof as to the value of such stock at Columbus, Ga. We overrule the contention referred to, and hold that no error was committed in that respect.

We also hold that it is immaterial whether or not there was a binding contract between Dismukes and the plaintiff for the sale of the bank stock. This is not an action against Dismukes for specific performance or for breach of contract, but is a suit against the defendant to recover damages on account of negligent delay in transmitting and delivering plaintiff's telegram to Dismukes, the plaintiff alleging that, if the defendant had not breached its contract, he would have obtained from Dismukes the bank stock referred to. Whether or not he would have obtained the bank stock if the defendant had complied with its contract was a question of fact to be decided by the jury; and, in order to prove such fact, the plaintiff was not required to show that the timely delivery of his message to Dismukes would have constituted a binding contract between him and Dismukes. Without constituting such a contract, it might have resulted in his obtaining the bank stock.

Certain objections are urged against the charge of the court, but they are regarded as untenable, and the assignments presenting such questions are overruled. We also hold that no error was committed in the re-

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fusal of requested instructions, and overrule the assignments relating thereto.

The plaintiff introduced in evidence a telegram from E. P. Dismukes to him, stating that the plaintiff's telegram was received too late, and that he had sold the stock to the Houston party. The plaintiff also introduced in evidence a letter from E. P. Dismukes to him, which reads:

"Columbus, Georgia, January 28, 1907.

"Mr. Langdon Harriss, Waco, Texas—Dear Sir: I have your telegram of this date, saying 'Offer accepted. Send Stock First National Bank. Please wire confirming.' To which I replied, 'Telegram received too late. Stock sold to Houston party.' The telegram from Houston was No. 44, and was received by me at 12:46, just before leaving for lunch. The telegram from you was No. 65, and received at 2:25 p. m. I am very sorry your telegram was not received first, as, having sold you part of my stock, I felt desirous that you should have the balance. However, it is your own fault, if any one is to blame, for the best price you ever offered me was $220, and that since the first of January. I regret, though, that your telegram was not received before the one from Houston. With kindest regards to Mr. Rotan and Mr. Gribble, I remain, very truly,

"E. P. Dismukes."

The introduction of the telegram as evidence was objected to by the defendant as irrelevant and immaterial, and the action of the court in overruling that objection is assigned as error. We overrule the assignment, because the telegram was material. It tended to show delay on the part of appellant, and that if the telegram had been delivered in time, appellee would have acquired the bank stock. When the letter was offered in evidence, appellant objected to it substantially upon the same ground—that of immateriality—which objection, for the reason already stated, was properly overruled. After the letter had been read to the jury, the defendant moved the court "to strike the said letter from the record, for the reason that it contains original testimony against the defendant unsworn to, is a transaction between third parties, and of which the defendant company had no knowledge or notice, and by which it could not be bound, and the said defendant had not had an opportunity of cross-examining Mr. Dismukes as to what was stated in the said letter," which motion was by the court overruled, and both rulings in regard to the letter are assigned as error and presented for decision. Of course the letter was material, as it tended to show delay in transmitting and delivering the plaintiff's message, and that if such delay had not occurred, the plaintiff would have obtained the bank stock. As to the motion presented after the letter had been introduced in evidence, it will be observed that it did not, in terms, request the court to instruct the jury that the letter was not competent testimony, and to withdraw it from their consideration, but doubtless such was the intention of the motion, and it may be assumed that it was so considered by the trial court. The rule is that, when no tenable objection is presented to the introduction of testimony, and, after it has been placed before the jury, the court is requested to withdraw such testimony, such request is addressed to the discretion of the court, and the party making the request should excuse himself for not urging, as an objection to the introduction of the testimony, the objections urged on motion to withdraw it. Ry. v. Lamothe, 76 Tex. 223, 13 S. W. 194; Hatzfeld v. Walsh (recently decided by this court) 120 S. W. 525. The objections urged in the motion to strike out the letter could have been urged to its introduction, and it is not shown that appellant offered any excuse for the failure to urge such objections when the letter was offered as testimony, and before it was read to the jury. Such being the case, we are not disposed to hold that the trial court abused its discretion in overruling the motion to withdraw the testimony. In making this disposition of the matter referred to we are not to be understood as holding that any of the objections urged in the motion to strike out were tenable.

There is testimony in the record which supports the verdict of the jury upon all the issues of fact which were submitted to and decided by them. This embraces all the questions which we deem it necessary to discuss in this opinion.

No reversible error has been pointed out, and the judgment is affirmed.

Affirmed.

INTERNATIONAL & G. N. R. CO. et al. v. DUNCAN.

(Court of Civil Appeals of Texas. April 28, 1909. On Motion to Reform Judgment, May 19, 1909.)

1. APPEAL AND ERROR (§ 1047*)—REVIEW—HARMLESS ERROR.

Erroneous rulings on evidence relating to an issue found in favor of the party complaining are harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4146; Dec. Dig. § 1047.*]

2. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR.

Error in refusing charges on an issue found in favor of the party complaining is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

3. CARRIERS (§ 317*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—EVIDENCE.

Where it was alleged that a female passenger was made sick by the unsanitary condition of the car in which she was riding, it was proper to admit evidence as to a child being sick in an adjoining compartment of the car, to be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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considered as a circumstance in connection with the other evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1295; Dec. Dig. § 317.*]

4. EVIDENCE (§ 99*)—MATERIALITY.

In a suit for personal injuries, evidence offered by the defense to show that an attorney, consulted with a view of employing him to bring the suit, did not bring it is properly excluded as irrelevant and immaterial.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 99.*]

5. WITNESSES (§ 199*)—COMPETENCY—PRIVILEGED COMMUNICATION—RELATION OF ATTORNEY AND CLIENT.

A statement of facts, made to an attorney with the view of employing him to bring a suit, is privileged, though another is employed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 749; Dec. Dig. § 199.*]

6. TRIAL (§ 29*)—REMARKS OF JUDGE.

An admonition against smoking in the courtroom is a proper exercise of the court's duty to preserve order during the trial, especially when smoking is objected to by a juror, though his attention has been called thereto by testimony that a female passenger was nauseated by tobacco fumes on defendant's train, and cannot be regarded as a comment on the evidence, or as prejudicial to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81; Dec. Dig. § 29.*]

7. CARRIERS (§ 284*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTS OF FELLOW PASSENGERS.

A railroad company is not liable for injuries to a female passenger who is shocked and made sick by improper language and conduct of fellow passengers during the absence of its servants, when they have no reason to know or anticipate improper conduct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1125; Dec. Dig. § 284.*]

8. CARRIERS (§ 247*)—CARRIAGE OF PASSENGERS—TERMINATION OF RELATION.

A passenger removed from a railroad company's depot on the completion of her journey over its line, who re-enters the depot several days thereafter, and procures a ticket to enable her to resume her journey from the depot of another company, is not a passenger of the former company while awaiting at its depot the departure of the other company's train, and the former company only owes the duty of ordinary care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 992; Dec. Dig. § 247.*]

9. CARRIERS (§ 282*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES.

A railroad company is not liable for injuries occurring to a passenger during other parts of her journey before becoming a passenger on its road, unless they were caused by parties who were tort-feasors with it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1107; Dec. Dig. § 282.*]

10. TRIAL (§ 237*)—INSTRUCTIONS—SUFFICIENT EVIDENCE—BURDEN OF PROOF.

An instruction which requires a party to "establish" his case by a preponderance of the evidence imposes a greater burden than the law requires.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 548; Dec. Dig. § 237.*]

11. CARRIERS (§ 321*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS—BURDEN OF PROOF.

In an action for injuries to a passenger, caused by the unsanitary condition of the car and misconduct of fellow passengers, it is error to refuse defendant's request to charge that the burden is upon the plaintiff to show, by a preponderance of the evidence, that the injuries were the proximate result of some negligent act or omission of the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

12. TRIAL (§ 424*)—INSTRUCTIONS.

Error in refusing to charge that the burden of proof is on the plaintiff was not cured by the giving of a special charge as to defendant's liability for injuries on other roads, which was in conflict with a charge given at plaintiff's request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 985; Dec. Dig. § 424.*]

13. DAMAGES (§ 216*)—INSTRUCTIONS.

Where the evidence showed that the future injuries complained of only had a tendency to aggravate the condition of the injured party, it was error to give a charge directing the jury to allow nothing for such future injuries, without reference as to whether ordinary care had been used to prevent their aggravation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

14. DAMAGES (§ 62*)—DUTY OF INJURED PARTY TO MITIGATE.

Where one is injured by the negligence of another, the latter is liable for the damages resulting, and the injured party is only required to use ordinary care to avert further injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 120; Dec. Dig. § 62.*]

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by T. J. Duncan against the St. Louis Southwestern Railway Company and others. From a judgment for plaintiff, the defendant named appeals. Reversed.

Henderson & Lockett, E. B. Perkins, and D. Upthegrove, for appellant. R. B. Pool and Monta J. Moore, for appellee.

RICE, J. Appellee, T. J. Duncan, sued appellant the St. Louis Southwestern Railway Company, the Texas & Pacific Railway Company, and the International & Great Northern Railroad Company, to recover damages for personal injuries alleged to have been received by his wife, Mrs. L. A. Duncan, while a passenger on defendants' lines of railway between Memphis, Tenn., and Taylor, Tex.

The evidence offered for plaintiff shows that on the 2d of January, 1904, he with his family, consisting of his wife and five small children, left their home at Chanute, Tenn., for Taylor, Tex., traveling overland some 35 miles from their home to Glenmary, where they went by train to Chattanooga, and from thence to Memphis, arriving there about 11 o'clock on the night of January 5th. While at Chattanooga plaintiff purchased coupon tickets over defendants' lines of railway for himself and family to Taylor, Tex. Remaining the night of the 5th at the depot in Memphis, where his wife and children slept on a quilt on the floor, they took passage on the morning of the 6th about 8 o'clock on the cars of the St. Louis Southwestern Railway for Tex-

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arkana, arriving there about 11:30 that night. Plaintiff's wife was enciente, about four months advanced in pregnancy, and shortly before reaching Texarkana miscarried, on account of which he and his family were compelled to remain at Texarkana until she was able to resume her journey. Upon reaching Texarkana, by direction of the conductor and a special agent of appellant, plaintiff's wife was taken to a private sanitarium where, after treatment for nine days, she was discharged on the 14th of January, and they resumed their journey that morning, arriving at Taylor that night.

Plaintiff alleged, among other things, that the car in which they rode from Memphis to Texarkana was crowded, was allowed to become filthy and in an unsanitary condition; that en route the drinking water gave out before reaching Texarkana; that his wife became very thirsty, and suffered intensely for the want of water, and that during said day she was greatly disturbed and annoyed by the rude and boisterous conduct and profane language indulged in by the other passengers in her presence and hearing; that the lights in the coach in which she was riding, after burning for a short while, suddenly went out, whereby they were compelled to travel the balance of the journey to Texarkana in the dark; that after said lights went out some one in the coach halloed out, "Hands on your pocketbook," on account of which she became very much frightened and nervous and miscarried, which was occasioned by all of the wrongful and negligent acts of appellant above recited. It was further alleged that while at the sanitarium she was improperly treated by the physicians of appellant, who were negligent in the removal of the afterbirth, and who discharged her in a feeble condition, and before she was able to resume her journey, and that at the time of said discharge the weather was cold, inclement, and damp, and that appellant's depot, where plaintiff was compelled to go to procure tickets for the balance of their journey, and where plaintiff's wife awaited the arrival of her train, was improperly heated and ventilated, causing her to contract a severe cold, which developed into a pulmonary trouble, from which she suffered great physical pain and injury, and that the cars in which they rode en route from Texarkana to Taylor were likewise improperly heated and ventilated, occasioning further injury; that on account of said injuries so received at the hands of appellant, she was made sick, and was confined to her bed some 4 or 5 months after her arrival at Taylor, and to her house some 12 months, suffering from milk leg, as well as other complications. The answers of appellants, among other things, consisted of a general denial and pleas of contributory negligence. Plaintiff dismissed as to the Texas & Pacific Railway Company, and, failing to introduce any evidence against the International & Great Northern Railroad Company, the court instructed a verdict in behalf of the latter, and the trial proceeded before a jury as against appellant, and verdict was returned in favor of plaintiff in the sum of $5,000, upon which judgment was accordingly rendered, and from which this appeal is prosecuted.

As the first seven assignments are addressed to supposed errors growing out of the ruling of the court in the admission and exclusion of evidence, and the refusal of special charges in reference to the injuries complained of, predicated upon the alleged improper treatment and premature discharge of plaintiff's wife by physicians while at the sanitarium at Texarkana, it will not be necessary to consider the same, for the reason that the court expressly charged that the plaintiff could recover nothing on account thereof.

We overrule the eighth assignment, because we think the evidence was properly admitted relative to a child being sick in an adjoining compartment of the same car, as the same might properly be considered as a circumstance in connection with the other evidence offered upon this subject.

By the ninth assignment appellant complains that the court erred in refusing to permit it to prove by R. D. Hart, Esq., an attorney of Texarkana, of the firm of Hart & Mahaffey, that the plaintiff, after the alleged injury to his wife, consulted him with the view of employing his firm to bring suit against appellant on account of the miscarriage of his wife, and submitted to him a written statement of the facts upon which he based his claim, and that the same was variant from plaintiff's testimony on the trial, and to show that said attorney did not bring suit for plaintiff against appellant on said claim. We do not think there was any error in the exclusion of this evidence. It was objected to on the ground that it was irrelevant and immaterial, and, further, that the same was a privileged communication between attorney and client. In our judgment all of these objections were sound, for which reason we overrule this assignment. McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611; Ry. Co. v. Lock, 30 Tex. Civ. App. 426, 70 S. W. 456; Greenleaf on Ev. § 238.

We overrule the tenth assignment, complaining of the admonition of the court in the presence of the jury, to the effect that there should be no smoking in the courtroom during the trial, because it was the duty of the court to preserve order and decorum, and to prevent smoking during its sessions. Especially was this true where a juryman had been made sick thereby, and had complained to the court, notwithstanding his attention had been called thereto by plaintiff testifying that his wife was nauseated from the smell of tobacco fumes while a passenger on appellant's railway. It was in no sense a charge

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or comment upon the weight of the evidence, as contended for by appellant, nor can we think it could be regarded as prejudicing its rights.

By its eleventh assignment appellant urges that the court erred in the following paragraph of its charge to the jury, to wit: "Now if you believe from the evidence that while the plaintiff's wife was a passenger on the St. Louis Southwestern Railway Company's train between Memphis and Texarkana the condition of the car in which she was riding was in such an unsanitary and unclean condition that it contained noxious fumes and odors, or if you believe from the evidence that the said car was not supplied with sufficient drinking water, or if you believe from the evidence that the lights in said car went out or became extinguished, or if you believe from the evidence that any of the passengers on said car were drinking liquor, and that they used improper or indecent language, or were guilty of improper conduct in the presence and hearing of the plaintiff's wife, and if you further believe from the evidence that any of the aforesaid conditions which may be shown to have existed were the proximate result of the failure of the St. Louis Southwestern Railway Company, its agents or employés, to exercise that high degree of care that very careful and prudent persons would have exercised under similar circumstances, and if you further believe from the evidence that any of the aforesaid conditions which may be shown to have existed were, either separately or in conjunction with each other, the direct and proximate cause of the miscarriage of the plaintiff's wife, and that by reason of such miscarriage plaintiff's wife suffered or sustained any of the injuries complained of in plaintiff's petition, then you will find for the plaintiff, unless you find for the defendant under further instructions herein"—because the same authorized the jury to hold this defendant liable for improper or indecent language, or improper conduct of passengers, on defendant's train in the presence and hearing of plaintiff's wife, without requiring that the jury should believe the defendant's servants, or some of them, were present at the time, or knew, or could have known, of such improper language or conduct, or could have anticipated and prevented the same, and, further, because said paragraph of said charge authorized and directed the jury to find for the plaintiff against the defendant, upon a finding that one set of facts or circumstances constituted negligence on the part of defendant, and another set of facts directly and proximately caused the injury to plaintiff's wife. By its proposition thereunder, appellant insists that passengers of whose conduct complaint was made were lawfully upon the train, and defendant cannot be held liable for any injury resulting to plaintiff's wife by reason of the words or conduct of such passengers, unless its servants knew or could by the exercise of care chargeable against it, have anticipated and prevented such acts and conduct. In this connection defendant requested the following special charges: "Gentlemen of the jury, you are charged that you cannot consider as against the defendant St. Louis Southwestern Railway Company any boisterous, loud, or unseemly conduct on the part of any passengers on the car in which Mrs. Duncan was riding, unless you believe from the evidence that at the time of the said boisterous, loud, or unseemly conduct one of the defendant's servants in charge of said train was present, or knew, or could have known, of the loud, boisterous, and unseemly conduct on the part of said passengers." "Gentlemen of the jury, you are charged that, if you believe from the evidence that some person in the car in which Mrs. Duncan was riding called out 'Hands on your pocketbooks,' and that the said words frightened and alarmed Mrs. Duncan, and was the direct and proximate cause of her miscarriage, yet before you can find for the plaintiff because of injuries resulting therefrom you must believe that some servant or employé of the said defendant St. Louis Southwestern Railway Company was at the time present in the car, or had reason to anticipate that the said words would be called out, and unless you believe from the evidence that some servant or employé of said defendant was present at the said time, or could have anticipated that the said words would be called out, then you must disregard the said words or any effect you may believe they had upon Mrs. Duncan in arriving at your verdict."

There was testimony on the part of plaintiff to the effect that some of the passengers were rude and boisterous, using loud language, and that when the lights went out, some one halloed, "Hands on your pocketbook." It was not shown who did this. Plaintiff's wife testified that she was greatly disturbed by reason of the disorderly conduct; that when some one halloed out, "Hands on your pocketbook," she became very nervous, shook all over, turned sick and miscarried. There was no testimony that any of the train crew were present at this time. The conductor testified that he caused the passengers that were cursing and swearing to sit down, which they did while he remained in the car; that he had no reason to believe that they would again become boisterous when he left; that he did not know whether this occurred in the particular car in which plaintiff and his wife were riding. We are inclined to think that the charge given by the court is open to the criticism urged against it, because it permitted a finding against appellant without requiring the jury to further believe that the defendant's servants, or some of them, were present at the time, or knew, or could have known, of such improper language or conduct, or could have anticipated or prevented the same. The par-

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ties who were guilty of this conduct were shown to have been passengers. They were lawfully upon the train, and before appellant could properly be held accountable for their misconduct in this respect, it must appear that the same was done either in the presence or hearing of its servants, and they failed to interfere and prevent it, or that the circumstances should have caused them to have anticipated something of the kind and prevented it. The charge, therefore, in our judgment, as given was error. The special charge asked should have been given, because it was the law of the case as made by the evidence. Ry. Co. v. Ball (Tex. Civ. App.) 61 S. W. 327–329; Thweatt v. H., E. & W. T. Ry. Co., 31 Tex. Civ. App. 227, 71 S. W. 976; Ry. Co. v. Woods, 15 Tex. Civ. App. 612, 40 S. W. 846; G., H. & S. A. Ry. Co. v. Long, 13 Tex. Civ. App. 665, 36 S. W. 485; Prokop v. Ry. Co., 34 Tex. Civ. App. 520, 79 S. W. 101, 103; G., C. & S. F. Ry. Co. v. Shields, 9 Tex. Civ. App. 656, 28 S. W. 709, 29 S. W. 652; Segal v. Ry. Co., 35 Tex. Civ. App. 517, 80 S. W. 233; G., C. & S. F. Ry. Co. v. Wallen, 65 Tex. 572; N. O., St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689.

By its fourteenth assignment of error appellant insists that the court erred in the following paragraph of its charge to the jury: "If you believe from the evidence that on January 14, 1904, plaintiff went to the depot of the St. Louis Southwestern Railway Company at Texarkana to get his tickets extended in order to resume his journey, and you believe it was necessary for him to go to said depot for such purpose, and you further believe that plaintiff and his wife, by the directions of the ticket agent of the said St. Louis Southwestern Railway Company at Texarkana, remained in the waiting room of said depot of the St. Louis Southwestern Railway Company at Texarkana until they boarded the passenger train of the Texas & Pacific Railroad, then you are instructed that plaintiff and his wife were passengers of the said St. Louis Southwestern Railroad up to the time they left said depot to board the train of the Texas & Pacific Railroad on which they left Texarkana; and, if you further believe from the evidence that while she was at said depot waiting for a train upon which to depart, said depot waiting room was not properly heated, and that by reason of the room being improperly heated plaintiff's wife became chilled and sick, and caught a cold, and suffered as alleged in plaintiff's petition, and you believe from the evidence that defendant's failure to have said depot waiting room properly heated, if it was improperly heated, was a failure on the part of the defendant St. Louis Southwestern Railway Company to exercise that high degree of care that a very prudent person would have used under similar circumstances, and that such failure on the part of defendant to properly heat the waiting room (if there was such failure) was the direct and proximate cause of plaintiff's wife becoming chilled and catching cold and suffering, as alleged in plaintiff's petition, you will find your verdict for the plaintiff, unless you find for defendant under other charges hereinafter given you, notwithstanding you may find against the plaintiff on the question of miscarriage already submitted to you."

The uncontroverted testimony established the fact that the plaintiff and his wife were transported over the line of the St. Louis & Southwestern Railway Company on a coupon ticket purchased from another carrier at Chattanooga, and that the line of the St. Louis Southwestern Railway Company terminated at Texarkana, and that the plaintiff's journey from that point was to be, and in fact was, over the line of the Texas & Pacific Railway Company. Plaintiff and family were detained at Texarkana for some eight days, on account of this mishap to his wife. On starting again it became necessary, it appears from the evidence, for him to procure other tickets upon which to continue his journey. These tickets, however, when issued to him were issued, as appears from the face thereof, by the Texas & Pacific Company, and not by the appellant. He testified, however, that he went to appellant's depot to procure his tickets, and obtained them there. But be this as it may, upon receiving the tickets his mission at appellant's depot was ended, as he must resume his journey from the depot of the Texas & Pacific. It seems that the plaintiff and his wife missed the first train out after procuring their tickets, and returned to the depot of appellant, and were told by the agent that they might remain there if they so desired until the arrival of the next Texas & Pacific train, about two hours thereafter, which they did. It was shown that the Texas & Pacific depot was only a short distance from appellant's depot; and, while plaintiff testified that this occurred at appellant's depot, and the tickets were procured there, yet it must be confessed from all the facts in evidence there is some doubt as to whether he was not mistaken in this regard. Plaintiff and his wife both testified that the latter caught cold while waiting at the depot for the train to Longview. It was shown by the testimony of the physician at the sanitarium that it was safe for Mrs. Duncan to leave the hospital at the time she did, provided care should be taken of her. It was alleged by plaintiff that, at the time his wife resumed her journey from Texarkana, the weather was cold, raw, and damp, and it was necessary for her comfort that she be furnished with a comfortable waiting room at the depot while waiting for her train, and that the defendant negligently failed to perform its duty in this respect, in this: That said depot was improperly heated and ventilated, by reason of which his wife became chilled while awaiting the arrival of said train, caught cold,

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and contracted a pulmonary trouble, which was alleged to be permanent and incurable, etc.

Appellant in this connection requested that the following charge be given, which was refused: "Gentlemen of the jury, you are charged that when Mrs. Duncan debarked from the train of the St. Louis Southwestern Railway Company at Texarkana, and was removed from the depot of said company, the relation of passenger and carrier no longer existed between the railway company and the said Mrs. Duncan, and the said railway company no longer owed to the said Mrs. Duncan that high degree of care that a very prudent and cautious person would have exercised under the same or similar circumstances." We are constrained to believe that the charge complained of ought not to have been given, for the reason that under the facts in evidence, plaintiff was not a passenger of appellant at the time this alleged injury was received by his wife. Her journey over appellant's road had been completed some nine days before, and at the time thereof she and her hubund had completed the transaction of procuring their tickets, and were merely awaiting at the depot the departure of the Texas & Pacific train, and were not at this time passengers of appellant. The special charge was applicable to the facts proven, and should have been given. Ry. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787; Harris v. Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862; Rozwadosfskie v. R. Co., 1 Tex. Civ. App. 487, 20 S. W. 872; Ry. Co. v. Franklin (Tex. Civ. App.) 44 S. W. 702; Ry. Co. v. Miller, 79 Tex. 82, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308. It seems to us, under the circumstances, appellant only owed the duty of ordinary care. Bullock v. Ry. Co. (Tex. Civ. App.) 55 S. W. 184; Ry. Co. v. Kendrick (Tex. Civ. App.) 32 S. W. 42; Ry. Co. v. Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247; Ry. Co. v. McCullough (Tex. Civ. App.) 33 S. W. 285; Davis v. Ry. Co., 25 Tex. Civ. App. 8, 59 S. W. 844.

By the sixteenth and seventeenth assignments appellant urges that the court erred in giving special charge No. 1, requested by plaintiff, and in refusing to give special charge No. 6, requested by appellant. Charge No. 1, which was given, is as follows: "Gentlemen of the jury, you are further instructed, if you believe from the evidence that the miscarriage of the plaintiff's wife was caused in part by the negligence of the defendant St. Louis Southwestern Railway Company as alleged by plaintiff, and in part by the journey shown to have been made by the plaintiff and his wife, you will find for the plaintiff on the issue as to the miscarriage, unless you believe from the evidence that the plaintiff and his wife, in undertaking said journey in the manner in which they did undertake it, or in remaining overnight in the depot at Memphis, or both, failed to exercise such care as persons of ordinary prudence would have exercised under similar circumstances." Special charge No. 6, which was refused, reads as follows: "Gentlemen of the jury, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all the facts and circumstances necessary to entitle him to recover, among which is included the fact that the injury to his said wife of which he complains herein was the direct and proximate result of some negligent act or omission of the defendant St. Louis Southwestern Railway Company or its servants, as charged in the petition; and, if you believe from the evidence that the injury to Mrs. Duncan was not the direct and proximate result of some negligent act or omission on the part of the defendant St. Louis Southwestern Railway Company or its servants, as charged in the petition, but was the direct and proximate result of some other act, fact, or circumstance, then you must find for the defendant St. Louis Southwestern Railway Company, although you may believe such cause was in no way due to the negligence of T. J. Duncan or his wife."

There was evidence showing that plaintiff's wife was a frail, delicate woman, had formerly suffered a miscarriage, and before reaching Memphis, where she boarded appellant's train, had traveled for three days a distance of over 400 miles, the major part of which was by rail; that she spent the night at Memphis at the depot, where she slept upon a quilt and capes spread upon the floor of the depot, having insufficient rest. There was also evidence to the effect that this trip was ill-advised, and that the inconveniences thereof prior to reaching Memphis might, of themselves, have brought on the miscarriage of which she complained; and, while it is true the evidence supported their allegations relative to the unsanitary condition of the car, and the other circumstances complained of as occurring therein while traveling from Memphis to Texarkana, still there was a conflict in the evidence on the issue thus raised by the pleading. Under these circumstances, we think it was improper for the court to have given special charge No. 1 at the request of plaintiff, because, in our judgment, it was error to hold appellant liable for injuries occurring to appellee's wife during other parts of the journey prior to the time that they became passengers on its road, especially so since it was not contended that the other injuries were occasioned by parties who were tort-feasors with appellant. Special charge No. 6 requested by appellant presented the issues upon this phase of the case in accordance with the law as we view it, and should have been given, with the exception that the word "establish" should have been eliminated therefrom, as it imposed a greater burden upon the plaintiff than the law required. Dumas v. Ry. Co. (Tex. Civ. App.) 43 S. W. 908. And this error was not cured

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by the giving, at the request of appellant, of special charge No. 5, because special charge No. 1 was in conflict therewith, and left the jury without a proper rule to govern them upon the subject. Ry. Co. v. Greer, 22 Tex. Civ. App. 5, 53 S. W. 58. And special charge No. 6 should have been given, notwithstanding the fact that the court had already given, at the request of appellant, special charge No. 5. See Ry. Co. v. Jamison (Tex. Civ. App.) 27 S. W. 1090; Ry. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 238.

By the eighteenth assignment of error it is urged that the court erred in refusing special charge No. 10, as follows: "You are charged that a railway company, upon whose train a passenger may have been injured through the negligence of its servants, is liable only for injuries which are the direct and proximate result of the said negligence of said railway company or its servants, and that if thereafter any independent, intervening cause from any source or agency not connected with the said railway company, directly and proximately causes any further or additional injury and damage to said passenger, then the railway company is not liable for such further and additional injury and damage. You are therefore instructed in this case that, if you believe from the evidence that Mrs. T. J. Duncan suffered any exposure at the depot of the Texas & Pacific Railway at Texarkana or on the Texas & Pacific train between Texarkana and Longview, or on the International & Great Northern train between Longview and Taylor, or in the hack between Taylor and Thorndale, or at any time thereafter, or overexerted herself, or failed to receive proper treatment, care, and attention during said time, and as the direct and proximate result thereof she sustained any additional injury, then you cannot find for the plaintiff, T. J. Duncan, against the defendant St. Louis Southwestern Railway any damages for any such additional injuries you may believe were so caused." As framed, this charge was properly refused. If the future injuries referred to were wholly disconnected with the one upon which the suit is predicated, then it probably presented a correct theory, but as the evidence in this case tended to indicate that the future injuries complained of only had a tendency to aggravate Mrs. Duncan's condition, the charge as presented was incorrect, because the same directed the jury to find against plaintiff as to such future injuries, without reference to whether she had used ordinary care to prevent their aggravation. When an injury flows from the negligent act of another, the latter is responsible for the damages resulting, and all that the law demands of the injured party is that ordinary care be used to avert further injury. See Texas & Pacific Ry. Co. v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237.

We think that the nineteenth assignment should be overruled, because, while it is unquestionably the law that the court should charge that the burden of proof is upon the plaintiff, and it is error to refuse so to do, yet a special charge, which was given at the request of appellant, properly told the jury that this burden was upon the plaintiff.

We overrule the twentieth assignment because we are inclined to believe that the objection urged to the charge is hypercritical.

The remaining assignments complain as to the insufficiency of the evidence to support the judgment. We refrain, in view of another trial, from a discussion of this branch of the case.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

On Motion to Reform Judgment.

At a former day of this term this cause was reversed and remanded generally, since which time a motion has been made in behalf of the International & Great Northern Railroad Company to reform said judgment, and affirm the same so far as said company is concerned. Upon the trial in the court below there was no evidence offered showing or tending to show any liability on the part of said International & Great Northern Railroad Company, and the court peremptorily instructed a verdict in its favor, and judgment was accordingly entered thereon. The plaintiff voluntarily dismissed as to the Texas & Pacific Railway Company, and judgment was so entered in its behalf; and, while both the International & Great Northern Railroad Company and the Texas & Pacific Railway Company were nominally made parties to said appeal, still there is no contention on the part of appellant nor appellee, Duncan, questioning the correctness of said judgment as to either of said companies, and since it appears that plaintiff's case as to each of said parties was fully developed on the trial below, said motion is now granted, and the judgment of the court below is here affirmed so far as it affects the International & Great Northern Railroad Company and the Texas & Pacific Railway Company, but the same stands reversed, as heretofore ordered, so far as it affects the St. Louis, Southwestern Railway Company.

Motion granted.

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CALLEN v. BEVIL.

(Court of Civil Appeals of Texas. July 7, 1909.)

BROKERS (§ 86*)—ACTION FOR COMMISSIONS—PROCURING CAUSE OF SALE.

Evidence, in an action by a broker for commissions, *held* to sustain the implied finding in a verdict that he was the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116, 117; Dec. Dig. § 86.*]

Appeal from Tyler County Court; A. G. Reid, Judge.

Action by J. R. Bevil against W. P. Callen. Judgment for plaintiff, and defendant appeals. Affirmed.

Joe W. Thomas, for appellant. Fleming & Fleming, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover the sum of $241.25, alleged to be due as commissions for the sale of timber under a contract by which appellant employed appellee to find a purchaser for said timber, and to recover the further sum of $33 for cost of abstract and $10 for surveying the land on which said timber was situated, both of which sums, it is alleged, defendant agreed and promised to pay to plaintiff. The petition prays in the alternative for recovery on quantum meruit of the reasonable value of plaintiff's services in effecting the sale of the timber. The defendant answered by general and special exceptions, general denial, and special pleas, in which it is averred, in substance, that plaintiff acted in bad faith and entered into a conspiracy with the agent of the purchaser of said timber for the purpose of procuring the sale of the timber by defendant at less than its value, and thereby defrauding defendant, and that the sale of said timber was not procured by the plaintiff, but was made by the defendant after the termination of plaintiff's agency. The trial in the court below by a jury resulted in a verdict and judgment in favor of the plaintiff for the amounts sued for.

The evidence sustains the following conclusions of fact: Plaintiff and defendant entered into a contract by which defendant employed plaintiff to sell the timber owned by defendant in the Turnbow league of land in Tyler county. This agreement was, in substance, that, if plaintiff should procure a purchaser for said timber at a price satisfactory to defendant, he would be paid by defendant a commission of 5 per cent. of the amount for which the timber was sold. Acting under this agreement, plaintiff tried to effect a sale to several persons. After negotiating for some time with Mr. J. S. Kirk, he procured an offer from him to buy the timber at $5.16 per acre The defendant claimed to own 1,100 acres of timber land in the league above mentioned. Kirk was unwilling to accept defendant's title to more than 600 acres, claiming that there was a conflict between land claimed by defendant and adjoining surveys, and that defendant did not own more than 600 acres of timber. Defendant was satisfied with the price per acre offered for the timber, but would not sell on a basis of 600 acres. Owing to this disagreement as to the acreage, the trade was pending for several months. The attorney employed by Kirk advised him that defendant did not have title to more than 636 acres of the land, and Kirk declined to buy on the acreage basis claimed by defendant. Finally plaintiff suggested to Mr. Meyers, an agent of Kirk, that he employ an experienced abstractor to examine the defendant's title and take the opinion of such abstractor as to the number of acres owned by defendant. This suggestion was acted on by Meyers, and upon the report of the abstractor employed at plaintiff's suggestion, which report showed title in defendant to 936 acres of the land, Meyers closed the trade with defendant on that basis, paying him the price per acre originally offered through plaintiff. Defendant was not informed as to plaintiff's continued activity in the matter of making the sale to Kirk at the time he closed the trade with Meyers, and plaintiff did not know of the sale until several weeks or a month thereafter. When defendant made the contract with plaintiff, he reserved the right to sell the timber himself at any time. The abstract was prepared at defendant's request, and the survey of the land was made for his benefit, and the amounts claimed therefor by plaintiff were reasonable charges. While the negotiation with Kirk was pending, plaintiff advised defendant to make the sale on the acreage basis contended for by the purchaser, believing at the time he so advised that the opinion of the attorney employed by Kirk to examine the abstract was correct as to the number of acres owned by the defendant. He did not claim to know what the acreage was, but thought, as defendant was getting a good price per acre, he had better accept Kirk's original offer.

As before stated, defendant claimed to have title to 1,100 acres, and that was the number of acres of timber which plaintiff was authorized to sell. It would serve no useful purpose to consider the several assignments of error in detail. The charge given by the court only authorized a verdict for plaintiff upon a finding by the jury that he was the procuring cause of the sale, and the evidence amply sustains a verdict based on such finding. The issue of bad faith on the part of the plaintiff was not raised by the evidence, and the court properly refused to submit such issue to the jury. The issue of revocation of plaintiff's agency was submit-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ted by special charges requested by the defendant, and the verdict upon this issue is amply sustained by the evidence.

The record presents no error which would authorize a reversal of the judgment, and it is therefore affirmed.

Affirmed.

OATES v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1909. On Rehearing, June 23, 1909.)

1. JURY (§ 58*)—SELECTION—METHOD—STATUTES.

Acts 30th Leg. 1907, p. 269, c. 139, known as the "jury wheel law," and providing the method of drawing a jury, is valid.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 58.*]

2. CRIMINAL LAW (§ 862*)—TRIAL — MISCONDUCT OF JURY.

Where the only jurors who could under the evidence have been influenced by discussion in the jury room of the fact that accused had been three times before convicted and sentenced to death, and that his codefendant had been hung for the same crime, had knowledge of such facts when they were taken as jurors and had stated that they could and would give defendant a fair and impartial trial and were voluntarily accepted, such discussion was not fatal to a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2055; Dec. Dig. § 862.*]

On Rehearing.

3. JUDGES (§ 14*)—SELECTION BY PARTIES—JUDGE PRO TEM. — DESIGNATION BY GOVERNOR — STATUTES — VALIDITY — SELF-EXECUTING PROVISIONS.

Const. art. 5, § 11, declares that, when a judge of the district court is disqualified, the parties may by consent appoint a proper person to try the cause, or, on their failing to do so, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law, and the district judges may exchange districts or hold court for each other when they deem it expedient and shall do so when required by law, and that the disqualification of judges of inferior tribunals shall be remedied and vacancies filled as may be prescribed by law. *Held*, that the right given to parties to agree on a special judge was the only part of such provision that was absolute and self-executing, and hence the provision did not deprive the Legislature of power to restrict such right to the selection of a judge pro tem. by agreement to instances where, by reason of sickness or other exigency, it was impossible for judges to exchange districts on the disqualification of the resident judge.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 14.*]

4. JUDGES (§ 14*)—DISQUALIFICATION—JUDGE PRO TEM. — APPOINTMENT BY GOVERNOR — STATUTES—VALIDITY.

Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), repealing Rev. St. 1895, arts. 1060, 1070, which gave the Governor authority to appoint a judge pro tem. from among the bar of the district on the disqualification of the resident judge, and denying the authority to the Governor to make such appointment, but providing that in such case the resident judge shall exchange with the judge of another district if possible, was not in violation of Const. art. 5, § 11, guaranteeing to litigants, in case a judge is disqualified, the right by consent to appoint a proper person to try the cause.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 14.*]

5. STATUTES (§ 64*)—PARTIAL INVALIDITY.

Where a statute is enacted to accomplish a single object, the whole will not fall because of the invalidity of some of its provisions, if sufficient remains to effect the object without the aid of the invalid portions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 58; Dec. Dig. § 64.*]

6. STATUTES (§ 64*) — PARTIAL INVALIDITY — SEPARATION.

Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), amending Rev. St. 1895, art. 1069, provides that, when a resident judge is disqualified, no change of venue shall be made necessary; but the presiding judge shall immediately notify the Governor, who shall designate some district judge in an adjoining district to exchange and try such case or cases and shall notify both of the judges of such order, and it shall be the duty of the judges to exchange districts for the purpose of trying such case or cases, and, "in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree on an attorney of the court for the trial thereof." *Held* that, if the part of the section quoted should be held invalid as violating Const. art. 5, § 11, guaranteeing to litigants the right to appoint a proper person to try a cause on the disqualification of the resident judge, its invalidity would not invalidate the balance of the section in so far as it provided for an exchange of judges under such circumstances.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 60; Dec. Dig. § 64.*]

7. JUDGES (§ 6*)—JUDGE PRO TEM.—JUDGE DE FACTO.

Where, on the disqualification of the resident judge, the Governor without authority appointed a member of the bar to try the cause, he was not a judge de facto.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. § 6.*]

8. CONSTITUTIONAL LAW (§ 257*)—DUE PROCESS OF LAW—DEPRIVATION OF LIFE—DISQUALIFIED JUDGE.

Where, on the disqualification of a resident judge to try accused for murder, the Governor without authority appointed a member of the bar to try the cause as judge pro tem., before whom defendant was tried and convicted and sentenced to be hung, such conviction was void as a deprivation of life without due process of law, in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 257.*]

Brooks and Davidson, JJ., dissenting in part.

Appeal from Criminal District Court, Dallas County; Walter S. Lemmon, Special Judge.

Burrell Oates was convicted of murder, and he appeals. Reversed on rehearing.

A. S. Baskett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. The appellant was convicted in the district court of Dallas county of the crime of murder in the first degree, and the penalty of death assessed against him by the jury. This is the fourth appeal of his case. The opinions of this court in the other ap-

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peals will be found in the following volumes: 48 Tex. Cr. R. 131, 86 S. W. 769; 50 Tex. Cr. R. 39, 95 S. W. 105; 51 Tex. Cr. R. 449, 103 S. W. 859—where a full history of the case is given.

When the case came on to be tried last, Hon. W. W. Nelms was the judge of the criminal district court of Dallas county. He was disqualified to try the case, in that, as assistant county attorney of Dallas county, he had been engaged in the prosecution of appellant in a former trial, or former trials of this case. Thereupon he certified his disqualification to the Governor, who, being so advised, appointed Hon. W. S. Lemmon, a member of the Dallas bar, who was a private citizen, a practicing lawyer, but not a judge of any district court in this state, to try this cause. Soon thereafter Mr. Lemmon took the usual and required oath of office and proceeded to set the case for trial, ordered a special venire, over the drawing of which he presided under the provisions of the act of the Thirtieth Legislature, applying to counties having a city or cities of more than 20,000 population. Upon the call of the case for trial, Mr. Lemmon, assuming to act as judge of the said criminal district court of Dallas county, the appellant, through his counsel, presented in limine his objection and exception to proceeding to trial in said case before the said Lemmon, as judge, and in effect urged a plea to the jurisdiction, right, or authority of the said Lemmon to try said cause: First, calling in question the right and power of the Governor to appoint a practicing attorney to act as special judge in his cause. This motion was overruled, and all the facts necessary to a decision of the validity of Lemmon's appointment and his right to try the case, as judge, are preserved in and evidenced by the record. In line with this same contention, appellant moved to quash the venire theretofore summoned, because, under the Constitution and laws of this state, Mr. Lemmon was not authorized to preside over the drawing of same, as well as for other reasons not necessary here to notice. This motion was also overruled, appellant compelled to submit to the trial of his case in said court before Mr. Lemmon as judge, and to select a jury from the venire drawn under his direction. Appellant excepted to this action of the court and evidences the facts as to both motions or pleas by proper bill of exceptions. Indeed, there is no dispute about the facts, and we are confronted at the threshold of the case with the question as to whether, under the law as it existed at the time of the trial, the Governor of this state had the constitutional and legal right to appoint a practicing lawyer, not a district judge, as special judge to try a pending case where the presiding judge of such court is disqualified. On this question, counsel for appellant submit the following proposition: "The Governor of the state of Texas has no authority in law to appoint a practicing lawyer as special district judge to try a cause where the presiding judge is disqualified, and such attempted appointment confers no power, authority, or jurisdiction on such practicing lawyer to hear and determine any of the issues in said cause, or to preside over the trial thereof. The only power the Governor has in such cases is to direct the judge of some adjoining district to exchange benches with the judge of this court for the purposes of trying this cause."

Section 11 of article 5 of our state Constitution, in so far as it relates to district judges, is as follows: "When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient and shall do so when required by law." It will be seen from this provision of the Constitution that parties have a constitutional right to agree upon a special judge without any legislation in reference to the matter. This was decided in the case of Parker County v. Jackson, 5 Tex. Civ. App. 37, 23 S. W. 924.

Article 1069 of our Revised Statutes of 1895 is as follows: "Whenever any case or cases are called or pending in which the district judge or the special judge chosen is disqualified from trying the same, no change of venue shall be made necessary thereby; but the parties or their counsel shall have the right to select and agree upon an attorney of the court for the trial thereof, and if the parties or their attorneys shall fail to select or agree upon an attorney for the trial of such case, at or before the time it is called for trial, or if the trial of the case is pending, and the district judge should become unable to act or is absent, and a special judge is selected who is disqualified to proceed with the trial, and the parties fail to select a special judge at once who is qualified, it shall be the duty of the district judge or special judge presiding to certify the fact immediately to the Governor by mail, telegram or otherwise, whereupon the Governor shall appoint a special judge not so disqualified to try the same. The evidence of such appointment may be transmitted by telegram or otherwise. The special judge so appointed shall qualify and proceed to the trial or disposition of such case immediately, if the trial is pending, otherwise, when called or reached, as in other cases." Article 1070 of the same chapter provides: "Whenever a special judge is agreed upon by the parties or is appointed by the Governor for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court as a part of the proceedings in such cause a record showing: (1) That the judge

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of the court was disqualified to try the cause; and (2) that such special judge (naming him) was, by consent, agreed upon by the parties to try the cause; or (3) that the parties having failed to agree upon a proper person to try the cause, and the judge of the court having certified that fact to the Governor, he had appointed such special judge (naming him) to try the cause; and (4) that the oath prescribed by law had been duly administered to such special judge." Under the above and foregoing articles, the parties having failed to agree upon a special judge, it was the duty and the right of the Governor of this state to appoint Hon. Walter S. Lemmon special judge of said court to try said case.

Appellant insists that the act of the Legislature, approved June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), in terms repealed articles 1069 and 1070, above quoted, and that under the law as it now exists such power of appointment no longer exists. The law in question is, as follows:

"Section 1. Be it enacted by the Legislature of the state of Texas: That articles 1069 and 1070 of the Revised Civil Statutes of the state of Texas be so amended as to hereafter read as follows:

"Art. 1069. Whenever any case or cases, civil or criminal, are pending in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately certify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall also notify both of said judges of such order, and it shall be the duty of said judges to exchange districts for the purpose of disposing of such case or cases, and in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof.

"Art. 1070. Whenever a special judge is agreed upon by the parties for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court, as a part of the proceedings in such cause, a record showing: (1) That the judge of the court was disqualified to try the cause; and (2) that such special judge (naming him) was by consent agreed upon by the parties to try the cause; and (3) that the oath prescribed by law had been duly administered to such special judge.

"Sec. 2. That all laws and parts of laws in conflict with this act be and the same are hereby repealed.

"Sec. 3. The fact that under the present law there is a heavy annual expense entailed upon the state for the payment of special judges which could be avoided by the regular district judges exchanging districts, creates an emergency and an imperative public necessity requiring that the constitutional rule requiring all bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

There can be no cavil over the question, as appellant insists that, if the last cited act is constitutional, it repeals the pre-existing law and deprives the Governor of this state of the power to appoint a district judge in the manner and form as was done above; but we hold said act unconstitutional in that, by the terms and conditions of said act of 1897, the parties are deprived of the right to agree upon a special judge. The reason for stating that said act is unconstitutional, which must always be done with great deference to the constitutional right of the Legislature to construe the Constitution as well as the courts, is this: The act of 1897 deprives litigants of the right to agree upon a special judge to try their cases, which right is circumvented and destroyed by the statute in providing for an exchange of judges in lieu of the agreement. It is true that article 1070 of the act provides that litigants can agree on a judge; but this right is subordinated to and may be dependent upon another condition in the statute, to wit: The exchange of benches by the designation through the Governor of a judge of an adjoining district to try the case. If the Governor has the constitutional right to designate another judge to try the case, then he thereby becomes empowered with the right to destroy the constitutional privilege of litigants to agree upon a judge. The last-cited article says that the reason for this legislation is that there is a heavy annual expense entailed upon the estate for the payment of special judges which could be avoided by the regular district judges exchanging districts, and this fact creates an imperative necessity requiring that the constitutional rule be suspended which requires bills to be read on three several days. This enforces the idea that the Legislature intended, and it was its direct purpose, to repeal or abrogate as near as they could the constitutional right of litigants to agree upon a special judge. This being true, this clause of the statute is clearly unconstitutional; that is, the clause authorizing the substitution of a judge of an adjoining district in lieu of a judge agreed upon by the parties. There can be no cavil, we take it, as stated repeatedly, over the constitutional right of parties to agree upon a judge, and this article—that is, article 1069 of the act of 1897—deprives litigants of their constitutional right. This being true, can the latter clause of the act remain, or can other provisions of the act remain? We say not, since it is a well-known rule very aptly stated by Black in his work on Constitutional Law, p. 65, as follows: "But when the parts of a statute are so mutually connected and dependent, as conditions, considerations, or com-

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pensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions which are thus dependent conditional or connected must fall with them; but if the purpose of the statute is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion. And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature never intended, the whole statute must be adjudged invalid." See, also, Cooley on Constitutional Limitations, (6th Ed.) p. 211; Black on Construction of Statutes, p. 96.

In the case of Texas & Pacific Railway Company v. Mahaffey, 98 Tex. 392, 84 S. W. 646, the Supreme Court of this state, in passing upon a similar question and laying down a similar rule of statutory construction, used the following language: "It seems to us that the main purpose of the act was to prohibit dealing in railroad tickets, which had been issued to travelers, and which for any reason remained, either in whole or in part, an outstanding obligation of a railroad company to carry a passenger. The scheme was to accomplish this object, and at the same time to avoid doing an injury to the holders of such tickets by requiring the railroad companies to redeem them. Therefore by section 5 (Acts 23d Leg. 1893, p. 97, c. 73) it was made the duty of the companies to redeem such tickets, and a penalty was provided for their failure to do so. For this reason we are of the opinion that the propriety of requiring the railroad companies to redeem unused tickets grew out of the provision which prohibited the sale of such tickets, and that but for the enactment of section 3 section 5 would not have been passed. Therefore the two sections must fall together." Another portion of the opinion recites the fact that in the case of Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821, our Court of Criminal Appeals has held that section 3, providing a penalty for the sale of a certain class of tickets, was unconstitutional.

Of course there could be no serious contention, under the well-settled authorities of this court, as well as the Supreme Court, that the judge who tried this case could not be a de facto judge. This has been settled by too many authorities and too numerous to mention. If his appointment was void, then he had no authority whatever to try this case; but we hold that he was a de jure judge appointed under authority of an act of the Legislature of 1895, above cited in this opinion, and that he had a constitutional and statutory right to appoint him, and that his appointment in all things was formal. So believing, we think appellant's contention is incorrect, and that the act of the Legislature last cited, containing other provisions than the one here under consideration, are also invalid, including the one under consideration, for the reason that the act as an entirety cannot stand, since the Legislature would not have passed that part of the act here declared unconstitutional if they had known same was such, since the purpose of passing the law was to save expense. Most of the expense incident to special judges are those appointed or agreed on by the parties. This act eliminates the constitutional right to agree, and to that extent alone would save expense, so, no economy being obtained by other provisions of the statute in view of the fact that the clause here under consideration is declared unconstitutional, we must presume that the Legislature would not have passed the rest of the act if they had known the provisions here were unconstitutional. We do not feel disposed to treat the matter further, but hold that the act of 1897, authorizing district judges to be designated to hold court in adjoining districts, thereby depriving parties of the right to agree, is unconstitutional and void, and that the other provisions of the act of 1897 are equally so for the reasons above stated.

Appellant's second assignment of error complains that the court erred in overruling appellant's motion to quash the special venire herein on the ground that Act 30th Leg. 1907, p. 269, c. 139, authorizing the drawing of a jury under what is known as the "jury wheel law" is unconstitutional and void. This question has been passed upon by this court and held adversely to appellant's contention in the cases of Smith v. State (Tex. Cr. App.) 113 S. W. 289, Brown v. State (Tex. Cr. App.) 112 S. W. 80, and Waters v. State (Tex. Cr. App.) 114 S. W. 628.

Appellant insists that the court erred in refusing to grant him a new trial on account of the misconduct of the jury, in that the jury discussed the final results of the trial of Holly Vann, appellant's codefendant. The juror Vineyard testified as follows: "The jury retired to consider the case under the charge of the court on Wednesday afternoon, about 3 o'clock, and arrived at a verdict about 8:30 or 9 o'clock Friday morning. During the time the jury were deliberating on the case, and before a verdict was reached, some member of the jury, I think Mr. Laird, but won't be sure, said that Holly Vann had been hung for this same offense, and that the evidence showed that the defendant was as guilty as Vann was. Some time during that time the jury were deliberating, and before the verdict was reached some of the jury, I don't remember who, said this was the fourth trial of this case, that it had been tried three times, and that he had received the death penalty each time. I don't remember who said it. I never heard any-

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thing said about the failure of the defendant to testify nor about his former character or career."

Whereupon, on this issue being joined, A. S. Baskett was sworn for the state and testified: "I think I examined each juror as to whether he heard of the result of the Holly Vann case, and of this case on any former trial. My recollection is that some of them had heard of both; but a number had heard of neither. The juror Williams had not heard of either. The juror Sturgess had heard of the result of the Vann case; but my recollection is he had not heard of the result of this case. Each one that was taken that had heard of either one swore that that would not influence them in arriving at a verdict in this case. That they could try the defendant according to the evidence and charge of the court as fairly as if they had not heard of it." Mr. Baskett was attorney for appellant upon the trial of the case as well as in this court.

E. A. Sturgess, being sworn for the state, testified: "I sat on the jury in the Burrell Oates case in this court in October. I was elected foreman of that jury. When I was taken I had heard of the result of the Holly Vann case and the result of this case on the former trials. I told the attorneys and court so at the time. The jury went out with the charge of the court one afternoon, about 3 o'clock. They elected me foreman. We then took a ballot on guilty or not guilty. The first ballot which was taken the first evening was twelve for guilty. Then we voted on the punishment. There were nine for the death penalty and three for life sentence. I was one of the three for life sentence. The other two were Burkhead and Christenson. We took several ballots that evening without any change. The next morning Mr. Burkhead and Mr. Christenson went over to the death penalty. We stood then eleven for the death penalty and one for life. We stood that way all that day and until the following morning, when I agreed to the death penalty. Yes, I heard the result of this case on the former trials discussed in the jury room by several of the jurors, but I don't remember the names of but one. I remember his name because he spoke of it five or six times. That was after Mr. Burkhead and Mr. Christenson had gone over to the death penalty. It occurred on the second day. It was before I agreed to the death penalty. When it was spoken of I told them it had nothing to do with this case. It did not influence me in my verdict. I made up my verdict from the law and the evidence. Every time it was mentioned I told them it had nothing to do with this case, and that I was foreman of that room, and they must not discuss it. The result of the Vann case was also mentioned by the same juror. That was while the jury stood eleven to one. That did not influence me." Cross-examined by the defendant, Sturgess testified: "That juror who spoke of the former verdicts in this case so often was Mr. Laird. I hate to tell it, but if I have to I will. All the remarks were made to me. I was the only one of them that was standing for a life sentence. As soon as I came over to the death penalty we returned the verdict. That was Friday morning about 9 o'clock. That juror said the defendant had already been tried three times and had received the death penalty each time. I told him it did not make any difference how many times he had been tried, that had nothing to do with this trial. He said 47 men had said he ought to be hung and 1 was saying he ought to be sent to the penitentiary; that I was putting my judgment against 47. I told him it made no difference if 99 said he ought to be hung; that had nothing to do with it. He kept on, and finally threw some sort of a slur at me, and we liked to have had a circumstance there in the jury room. I told him it had nothing to do with this case; that he must not be slurring at me. I would not stand it; that I was foreman of that room, and they must not discuss that matter any more. I never heard it mentioned any more. That was on Thursday. Yes, I heard this same man Laird speak of the result of the Vann case. He said there in the jury room while we were considering of our verdict that Holly Vann had been hung for this same thing, and what would the people of Dallas county think of us if we should send the negro to the penitentiary after the white man had been hung. That happened before I agreed to the death verdict. That was on Thursday, but after Burkhead and Christenson had agreed to the death verdict. That was spoken to me. I heard Mr. Williams, one of the jurors, say: 'I wish the defendant had gone on the stand and testified. He might have cleared up some circumstances.' That was all that I heard said about the failure of the defendant to testify. This all occurred in the jury room while we were deliberating on our verdict and before we reached a verdict. I never heard anything said about the former life or character of the defendant."

This is all the testimony that was introduced on the trial of this issue. It appears from the foregoing statement that the foreman of the jury held out for quite a while for life sentence. He further states in his testimony that he knew of the previous verdicts, and so stated at the time he was taken on the jury. We do not think, in the light of this statement and the balance of the testimony above detailed, there was any such comment upon either the failure of the defendant to testify, or the existence of previous verdicts, as will authorize us to reverse this case. We have several times held lately that bare allusions to these matters will not operate a reversal of the case. We do not believe there was anything here stated that would justify us in so doing. See

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Arnwine v. State (decided at the recent Tyler term) 114 S. W. 796.

The only remaining question for our consideration is the sufficiency of the evidence. To our minds it in all respects measures up to the requirements of the law for the infliction of the death penalty. That appellant, in company with Holly Vann, murdered the deceased, Sol Aranoff, the evidence excludes every reasonable doubt of. That they murdered Sol Aranoff in order to secure his money is also beyond cavil. The jury have seen fit four several times to inflict upon appellant the death penalty, and we believe his conduct and the circumstances surrounding it, and the mode, animus, and purpose actuating him at the time of the commission of this offense, clearly justify the jury in their verdict.

The judgment is in all things affirmed.

RAMSEY, J. (dissenting). The majority of the court having determined that the Governor is authorized, under the law, to appoint a special judge, I agree to the disposition made of the case. My own opinion is that the Governor is not authorized in any case to appoint a special district judge. I will at some convenient time write my views on this question.

DAVIDSON, P. J. (dissenting). I concur in the disposition made of the question in regard to the appointment of a special judge, believing the law relied upon by appellant to be unconstitutional, and therefore the Governor had a right to appoint, as he did, the special judge in this case. In regard to the jury law question suggested for revision, I have heretofore expressed my views in a dissenting opinion in the case of Bob Smith v. State, 113 S. W. 289, and think my position on that question sufficiently explicit.

I cannot agree with my Brethren in regard to the matters suggested in the motion for a new trial as to the misconduct of the jury, and matters discussed by them during their retirement, and think they are of such material character as should have required the district judge to grant a new trial, and, upon his failure to do so, this court should reverse the judgment. See Lankster v. State, 43 Tex. Cr. R. 298, 65 S. W. 373; Hughes v. State, 44 Tex. Cr. R. 296, 70 S. W. 746; Horn v. State, 50 Tex. Cr. R. 404, 97 S. W. 822; Casey v. State, 51 Tex. Cr. R. 433, 102 S. W. 725; Morawitz v. State, 49 Tex. Cr. R. 366, 91 S. W. 227; Tutt v. State, 49 Tex. Cr. R. 202, 91 S. W. 584; Terry v. State (Tex. Cr. App.) 88 S. W. 986; Tate v. State, 38 Tex. Cr. R. 261, 42 S. W. 595; Gann v. State (Tex. Cr. App.) 59 S. W. 897; Blocker v. State (Tex. Cr. App.) 61 S. W. 391; Darter v. State, 39 Tex. Cr. R. 47, 44 S. W. 850. In the case of Horn v. State, supra, before the jury had agreed on the penalty to be assessed against appellant—that is, the number of years—the conviction of his codefendant, Jack Early, was discussed. Early had been previously convicted in a separate case for the same offense and had been given 15 years, and the matter of his punishment was discussed in the jury room, and this was assigned as error. After such discussion they agreed on the punishment and assessed it at 30 years' confinement in the penitentiary. This language is found in the opinion: "We do not believe that what occurred can be considered as a bare reference to the matter, but was more than this. Evidently it suggests that the juror or jurors who may have used this argument must have had some prejudice against appellant; otherwise they would not have referred to it. It might not have disqualified a juror who knew this fact; but if a juror not only knew the fact, but used it, this occurs to us shows he was influenced thereby himself and resorted to it for the purpose of influencing others. Appellant's contention here is supported by an unbroken line of authorities in this state and is of itself sufficient to reverse this cause." Judge Henderson wrote the opinion. In Hughes v. State, 43 Tex. Cr. R. 511, 67 S. W. 104, this language is found: "This misconduct is so reprehensible, and is so fraught with probable injury to the rights of appellant, that we cannot say that it was not calculated to injure his rights. Instead of a fair and impartial judgment by the jury upon the facts and conclusion from those facts as to the punishment that the law authorized to be meted out to appellant, we have a verdict predicated probably upon the supposed action, in part at least, of a former jury. This is not a fair trial under the laws of this state, nor is it a deduction from the evidence. We cannot permit such a verdict to stand." In the case of Hughes v. State, 44 Tex. Cr. R. 296, 70 S. W. 746, the court uses this language: "The statute is imperative and must be followed, which says that the jury shall not discuss or use the fact of previous conviction as a predicate or probable predicate for their verdict. It is true, as indicated by the court, that each of the jurors stated that the discussion of the Denton county verdicts did not influence their action in finding the verdict. This is a conclusion so wrought with speculation and caprice that we cannot make it the basis of holding appellant was accorded a fair and impartial trial." Judge Brooks delivered the opinion in both of the cases of Hughes v. State, supra. They are in accord with the writer's views and enunciate the correct doctrine. In the case of Lankster v. State, supra, there had been two former trials and convictions. The jury after their retirement, after agreeing upon a verdict of guilty, but before assessing the punishment, discussed the previous convictions and punishment. The court held the jury were guilty of misconduct, and the bare fact that this misconduct was of a character calculated to injuriously affect defendant constituted reversible

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error, and the judgment for this reason alone was reversed.

The statement in the opinion as to what occurred in the jury room is taken as a basis for my dissent, and as having fairly and correctly stated the conduct of the jury during their retirement. It will be observed from that statement that not only the prior convictions of appellant were discussed and urged as a reason why he should not be acquitted, but it was further stated and urged as a reason why the conviction for death penalty should obtain that a white man, Holly Vann, had been previously convicted and hung for the same offense, and that this appellant had had three death penalties prior to this assessed against him for this offense, and in this connection the pungent question was asked: "What would the people of Dallas county think of this jury if they were to send a negro to the penitentiary for the same offense for which a white man had been hung?" Then it is patent that the previous conviction of Vann was mentioned and urged, previous convictions of appellant were used, the fact that he was a negro and Vann was a white man emphasized, the probable censure of the people of Dallas of the jury if they should fail to hang this negro was pleaded, and to such an extent that it almost reached the point of a personal difficulty between the juror Sturgess and some other member of the jury. That the juror may under such circumstances say that he is not influenced does not necessarily control this matter, but may in fact tend to show prejudice as was stated in some of the opinions above quoted. Nor was this all. Before the verdict was reached, one of the jurors expressed the wish, or stated, in substance, that he wished the appellant had taken the stand; that had he done so he might have explained a lot of matters occurring at the homicide. This was not merely a bare allusion to the fact that appellant did not testify. It was more than that. There were things in the mind of the juror that needed explanation, and the appellant failed to take the stand to explain those in accordance with the wish of the juror. They were evidently not explained, and appellant was held responsible to the limit of the law. To the mind of the writer this conduct was of such character that the judgment ought to be reversed. In fact, it is seldom the case that such conduct occurs in the jury room.

Without going further into a discussion of these matters, I suggest briefly the above reasons for my dissent, and respectfully nonconcur, and rely in part upon the authorities above cited, though quite a number more might be added.

On Rehearing.

RAMSEY, J. This case has been pending in the courts for many years and has attracted wide notoriety. The appellant has four times received in the trial court the death penalty, and his case has already been three times reversed by this court. With the other reversals I have personally nothing to do, since they all occurred before I had the honor to sit as a member of this court. I am by law, however, charged with the responsibility for the result of this appeal. I am clear and firm in my belief that the Governor has no authority to appoint a special district judge in this state anywhere or under any circumstances. It is, of course, greatly to be regretted that we should be compelled so to decide. The Governor is by law charged with the enforcement of the law. He is, as we know, a lawyer of large experience and recognized distinction. In addition, in this case, we are advised that he has acted on the written opinion of the Attorney General. If therefore we could set aside our own responsibility and place our decision on the authority of these officers, our decision were an easy matter; but by law we must pass on and decide questions raised on the appeal of criminal cases. It is a responsibility we cannot share with another. It is ours, and we must recognize and discharge it, although our decision conflicts with the opinions of others whose judgment is entitled to respect, and although it results in the reversal of a judgment of conviction the fourth, or even the forty-fourth, time. If the tribunal which condemned this man to die was not presided over by a district judge duly chosen and selected according to law, it had no more legal right to take his life, guilty or innocent, than a mob at night. There can be no court, in a legal sense, without a judge, and there can be no judge except as he may be elected and chosen under the Constitution and agreeably to law. It therefore results that, however eminent in learning and however fair in fact may be the person who presides over the trial, unless he is in a legal sense a district judge the gathering masquerading as a court becomes of no higher dignity than the same number of respectable gentlemen gathered by chance on the street corner.

It is conceded in the original opinion filed in the case that, if the act of the Legislature approved June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), is constitutional, there exists in this state no authority in the Governor to appoint a special judge. There can be no doubt of the correctness of that position. This act repeals articles 1069 and 1070 of the Revised Statutes, which had given the authority to make such appointment. The act of 1897, denying in express terms the authority to make such appointment, has now been on the statute books of this state for more than a dozen years. No court in this state has, until the decision in this case, held it invalid. Here is a man, a negro to be sure, and probably a very guilty negro, who by his counsel stands up and demands the priceless heritage of a free man to be tried according to the law of the land and by a judge chosen

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and selected in accordance with the laws of his country. He relies on a statute passed with the set purpose and deliberate intention of denying to the Governor the authority to appoint a district judge from private life to try his case. In such a case, unless it is clear almost beyond the peradventure of a doubt that such law of my country is unconstitutional, I would never be as one standing by and consenting to his death. I cannot see and do not believe that this act is unconstitutional. To consent that it shall be so declared is to abdicate my position as a member of this high tribunal, or commit the unpardonable offense of refusing to speak out when every suggestion of honor and every consideration of public duty demands that I shall speak. But is the act in question unconstitutional? We ought not so to hold except on such weight of authority or compulsion of reason as to leave the matter substantially free from doubt. The rule is elementary and the authorities unbroken that we ought, if possible, to sustain this law. A large deference should be paid to a statute duly enacted. The same electorate which chooses us elects the Legislature. It is one of the three great departments of our government. This act seems to have been carefully drawn and received the approval of a Governor whom envy itself would not deny the praise of a great lawyer. Again, through all these years it has remained on the statute book of the state and is now a part of the statute law of this state. Again, it relates to a matter of procedure in our courts in the trial of cases both civil and criminal. What article of our Constitution does it offend? Let us see.

The original opinion does not quote all of section 11, art. 5, of our Constitution relating to district judges. This section, so far as is important here, is as follows: "When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. The disqualification of judges of inferior tribunals shall be remedied, and vacancies in their offices filled, as may be prescribed by law." As stated in the original opinion, the portion of the above-quoted section of the Constitution giving parties the right to agree on a special judge is self-executing, absolute, and is perfect even in the absence of legislation in respect to the matter. Parker County v. Jackson, 5 Tex. Civ. App. 37, 23 S. W. 924. But it is the only portion of the constitutional provision which is, by its terms, absolute. As to appointment the language is: "A competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law." Again, the last clause provides that: "The disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled, as may be prescribed by law." Again, the Constitution that: "And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law." Every district judge in Texas is chosen with reference to, and presumably with a knowledge of, the constitutional provision. That he may be required and compelled to exchange districts under such regulation and by such directions as the law provides does not to my mind admit of any doubt. Now then, as I conceive, the error in the majority opinion consists in this: (1) The present statute does recognize the right of parties to agree on a judge, when the law fails to provide one duly elected and serving at the salary fixed by law. It in terms provides that: "In case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof." Thus it is obvious, as I believe, that the existing law does authorize and recognize the right given by the Constitution to agree upon a judge. The right to voluntarily exchange districts and the right to require such exchange is fixed and granted in the same section of the Constitution as that which guarantees the right to agree on a trial judge. One is of no more importance or dignity than the other. They may and do both exist in the same section and dwell together in harmony under the same shelter. They both, when properly construed, mean this, and no more than this: District judges, when elected, shall under the regulations and rules fixed by law try all cases pending in the courts wherein they preside. For reasons deemed sufficient, and in the manner and by the person named by law, they may be required to exchange. When no judge elected in the particular district appears qualified to try the case, and when no duly elected judge on proper exchange appears, then, since the law fails to supply a duly elected officer, the constitutional provision is effective and available, and the right to select a judge by agreement is granted.

Let us see if this is not the true and clear intent of the Constitution. In the first place, society and the public have some rights. They are interested, as well as the immediate parties, in the proper administration of justice. They are interested in the integrity and tried capacity of the judges. The law and the state has the right to say to the litigant: "Here is a judge possessing the qual-

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ification of the Constitution and approved and chosen by the voters of his district. To him the law requires you to submit your case for decision." The same Constitution too provides that, to prevent delay or the denial of a prompt hearing and the due administration of justice, a system of exchange may be arranged and provided by law. Then too the public and society at large have some rights in the matter of expense. If and when provision is made for the prompt and orderly trial of cases by judges duly chosen and serving at a fixed salary to be paid in any event, shall it be held that these officers may be thrust aside and private persons chosen at public expense to do their work because for any reason it may suit litigants better? The error of the majority, as I conceive, is found in the fact that they do not recognize, which seems to me to be clear, that the constitutional right of agreement applies and obtains only when the law fails to supply a judge duly chosen. If this constitutional right is superior to the other constitutional provisions contained in the same section and is available at all times and under all circumstances, its application would, or at least could, be made an instrument and means of judicial anarchy. Under my construction that the constitutional right to agree upon a district judge applies and is available only when the law fails to supply a judge not disqualified in the constitutional sense, perfect harmony in our judicial system is assured.

Again, the makers of our Constitution recognized that men must first be lawyers before they could become judges. Slight reflection under our frequent change of judges would have suggested, and obviously did suggest, to them that these practicing lawyers called from the bar to the bench on short notice would be disqualified from having been counsel, and for other reasons, in many cases pending before them, and the consequent necessity of making provision for furnishing the courts and litigants with duly chosen judges to try, under a system of exchange, cases in which the regular judge of the district was disqualified. Let us suppose that either voluntarily or under direction of the Governor in the manner prescribed by law the district judge of Travis county, to secure the trial of a case in which he is recused, exchanges benches with the district judge of the neighboring county of Fayette. That learned judge duly accredited appears at the time stated, takes his seat on the bench, and begins the call of the docket. He is met with the announcement that the parties litigant in all the cases triable before him have agreed on another person or other persons to try such cases. A similar course may be pursued in Fayette county. Can they be thus ousted of their jurisdiction and be set aside at the whim and caprice of litigants, and the public burdened with the expense of a special judge, when under sanction both of the Constitution and the statute of our state there is present a duly elected and qualified judge ready, able, and willing to hold court and try the cases set for hearing without even a suggestion of disqualification? I cannot think so. Now, remember that the Constitution prescribes that "the district judges may exchange districts or hold courts for each other when they may deem it expedient and shall do so when required by law." Now, article 1069, as fixed by the act of June 19, 1897, undertook to carry into effect the constitutional provision of enforced exchanges. This they had the right to do. Evidently they believed that the public good so required. This was and is a matter of public policy which, since authorized by the Constitution, we ought not and cannot control or set aside. In this very act, too, they provide for and in express terms recognize the right of litigants to agree on a special judge, and also make provision for his induction into office and prescribe the manner and method of his qualification and the preservation of the authentic evidence thereof. If the act denied the authority in a proper case to select a judge by agreement, the question would be more serious; but here, so far from denying such right, it is both granted and recognized in express terms. It is granted in cases where the regular judge is disqualified, and where for sickness or other reasons rendering it impossible to exchange and where, as a result of the failure of the law to supply a judge, the right to have one by agreement becomes available. Section 5 of the act in question furnishes a key to its own proper interpretation. It says: "The fact that under the present law there is a heavy annual expense entailed upon the state for the payment of special judges which could be avoided by the regular district judges exchanging," etc. Thus we have here a plain statement of the purpose of the law. It undertakes, among other things: (1) To authorize the Governor, on receipt of evidence of the disqualification of any district judge, "to designate some district judge in an adjoining district to exchange districts for the purpose of disposing of such case or cases"; (2) it provides in case of such disqualification of the district judge, and where circumstances are of a character "rendering it impossible to exchange," that the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof; (3) it provides the manner of evidencing the proper qualification of the special judge chosen by the parties; (4) most important of all, it omits what has formerly been in terms provided for, any authority giving power to the Governor to appoint a special district judge, in any case; (5) in the emergency clause it sets out the reasons for the enactment of the law.

I should be content to rest the decision on the above ground; but there is another basis

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for my conclusion which is so forcibly and clearly expressed in appellant's motion for rehearing that I adopt it without change as my own views:

"Then, granting that the latter clause of the statute of 1897 is, by reason of its position, unconstitutional, does it necessarily follow that the remainder of said act is? We say not. This court quotes from Black and Cooley on Constitutional Limitations. The language of the two authors is practically identical. The quotation is as follows: 'But when the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not have passed the residue independently, if some parts are unconstitutional and void, all the provisions which are thus dependent, conditional, or connected, must fall with them; but if the purpose of the statute is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion. And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature never intended, the whole must be adjudged invalid.' That same authority, on page 211, further says, in that connection: 'If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.' Again, on page 214, he says: 'If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated if it shall be held valid as to some cases and void as to others.' Again, the same author, on page 215 of said work, as quoted by the Supreme Court of Texas in W. U. T. Co. v. State of Texas, in 62 Tex. on page 634: 'When therefore a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.'

"Now, tested by these rules, must the first portion of the act of 1897 fall because the second portion is unconstitutional? We cannot see why or where. Is one a condition of the other? If so, which is the condition of or for the other? One had been in operation from its own force since 1876; the other was enacted by virtue of an entirely different power granted by the Constitution. Was one of them a consideration or compensation for the other as it was held in the case of T. & P. Ry. Co. v. Mahaffey in 98 Tex. 392, 84 S. W. 646, cited by this court, in which it was held that that portion of the statute requiring the railroads to redeem tickets was a consideration or compensation for the legislation providing a penalty for scalping in railroad tickets? If so, which is the condition or compensation for the other? Should the latter clause be stricken out as unconstitutional, would what remains be what the Legislature intended? What remained would be that the Governor should not be permitted to appoint judges, and thus increase the expenses of the judiciary, but should designate district judges to exchange benches, and thus eliminate that expense. The Legislature evidently so intended, because the purpose of the act was economy in that line. This act had a single object, viz., economy. Now, the whole must fall 'unless sufficient remains to effect the object without the aid of the invalid portion.' Economy, the purpose of the bill, is attained in all cases where a special judge is not agreed on. That is the effect without the aid of and in spite of the latter clause. Would the Legislature have passed the first part without the latter or unconstitutional clause? The purpose of the act, as stated in the emergency clause, was economy. This court says in its opinion that, because most special judges are agreed upon, and therefore most of the expenses come from that source, therefore it is reasonable to conclude that the Legislature would not have attempted any retrenchment at all had it known it could not have gone through the entire subject. That conclusion does not seem even plausible. It was absolutely beyond the power of the Legislature to retrench in that particular. The Legislature is supposed to have known that. Then, would you presume they would undertake no retrenchments at all simply because there were some they could not effect? Then if these clauses are not mutually connected, nor dependent, are not conditions, considerations, nor compensations of each other, one may be carried into effect without the aid of the other, one may be rejected without causing the

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other to enact what the Legislature never intended, and one of them might have been passed by the Legislature without the other, then it occurs to us that every constitutional objection to declaring the one unconstitutional and sustaining the other has been fully met.

"But let us follow the author a little further. He says: 'If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.' The remaining portion, after eliminating the last clause, is as follows: 'Whenever any case, or cases, civil or criminal, are pending in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately notify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall also notify both of said judges of said order, and it shall be the duty of said judges to exchange districts for the purpose of disposing of such case or cases.' Is that not complete within itself? If not, what is lacking? Is it not capable of being fully executed in accordance with the expressed legislative intent, economy, wholly independent of either the rejected part, or any other statute, as to that matter? If not, in what respect is it lacking? We contend that by no rule laid down by Mr. Cooley must the first clause fall perforce the fact that the last clause is unconstitutional. We further contend that that provision as contained in the act of 1879 has no force, and is as injurious to the statute, coming at the first, as it is in the act of 1897, coming at the last. It has no force anywhere. We think this assignment is well taken, and that the appellant was tried without a legally constituted judge, that in that respect he is deprived of his life without due process of the law of the land, that he has been deprived of his rights under the fourteenth amendment to the federal Constitution."

It seems to be thought that, inasmuch as the provision of the Constitution in respect to the right of parties to agree on a judge precedes, in the section quoted, the clause in reference to appointment, and the matter of exchange of judges both voluntary and enforced, that it is paramount and in a sense exclusive and superior to these wise and important provisions. I have rather been inclined to construe them as parts of the same general scheme of providing a trial judge in the absence or because of the disqualification of the regular judge, and that no significance is to be attached to the order in which these provisions appear. I have endeavored in interpreting this section of our Constitution to follow the rule laid down by Cooley in his great work on Constitutional Limitations, which is as follows: "Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other classes or portions of the same law. It is therefore a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part, and this Sir Edward Coke regards as the most natural and genuine method of expounding a statute. If any section of a law be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written Constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written Constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

Again, it should be remembered that this is not a case in which a citizen is asserting the constitutional right to agree on a judge to try his case. If such a case were presented, and we had before us the appellant asserting his right to be tried before a special judge on whom, with counsel for the state, he had in a proper manner agreed, and who had accepted the trust and qualified as by law provided, then indeed the question would be presented that he had been denied the constitutional right to be tried by a judge selected and agreed on under the terms of the Constitution; but here no such right is asserted by him, nor should or can we say that the law is invalid as to him because he

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has not raised a question or asserted a right which we may think he might have asserted.

Nor can it be said that Mr. Lemmon, who assumed to preside as judge, was in any proper sense a de facto officer. If the act of 1897 is valid, then the Governor was wholly without warrant to appoint him as special judge to try this case. Cooley defines a "de facto officer" as one "who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact." An "intruder" he defines as one "who attempts to perform the duties of an office without authority of law and without the support of public acquiescence." "No one," he says, "is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void." Cooley, Const. Lim. p. 751; Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574; Peck v. Holcombe, 3 Port. (Ala.) 329; Petersilea v. Stone, 119 Mass. 465, 20 Am. Rep. 335. The matter has been so ruled in our own courts. Franco-Texan Land Co. v. Laigle, 59 Tex. 339; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874; Cox v. H. & T. C. Ry. Co., 68 Tex. 226, 4 S. W. 456; Weatherford v. State, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828. In Brumby v. Boyd, supra, the court say: "When an appointment to office is not merely irregular or informal, but is absolutely void, the appointee, though attempting to discharge the duties of the office, is not an officer de facto. That one whose claim to an office is under a void appointment is not a de facto officer, but a mere intruder, is well settled." In the earlier case of Franco Land Co. v. Laigle, 59 Tex. 339, the court uses this language: "A de facto authority cannot arise when there has been absolutely no election or appointment, or what is equivalent—one that is absolutely null and void and not merely irregular or informal."

If these views are correct, then appellant has been denied the right to be tried by a judge selected under the law and has been forced to submit his case before one assuming to act as judge, but who was in truth a mere intruder. He is sought to be convicted for an offense against the laws of his state. To this law and its guaranties he makes appeal. If this is to be denied, and his life taken under the judgment of a tribunal unknown to the law, I want it written in the books and the record to show that I had in the most solemn and earnest manner protested against his condemnation by an extrajudicial tribunal. If these views are incorrect, then, as I believe, there is no other question raised in the record on which we ought to reverse the case. I think the evidence shows him guilty beyond doubt. We have heretofore upheld the validity of the jury wheel law, and this course has been followed and approved by our Supreme Court on a refusal of a writ of error. I share in the views of Judge BROOKS on the issue of the alleged misconduct of the jury and assume my full share of the responsibility for the conclusion on this question, as stated in the original opinion. The length of this opinion, and the fact that we are so soon to adjourn, and the pressure of many cases and questions prevent my going into the matter at length. Ordinarily I would be disposed to coincide with the conclusion at which Judge DAVIDSON arrives; but, under the facts of this case, the general rule has, as I conceive, little or no application. Here the only jurors who could possibly, under the evidence, have been influenced by the discussion and happenings in the jury room, knew, when taken as jurors, every fact mentioned in their discussions, and this fact was well known to appellant and his counsel when they were accepted as jurors. These jurors knew of the former convictions of appellant and the conviction and presumable execution of Holly Vann. With knowledge of these facts, they were voluntarily accepted as triers of his case. Notwithstanding such knowledge, they declared they could and would give him a fair and impartial trial. The mention of these matters in the jury room adds nothing to what they already knew and of which appellant was freely advised when he accepted them as jurors. I think the Arnwine Case, supra, is directly in point, and that there was no reason, under the entire evidence, why on this account a new trial should have been granted.

Judge DAVIDSON agrees that the motion shall be granted which is now done, and the judgment of conviction is reversed, and the cause remanded. He will write his views separately.

BROOKS, J., dissents.

DAVIDSON, P. J. When I concurred with Judge BROOKS in affirming the judgment in regard to the error assigned on the want of authority in the Governor to appoint a special judge to try appellant, I was under the impression that the present law in regard to the matter was unconstitutional, and therefore the old law would obtain, under which it was provided that the Governor could, under certain emergencies, appoint a special judge. A very cogent motion for rehearing was filed. A more careful review of the matter and a more thorough discussion in consultation has led me to believe that I was in error, and to reach the conclusion that the present law is constitutional. Under this view I agree with the conclusions reached by my Brother RAMSEY that the Governor was not authorized to make the appointment of the special judge. I,

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therefore, on this phase of the case, agree with the conclusion reached by my Brother RAMSEY, and concur in the reversal. I am still firmly of the opinion however, that the judgment should be reversed also on account of the misconduct of the jury as expressed in my dissenting opinion. I do not care to go into a discussion of either question, and simply state this much in view of the fact that I have reached the conclusion I was in error in regard to the appointment of a special judge.

I therefore concur in the reversal of the judgment.

WARD et al. v. STARK BROS.

(Supreme Court of Arkansas. July 12, 1909.)

1. HOMESTEAD (§ 119*) — MARRIED WOMEN — RELINQUISHMENT OF DOWER AND HOMESTEAD—CURATIVE ACTS.

A certificate of acknowledgment by a wife, reciting that she voluntarily appeared and in the absence of her husband declared that she had of her own free will signed and sealed the relinquishment of dower and homestead for the consideration and purposes therein contained and set forth, without compulsion or undue influence of said husband, was sufficient, under Kirby's Dig. § 3901, concerning conveyances of homestead; any defect therein being cured by Act March 20, 1903 (Acts 1903, p. 150; Kirby's Dig. §§ 783, 786).

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 210–214; Dec. Dig. § 119.*]

2. MORTGAGES (§ 28*)—EQUITABLE MORTGAGE —SUFFICIENCY OF INSTRUMENT.

A duly executed and acknowledged instrument, reciting that the agreement "is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive from the said party of the first part the compensation hereinabove specified," was sufficient as an equitable mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 28.*]

3. LIENS (§ 7*)—EQUITABLE LIENS—FORM OF INSTRUMENT.

Equity looks through the form to the substance of the agreement, to determine whether it creates a lien.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26–28; Dec. Dig. § 7.*]

4. LIENS (§ 4*)—CREATION BY CONTRACT.

If the instrument evidencing the agreement shows an intent of the parties to charge or pledge property, real or personal, as security, and the property is so described that it can be sufficiently identified, a lien is created.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 23, 24; Dec. Dig. § 4.*]

5. HOMESTEAD (§ 115*)—MORTGAGE—EXECUTION—RELINQUISHMENT OF DOWER.

Where the wife's name did not appear in the body of the mortgage of a homestead, but she signed and acknowledged the same, it will be effective to create a lien as against her, though it contained no relinquishment of dower and was not executed in compliance with the homestead statute.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 115.*]

6. SIGNATURES (§ 5*)—ATTESTING.

Kirby's Dig. § 7799, providing for attesting the signature by mark of persons who cannot write by the person who wrote the name, is not exclusive; and where a person, whose name was signed by mark, appeared before an officer and acknowledged execution of the instrument, it is valid, though the signature was not attested.

[Ed. Note.—For other cases, see Signatures, Dec. Dig. § 5.*]

7. MORTGAGES (§ 94*)—RECORD—DEFECT.

A defect in a record of a mortgage as to the description of the property does not invalidate the lien, where the original instrument was correct.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 94.*]

Appeal from Greene Chancery Court; Edw. D. Robertson, Chancellor.

Action by Stark Bros. against G. O. Ward and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Huddleston & Taylor, for appellants. Johnson & Burr, for appellees.

McCULLOCH, C. J. This is a suit in equity instituted by appellees, Stark Bros., against G. O. Ward and his wife, N. G. Ward, to obtain foreclosure of two certain instruments of writing, alleged to be mortgages on the same tract of land, which constituted the homestead of G. O. Ward. J. A. Gill, a subsequent purchaser of the land from Ward, was made a defendant in the suit, and he also appeals from the decree of foreclosure.

The first instrument executed is as follows:

"This indenture, made and entered into on this 14th day of October, A. D. 1901, by and between G. O. Ward, of Finch, Ark. (residence 10 miles S. W.), county of Greene, state of Arkansas, party of the first part, and Stark Brothers, of Louisiana, county of Pike, state of Missouri, parties of the second part, witnesseth that the said party of the first part, in consideration of the parties of the second part selling and shipping to him in the fall of 1901, to Paragould, Ark., railroad charges prepaid, thirteen hundred (1,300) fruit trees binds himself and his heirs and assigns to carefully plant and care for said trees on his farm, containing 80 acres, situated in Greene county, state of Arkansas, and more particularly described as follows, to wit: W. ½ N. W. ¼ of section 14, township 16 N., range 4 East. Boundaries (here give names of adjoining owners): A. Fletcher on N.; Bob Treece on E.; on south, Elen Edwards; W., W. J. Hyde—and pay to the order of said second parties, their heirs and assigns, as per first party's four promissory notes, to be executed by said first party to said second parties when the aforesaid trees are shipped, two hundred and seventy dollars ($270), due and payable as follows, all deferred payments and interest hereinafter particularly specified to date from the first

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date, Nov. 1st, 1901: * * * One-fifth cash on receipt of trees, one-fifth (⅕) in one year, one-fifth (⅕) in two years, one-fifth (⅕) in three years, one-fifth (⅕) in four years, with interest at the rate of six per cent. per annum, and if the interest be not paid annually the same is to become principal and bear the same rate of interest, to the payment of which sums as the same shall become due the party of the first part binds himself, his heirs, assigns, and grantees of and to the aforesaid described lands; the right being reserved to the said party of the first part to pay the full amount remaining unpaid and not yet due, together with accrued interest, at any time he may elect. Said first party, for the purpose of obtaining the aforesaid trees, waives all exemptions and states that the above-described real estate is free and clear of all incumbrances, and that he claims the same with a perfect title. And it is also understood and agreed by the parties hereto concerned that this agreement is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive of the said party of the first part the compensation hereinabove specified. In witness whereof, we have hereunto set our hands and seals this day and year first above written.

" G. O. Ward.

her

"N. G. X Ward.

mark.

"Witnessed by .....

"State of Arkansas, County of Greene—ss.:

"Be it remembered that on this day came before me, a justice of the peace duly commissioned and acting, G. O. Ward and N. G. Ward, his wife, to me well known as grantors in the foregoing instrument of writing, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. In witness whereof I have hereunto set my hand and affixed my official seal at my office in Paragould, the day and year above written.

"Jeff Bratton, J. P."

This instrument was duly filed for record and recorded, and notes were subsequently executed to cover the debt therein described. The second instrument is regular in form as a mortgage, and was duly executed and acknowledged by G. O. Ward. His wife, N. G. Ward, joined her husband in the granting clause of the deed, and also expressly relinquished dower and homestead. The certificate of her acknowledgment is as follows:

"State of Arkansas, County of Greene—ss.:

"Be it remembered that on this day came before me, the undersigned, a justice of the peace within and for the county aforesaid, duly commissioned and acting, voluntarily appeared before me the said N. G. Ward, wife of the said G. O. Ward, to me well known, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower and homestead in the foregoing deed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband. Witness my hand and seal as such justice of the peace on the 10th day of August, 1904.

"S. W. Atchinson, J. P."

It is contended that the wife's acknowledgment to this mortgage was insufficient compliance with the provisions of the statutes (Kirby's Dig. § 3901) concerning conveyances of a homestead. This objection may, however, be disposed of by reference to the recent case of Gantt v. Hildreth (Ark.) 118 S. W. 255, which is precisely in point and decisive of this case.

Questions arising on the other branch of this case, involving the first instrument, are, however, more serious. Was it sufficient to constitute an equitable mortgage on the land described? The only language purporting to create a lien is as follows: "It is also understood and agreed by the parties hereto concerned that this agreement is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive of the said party of the first part the compensation herein above specified." This language in the instrument unmistakably manifested the intention of the parties that a lien should be thereby created on the land and equity will give effect to this intention by enforcing the lien. Mitchell v. Wade, 39 Ark. 377; Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. Rep. 57; Williams v. Cunningham, 52 Ark. 439, 12 S. W. 1072; Martin v. Schichtl, 60 Ark. 595, 31 S. W. 458; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Pinch v. Anthony, 8 Allen (Mass.) 536; Stark v. Anderson, 104 Mo. App. 128, 78 S. W. 340; Martin v. Nixon, 92 Mo. 26, 4 S. W. 503. "Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement; and if, from the instrument evidencing the agreement, the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation and the property is so described that the principal things intended to be given or charged can be sufficiently identified the lien follows." Martin v. Schichtl, supra. Mr. Pomeroy stated the rule in substantially the same language. 3 Pom. Eq. Jur. § 1237.

It is also contended that the instrument now under consideration was not executed in compliance with the homestead statute, and therefore was insufficient to create a lien. The wife's name does not appear in the body of the instrument; but she signed it and acknowledged its execution. It contains no relinquishment of dower, and the wife's execution of it is referable only to an intention to consent to the creation of the lien

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and to join in the act creating it. In no other way can any effect be given to her signature. Sledge & Norfleet v. Craig, 87 Ark. 371, 112 S. W. 892. Any defect in the acknowledgment to the deed was cured by the two statutes enacted on March 20, 1903. Acts 1903, p. 150; Kirby's Dig. §§ 783, 786.

Appellants introduced testimony tending to establish the fact that Mrs. Ward did not sign the deed or acknowledge its execution, that her name was signed without authority, and that she did not appear before the officer who certified the acknowledgment. The testimony on this point was conflicting, and the preponderance is not against the chancellor's findings. Mrs. Ward signed by mark, and the person who signed her name did not attest the signature as provided by statute. Kirby's Dig. 7799. The method provided by statute for attesting the signature of a person who cannot write is not exclusive, but only establishes prima facie the genuineness of the signature without other proof of signing. Ex parte Miller, 49 Ark. 18, 3 S. W. 883, 4 Am. St. Rep. 17. Where a person whose name is signed in this way appears before an officer and acknowledges the execution of the instrument, but the statutory requirement relating to signature by mark is not observed, the validity of the instrument is not affected. An unauthorized signature is ratified by the person appearing before an officer and acknowledging the execution of the instrument.

There is a defect in the record as to the description of the property on which the lien is created; but the original instrument in writing which was introduced disclosed the fact that there is no defect. The error was that of the recording officer, and the lienor is not responsible therefor. Oats v. Walls, 28 Ark. 244; Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35.

Decree affirmed.

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BENDER v. WEBER et al.

(St. Louis Court of Appeals. Missouri, July 6, 1909.)

1. NEGLIGENCE (§ 136*)—DEFECTIVE PREMISES—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

That one knew of the existence of an areaway into which he fell, but had not noticed that it was so close to a door, did not make him guilty of contributory negligence as a matter of law; the areaway not being a place of imminent danger, but being an ordinary affair, about which prudent persons moved with more or less carelessness, believing it safe to do so.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–346; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 136*)—DEFECTIVE PREMISES—CONTRIBUTORY NEGLIGENCE.

Whether a person injured by falling into an areaway could have avoided the fall by exercising ordinary care *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–346; Dec. Dig. § 136.*]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Charles C. Allen, Judge.

Action by Laura Bender against George Weber and another. From a judgment for plaintiff, defendants appeal. Affirmed by divided court, and cause transferred to the Supreme Court for final determination.

Claud D. Hall, for appellants. E. V. Selleck and John A. Talty, for respondent.

REYNOLDS, P. J. (dissenting). This is an action by plaintiff, respondent here, against the defendants, owners of premises fronting on Laclede and on Cardinal avenues in the city of St. Louis. The buildings were rented to various tenants; the lower or first floors of the buildings fronting on Laclede avenue, Nos. 3041, 3043, and 3045, being used as stores, and the upper floors of these, as well as the buildings Nos. 8, 10, and 12 Cardinal avenue, being used as residences. A granitoid paved alleyway, about seven feet in width, extends east from and off of Cardinal avenue, between the rear of the Laclede avenue premises and the south wall of No. 8 Cardinal avenue, and thence around in rear of Nos. 8, 10, and 12 Cardinal. It has no exit to the north or east. It was used by the different tenants of defendants who were occupying the buildings, as well as to some extent by the general public, in going and coming to and from the rear of the grocery and residences. The second store from the corner of Laclede and Cardinal, No. 3043 Laclede, was used and occupied by Woods Bros., tenants of defendants, as a grocery; their store building fronting on Laclede avenue and running back north to this alleyway. The accident occurred in the rear of this grocery. A fence and gate of trellis work ran across the west end of the alleyway, the gate without lock, through which entrance was obtained to the alleyway. To the rear of the grocery there was an ordinary cellar opening (which we will hereafter refer to as the area), the east edge or end of it directly west of the west jamb of the rear door of the grocery. A flight of stairs, starting at the top of the west end of this area, ran down to the bottom, by which access was obtained to the cellar under the grocery. This area was about 10 feet deep, 27 inches wide, and 8 feet 6 inches long. The latch and knob of the grocery door were on the west edge of the door, and hinges on the east; the door swinging inward to the south. The area had an ordinary wooden railing, about 2 feet 10 inches high across its west end and north side; an ordinary wooden post being at the northeast corner. The wall of the building was on the south side, and the west end was open, giving access to the steps leading to the bottom and into the cellar. The space between the west door jamb and east end or edge of the area opening was 9½ inches; the door sill, a few inches, 2 or 3, above the pave of the alleyway; the opening of the area, level with that pave. The alley was between 6 and 8½ feet wide—6 feet where it enters from Cardinal, and about 8½ feet between the wall of the grocery on the south and the wall of the dwelling on the north—so that there was about 6 feet 3 inches in the clear in the alley, between the side of the area railing and the side of the dwelling.

Plaintiff was employed as housekeeper for the tenant occupying No. 8 Cardinal avenue, which, as before noted, lies on the north side of the private alleyway. On Sunday evening, October 28, 1905, she was sent by her mistress to Woods' grocery. Her petition states that "as she was leaving said store by and through said rear door * * * she fell into and through said opening or hole in said alleyway to the floor of said basement, whereby she was severely injured and crippled," and describes her injuries, which are quite serious. In her testimony plaintiff stated that she had been working at the house of Mrs. Conley, the tenant of No. 8 Cardinal avenue, for about two weeks prior to the accident; that she knew the premises and the alleyway or passageway; that it was used by people going into the store to buy groceries while it was occupied by the Woods Bros. Passageway was paved. She went to Woods' grocery on the evening of October 28th to get oysters and milk for Mrs. Conley. Asked what she did, she said: "I stepped into the store, and was getting some things, and wanted to speak to Mrs. Conley, and at that time I stepped into the hole." Had gone only a few steps into the store when she turned back. There were ash bins and bread boxes in the alleyway, and openings or areaways to cellars in it. At the time of the accident had come into the passageway from Cardinal avenue.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Passageway was 7 or 8 feet wide. Had seen bread men leave bread in the boxes in the alley and Woods come out of the rear door and get it. Continuing, witness said: "The steps were too steep for me to hit, and I stepped in just like you would drop your head down and fall in." Said the area was about 10 feet deep, 6 feet long, and about half a yard wide, a banister around it; the steps leading down from the east end of the opening, westwardly, toward Channing avenue. The east end, where the steps lead down, was open. It was close to 7 o'clock, "and getting dark, just getting dusk," at the time of the accident. Went into the store by the rear door; "got part way in and stepped out the same way I went in; stepped out facing forwards;" had hold of the door knob; stepped with her right foot, and went down, and clung to the door knob, but it was too late. The door knob was on the west side, next to the opening on the area or cellarway. Fell about 10 feet to the bottom of the opening and was unconscious for awhile. Her eye dropped out and her temple was cut and opened; could not see for some time afterwards. Her left hand was broken, and she has little strength in it and still suffers from it; was also bruised about her face and head.

On cross-examination plaintiff testified that on the day of the accident she was employed at Mrs. Conley's as a house girl; had gone to Mrs. Conley's to get employment about two months prior to the accident; had been a neighbor, and at her house previous to her employment, but not very often; had never been through the alleyway previous to her employment by Mrs. Conley. She used the alleyway or passageway in going to the Woods' store, but not often; had used the alleyway about three times previous to the accident. There were other areas besides the one she fell into in this alley, but had never noticed one so close to the door as the one she fell into. She had been in and out of the store door where the accident occurred three or four times before the accident, not any more. The cellarway or areaway she fell in was in plain view; but she never noticed it was so close to the door. Saw the banisters on the west side and on the north side of the areaway. She saw the opening on the east end of the areaway, where the steps begin to lead down, but did not know it was so close and dangerous; saw it, but did not know it was so close; knew the east end of the areaway was open, but did not know it was so close; knew the east end of the areaway, where the steps begin to lead downward, was open all the time she worked at Mrs. Conley's, which was for about two weeks prior to the accident. On the occasion of the accident she went to the store from Mrs. Conley's house, into the alleyway, and from the alleyway stepped into the store. Took hold of the door knob and turned it and walked in. Mrs. Conley had told her to go into the store. She (witness) had business there. Mr. Woods and one or two others were in the store. She started to buy something, but forgot, and wanted to speak to Mrs. Conley about something before she made the purchase; wanted to step back and speak to her; had a bucket in her hand to get the oysters; only said "Good evening," to the gentlemen in the store, and was only in the store long enough to step out; "just stepped in and stepped out." She came right straight out of the door and started west toward Cardinal avenue; had left her bucket in the store; had started to go west, because it was lighter; could see better in that direction. It was just getting dusk. She stepped forward out of the door; stepped forward, and her foot sank down. She knew the cellarway was there, but did not know that it was so near the door. She had used the back door, because Mrs. Conley went that way, and the tenants and people across the way used it. This alleyway, she said, was shut off by the gate, and was for the purpose of permitting tenants to go into the rear of their own respective premises. Witness had used it in going to Mrs. Conley's back door, and to go from the back door of Mrs. Conley to the street, Cardinal avenue. The rear door of Woods' grocery opening on the alleyway was sometimes open. In the summer time it was always open, "a full passageway for everybody." This time of the accident was not exactly summer. It was getting cool, and was on Sunday night. The store was open. Witness had probably opened the door herself. It was unlocked. Describing the alleyway, the premises, and the area, and the railing around it, witness said that the only part not protected around the areaway was the east opening, which was west of the rear door of Woods' grocery.

On redirect examination plaintiff said she had been in the grocery store about three times previous to the accident. On recross-examination plaintiff said she could see the rear door of the grocery by looking out from Mrs. Conley's house; could see everything in the alleyway; knew the areaway or cellarway was there, but did not know it was so dangerous; saw it, but she never noticed it being at the door there.

This was substantially all of the testimony, as shown by the abstract in the case, given by the plaintiff herself, in her direct, cross, redirect, recross, and redirect examination as to the fact of the accident itself. Only three witnesses were introduced by her. One, Mrs. Conley, testified to knowing the alleyway and the area, and that, while plaintiff had visited her several times, she had only been at work for her about two weeks previous to the accident; knew that plaintiff was in the habit of using this passageway in and out of her house; alley used by all the tenants. Their children played in it. Had told Mr. Weber before the accident that this area was dangerous to the children

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who played in the alleyway; that he ought to put a gate across its end. He said he would attend to it. Bakers and milkmen used this alleyway for bread boxes, milk delivery, etc.

A physician, the superintendent of the City Hospital, was sworn as a witness for plaintiff, and, while he remembered her being at the hospital, he was not able to remember her particular case, or what treatment she received there, or how long she had been at the hospital. Another witness testified to measurements, about as given above, and that the area opening was on a level with the granitoid walk through the alleyway; that from east to west it was approximately 8 feet in length and 27 inches wide and 8 feet deep from the granitoid to the bottom. It was admitted that the defendants are the owners of the premises on Laclede and Cardinal avenues.

This was all of the testimony as disclosed by the abstract bearing on the accident, save that witnesses who testified for plaintiff testified as to her coming to the store that Sunday night, speaking to them, then "backing out," they said. They heard her scream, and picked her up. No one saw her fall. No evidence for defendants or in rebuttal put any different version upon the fact of the accident itself than had plaintiff.

Opinion.

Probably the case nearest in line with this, so far as the principle of law controlling cases of this kind is concerned; is the case of Buesching v. St. Louis Gaslight Company, referred to and relied upon by counsel for appellants as decided by this court (6 Mo. App. 85), and relied on by counsel for respondent, as decided by our Supreme Court (73 Mo. 219, 39 Am. Rep. 503). When the case was before the Court of Appeals, that court held that the facts in it raised a presumption of negligence on the part of the deceased which precluded a recovery. On appeal to the Supreme Court, the judgment of the Court of Appeals was reversed. Judge Hough, who delivered the opinion, said (73 Mo. 219, loc. cit. 229 [39 Am. Rep. 503]): "It has been repeatedly decided by this court that it is not incumbent upon the plaintiff, in the first instance, to show that he was free from negligence, or in the exercise of ordinary care at the time of receiving the injury complained of, but that the concurring negligence of the plaintiff is a matter of defense, and the burthen of showing it is, therefore, upon the defendant. If, however, it appears without any conflict of evidence from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury, by declaring as a matter of law that the plaintiff cannot recover." We know of no better declaration of the law on the subject as applicable to cases of this kind than the foregoing, and it has never been questioned or disturbed by any decision in this state. Like the case at bar, the accident occurred in consequence of an open area or cellarway on a public thoroughfare. The case differs from the one at bar, however, in this: That the husband of plaintiff in the Buesching Case was found lying at the bottom of the areaway dead. No one saw him fall. No one knew how long he had lain there. There was even a suggestion that he might have been murdered and thrown there; the theory of homicide, however, being held by the court to be untenable from the fact that his personal effects were found on the body of the deceased, and every surface indication tended to show that he had met his death by falling down into the open area, and knowledge by the deceased of the open area rested entirely on presumption. How the accident occurred was left entirely to presumption and conjecture. The Court of Appeals held the presumptions under the facts led to the conclusion of negligence on part of the deceased. This was denied by the Supreme Court.

In the case at bar, it is not necessary to resort to presumption. The actual facts of the accident are in evidence. In the Buesching Case the cellarway was an open space on the street, without any protection whatever around it, or on either side. In the case at bar the area was open only at one end, and that open end not toward the alleyway, but on the side of the wall, the roadway, passage, or space 6 feet 3 inches wide between its rail and the opposite wall, so that persons passing up and down the alleyway were in no danger whatever of falling into this open space. To get into or fall into this area, one would have to go out of their way, unless coming out of or going into the store. It was not on the line of travel of persons coming in from the Cardinal avenue entrance, and would not even be on the line of travel of those coming out of the doorway of the grocery, unless they turned toward it, instead of going straight out into the alleyway; that is to say, it was not on the usual path of passage or travel through the alleyway. Therefore in this respect it differs radically in position from the open area in the Buesching Case. After stating the facts in evidence, Judge Hough continues: "In passing on a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor, and if, when received in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. Wilson v. Board of Education, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of

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law or inferences of fact in favor of the plaintiff. That would clearly be usurping the province of the jury. So that if it were essential, in order to sustain the demurrer to the evidence, that it should appear to the court at the close of plaintiff's case that the deceased had knowledge of the opening in question, inasmuch as such knowledge could only appear by way of inference in favor of the defendant from facts which were proven, the demurrer could not be sustained."

Applying this to the case at bar, and drawing the inferences and conclusions from it, which are so plainly deducible and unmistakably follow, we have in the case at bar the very facts, by uncontradicted evidence, that were absent in the Buesching Case, and which facts, if present in the Buesching Case, would have resulted in withdrawing the case from the jury. In the case at bar the plaintiff herself admits that she knew of the cellarway or area. She knew that it was unprotected. She had gone past it hardly an instant before, gone over by exactly the same route, and, unmindful of the proximity of the opening, she has walked or backed into it; her only explanation being that she had not realized that it was so near. This will not do, and, if I understand the law announced in the Buesching Case, would have warranted, even compelled, the trial judge to have taken the case from the jury. Plaintiff should not be allowed to shift onto the defendants the responsibility for her carelessness.

Smith et al. v. City of St. Joseph, 45 Mo. 449, is relied on by my learned Associates as particularly in point in support of the view they take of this case. Reading that case will show that the facts in it are in no manner analogous to those in the case at bar. In that case plaintiff, with knowledge of the existence of the excavation, tried to avoid; in this case plaintiff, with knowledge of the open area, carelessly and negligently stepped into it. There is no possible analogy between the facts in the two cases. The use of expressions in the Smith Case as applicable to this case fairly illustrates the danger of the application of a correct principle to entirely different facts. The same remark applies to the application made by my learned Associate of the Buesching Case. My learned Associate appears to reason on the theory that, because Buesching fell into an open areaway and the defendants were held liable, the plaintiff in this case falling into an open area, therefore the defendants are liable, and that, because the Supreme Court held in the Buesching Case that a demurrer to the evidence should not have been sustained, it would be error in this case to sustain the demurrer.

That reasoning, I respectfully submit, destroys and is directly contrary to the rule announced by the Supreme Court, through Judge Hough, in the Buesching Case. To put it briefly, there was no evidence in the Buesching Case that Buesching knew of the presence of the open area. That knowledge had to be presumed. There was no evidence as to how he fell into the area. That had to be presumed. The court held that if the positive and uncontradicted facts showed knowledge of the dangerous opening, and that by his own negligence or carelessness Buesching was killed, the case should have been taken from the jury. But if knowledge and acts amounting to carelessness had to be presumed from the mere fact of the fall, then carelessness could not be presumed because the facts on which it might be predicated rested on mere presumption, and not on evidence. My contention, therefore, is that my learned Associates, in allowing the verdict of the jury to stand in this case, and in holding that the case should not have been taken from the jury, have disregarded the principle underlying all the cases, and, taking the law to be as stated by Judge Hough in the Buesching Case, have gone contrary to the last controlling decision of the Supreme Court. Of course, any quantity of cases can be cited where the court holds a case should go to the jury. None of the cases referred to overrule the rule of law announced by Judge Hough as to when a case should be taken from the jury. This case illustrates the danger of following what is sometimes referred to as "case law"; that is to say, looking to the decision in a particular case, rather than to the underlying principle. When the Supreme Court announces a rule as a principle of law, we are bound by it. When it applies that principle in a given case and reaches a certain result, we are not bound to apply it in another case to reach a like result, unless the very facts in the case before us are "on all fours," as it is patly said, with the case before us; that is, are so nearly analogous as to bring the cases in line.

Applied to the facts in this case, I contend that the rule laid down in the Buesching Case as to when a case should be taken from the jury is controlling, and as applied to the facts in this case must result in a reversal. While recognizing as the law that it is the province of the jury to pass on the evidence, and that their verdict is usually binding on the courts, there is the grave and ever-present obligation, resting on the trial as well as appellate courts, to determine whether the case should go to the jury at all. Moreover, it is the duty of the appellate as well as of the trial court to see to it that in and by their verdict the jury have followed the direction of the trial judge and are supported in or have evidence before them warranting the verdict. In this case I am so clearly of opinion that the jury not only had no evidence warranting their verdict, but that they disregarded the instructions as to contributory negligence of plaintiff barring her recovery, that I do not think it should be

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permitted to stand. The jury were told that if they believed from the evidence "that the plaintiff knew, or by the exercise of ordinary care on her part she would have discovered, prior to said accident, that the areaway or stairway described in the evidence was partly unprotected and unguarded, then the plaintiff cannot recover, and your verdict must be for the defendants, even though you may believe that plaintiff was injured by falling into said stairway," and "that the plaintiff was bound to exercise ordinary care for her own safety. If you find from the evidence that plaintiff did not exercise ordinary care for her own safety, and that such failure of plaintiff to exercise ordinary care for her own safety, if any, contributed to cause the injuries of which plaintiff complained, then the plaintiff cannot recover, and your verdict must be for the defendants." There was no dispute, no contradictory testimony, over the fact that plaintiff knew of this opening; that she backed or stepped into it, not remembering or realizing, as she says, that it was so close to the door. Her own testimony, to my mind, proves that she came within these two instructions, and should not recover. That being so, I am clearly of opinion, not only that the law as announced by Judge Hough in the Buesching Case comes into play, and that the court, in refusing to take the case from the jury, acted in disregard of that rule of law, and that in affirming this judgment we are in direct conflict with it, but also that the verdict is contrary to the instructions given, and should have been set aside for that, if for no other, reason.

Furthermore, as going to the absolute justice of the case, we should not overlook the fact that plaintiff was where she had no business to be on the evening of the accident. It was Sunday evening, about dusk. The store was closed, as it should have been. Two or three people were sitting inside talking. Plaintiff insisted on being admitted, to buy oysters, she says; but when she got in she forgot what she was sent for, and turned back to find out from her employer, when she stepped into the area. Nor is there any proof that defendants had any occasion to consider the open area dangerous. They were landlords, not tenants in possession, and that they should be mulcted in heavy damages under the facts in this case seems to me very unjust. They have every right to demand that plaintiff should prove herself free from careless negligence before they are called upon to respond.

Another proposition in the case, in my opinion, calls for reversal. There were certain photographs in evidence, showing the area and alleyway. Admittedly they were taken after the accident. On one of them hinges, as of a gate, appeared on the post at the side or open end of the area. It was conceded at the trial that no gate had ever been across this end prior to the accident. The court in an instruction, told the jury that they should disregard all evidence, if any, of any gate having been placed on the stairway—that evidence of repairs or alterations made after the accident is not competent evidence of any negligence on the part of defendants. In the face of this, counsel for plaintiff, in his closing address to the jury, with the photograph in his hands, said: "Are there—in this picture, sworn to, brought here by them—are there or are there not hinges on that upright there? Don't you see there are?" Counsel for defendant checked counsel for plaintiff, and, calling the court's attention to the remark, asked the court to check and correct counsel, whereupon the court said: "The court declines to correct counsel in his argument with reference to the photograph." Exception was duly saved. I think this reversible error.

On the whole case, I think the judgment should be reversed, without a remander of the case, on the refusal of the court to take the case from the jury, and that my learned Brothers, in holding to the contrary, are in conflict with the decision of the Supreme Court in the Buesching Case, and also with Wheat v. City of St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292, and Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89. I therefore request that this cause be certified to the Supreme Court.

NORTONI, J. Referring to the facts stated by our learned Associate, the Presiding Judge, in the opinion tendered by him for adoption by the court, I find myself wholly unable to concur in the conclusions of law pronounced upon these facts. The view I have taken of this case, and the doctrine of the opinion tendered, may be properly presented in a memorandum as follows: I am persuaded that it was proper to send the case to the jury. The girl testified that, while she knew the areaway was there, she had not noticed it was so close to the door, and it was not such a place as a person of ordinary prudence would not go near. The opinion holds that the plaintiff should be declared guilty of contributory negligence as a matter of law, for the reason the girl knew of the areaway. Now the mere fact of knowledge touching a danger of this kind is not of itself sufficient to operate negligence as a matter of law. This idea runs through all the decided cases in this state, as I understand them. Indeed it has been expressly decided in a case where a lady walked off an embankment, and it appeared she was familiar therewith. It is said in that case that the mere fact a person had previous knowledge of a defect or hole in the ground is not conclusive evidence of negligence if she afterwards walked into the same. The fact should be submitted to the jury with the other evidence, for them to ascertain whether the party exercised that degree of care which would be exercised by an ordinarily prudent person under the circumstances. See Smith v. St. Joseph, 45 Mo. 469.

And this, too, is the doctrine of the case

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of Buesching v. St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503, cited in the opinion. I do not understand that portion of the Buesching Case quoted by Judge REYNOLDS to be the doctrine of that case; that is, the nub of the case. The portion relied upon in the present instance as pointing this plaintiff guilty of contributory negligence as a matter of law is where Judge Hough says in the Buesching Case, as follows: "So that, if it were essential in order to sustain the demurrer to the evidence that it should appear to the court, at the conclusion of plaintiff's case, that the deceased had knowledge of the opening in question, inasmuch as such knowledge could only appear by way of inference in favor of the defendant from facts which were proven, the demurrer could not be sustained." Now the opinion reasons as though Judge Hough implied by these remarks that, if it appeared plaintiff had knowledge of the opening, she could not recover. In fact, those remarks were only preliminary, and did not purport to state the law of the case. The law of the Buesching Case on the question of prior knowledge of the opening is stated on top of page 232 of 73 Mo. (39 Am. Rep. 503). In discussing the question of a defect or nuisance in or near a highway, and what influence prior knowledge on the part of the plaintiff should have in such case, Judge Hough states the law on page 232, as follows: "In the latter case no person is required to abandon a convenient or customary route of travel in a city because of dangerous excavations near the highway, unless the use of the way under such circumstances would be inconsistent with the exercise of reasonable and ordinary care. Barton v. Springfield, 110 Mass. 131; Snow v. Provincetown, 120 Mass. 580. And a traveler, if injured thereby, may recover, notwithstanding his knowledge of the existence of the nuisance, provided he was at the time using ordinary care. Smith v. City of St. Joseph, 45 Mo. 499; Thompson on Negligence, pp. 1203, 1204, 1205, 1206, §§ 52, 53; Shearman & Redfield on Neg. § 414." It therefore appears that the Buesching Case approves the doctrine of Smith v. St. Joseph, 45 Mo. 499, and that it asserts the doctrine that mere knowledge of itself is not sufficient to charge a party with contributory negligence. In fact this doctrine runs through all of the cases on the law of negligence, as I understand it. And at page 233 of 73 Mo. (39 Am. Rep. 503), Judge Hough, in speaking of the fact that if Buesching knew of the areaway in the sidewalk, says: "The law is that the deceased was guilty of negligence" if he knew it, and did not avoid it, "provided he could have avoided it by the exercise of ordinary care." The result of the authority is, then, as I understand it, this: That knowledge of the areaway is not sufficient to charge the plaintiff with contributory negligence as a matter of law. Therefore, the only question for determination is whether plaintiff would have avoided falling into it by exercising ordinary care on her part. I think that question, in view of the situation, and in view of the plaintiff's testimony that she did not notice the areaway was so close to the door, under the circumstances surrounding the case, ought to be decided by a jury. The circumstances which more or less influence this conclusion are: First, that the areaway was not a place of imminent and great danger; that is, it was an ordinary affair about which and near which persons of ordinary prudence frequently go. In this respect the case is distinguishable from those which present imminent and threatening dangers which all persons of ordinary prudence know are likely to entail injuries. For instance, if this were a coal shaft 50 or 100 feet deep and unprotected, I would say that a person was guilty of contributory negligence as a matter of law for thus inattentively moving about it. But as it was only a small areaway, about which prudent people move or go, it does not present that feature of glaring and imminent danger which is essential under our decisions to infuse the element of negligence as a matter of law. For the distinction which obtains with respect to declaring negligence as a matter of law and a question for the jury, see Garaci v. Hill O'Meara Const. Co., 124 Mo. App. 709, 102 S. W. 594; Huhn v. Mo. Pac. Ry. Co., 92 Mo. 446, 447, 4 S. W. 937. This was not a place of great and imminent dangers, but it was an ordinary affair, about which prudent persons move with more or less carelessness, believing it safe to do so. If the danger is one which a prudent person will move about, believing that by the exercise of even great care they are safe in so doing, the question is for the jury. See Huhn v. Mo. Pac. Ry. Co., 92 Mo. 447, 4 S. W. 937.

Since writing the foregoing memorandum Judge GOODE has directed me to note him as concurring in the views therein expressed, and suggested that it be filed as the opinion of the court.

As to the other arguments in the brief, it is sufficient to say that we have examined the questions presented, and do not find sufficient error in the record to warrant a reversal. In this connection we invite attention to our statute (section 865, Rev. St. 1899 [page 812, Ann. St. 1906]), providing as follows: "The Supreme Court, or courts of appeals, shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." Judge GOODE concurring, the judgment will be affirmed.

Judge REYNOLDS is of the opinion the decision is in conflict with the opinion of the Supreme Court in Buesching v. St. Louis Gaslight, Co., 73 Mo. 219, 39 Am. Rep. 503. It is therefore ordered that the cause be transferred to that court for final determination.

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WALTON & CO. v. BURCHEL.

(Supreme Court of Tennessee. Sept. Term, 1907.)

1. MASTER AND SERVANT (§ 265*)—ACTION FOR DEATH OF SERVANT—BURDEN OF PROOF.
One suing for the death of a servant by the premature explosion of dynamite in charge of the foreman has the burden of showing by a preponderance of the evidence that the explosion was caused by the negligence of the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 891; Dec. Dig. § 265.*]

2. APPEAL AND ERROR (§ 927*)—RULING ON MOTION FOR PEREMPTORY INSTRUCTIONS—REVIEW.
The court, in determining whether the motion for peremptory instructions should have been granted, must take as true the strongest legitimate view of the evidence in favor of the verdict, and disregard countervailing evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2012; Dec. Dig. § 927.*]

3. MASTER AND SERVANT (§ 267*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.
In an action for the death of a servant, caused by the negligence of a foreman, the foreman's negligence may be proved by circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 935; Dec. Dig. § 267.*]

4. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.
In an action for the death of a servant by the premature explosion of dynamite in charge of the foreman, evidence *held* to establish facts justifying the inference that the explosion was caused by the negligence of the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. § 279.*]

5. MASTER AND SERVANT (§ 216*)—INJURY TO SERVANT—ASSUMPTION OF RISK.
A servant under 16 years of age was killed by the premature explosion of dynamite used in constructing a railroad track. His father was foreman in charge of the dynamite. He was a reckless and drinking man, and so known to the master. The servant was ignorant of the use and danger of dynamite, and his father had not given him instructions. *Held*, that the servant had not assumed the risk because he continued in the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 570; Dec. Dig. § 216.*]

6. DEATH (§ 5*)—DEATH AND SURVIVORSHIP—PRESUMPTIONS.
In the absence of evidence as to which of two persons, killed in a common disaster, died first, the presumption is that both died at the same time, and descent and distribution will take their course as if their deaths had been simultaneous.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 7; Dec. Dig. § 5.*]

7. DEATH (§ 31*) — ACTIONS FOR DEATH — RIGHT TO SUE.
Where a father and son, killed in a common disaster, died at the same time, the right of action for the death of the son survived to his mother, brothers, and sisters.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 35; Dec. Dig. § 31.*]

Error to Circuit Court, Campbell County; G. McHenderson, Judge.

Action by S. E. Burchel, administrator of C. E. Burchel, deceased, against Walton & Co. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Lucky, Sanford & Fowler and J. Will Taylor, for plaintiffs in error. Pickle, Turner & Kennerly and R. M. Harrell, for defendant in error.

HENDERSON, Special Judge. This is an action for damages for the death of Burchel, intestate of defendant in error, caused by a premature dynamite explosion in the construction of the Knoxville, La Follette & Jellico Railroad. There was verdict and judgment in favor of defendant in error for $1,650, and plaintiffs in error have appealed and assigned errors.

At the conclusion of the evidence of defendant in error before the jury, plaintiffs in error moved for instructions in their favor. This was refused. The motion was renewed at the conclusion of all of the evidence, and was refused. The second assignment of error is to this action of the trial judge.

Plaintiffs in error were contractors for the railroad company, and had undertaken the work of constructing a part of the road. This work consisted in the excavation of earth and stone, which required the use of dynamite as an explosive. The duties of the intestate of defendant in error were those of a helper and ordinary hand or laborer, consisting in digging and transporting dirt and stone and preparing stone for blasting; but it was no part of his duty to store or handle the dynamite, further than the same is done under the immediate control and direction of the boss or foreman of the plaintiffs in error.

It is averred that the intestate of defendant in error was a minor, inexperienced and uninstructed in the handling of such explosives, and not acquainted with the dangers incident thereto; that it was the duty of the boss or foreman to superintend their use, which he undertook to do; and on account of his negligence in this particular said intestate lost his life.

It is further averred that large quantities of dynamite were negligently exposed by the foreman, without sufficient safeguard, near the place where said intestate was at work; that the foreman knew of the defective and improper instruments for the purpose of tamping, packing, and removing the dynamite, and used same in a negligent manner, producing a premature explosion of a small quantity of dynamite, causing the explosion of a large amount negligently placed near, resulting in the death of said intestate.

The second count contains the additional averments that the explosion was caused, first, by the failure of plaintiffs in error to provide a safe and good quality of dynamite; second, that said foreman was incompetent,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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negligent and reckless, and this had been evidenced by acts of recklessness prior thereto, of which plaintiffs in error knew, yet, notwithstanding this, he was placed in position of the highest responsibility with reference to the handling, use, and care of the dynamite, and that said intestate did not know of his incompetency.

Plaintiffs in error were excavating a cut in the construction of the railroad. The work was begun on each side at the same time. J. H. Burchel, the father of said intestate, as foreman or boss, was in charge of one crew of hands beginning on one side, and Hugh Jordan was in charge of the crew beginning on the other side, and they had worked up to within about 6 or 8 feet of meeting. J. R. Johnson, known as the "walking boss," had the supervision of both crews, and employed the bosses or foremen; the latter having the right to employ hands under them and to discharge them.

The cut upon which they were at work was about 45 feet deep, and they had to make the excavation through limestone rock and dirt. Dynamite was the explosive used. The foreman had charge of the dynamite, and gave instructions as to its use. If he did not handle it himself, it was his duty to have a safe, reliable man to do that; but its use was directed under his personal supervision.

The dynamite is kept in a magazine some 300 or 400 yards from the place of the work. When any is needed for blasting, it is the duty of the foreman to provide a safe and reliable man to go for it. When that which is needed for making the blast is put in proper position, the other dynamite should be removed, in order to prevent the jar of the blast from causing that to explode.

Dynamite is in sticks about 10 inches long, weighing a half pound. When the whole is ready for the blast to be made, the number of sticks necessary are placed therein. A wooden stick or pole about an inch in diameter and from 7 to 10 or 20 feet long, as may be needed, is used to tamp the dynamite and settle it down in its place. This tamping should be done very lightly. The cap, or fuse, or explosive, is then put in, then some tamping, and the dynamite is ready for the battery to be applied. It is the duty of the foreman to load the hole. Where he does not do it personally himself, he should provide a safe man for the purpose, and should superintend it.

There is some conflict in the evidence as to the exact cause of the explosion, or the manner in which it occurred. The witness Ridenour was engaged in laying the track upon which to run the cars for carrying out the dirt and rock. There was some rock in the way of laying the track, and Burchel, the foreman, ordered the witness to dobe it, to get dynamite and place mud blasts on it, which he did, placing nine sticks on the larger rock and three on the smaller. The witness testifies:

"He [Burchel, the foreman] picked up a crowbar and walked up to about six feet from me, I guess, and commenced punching in the rock. It seemed to be a solid bench, except a crevice and some mud, and he was punching in there with a crowbar, and turned around after he punched a little while and hollowed, and told McNeally to fetch him a case of dynamite, a box of caps, and a fuse, and McNeally brought them."

A case contains 50 pounds of dynamite, or 100 sticks. The mud blasts referred to were prepared by placing the sticks on dynamite on the rock and putting mud on them. Burchel, the foreman, had used a bar in jabbing down in the holes or crevices of the rock to prepare the place for the dynamite. After he had placed some of the sticks in the hole, he picked up a wooden stick some larger than a hoe handle, cut for a tamping stick, which was about 7 feet long. The witness says he was punching or jabbing "pretty hard."

The foreman should have had removed to a safe distance the case of dynamite, while he was doing what is above stated; but it was not done. He called for a cap and fuse; and as he turned to the mud blasts there was an explosion, as a result of which the intestate of defendant in error was killed and three others, including the foreman. There was evidently a premature explosion of the small blast, which caused the explosion of the dynamite in the case.

Just what the foreman did to cause the explosion does not appear with certainty. In order that the action may be maintained, the burden is on the defendant in error to show by a preponderance of the evidence that the explosion was caused by some negligent acts of the foreman. This jabbing with the bar and stick, which the witness saw, did not do it. Then what other facts are shown in the record upon which the verdict of the jury could have been based? In determining the question as to whether the motion for peremptory instructions should have been granted, we must take as true the strongest legitimate view of the evidence in favor of the verdict, and discard all countervailing evidence. Machinery Co. v. Hargraves, 111 Tenn. 476, 78 S. W. 105.

If we have not the positive, direct evidence that the foreman was guilty of the particular act of negligence, and evidence to show what that act was, like any other act of negligence, it may be proven by circumstances. The foreman lost his life by the explosion, as did three of the bystanders. He and some of these, were they living, could furnish the evidence. As they cannot speak, we will have to look elsewhere.

Dynamite is an exceedingly dangerous explosive. It requires very great care in the handling of it, both in loading for the blast

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and in adjusting the cap, and should never be undertaken save by one who has had experience and is careful and cautious. It is shown that this foreman was a man of the most reckless character, reckless of his own life and that of others in the use of dynamite. He had on the day before provided himself with a half gallon of liquor, was drinking on that day, and was evidently considerably under its influence. He had an ambition to outstrip Jordan and his crew, who were working on the other side of the cut. On Saturday, before the explosion on Monday, he had said "he would beat the Jordan boys through that cut, or that he would kill every damn man that he had." And one of the men at work under him, who heard the remark, refused to return to work.

He was a violent, overbearing, dictatorial, profane man. He was exceedingly reckless and careless in the use of explosives, was in the habit of smoking his pipe while handling large quantities of powder, had frequently put off blasts without warning his men, and would curse and abuse his men for being so afraid to die.

There were 100 sticks of dynamite in the case. The witness Ridenour had used 12 of these to make the mud blasts. This left 88, of which the witness says the foreman had put into the hole where he was jabbing but very few, he thinks not over 3 or 4 sticks, and the rest were still in the case. There was evidently the initial explosion of the smaller quantity, which produced the jar and caused the explosion of those in the case. Just precisely how it was done cannot be proven, because all of the eyewitnesses were killed. Some of the witnesses say that sometimes a very slight jar will cause an explosion; sometimes it takes a harder jar. Morris, the engineer of plaintiffs in error, says that it is very rare that there is an explosion without some known cause. Raines, witness for the defendant in error, has been at work with dynamite for 15 years, and says that he never knew of an explosion "without somebody having caused it."

Evidently something was done which should not have been done that caused the premature explosion. Whatever it was, it was done by Burchel, the foreman. It would have been strong evidence in favor of plaintiff in error that the explosion occurred from some unknown cause, by some unavoidable accident that could not have been provided against, had he been the prudent, careful, and cautious man which the occasion imperatively demanded. But he was not. In addition to being a reckless man in the use of dynamite, he was evidently under the influence of strong drink, and had been guilty of reckless conduct immediately preceding the explosion; so the jury thus had some evidence, and some very material evidence, from which to conclude that the explosion was caused by the negligence of the foreman.

In addition to this, when the hole is prepared for the blast, it is proper to bring from the magazine only the number of sticks of dynamite that may be reasonably needed for the purpose, and they should not be brought until the hole is ready. If more be brought than is found to be needed, the excess should be removed before the blast is made, as it is very dangerous to have other dynamite near when the explosion occurs. There is evidence tending to show this, though Morris, engineer for the plaintiffs in error, says that usually they bring out a box, take out that which is needed, and carry the box back to the magazine. But none should be brought until the hole is prepared, ready to be charged.

In this instance Burchel had the whole box or case brought out before he was prepared for the blast, although he evidently knew that but a few sticks would be needed. This was negligence, and the presence of this case when the explosion occurred caused the death of the intestate.

What is above said does not conflict with the rule in Railroad v. Lindamood, 111 Tenn. 459, 78 S. W. 99. In that case there was an injury to the brakeman claimed to have been caused by a defective brake, but there was no proof that the brake was defective. The witnesses were permitted to say that they presumed a defect in the brake staff, because in its turning it lurched and jerked, and on this presumption they then infer that it would not have done so, save for the existence of one of the defects alleged in the declaration, or some other defect; and it is said:

"Inference may be drawn from established facts, but never from mere presumptions. 2 Wharton, Evidence, § 122. As said by the Supreme Court of the United States in U. S. v. Ross, 92 U. S. 281, 23 L. Ed. 707, these were 'inferences from inferences, presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. * * * The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences.'"

Such is not the case at bar. There is no proof that the dynamite was defective. On the contrary, it is shown to have been purchased from reputable manufacturers, and that the master had done his duty in this particular. It is not left simply as a matter of inference that the explosion occurred through the negligent act of the foreman. In addition to the proof of his previous reckless character and habits, there was the fact that he was evidently more or less under the influence of strong drink at the time, just the moment before he was guilty of negligent acts which were liable to produce a premature explosion. These were established facts, "from which, together with all of

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the circumstances and proof, the legitimate inference could be drawn that he was guilty of the negligent act which caused the explosion, although no living witness saw it." This is strengthened by the proof of positive negligence in having so much dynamite near the place where the blast was being prepared.

It is shown, as above stated, that Burchel, the foreman, was a drinking man, exceedingly reckless. His character and habits were well known to Johnson, the walking boss and superior of the foreman, and were thus known to plaintiff in error. As a matter of fact Johnson had drank with him. Johnson had been urged by some of the men to discharge him on account of his recklessness. It is argued by plaintiff in error that these matters were well known to the intestate, who was his son; and having this knowledge, and continuing in the service, he will be held to have assumed the risk.

The boy was 3 months less than 16 years of age, of course under the influence of his father, and was evidently dominated by such a man as he is proven to have been. It is averred in the declaration that the boy was ignorant of the use and danger of dynamite, and there is evidence tending to show that his father had given no instructions to him along this line. It would surely be too harsh an enforcement of the rule to repel the child for failure to distrust his natural protector, especially when he sees that his father, notwithstanding his reckless conduct and habits, had the confidence of his employers.

It is next insisted that defendant in error cannot recover, because the father survived the intestate, and, being sole beneficiary, the entire cause of action abated, and that the surviving mother, brothers, and sisters of the intestate have no right of action. This is a part of the assignment of error which we are now considering. It is included, also, in the sixth assignment of error, which is to the charge of the court on the subject, as follows:

"But, when the proof shows that two persons are killed in a common sudden disaster, the presumption is that they died simultaneously; that is, that they both died at one and the same time. Still this presumption is a presumption merely, and is not conclusive upon the court and jury; and it is still a question of fact for the jury to determine. You may look to all the proof in this case, and see whether J. H. Burchel survived C. E. Burchel, or whether C. E. Burchel survived J. H. Burchel, or whether under the proof you believe that the presumption above referred to maintains, and that both died at one and the same time. If you find that J. H. Burchel survived C. E. Burchel, was alive after C. E. Burchel was dead, then plaintiff cannot recover; but if you are of opinion that C. E. Burchel survived J. H. Burchel, or that they both died at the same instant of time, then plaintiff can maintain this suit, so far as that question may affect her right of recovery. But you will find how this fact is from the proof. If you fail to find from the proof that the father was alive after the son had died, then you will be warranted in finding that both died at the same time under this presumption of the law, and this should be your finding unless the evidence shows to the contrary."

The evidence before the jury as to which survives, the father or son, is conflicting. There is, however, ample evidence to sustain the verdict that the two perished at the same time. There is thus presented the question of the right of the defendant in error to maintain the action.

In the absence of evidence as to which died first, there is no presumption in favor of either; the presumption being that both died at the same time. In such case the question of actual survivorship is regarded as not capable of determination, and descent and distribution take the same course as if the deaths had been simultaneous.

There is a carefully prepared note to the case of Policemen's Ben. Ass'n v. Ryce, 104 Am. St. Rep. 210, in which quite a number of authorities on the subject are cited, among them the following:

"At common law there is no presumption of survivorship in case of persons who perish by a common disaster, and in the absence of evidence from which survivorship can be determined it will be presumed, for the purpose of settling rights to property, that all persons, of whatever age or sex, perishing in a common disaster, die at the same time, as the common law does not under any circumstances, even in the case where two or more perish of the same calamity, indulge in any presumptions of survivorship resting upon consideration of age or sex. Balder v. Middeke, 92 Ill. App. 227; Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002, 59 L. R. A. 653, 92 Am. St. Rep. 284; Russell v. Hallett, 23 Kan. 276; Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Cook v. Caswell, 81 Tex. 678, 17 S. W. 385.

"It is a general rule that if husband and wife are shown to have perished in the same calamity, nothing appearing to the contrary, there is no presumption of survivorship; but it is presumed that both died at the same moment. K. & P. Ry. Co. v. Miller, 2 Colo. 445; Fuller v. Linzee, 135 Mass. 468.

"If husband and wife die together on the same night from escape of gas in the room, there is, in the absence of evidence upon the point, no presumption that one survived the other. Southwell v. Gray, 35 Misc. Rep. 740, 72 N. Y. Supp. 342.

"If a mother and her infant son perish in a common catastrophe, and there is no evidence as to which perish first, there is no presumption of survivorship, but it will be presumed that both perished at the same time. Stinde v. Goodrich, 3 Redf. Sur. (N. Y.) 87. The same presumption prevails as to mother and child, regardless of age or the sex

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of the child. Moehring v. Mitchell, 1 Barb. Ch. (N. Y.) 264; Russell v. Hallett, 23 Kan. 276."

In 22 Enc. Law (2d Ed.) pp. 1251, 1252, the rule on this subject of survivorship in common disaster, both at the civil law and at the common law, is stated. The author thus states the common-law rule:

"The rule of the common law, as now established in England and as recognized in the several jurisdictions in the United States where the question has arisen, is that where persons perish in a common disaster, no presumption of survivorship arises from their strength, age, or sex, and the party claiming such survivorship of one or the other of such persons must prove it, and in the absence of such proof the rights of property, as by succession, etc., are to be settled on the theory that all died at the same time."

In the case of Young Woman's Christian Home v. French, 187 U. S. 401, 23 Sup. Ct. 184, 47 L. Ed. 236, Chief Justice Fuller cites quite a number of authorities in support of the following:

"The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding the calamity of the character appearing in this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous."

In that case Mrs. Rhodes, a corpulent lady 52 years of age, with her son, 22 years of age and a good swimmer, perished in the sinking of the steamer Elbie. Even under these circumstances, in the absence of other proof, it is held to be the presumption that both perished at the same time.

In the case of Re Willbor, 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842, it is held that in case of death by the same disaster of sisters who left wills in each other's favor, with no circumstances appearing from which it can be inferred that either survived the others, the rights of succession to the estates will be determined as if death occurred to all at the same moment.

There is an elaborate note to this case reported in 51 L. R. A. 863, citing the rule at the civil law and at common law, by the English and American cases, containing an extensive discussion of the authorities on the subject.

The jury by their verdict having found that the father and son perished at the same time, the right of action for the death of the latter survived to the mother, brothers, and sisters. It results that the assignment of error now under consideration is overruled.

Other questions are made by other assignments, but what is above said is decisive of the case.

There is no error in the judgment of the circuit court, and same is affirmed, with costs.

FRAUENTHAL et al. v. SLATEN.

(Supreme Court of Arkansas. July 12, 1909.)

1. DEDICATION (§ 19*)—PLATS—PUBLIC PLACES.

An owner of land, by laying out a town on it, dividing it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets, alleys, and other public places marked on the plat irrevocably to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*]

2. DEDICATION (§ 15*)—INTENTION.

Though dedication of property to public use depends on the intention of the owner, such intention only will be regarded by the courts as has been manifested by the owner's acts.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

3. DEDICATION (§ 19*)—PLATS—"SQUARE."

Where a plat of a city addition contained a place marked "Spring Square," the term "square" would be given the same significance as the word "park," and would indicate an irrevocable intention on the part of the owner to dedicate the square to the public.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 19.*

For other definitions, see Words and Phrases, vol. 7, p. 6618.]

Appeal from Cleburne Chancery Court; G. T. Humphries, Chancellor.

Action by J. H. Slaten against Max Frauenthal and others. Judgment for plaintiff, and defendants Frauenthal and others appeal. Affirmed.

J. H. Harrod and R. W. Robins, for appellants. M. E. Vinson and S. Brundidge, Jr., for appellee.

McCULLOCH, C. J. This suit involves a controversy between Max Frauenthal and his wife, Sallie Frauenthal, and son, Mortimer Frauenthal, on the one side, and the incorporated town of Sugar Loaf (or Heber, as it is sometimes called) and certain citizens thereof on the other side, concerning the ownership of a block or square of ground in said town, known as "Spring Square." The chancellor rendered a decree in favor of the plaintiffs, and the defendants Frauenthal and others appealed.

The question at issue is whether or not the defendants have irrevocably dedicated said property to public use as a park or square. In the year 1881 Max Frauenthal purchased the tract of 680 acres of land on which is now situated the town of Sugar Loaf. The land was then situated in Van Buren county, but is now in Cleburne county, which was thereafter created by an act of the Legislature. In the same year Frauenthal executed to the Sugar Loaf Springs

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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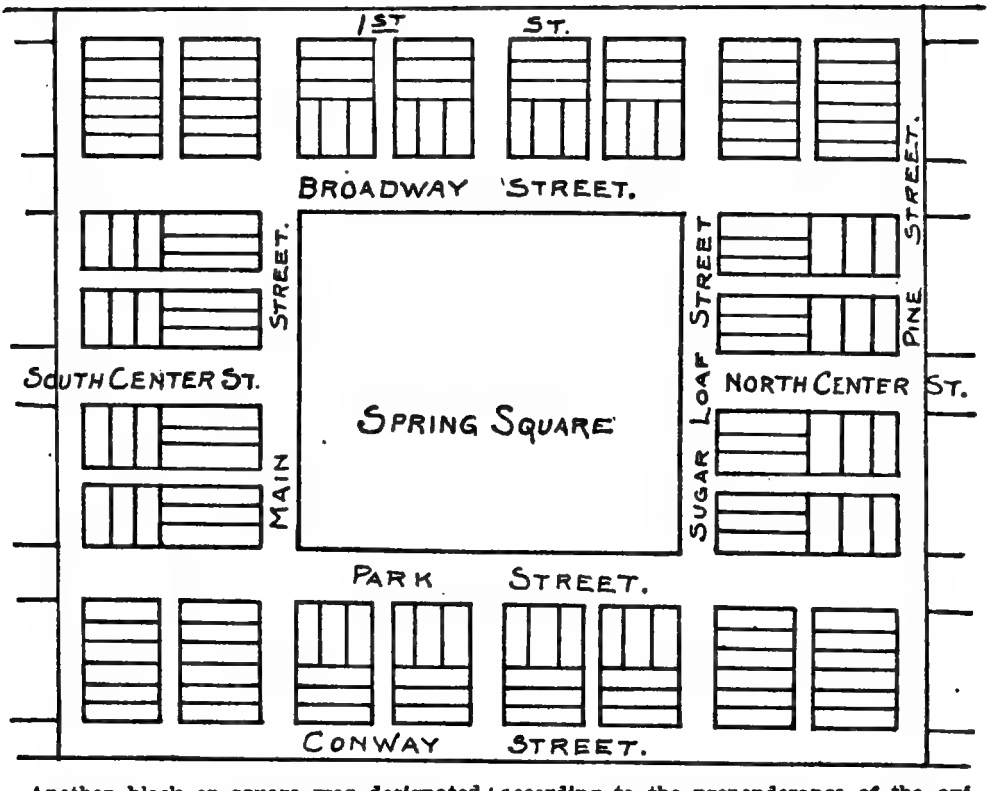
Company a deed to a large portion of said tract, and in 1883 that company platted 200 acres of it into the town site known as Sugar Loaf, which plat was duly filed for record and recorded. The plat contained blocks and lots, intersected by streets and alleys, and the property in controversy, which comprises about four blocks of the usual size designated on the plat, was marked "Spring Square." A section of the plat, showing this square and the surrounding blocks and streets, is herewith shown:



Another block or square was designated on the plat as "Court Square." It does not appear that the Sugar Loaf Springs Company was ever incorporated; but Max Frauenthal was president, and one Watkins was secretary, of the unincorporated company or association, and Frauenthal was the principal owner or shareholder. For some time thereafter lots were sold with reference to this plat, and deeds of conveyance were executed by Frauenthal as president and Watkins as secretary of said company. Some time later the other individuals composing said company reconveyed the remainder of the lots embraced in the plat to Frauenthal, and lots have from time to time been sold off to individuals. Soon afterwards Cleburne county was created, and the town of Sugar Loaf was made the county seat. Frauenthal agreed to convey Court Square to the county for the purpose of building a courthouse thereon, and this was done.

There are six springs in this park, known as "Spring Square," from which fine medicinal water flows—white, black, and red sulphur. These waters are said to possess many curative properties, and the place was then noted as a summer resort. Since then it has grown in popularity year by year, and has many visitors, sometimes as many as 1,500, each summer. The public generally has always had free use of the park and the waters therein contained. Notwithstanding the fact that the public has always enjoyed the freest use of the park, Frauenthal has, according to the preponderance of the evidence, maintained some sort of supervision over it. Before the alleged act of dedication he built a fence around the square, but afterwards, when it rotted down, it was replaced at the expense of the town. He built a toolhouse in the park, and for a time employed a man to look after the park. The town has from year to year expended small sums of money on repairs, aggregating something over $600; but it appears that these repairs have usually been after consulting Frauenthal, who lived there a portion of the time, and in Memphis, Tenn., and in Conway, Ark., the balance of the time, usually visiting the place several times each year. There is some conflict in the evidence, and numerous citizens of the place have testified in the case as to the precise relation of Frauenthal to the property. We take it to be settled, however, by the preponderance of the evidence, that he exercised some kind of supervision over it, and was consulted when-

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ever any change was to be made. It appears clearly that the character of this supervision was for the protection of the public and for the public benefit. There is no evidence that he manifested any intention of using the property for private purposes.

In the year 1901 Frauenthal and wife conveyed all of the unsold lots (not including Spring Square) to the Bank of Conway, and on the same day the bank reconveyed the same property to his wife, Mrs. Sallie Frauenthal. Frauenthal paid taxes on the square, together with the other property, for several years after the alleged dedication; but finally, at the suggestion of the town authorities, and with the assent of the county assessor, Spring Square was left off the tax books, and no taxes have been paid thereon since then, the property being entirely omitted from the tax books. Shortly before the institution of this suit, and after there was a prospect for a railroad coming to the town, Frauenthal proposed to put the property back on the tax books and pay taxes thereon. These matters were introduced in evidence as tending to establish the fact that Frauenthal treated the square or park as public property. On the other hand, Frauenthal insists that the omission of the property from the tax books was suggested by the town authorities, and consented to by him, merely as an act of grace, in view of the fact that he was getting no benefit from the property for the time being, and that the public at large was enjoying the use thereof. He denies that that was a permanent arrangement, or that any dedication was ever intended.

The law bearing on the question of dedication of property to the public use is well settled by the decisions of this court. An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. He will also be held to have thereby dedicated to the public use squares, parks, and other public places marked as such on the plat. The dedication becomes irrevocable the moment that these acts concur. Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003; Davies v. Epstein, 77 Ark. 221, 92 S. W. 19; Dickinson v. Ark. City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; Brewer v. Pine Bluff, 80 Ark. 489, 97 S. W. 1034; Stuttgart v. John, 85 Ark. 520, 109 S. W. 541. The fact of dedication depends upon the intention of the owner to dedicate to the public, as clearly and unequivocally manifested. But it is held that "the intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts." Davies v. Epstein, supra; 13 Cyc. 452; Elliott on Roads & Streets, §§ 124, 156.

The word "square," as used on a plat to designate a certain portion of ground within the limits of a city or town, indicates a public use. This is said to be the proper and settled meaning of the term in its ordinary and usual signification. Rowzee v. Pierce, 75 Miss. 846, 23 South. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625; M. E. Church v. City of Hoboken, 33 N. J. Law, 13. In the New Jersey case above cited an owner of real property filed a map or plat, showing lots and blocks with intersecting streets and alleys and certain spaces, one of which was marked with the word "Square"; and the court held this to be an irrevocable dedication of the space to the public use. The court there said: "It may be stated as a general rule that when the owner of urban property, who has laid it off into lots, with streets, avenues, and alleys intersecting the same, sells his lots with reference to a plat in which the same is so laid off, or when, there being a city map on which this land is laid off, he adopts such map by reference thereto, his acts will amount to a dedication of the designated streets, avenues, and alleys to the public. The same principle is applicable to urban lands to be used as an open square." In the case of Mayor of Bayonne v. Ford, 43 N. J. Law, 292, an owner (R. Graves, by name) platted a tract of land into building lots, selling some of them by reference to this plat. On said plat was a small section, marked "Annette Park, now belonging to R. Graves." Held, that this became public property by dedication. The same court, in Price v. Inhabitants of Plainfield, 40 N. J. Law, 608, laid down as a definite rule of law that where a landowner caused a map of a tract of land to be filed in the county clerk's office, on which streets and building lots were delineated, and one block was set apart and marked with the word "park," and when such landowner subsequently made conveyances of certain of said lots to various purchasers, such conduct was conclusive evidence of a dedication of the "park."

The Connecticut court, in Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275, held that where an owner laid out land in lots, bounded on the inside by an elliptical half acre, marked "park" on the plat, and sold the lots with reference to the plat, that this constituted a dedication. In that case there was an element in the facts of representation to purchasers that the space marked "park" was to be kept open for all the lot owners; but the court in its opinion distinctly held that the designation on the plat was sufficient to constitute a dedication, saying: "In the first place, the word 'park' on the map cannot be eliminated from the deeds, but is, on the contrary, an inseparable part of those deeds, and thereby the grantors are estopped from appropriating the land in question to a use inconsistent with such designation. * * * Why not give like effect to the plan and designation of the 'park'? That, surely, is a prominent and attractive feature of the plot, and, indeed, essential to its completeness.

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The lots for sale were all numbered in order from 1 to 22. The center piece contained no number to facilitate selection by a purchaser; but, on the contrary, it was given a name which in itself imported a design to set it apart and reserve it for the common benefit of all."

In Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145, the court held that "the word 'park,' written upon a block of land designated upon a map of property within the limits of an incorporated city or town, signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same, whether the word be used alone or with some qualifying term, as 'Central Park.'" Judge Dillon, in his work on Municipal Corporations (section 645), says: "The word 'park,' written upon a block upon a map of city property, indicates a public use; and conveyances made by the owners of the platted land, by reference to such map, operate conclusively as a dedication of the block"—citing Price v. Plainfield, 40 N. J. Law, 608; Maywood Co. v. Maywood, 118 Ill. 61, 6 N. E. 866. Also in Rhodes v. Town of Brightwood, 145 Ind. 21, 43 N. E. 942, it was held that an irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder's office as a "park," and by selling lots with reference to the map.

There is little, if any, distinction between the words "park" and "square"; and when used in this way they mean substantially the same thing. The defendants in this case are not aided by the extrinsic evidence as to the intention of the dedicator; for, as before stated, though it shows that he intended to reserve some measure of supervision over the property, it was yet altogether for the public use, and it does not appear that any private rights therein were intended to be reserved. Nor is he aided by the fact that in the certificate of dedication it is shown that certain streets were dedicated to the public use, as the evidence shows the area in controversy was also intended to be used by the public, and was set apart for that use.

We are therefore of the opinion that the decree of the chancellor was correct, and the same is affirmed.

FRAUENTHAL, J., disqualified and not participating.

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COMMONWEALTH v. LOUISVILLE PROPERTY CO. et al.

(Court of Appeals of Kentucky. June 18, 1909.)

1. ESCHEAT (§ 4*)—TITLE TO REAL PROPERTY.
Where a railroad company provided the money to purchase land not necessary for its legitimate business, and caused the title to be conveyed to a dummy corporation created at its instance, whether the stockholders thereof and those of the railroad company were the same or not, if the railroad company in reality held the title, the land was subject to escheat, under Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153), providing that no corporation shall hold or own real estate not necessary to its legitimate business for more than five years under penalty of escheat.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 1; Dec. Dig. § 4.*]

2. CORPORATIONS (§ 435*)—CHARTER—RIGHT TO HOLD LAND.
A corporation authorized to "purchase, hold, lease, sell, convey, and otherwise use, manage, and dispose" of real and personal property wherever situated in the United States was empowered to hold real estate for a reasonable time only, and not indefinitely, in violation of Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1765; Dec. Dig. § 435.*]

3. ESCHEAT (§ 4*) — CORPORATE POWERS — HOLDING REAL ESTATE—DUMMY CORPORATION.
Where a railroad company organized a dummy corporation to hold lands belonging to it, to evade Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153), prohibiting corporations, on penalty of escheat, from holding real property not necessary to their legitimate business for more than five years, the powers of such dummy corporation were immaterial, so far as the state's right to escheat the property was concerned.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 1; Dec. Dig. § 4.*]

4. ESCHEAT (§ 2*)—RIGHT OF CORPORATION TO HOLD REAL ESTATE—STATUTES.
Ky. St. 1909, § 567 (Russell's St. § 2153), providing that no corporation shall hold or own real estate not necessary for its legitimate business for more than five years under penalty of escheat, deals with a situation existing five years next preceding the time the statute is invoked, and has no reference to the future.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. ESCHEAT (§ 6*)—POWER OF CORPORATIONS TO HOLD REAL ESTATE—PETITION.
Where the commonwealth claimed that a railroad company had incorporated a holding company, to which certain real estate had been conveyed which was not necessary for the railroad company's business, in violation of Ky. St. 1909, § 567 (Russell's St. § 2153), prohibiting a corporation from holding such real estate for more than five years under penalty of escheat, a petition for escheat, alleging that the property was not necessary at the time the petition was filed, but failing to allege that it was not necessary at any other time, nor that the railroad company had for five years held the property, either in its own name or in the name of the holding company, and that the property was not necessary for its legitimate business for that period, was fatally defective.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 13; Dec. Dig. § 6.*]

Appeal from Circuit Court, Bell County.
"To be officially reported."
Action by the Commonwealth against the Louisville Property Company and another. From a judgment sustaining a demurrer to the petition, complainant appeals. Affirmed.
See, also, 109 S. W. 1183, 33 Ky. Law Rep. 225.

A. G. Patterson, E. B. Beard, Bearce & Marshall, Geo. L. Pickett, and Pickett & Barrickman, for appellant. Henry L. Stone, Chas. W. Metcalf, G. W. Alcorn, Benjamin D. Warfield, and William Ayres, for appellees.

O'REAR, J. This action was instituted against two corporations to escheat certain unimproved land in Bell county, Ky., because the corporations had owned the lands for more than five years, when during the whole of that time the ownership of that property was neither proper nor necessary for carrying on the legitimate business of the corporations, or of either of them. The corporations sued are the Louisville Property Company and the Louisville & Nashville Railroad Company. The lands were conveyed to the corporation the Louisville Property Company during the year of 1902. The allegations of the petition, to which a general demurrer was sustained, and the petition dismissed in consequence, are as follows, so far as it states the facts relied on against the Louisville Property Company: "The plaintiff, the commonwealth of Kentucky, further says that the said defendant Louisville Property Company has been the owner and in possession of the said land embraced by the said deeds to it since the respective dates of said deeds conveying said property to it, and for a period of more than five years before the institution of this action and the filing of this petition. Plaintiff further says that none of said lots or tracts of land are used by said corporation in connection with the legitimate business authorized under its charter, nor is any of said lots or parcels of land necessary or proper for the carrying on of the legitimate business of said corporation, and same having been held by said Louisville Property Company for more than five years continuously last past, each and every one of said lots, parcels, or tracts of land has escheated and reverted to the state of Kentucky, and that the said state of Kentucky is now entitled to the possession of same." It was also alleged that the property company was organized and empowered to buy, sell, and lease land. In an amended petition, supplementing the averments of the original petition, is the attempt to state the cause of action against the railroad company. The allegation is that the railroad company furnished the money with which to buy the land, that it really owns the land, that the Louisville Property Company is "a holding cor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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poration" for the railroad company, that "some or a majority of the stock" of the Louisville Property Company is owned by persons who are also stockholders of the Louisville & Nashville Railroad Company, and that the property is not proper or necessary for the use of the railroad company.

The provisions of law under which the petition was framed are section 192 of the Constitution and section 567, Ky. St. (Russell's St. § 2153). The section of the Constitution is: "No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat." The section of the statute is as follows: "Sec. 567. No corporation shall engage in business other than that expressly authorized by its articles of incorporation or amendments thereto; nor shall any corporation, directly or indirectly, engage in or carry on in any way the business of banking, or insurance of any kind, unless it has become organized under the laws relating to banking and insurance; nor shall any corporation hold or own any real estate, except such as may be necessary and proper for carrying on its legitimate business, for a longer period than five years under penalty of escheat." We hold that if the fact is that the Louisville & Nashville Railroad Company provided the money to buy the land, and caused the title to be taken to a dummy corporation created at the instance of the railroad company, whether its stockholders and those of the railroad company were the same or not, so that the railroad company might in reality hold the title to the land in spite of the Constitution and statute, the land would be subject to escheat. Corporations may endure always. The public policy of this state, declared by the section of the Constitution quoted, is to prevent the title to real estate being taken to corporations in this state, and held interminably, when not necessary and proper for the carrying on of the legitimate business which the corporation was specifically authorized by this state to do. What is prohibited cannot be done by indirection, any more than it could have been by direct violation of the Constitution.

It is argued that, as the Louisville Property Company was authorized by its charter to "purchase, hold, lease, sell, convey, and otherwise use, manage and dispose of all kinds of real or personal or mixed property wherever situated in the United States of America," its holding the property for longer than five years cannot be held to be either improper or unnecessary to the carrying on of its legitimate business. We construe the charter of that company to mean that it was empowered to deal in real estate. That means to buy and sell real estate, and to hold it for a reasonable time until it can sell it. If it had been the purpose of the corporation only to buy and "hold" lands, and if that purpose was not an infringement of the Constitution, then it would be possible for a corporation to own all the land in course of time, and to hold it always. That was the very thing the Constitution was aiming to prevent. We will not construe an open expression in a corporate charter so as to make it conflict with the Constitution, when another construction in harmony with the Constitution is susceptible from the language of the charter. If the Louisville & Nashville Railroad Company does actually own the land, as charged, and if it is not necessary and proper for the conduct of its legitimate business, then it is immaterial what the powers expressed in the charter of the property company may be.

Appellee railroad company argues that the expression in section 192 of the Constitution, "as may be proper and necessary," is used in reference to the future; that, if it now appears that it may be necessary in the future for the railroad company to own these coal and timber lands, the Constitution does not forbid it. But the section is dealing with a situation five years next preceding the time it may be invoked. It has no reference to the future.

The petition, however, is fatally defective. It does not allege that the Louisville & Nashville Railroad Company has for five years held, in its name or in that of its agent, the "holding" company, the title to the land, when for that time it was not proper and necessary for the railroad company to carry on its legitimate business. The allegation is that it is not necessary now, not that it was not necessary and proper two years ago, or other time than at the present. The circuit properly sustained the demurrer.

Judgment affirmed.

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WOMBLE v. HICKSON & FINDLEY.

(Supreme Court of Arkansas. July 12, 1909.)

1. CONTRACTS (§ 166*)—BUILDING CONTRACT—PLANS AND SPECIFICATIONS—CONDITION.

Where a house was to be a duplicate of a certain other house in the town, with certain specified changes, the provision for the attachment of plans and specifications was not a condition of the contract, and hence a failure to do so through no fault of the contractor was immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 749; Dec. Dig. § 166.*]

2. DAMAGES (§ 124*)—CONTRACT—BREACH.

Where contractors, who had agreed to perform the carpenter work on a house for $155, were not permitted to do the work by the owner, they were entitled to recover the difference between such amount and what they were able to earn at other employment during the time that would have been consumed in constructing the house by the use of reasonable diligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326–338; Dec. Dig. § 124.*]

Appeal from Circuit Court, Montgomery County; Jas. S. Steel, Judge.

Action by Hickson & Findley against O. O. Womble. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. I. Alley, for appellant. Gibson Witt, for appellees.

BATTLE, J. The following is the complaint filed in this action (omitting caption):

"Comes the plaintiffs, John C. Hickson and Joe Findley, and state that on or about the 15th day of January, 1908, they, as carpenters, entered into a contract with the defendant, O. O. Womble, to build a residence for the defendant on his lot in the town of Womble, Ark., and that according to said contract the said defendant was to pay them the sum of $155 for the carpenter work, in a manner and at such times as was to be agreed upon at a later date. The said O. O. Womble was to furnish all material for the construction of said residence. The said contract, together with the specifications and drawings, as provided for, are filed herewith and marked 'Exhibits A and B.'

"That the contract was entered into in good faith by all parties and signed in the presence by both plaintiffs and defendant.

"They state further: That the defendant, O. O. Womble, has refused to furnish them (the plaintiffs) the said carpenter work. That according to agreement they were to begin the work on or about January 18, 1908. That said defendant has placed other carpenters to work on said residence.

"That plaintiffs have been ready and willing to begin work on said house at all times since the contract was entered into, and that they have been hindered by virtue of said contract from taking other contracts or jobs of work, and that they have been damaged thereby.

"They pray judgment for $155 and for costs."

The following is a copy of the contract on which the action is based:

"This agreement entered into this day by and between John C. Hickson and Joe Findley, house carpenters, and O. O. Womble, all of Womble, Ark., is and shall be as follows:

"The said Hickson & Findley agree to build a residence out of the material furnished by Womble which will be a duplicate of the Monroe Rowton house in Womble, with the exception that they will build the hall 7 feet wide, will make the cornice 'square style' and build the front and back porches with flat roof to be covered with tin, and it is understood and agreed that Womble is to furnish all lumber, nails and shingles, tin and all other necessary material for the construction of said house.

"Hickson & Findley agree to put only first-class workmanship in this building and agree to sandpaper and smooth all finishings such as baseboards, casings, etc.

"Womble agrees to pay for the carpenter work on said house to Hickson & Findley the certain sum of one hundred and fifty-five dollars ($155.00) in a manner and at such times, as will be agreed on later, which subsequent agreements will be attached and become a part of this instrument. A drawing and specifications of said house is to be attached and become a part of this contract.

"Signatures: John C. Hickson,
"Joe Findley,
Carpenters.
"O. O. Womble."

The contract was written by Womble and signed by all the parties. It was not dated. The place where the residence was to be constructed was not specified, nor the time when it was to be built; but that was understood and agreed upon. A drawing and specifications of the house was to be attached and become a part of the contract, but was not done through no fault of the plaintiffs. This was not a condition of the contract, and was not necessary. The house to be built was to be a duplicate of the "Monroe Rowton house" in Womble, with certain specified exceptions, which itself furnished the plans and specifications required. Plaintiffs offered to perform their part of the contract, but were not allowed by the defendant to do so. They made diligent efforts to obtain work in the time required to build the house of the defendant, but were unable to earn in that time exceeding $48. The jury impaneled to try the issues in the case returned a verdict in favor of the plaintiffs for $107. It was more favorable to defendant than he was entitled to.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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CHESAPEAKE & O. RY. CO. et al. v. WILEY.

(Court of Appeals of Kentucky. June 18, 1909.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—RAILROADS—BROKEN RAILS—EVIDENCE—RULES.

Where a railroad employé, who was injured by derailment caused by a broken rail, claimed that the rail was probably cracked by being forced into a curved position, when cold, and the curve on which the rail was laid was from 2½ to 8 degrees, defendant's rule, requiring all rails for curves of 4 degrees and over to be properly curved before laid, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

2. EVIDENCE (§§ 548, 552*) — OPINION EVIDENCE—BODILY CONDITION.

The opinions of expert physicians as to plaintiff's condition, based on objective symptoms and on a hypothesis submitted in questions propounded to them, are admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. §§ 548, 552.*]

3. EVIDENCE (§ 556*)—OPINION EVIDENCE—BODILY CONDITION—SYMPTOMS.

Physicians may describe the symptoms of a complaint in issue as given by accepted medical authorities.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2377; Dec. Dig. § 556.*]

4. EVIDENCE (§ 528*)—EXPERT OPINIONS—PERMANENCY OF INJURY.

A physician may give his opinion as to whether plaintiff's condition is permanent or temporary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2337; Dec. Dig. § 528.*]

5. EVIDENCE (§ 127*) — RES GESTÆ — BODILY CONDITION—EXPRESSIONS OF PAIN.

Statements of an injured person as to pain and suffering or his bodily condition are admissible, if res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377–382; Dec. Dig. § 127.*]

6. EVIDENCE (§§ 127, 128*)—DECLARATIONS—EXPRESSIONS OF PAIN.

Such statements are admissible if they are the usual, natural and spontaneous expressions indicating present pain and suffering or if made to a physician while seeking medical assistance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377–387; Dec. Dig. §§ 127, 128.*]

7. EVIDENCE (§ 548*) — EXPERTS — OPINION—HEARSAY.

Where an injured person goes to a physician, not for treatment, but to be examined that the doctor may testify as an expert in behalf of the party, the physician should not be permitted to express an expert opinion on subjective conditions and fortify it by stating acts of the injured person which could have been purely voluntary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.*]

8. APPEAL AND ERROR (§ 1050*)—PREJUDICE—EVIDENCE—EXPERT OPINION.

Where, in an action for injuries, none of the physicians testifying for plaintiff disassociated his opinion based alone on objective evidences as to plaintiff's condition from what he had received from plaintiff, which was purely hearsay, capable of being manufactured, and therefore inadmissible, the admission of such evidence could not be held without prejudice to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

Appeal from Circuit Court, Woodford County.

"To be officially reported."

Action by Edward Wiley against the Chesapeake & Ohio Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Shelby & Shelby and Wallace & Harris, for appellants. Scott & Hamilton, D. T. Edwards, and W. O. Davis, for appellee.

O'REAR, J. Appellants Chesapeake & Ohio Railway Company and Louisville & Nashville Railroad Company use, under an agreement between them, the track of the Louisville & Nashville Railroad Company from Lexington, Ky., to Louisville, Ky. As one of the freight trains of the Chesapeake & Ohio Railway Company was going from Lexington to Louisville, and while near Spring Station the caboose and five or six of the cars on the rear end of the train were derailed. Appellee was riding in the caboose, which, when derailed, turned upon its side and injured him. On the day before his right of action was barred by the statutes of limitations, he instituted this action. He alleged, in substance, that appellants were negligent in the construction of their track at the point named and in failing to keep it in reasonably safe condition and repair, and that by reason of their negligence he received his injuries. A trial of the case was had nearly two years after the injuries were received, and the jury returned a verdict in his favor for $5,000.

The testimony shows that the derailment was caused by a broken rail, or rather by the breaking out of a piece of the ball of a rail. The witnesses vary as to the length of the piece of the rail that broke out, from 18 inches to 3 feet. The rail consisted of a base, which rests upon the ties, next the web, and on top the ball upon which the wheels of the cars run. The rails are held together at the joints by what are called "fish plates," which are placed on each side of the rails and held in position by bolts passing through both the plates and the web of the rail; one-half of each plate resting against the web of each rail. There was testimony that there was an old crack in the rail at or near the break; but the witnesses differ as to the exact location of it. They all agree, however, that it was near the end of the rail and extended six or more inches beyond the end of the fish plate. Some of

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the witnesses stated that it started from the second bolt hole under the fish plate. Others say that it was above the fish plate; but all agree that it was in the web. They seem to agree that the crack was an old one as far as it extended in the web, but that the break through the ball was fresh. One of appellee's witnesses gave it as his opinion, judging from the appearance of the break, that it had existed for more than a month; and three or four of them, who had had considerable experience in railroading, stated that it would have been an easy matter for a person who was exercising ordinary care to have discovered this crack by sight or by tapping the rail with a hammer or some other metal substance. About the same number of witnesses, also experienced in railroading, controverted this. Appellee, for the purpose of showing the negligent construction of the track, introduced testimony to the effect that the rail which broke was originally a straight one, but had been forced into its position on a curve of more than four degrees in violation of the company's rules, and introduced a rule promulgated by appellant, which is No. 86, and is as follows: "Curving Rails.—All rails for curves of four degrees and over must be properly curved before they are laid in the track." The rail that broke was on a curve. Appellee's witnesses fixed it at from 5 to 8 degrees, appellants' witnesses at from 2½ to 3 degrees. Appellee's theory is that the rail was probably cracked by being forced, when cold, into its curved position, or that it was cracked by the weight of the heavy engines and trains after being put into the strained position, and that appellants were negligent in failing to discover the crack and repair it before the accident. The issues on these questions were submitted under clear, explicit instructions to the jury.

Appellants contend that it was error for the court to allow its rule referred to to be read to the jury, and cite the case of L. & N. R. Co. v. Gaugh, 118 S. W. 276, the opinion in which was delivered April 22, 1909, as sustaining them. The principle established in that case is not applicable to the case at bar. Appellee in that case was a mere pedestrian using the streets of the city. She was not connected with or using the railway property in any sense. In the case at bar appellee was an employé of and using the tracks of appellants in the discharge of his duties, and had a right to show that the road was improperly and negligently constructed. The rule which was introduced tended to show an admission of appellants that, in order to make the road reasonably safe on a curve of more than four degrees, it was necessary to curve the rail before putting it on the track. It has been so often decided by this court that the rules governing the conduct of a business may be read in a suit between the employer and employé by either party, when the injured party is suing to recover for injuries inflicted because of the violation or nonobservance of the rule, and was himself in a service and performing work in the sphere of the operation of the rule, that we deem it no longer an unsettled question. See cases of L. & N. v. Hilter, 60 S. W. 2, 22 Ky. Law Rep. 1141; L. & N. v. Scanlon, 60 S. W. 643, 22 Ky. Law Rep. 1400; L. & N. R. R. Co. v. Gilliam's Adm'x, 24 Ky. Law Rep. 1536, 71 S. W. 863; I. C. R. R. Co. v. Stith's Adm'r, 120 Ky. 237, 85 S. W. 1173, 27 Ky. Law Rep. 596, 1 L. R. A. (N. S.) 1014; Cincinnati, N. O. & T. P. Ry. Co. v. Curd, 89 S. W. 140, 28 Ky. Law Rep. 177; Alexander v. L. & N. R. R. Co., 83 Ky. 598.

Appellants contend that appellee was not injured to any considerable extent and that he was allowed to introduce incompetent testimony to show the extent of his injuries. This is the real question presented on this appeal. The evidence tends to show: That, when the caboose was derailed and turned upon its side, appellee was thrown from his position therein on the right-hand side of the car to the other side near the end of the car and against the wall; that he was unconscious for a few moments; that as soon as he recovered he found himself in a lot of débris and thought of the fact that it was his duty to flag another freight train that was following; that he managed to get out of the caboose and go back on the track for about 150 yards, at which point he became dizzy and sick, sank upon the track, and the conductor of his train and some other person carried him back to the caboose and made a bed for him with the cushions. He was soon afterwards carried to his home in Lexington, where he remained in bed for 15 or 18 days under the treatment of a physician, Dr. Scott, and after he was able to get out of the bed he remained under the treatment of the same doctor for several months. For a while the doctor called at his home to see him. After that appellee went to his office. The doctor finally advised him to go to the Chesapeake & Ohio Railway Company's hospital at Clifton Forge, Va., which he did, and remained there under treatment for a short time, returned home, and again placed himself under treatment of Dr. Scott. At about this time he claimed his spinal column became curved to one side, and the doctor cauterized him for the purpose of relieving him. Appellee took all the exercise possible, under the directions of his physician. He hunted and fished some; but he had not performed any manual labor since receiving his injuries. Appellants claim that appellee's injuries are not as severe as he insists they are. In testifying to the effect and extent of his injuries, appellee said, in substance: That he had suffered pain all the time since he was in-

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jured in the region of the small of the back and from there down to the end of the spinal column. That there were tingling sensations passing from that point down his limbs. That he lost use of one of his legs; it becoming paralyzed for about 15 days in the month of April or May after he received his injuries in November. That he had severe pains in the back of his head once or twice each month. That he had no such afflictions before he was injured. That his back had been stiff. That he could not bend forward or backward. That the only way that he could reach anything on the ground was by bending his knees and reaching down from his left side. That he could scarcely walk up or down stairs or up or down a steep incline. That he could walk on fairly level ground, but that it was much discomfort to him. That he had not been able to perform manual labor at any time since he received the injuries. That he had not been able to sleep well at night. That he often had no appetite. That when he fished and hunted, or moved about, it was with great pain. Three physicians, appointed by the trial court to examine the plaintiff, testified, in substance, that they had made a thorough examination of him and could not find any cause or defects which could produce the ailments he complained of. Appellee introduced three physicians who testified that they had made a thorough examination, and that they found causes which produced the trouble he complained of, and it is of the incompetency of their testimony that appellants complain. Neither of them treated him for his injuries. They examined him for the purpose only of ascertaining if he had been injured, the extent and probable cause thereof, so as to qualify themselves to give testimony in his behalf concerning his injuries. The effect of their testimony was: That they found upon examination that two bones of the spinal column in the lumbar region united so that they prevented him from bending either forward or backwards; that the nerves and muscles in that region were injured and sore, and slight pressure on them gave him great pain; that they could defect this by the expression of pain shown in his face when they pressed upon one of the nerves; that there was a bare possibility that he could have deceived them; that he did not know where the nerves were, and, of course, could not tell when they pressed upon one, except from the pain; that they thoroughly tested him upon this point.

The testimony of Dr. Wallace, a physician and witness called by the appellee, contains this matter: "Q. Now, Dr. Wallace, tell the jury, with as little technical verbiage as you can, in English, that the jury and I can understand you, what condition you found Mr. Wiley in when you examined him, when you made the examination last January? A. Well, I found him with what doctors call a partial ankylosis of the lower part of the backbone, two bones in the spinal column above the hip, and a general soreness and tenderness all over the lower part of the backbone, clear on down to the end of it. That caused a great deal of pain on pressure over those bones, and in the muscles about and around for a considerable distance. He had evidence of what we call neurasthenia, which are various symptoms, resulting from some disorder of the nervous system, which I will try to make plain to you, such as headache, constant headache, not able to sleep at night, frequently called insomnia— Q. Mr. Wallace, Did you get that statement from Wiley, about the headache? A. Yes. Mr. Shelby: We object to that, if the court please. We desire to save an exception to that statement. A. Shall I state what the patient complained of? The Court: Yes, go ahead. Mr. Shelby: The defendants object and except to the statements of the witness as to the declarations made by the plaintiff to him at the time of the examination of the plaintiff by the witness. A. Well, he had constant headaches, wakefulness, not able to sleep well, startings in his sleep like a child. He was troubled with wakefulness, I said, startings in his sleep, not able to sleep well, starting as if he was frightened, like a child, nervous troubles at night, and a constant feeling of fatigue in his leg, the general symptoms of what we call traumatic neurasthenia, which is due to a wound or lesion of some kind. Then I found that he was also troubled with what doctors call neuritis. That is an inflamed condition of the nerves, an inflammation of the nerves that leave the lower part of the backbone, which interfered with the movements of his right limb at that time, and then he had feelings of numbness and twitchings of his muscles in both legs. (Defendants except.)"

On cross-examination this witness said: "Q. Did he come to you for the purpose of having an examination made, or to employ you as a physician to treat him? A. No, he came to me for this advice, told me that there was some prospect of a suit, of the determination of a suit, and he wanted my opinion as to his disability, how badly he was hurt, and whether it was permanent or not. Q. Did he come to you for treatment? A. Not at all. Q. You didn't see him any more after that time until your examination of him this week? A. No, not in a professional way. I met him on the street once or twice. Q. How long did this examination last that you spoke of, in January? A. Oh, some little bit. I could not say that. I went over him very carefully. I will say that. I don't know how long it was, I couldn't remember that; but I was very careful about it. Q. Was he stripped? A. Yes, sir. Q. Did you discover any evidences of fracture? A. None. Q. Discover any visible bruises, or lacerations, or anything of that kind? A.

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None; no, not on the skin. Q. Now, you spoke of some evidence of ankylosis, or stiffening in some of the lower vertebræ? A. Yes. Q. The two lower? A. The lumbar vertebræ, the two lower vertebræ, where it joins the sacrum, that large, triangular bone between the hips. A. How did that condition manifest itself in the examination? A. In the movements of his body, and with my thumbs on what is known as the soft spinal vertebræ, the lateral processes, giving pressure there, I could feel and see that there wasn't the usual motion, bending of the back and contortions in various uses. Q. It didn't seem to move as freely as the other? A. No. Q. You didn't see anything in that condition, of those two lumbar vertebræ, to indicate to you that was a permanent condition at that time, did you? A. When? Last January? Q. Yes. A. No, I didn't at that time. Q Now, as to— You say you discovered evidences of soreness to the touch? A. Yes. Q. That was manifest, I suppose, by flinching? A. Yes, sir. Q. That was the only way in which it could be manifested to you? A. Yes. Q. Of course, you couldn't tell it by the touch yourself? I mean, your own sense of touch would not have disclosed the soreness to you, but it was his flinching under your touch? A. In a particular region, under pressure of my thumb— Q. When you pressed, he would flinch? A. In certain places. Q. Now, will you— You stated you saw what was to your mind evidences of a neurasthenic condition? A. Yes, sir. Q. It is a fact that neurasthenia means simply an impairment of the nerve forces? A. Yes, sir; what is known as nerve fatigue, or tired nerve. Q. Just nerve tiredness? A. Yes, sir; nerve tire and nerve irritability. Q. And traumatic neurasthenia is that condition of nerve fatigue that is the result of a wound or an injury? A. Yes, a blow or an injury or a twisting in various ways, of the nerve. Q. Now, this neurasthenic condition, or nerve fatigue, may come from other causes than traumatic causes? A. Yes. Q. And the symptoms are the same, unless you have the history of some injury? A. Practically the same. Q. Practically the same. In other words, nerve fatigue has the same general symptoms and the same general manifestations, whether it results from an injury or whether it results from other causes? A. I have always thought, in cases that I have seen, that in traumatic neurasthenia there is more of general irritability than in other cases, more general irritability, the man is more irritable, and there were evidences of a more general disturbed condition than I saw in purely functional neurasthenia; that is, using that term, not due to injury. Q. That condition of nerve irritability is called neuritis? A. No, sir; neuritis is an entirely different thing from neurasthenia. Q. I was talking about the irritable condition of the nerves. A. I was speaking of the general irritability of the patient in a general sense, as seen by the doctor. I wasn't applying it to the nerve, Mr. Shelby, in a general way. Q. Now, is it not a fact that all the symptoms which go to enable a doctor, as a rule, to diagnose a case as one of neurasthenia, are they, not subjective symptoms as a rule, his subjective symptoms? A. Yes, sir. Q. And the doctor is dependent upon the statements of the patient as to his feelings and symptoms? A. No, sir; not altogether. Q. I didn't say altogether. A. I generally take a general statement from the patient. Q. I understood you to say, in enumerating the symptoms which led to diagnose his condition as one of neurasthenia, that the headache symptom was one? A. Yes. Q. Insomnia was one? A. Yes. Q. Starting in his sleep? A. Yes. Q. Loss of appetite? A. Yes. Q. Sensation of fatigue? A. Yes. Q. All of that you had to get from his statement, did you not? A. Yes. Q. That opinion of yours was based upon the statement of those symptoms as having existed anterior to this examination? A. Yes."

Dr. Neely, another physician called as a witness for the plaintiff, testified in chief, in part, as follows: "Q. Now, Doctor, will you please tell the jury, with as little technical verbiage as you can express yourself with, the condition in which you found Mr. Wiley when you made the first examination of him several months ago? A. Well, he came to my office several months ago, and I examined him. I found that he was suffering with pain in the back, and, of course, he told me what produced it. Q. No matter what produced it. Just give his condition. A Well, he was suffering with considerable pain; that is, not complaining so much of an acute suffering except upon pressure. I found upon pressure and examination a great deal of pain, from the lower portion of his spine clear down to the end of the spinal cord, what we term—next to the sacral region, the region of the sacrum, involving all the sacrum and the coccyx bone; in other words, to the small of the back. Q. Down to the end of the backbone? A. Yes, sir. Q. What general condition of the back and spine did that produce, Doctor? A. Well, it seemed to have produced a very rigid condition of the bony structure. In having him bend over, I found that he could not bend like an ordinary man. Q. Now, when you say 'rigid condition,' Doctor, do you mean a stiffening of the parts? A. Yes, sir; and that resulting, in my opinion, in congestion of the spinal cord, brings about and produces the various symptoms that he complains of, with a partial paralysis, and a tingling, pricking sensation of the muscles. Q. Doctor, you stated that he was unable to bend forward as the ordinary man. How could you tell that he was unable to bend forward, independent of his own assertion to that fact? A. Well, I don't know that I could tell, except seeing him make the effort. I

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don't know that he knew my object in asking him to do it. I didn't use the X-ray on him. I wanted to do it; but my main object was to ascertain if there would be any way of getting at the amount of trouble in the spinal cord, and the doctor who had the X-ray machine said that it would be no good to use it, that he couldn't tell anything about it. Q. Could you, Doctor, and did you, ascertain from your examination, by your observation of the parts and your touch of the parts you examined, that this stiffness was there independent of his assertion to that fact? A. Well, I thought so, in my opinion, I thought I could find enough to satisfy me that there was practically no motion, and there is but slight motion in that except right where what we term the lumbar region, the sacral region, right at that joint, from that down to the coccyx, there seemed to be absolutely none, scarcely. Q. Doctor, the condition you found that was abnormal, would that have produced the complaint that the patient made to you? Mr. Shelby: We object. Leading. Q. State, Doctor, what results or complaints would have been produced by the abnormal conditions that you found? A. Well, I would suppose that I would find about the same set of symptoms that he complained of. (Objected to. Overruled.) * * * Q. Doctor, you have stated that, when you made this examination, you found that the patient was suffering from pain. How did you determine that? A. By pressure upon the tender points of those processes. Q. The points upon which you gave this pressure, was there any visible condition of those parts that indicated that they were abnormal? A. Except only—just one particlar spot. I don't know for certain that had anything to do with it or not. There was one particular place in the small of the back that seemed to have shrunken in more than the others, that the muscle was atrophied a little. That, of itself, I don't think would be sufficient; but all the symptoms that he complained of would lead you to believe that he not only had some kind of injury—I don't know what he owed it to—but sufficient to have produced this condition of the spine that we find it in, that rigid condition, and also the congestion of the spinal cord. Mr. Shelby: We move, your honor, to exclude that last statement of the witness from the jury. (Which motion is overruled; to which ruling of the court defendants except.) * * * Q. Yes, sir. Well now, Doctor, I will ask you if any— did you trace the nerves that run from the backbone down into each limb with the touch? A. Well, I don't know that I traced them except in his general description of how it affected him, commencing from where he had received the injury, going down each limb, effecting the sciatic nerve more or less. (Defendants except.) Q. Independent of his statement to you of his suffering, did you undertake to touch the nerve in its course from the backbone down the limb to ascertain whether or not it was tender? A. No, I don't remember whether I did or not, but that was his own description of it. I suffer with sciatic trouble myself, and so I was satisfied that he knew what he was talking about. (Defendants object. Overruled. Except.)"

It is not contended that Dr. Neely examined the plaintiff for the purpose of giving him medical treatment, or professional advice. The only purpose of his examination, so far as is disclosed, was to qualify the doctor to speak in plaintiff's behalf as a witness.

Dr. Prather is the third of the physicians called for the plaintiff. His testimony, in full, was as follows: "Q. Where do you live? A. I live in Lexington. Q. What is your profession? A. I am a physician. Q. How long have you practiced medicine? A. Twenty-two years. Q. General or special practice? A. General practice. Q. Do you know Mr. Ed. Wiley? A. I do. Q. Have you at any time made an examination of Mr. Wiley to ascertain what injury, if any, he has? A. Well, about three weeks ago, I made an examination of Mr. Wiley for the first and only time. Q. Where? A. In my office. Q. Lexington? A. Lexington. Q. Tell the jury, Doctor, what was the extent of that examination, and what was the result of it, as to the condition you found him in? A. The only thing I know about the case was this examination I made about three weeks ago. I found a partial ankylosis of the lumbar vertebræ, with the sacrum and the coccyx bones. Q. Explain to the jury, Doctor, what ankylosis is? A. It is stiffness of the joints, and a stiffening of the vertebræ, with lack of motion. Q. Does not that stiffening cause a lack of use or— A. Lack of use? Q. Of of the back? A. Yes. Q. Did you make only that one examination of him? A. That's the only one I made. Q. Now, Doctor, could that condition which you found have resulted from a blow or a wrench of the backbone? A. Yes, sir. Mr. Shelby: We object. Q. Without any visible indication of a wound or abrasion? (To the foregoing question defendants, by counsel, objected. Objection overruled. Defendants except.) Q. Now, the question, as a whole, that I ask you, was: Could the condition you found have resulted from a blow upon or a wrenching of the backbone, without any visible indication of a wound or abrasion? (To which defendants except.) A. I think the condition could have existed from a wrench or from a blow. You know, I have not seen him at all. I think he claims he was hurt two years ago. I think the blow would have given some special signs at that time, at least. Q. Did you make any examination of his limbs? A. Well, not specially. He complained of a good deal of tingling

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and numb feeling in his limbs. (To the foregoing statement of the witness as to the complaints of the patient, the plaintiff, made to the witness, the defendants except.) Q. That would have resulted from the injury you found? A. Yes, sir; I think so. Mr. Wallace: We object and except. Q. Doctor, in your judgment, from your examination and the condition in which you found his back and the parts that you did examine, is that injury a permanent or a temporary one? A. Well, it seems to me, from the fact of its long standing, it must be permanent. (To the foregoing statement of the witness, the defendants, by counsel, object. Objection overruled. To which ruling of the court the defendants except.)"

Cross-examination by Mr. Wallace: "Q. Doctor, do you know how long standing that condition was except from what he told you? A. I do not. Q. So, then, your opinion as to its being permanent injury depends entirely on what he told you? A. On what he told me, the history of the case; yes, sir. Q. The time of the injury— Well, do you mean that because it has lasted from the time that he told you it occurred up to this time that it is permanent? A. I didn't understand. Q. Do you mean it is a permanent injury because it has lasted from the time he told you it occurred up to the present time? A. Do you believe— Q. Do you mean it was a permanent injury? A. Yes, sir; from the condition that I found his spine, column there, the sacrum— Q. Did you examine him with the X-ray? A. Did not. Q. Treat him? A. Did not. Q. Strip him? A. Yes, sir. Q. Any visible signs of the injury? A. None that I could see. Q. None that you could see. All, then, that you know about it, is what he told you of the symptoms? A. Yes, sir; and the condition of the spinal column. He couldn't bend himself over with the motion that he should have had. The sacrum showed a great deal of tenderness. Q. Did he indicate how much motion he had, show the amount of that? A. He gave me a history of the case, that he was— Q. Didn't he tell you how much motion he had? A. Certainly. Q. Did you treat him? A. I did not. Q. Did he come to see you to be treated? A. No, sir. Q. Did he come to see you that you could testify in this case? A. Not—no, sir; not that I know of. I am the examiner for a brotherhood of railroad trainmen, firemen, and so forth. It seems that he had a policy in one of those companies, and he came to me to be examined. I didn't know that he had this suit pending. Q. When was that? A. About two weeks ago. Q. When were you summoned as a witness? A. Why, I was summoned a few days ago. I believe it was the second or third day of the week."

Drs. Wallace and Neely testified to having found by their physical examination of the plaintiff an ankylosis of the backbone, a stiffening of its lower part. They also testified as to the general symptoms of neurasthenia, and traumatic neurasthenia, as well as testified, in response to hypothetical questions propounded by plaintiff's counsel detailing the symptoms which plaintiff in his testimony claimed to have had, that those symptoms indicated neurasthenia, and might indicate traumatic neurasthenia. What these witnesses said, based upon objective evidences of the plaintiff's condition, was relevant, as well as their opinions based upon the hypothesis submitted in the questions propounded them. Their descriptions of symptoms of that complaint given by accepted medical authorities were also relevant as testimony. Their opinions were also relevant concerning whether the plaintiff's condition was permanent or temporary. The important question in the case was whether the plaintiff was in the physical condition claimed by him. There was nothing in his appearance to indicate it. A close, careful, professional physical examination of his person disclosed this situation: Three of the examiners were unable to say that they found any evidences of physical impairment. Three thought they could discover them; but the latter were not willing to say, and did not say, that independent of the statements made to them by the plaintiff, and independent of his muscular demonstrations in their presence in the course of their examination, that what they found upon an examination of his lumbar regions was of a serious nature, or would of itself impair his ability to labor, or cause him pain. Ankylosis of the backbone, if it existed, would not necessarily, or even probably, alone produce neurasthenia. It does not seem to a lay mind that a stiffening of a joint in the body, and an impoverished state of nerves, have any necessary relation. Nor are we enlightened upon the subject by the testimony of the professional gentlemen who appeared in the case. Whether there was a stiffening of the backbone was left to depend entirely upon the statements of the plaintiff. The doctors said he could not bend forward nor backward, nor sideway, except to one side. They said the plaintiff, when asked to bend, responded that he could not without pain, and after an apparent effort gave it up. So, after all, the question was left to the plaintiff. So much for that ailment. Now, as to the impoverished condition of his nerves, it was even more dependent upon the plaintiff's statement of facts, than the other trouble, for its discovery. The testimony was that the plaintiff appeared in good health, that he looked well, that he had gained in weight, and had a florid complexion. It was the testimony of some of the doctors that one might have that appearance and still be a neurotic, but that it was exceptional. The symptoms which the plaintiff claims to have, and which the doctors say indicate neuras-

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thenia, are insomnia, loss of appetite, numbness in the limbs, a sensation like pinpricks in the skin, lassitude, undue apprehensiveness, a certain contraction of the circle of vision, and a dizziness, accompanied by more or less pain in the head. Now all, or nearly, by the observation, at least, they are not easily discoverable. All these are not discoverable upon an examination made at one sitting lasting for a short while. There are certain tests which it is claimed will show their existence or absence; but it is generally essential to the validity of those tests that the patient be unaware of their object or application. They must act independent of the will of the patient, to have any probative force.

This much has been said, not to criticise the conduct of the plaintiff, nor to imply that he was malingering; nor to intimate that his statements are either unbelievable, or that they alone may not be sufficient to base a recovery upon if the jury should consider that his condition is as he claims it is; but to set forth the legal question presented for our decision, which is the relevancy of the statements and conduct of a party, not under oath, testified to by another in his behalf. It is a familiar rule of evidence that statements of a party not under oath, and which are favorable to his cause, are not receivable. They are deemed self-serving, and are known to be unreliable evidences of the truth in general. His conduct of the same character, done for the same purpose, is, for the same reason, not receivable in evidence. The question is not whether what he said was true, or whether what he did was a natural, unstudied act, but whether the principal fact may be proved in that way. Illustrating by the same case at bar, the plaintiff was sleepless, nervous, weak, and had pains, might all be proved, the question is, how? Hearsay evidence is generally irrelevant; but there are many exceptions to the rule. The exceptions are in the main based upon the experience of jurists as well as of men in general that in the particular matter the statement was made under such circumstances as warrant a belief in its truth. One of the exceptions to the general rule is that in a case where pain, or a state of health, is a fact at issue, the natural, spontaneous, and usual expressions indicating pain and suffering may be shown, as generally that is the only way in which, aside from the testimony of the sufferer, the existence of pain may be proved. So of other mental states; but it is the invariable rule that the expression should accompany immediately and naturally flow from the pain then being suffered, otherwise it becomes a narrative of a past event, and is not receivable in evidence in court to prove that the pain had existed. Such expressions or manifestations of pain or any mental state which is at issue in the case may be shown by any observer, whether physician or not. Another exception is, though it belongs to the same class, where one suffering from an ailment seeks medical assistance or advice, it is competent to show what he then told his physician as to his symptoms, but never as to the cause of an injury (Shade v. Bridge Co., 119 Ky. 592, 84 S. W. 733, 27 Ky. Law Rep. 224), because it is believed that the motive for telling the doctor the truth as to his sensations of pain, suffering, or history of his ailment, so as to enable the doctor to relieve the suffering, or save the life of the patient, is greater than could be the motive of making a merely self-serving statement to be used in his behalf by the man in some other affair. This allows more than if the same statement had been made to one not a physician or nurse, from whom the patient was expecting aid or physical relief, because in the instance of the physician or nurse there is present a motive for telling the truth that is not present when the same matter is told to one from whom the relief is not sought. If the act or statement is the natural, ordinary, and probable expression of one in that condition, it is deemed to be probably true, and is receivable as evidence of the state which it indicates, and because from the nature of the matter it may be the only evidence of the fact. There is another ground upon which the evidence of the character discussed (that is exclamations indicating pain, or emotion, and declarations as to sensations, as well as the conduct of a person whose pain or sickness is at issue) is receivable; that is, when it is part of the res gestæ. If it is relevant to show the physical condition of the person, such as that he was injured or made sick, not only what a witness has seen and testifies to is relevant, but the exclamations or statements of the person which are the natural spontaneous expressions ordinarily made by one who suffers such pain or illness, are receivable as verbal acts; and upon the same principle, his actions, such as naturally and spontaneously result from such injury or illness, may be proved. They are the best evidence obtainable of his condition, and in many instances the only evidence of it aside from his own testimony, should he testify. They may be even more convincing evidence of the main fact than the opinion of an observer, or even the opinion of the declarant himself.

But the proposition involved in the ruling of the learned trial judge in admitting the evidence, of the class which has been quoted in this opinion, is whether the exception to the general rule of evidence which excludes hearsay is so broad as to include the statements and conduct of the party made not under the conditions which have been discussed above. There is not a unanimity among the authorities on the subject, and, so far as this court is concerned, the precise

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question has never before been presented to it. It is proposed by those advocating the admissibility of such evidence to rest it upon the ground that it is all of the same class, and is to be regulated alone in its application by the jury, who give it such weight as they deem it entitled to. The same argument extended would let in every self-serving statement made by one in contemplation of its effect upon his lawsuit. The cunning and venal would be afforded extraordinary opportunities for multiplying their own statements, and gain for them some additional weight by the character of the deponent who repeated them, with more or less mixture of relevant fact. Self-corroboration under such circumstances would soon cease to be novel.

The competency of witnesses has been greatly extended in modern times by legislation. The tendency of courts has been in the same direction of liberality. More and more has been left to be determined upon the credibility of the witness; but there has not been any relaxation of the rule against hearsay evidence. Nor has the scope allotted to the field of opinion evidence been materially enlarged. Hearsay evidence has been always regarded as generally untrustworthy, while opinion evidence is placed low in the scale, and receivable at all only because there seems no other practicable way to establish the fact. It is doubtful whether its service to the cause of justice in ascertaining truth entitles it to any great confidence. The proposition now in hand is to extend the scope of hearsay evidence, and to allow opinions based upon it to be received as evidence of the main fact. The tendency of each would be to dilute the strength of proof. Each is a degree further removed from what is called "the eyewitness." The issue is whether a plaintiff was sick. He testifies under his oath that he was, and gives the symptoms of his ailment. All that is relevant. Out of court he complains of symptoms to his companions; he staggers, grasps for something to stay his falling; he vomits; he turns pale; he exclaims of pains in particular regions of his body; he swoons; his muscles relax; the pupils of his eyes dilate; a cold clammy sweat appears on his body; he limps when he walks; his speech is inarticulate, or disconnected—all these, and such, are admissible to prove the fact at issue. He calls a physician to administer to him; he explains to the doctor the sensations, present and past, which he has experienced in the attack—what is called a "history of the case"; the physician notes his pulse, his respiration, his temperature, the objective and subjective symptoms of the patient—from all these he is able to diagnose his trouble, and to prescribe for it. Not only what the doctor observed, but what he was told by the patient as to his sensations and symptoms, and his own opinion based thereon, are receivable as evidence of the fact at issue. Others saw the man, noted his appearance and conduct, and heard his complaint or exclamations, under such circumstances as indicated they were the spontaneous, natural, and unstudied actions and utterances of the person. All that is receivable as evidence of the fact at issue. So all the authorities agree. It is needless to cite them.

Now it is proposed that the rule be further extended, that a physician selected by the party for the sole purpose of procuring his testimony on the trial of a lawsuit may be told by the party what his past sensations and symptoms were, or what they then are, and to have the doctor, upon that evidence, which would not be receivable as evidence in court, base an opinion as to the cause and probable duration of the party's ailment, and give in that opinion as evidence that he was then or had been afflicted with that ailment. How a party acts under such circumstances is not on a different plane from what he says. A nod, a jerk of the hand, the wink of an eye, or the mobility of a leg under pressure, may all be the voluntary result of the will, as much as the spoken word, and be actuated by the same motive. All subjective evidence furnished by the patient under those conditions is on the same plane.

Many authorities have been cited and examined, and will be found in the notes of the reporter. We do not cite from them, as any one desiring to test the accuracy of the reasoning by which we undertake to sustain our conclusion, and the character of the authority which we follow, will have recourse to the whole of each case, and more satisfactorily note its appositeness; but the language of the Supreme Court of Illinois, in the recent case of Greinke v. Chicago City Ry. Co., 234 Ill. 564, 85 N. E. 327, so clearly expresses what we deem not only the prevailing rule, but the better reason, that we take from it this extract: "No such safeguards, however surrounded him when he is being examined by an expert whom he has employed to examine him and to give evidence in his case which is about to be tried in court. To permit the injured party, while undergoing an examination by an expert in his employ, by jerks and twitches, by a pressure of his hand, by turning his toes, or dragging one of his legs when walking, to thus make evidence for himself, and then to permit his expert to go before the jury and bolster up and strengthen by his opinion the self-serving testimony thus manufactured by the injured party, would open up the door wide for the grossest fraud, which might work upon his adversary the most palpable injury. The character of self-serving testimony has been held incompetent by the Supreme Court of Michigan in McKormick v. City of West Bay City, 110 Mich. 265, 68 N. W. 148, and Comstock v. Georgetown Township, 137 Mich. 541, 100 N. W. 788, and the general rule announced by that court is, we think, in entire harmony with the ruling of

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this court in the numerous cases hereinbefore cited, and is the correct rule and the one most conducive to justice. We do not intend to hold, however, that a physician may not be able, from an examination of an injured party, to form and express an opinion as to his physical condition and the probable cause which induced such condition, based upon objective testimony alone; but what we do intend to hold is that a physician who has not treated the injured party, but who has made an examination of the injured party solely with a view to testify as an expert, should not be permitted to express an expert opinion to the jury based upon subjective conditions, and then be allowed to fortify his opinion by stating to the jury acts of the injured party which could have been purely voluntary and under the control of the injured party, and which may rest upon no other basis than the truthfulness of the injured party."

Three physicians were appointed by the court to examine the plaintiff for the purpose of testifying as to his condition. If they are disinterested men, such expert witnesses have not the same inducement for bias as they would have if chosen by a party. However, that would seem to go to their credibility alone. When they examine the party physically, of necessity they must observe what he does in apparent response to their tests. If the party is endeavoring to deceive the examiners, he may simulate pain, or involuntary muscular action. In so far as the tests of the examiners have resorted to the subjective, they do not seem to be on a different footing than if the examination was made by a physician of the party's own selection. Of course, if they resort to subjective or objective tests, and from them are able to say that the party was simulating, they may state both their opinion and the fact on which it is based, for that would be receivable under another rule of evidence, to wit: An attempt by a party to fabricate evidence in his behalf is receivable as evidence against him. It has been urged upon us by appellee that the evidence complained of, though erroneously admitted, was not prejudicial, that some of the cases holding to the rule which we adopt so held. Whether evidence erroneously admitted is prejudicial in a given case must necessarily depend upon the record of that case. Inasmuch as none of the physicians testifying for appellee in this case dissociated his opinion based alone upon objective evidences in the patient as to the plaintiff's condition from what he had received from the plaintiff of a character which we have held was erroneous, it is impossible for us to determine what their testimony would have been independent of the plaintiff's action and statements. It would strip the plaintiff's case of the most material part in value and quantity of his evidence to exclude the opinions of these physicians entirely. Not only can we not say that the evidence appears unprejudicial, but it seems more than likely that it was.

Judgment reversed, and cause remanded for a new trial consistent herewith.

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CITY OF LOUISVILLE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1909.)

1. STATUTES (§ 95*)—SPECIAL LEGISLATION—IMPOSITION OF TAXES.

The maintenance of a public school being a public duty of the state, and not purely a municipal purpose, Act March 24, 1908 (Laws 1908, p. 156, c. 61), requiring a minimum school tax rate of 36 mills for cities of the second class, was not in violation of Const. § 181, providing that the General Assembly shall not impose taxes for the purpose of any municipal corporation, but may by general laws confer on the proper authorities thereof power to assess and collect taxes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 106; Dec. Dig. § 95.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 12*)—CITY SCHOOLS—STATUS—"OFFICERS OF THE STATE."

The schools of a city, including high schools, are a part of the state's school system, and their trustees are "officers of the state."

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 14; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 7, pp. 6635–6638; vol. 8, p. 7804.]

3. STATUTES (§ 95*)—LOCAL AND SPECIAL ACTS—TAXATION.

Laws 1908, p. 156, c. 61, providing a minimum school tax rate of 36 mills for cities of the second class, is not in violation of Const. § 59, subsec. 15, prohibiting the passage of local or special acts to authorize or regulate taxation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 106; Dec. Dig. § 95.*]

4. STATUTES (§ 92*)—SPECIAL LEGISLATION—CLASSIFICATION—POPULATION.

For purposes of legislation, cities may be classified according to population, though a class may embrace but one city.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 101; Dec. Dig. § 92.*]

5. TAXATION (§ 42*)—SCHOOL TAXES—UNIFORMITY.

Laws 1908, p. 156, c. 61, requiring a minimum school tax rate in cities of the second class of 36 mills, does not violate Const. § 181, requiring that taxes shall be uniform and assessed against the property within the territorial limits of the authority assessing the tax, since the city, and not the state, must be regarded as the agency assessing the tax; the tax being uniform as to the city.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 90; Dec. Dig. § 42.*]

6. MUNICIPAL CORPORATIONS (§ 73*)—LEGISLATIVE CONTROL—LOCAL SELF-GOVERNMENT—TAXATION.

Laws 1908, p. 156, c. 61, requiring a minimum school tax rate in cities of the second class, is not unconstitutional as a violation of the spirit of local self-government.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 177; Dec. Dig. § 73.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Mandamus by the Commonwealth, for the use and benefit of the Louisville School Board, against the City of Louisville. Judgment for relator, and respondent appeals. Affirmed.

Clayton B. Blakey, for appellant. Wallace A. McKay, Lafon Allen, and Howard B. Lee, for the Commonwealth.

O'REAR, J. By an act of the Legislature of 1908, approved March 24, 1908 (Acts 1908, p. 156, c. 61), the minimum levy of taxes for school purposes in cities of the first class was fixed at 36 cents on the $100. This appeal involves the constitutionality of that act.

The question arises out of these facts: The Louisville School Board, an administrative agency created by the Legislature by the act of July 1, 1893 (Laws 1891–93, p. 1307, c. 244, § 166), having control of the public schools of that city, presented to the general council of Louisville their budget for the schools for the year 1909, to defray which would require the levy of at least 36 cents on the $100 worth of taxable property within the city. The general council refused to accede to the demand made upon it by the Board of Education, not because of any error in the estimate of that board, but solely because, so far as we can gather from the record, the council deemed it inexpedient to appropriate so much money for school purposes, in view of the other necessary expenses to which the city was put in maintaining its local government. Appellee brought this suit for the writ of mandamus against the city and its mayor and general council. The circuit court granted the writ. The defendants appeal.

The main feature of the question presented is: Is it competent for the Legislature to fix a minimum sum to be raised by a city for school purposes, and to require that sum to be raised without discretion? It is claimed by appellant that section 181 of the Constitution prohibits the legislative action. That section reads: "The General Assembly shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by general laws confer upon the proper authorities thereof respectively power to assess and collect such taxes." If the maintenance of a public school is a purely municipal purpose, then the section would seem to be conclusive of the matter. But education is not a subject pertaining alone, or pertaining essentially, to a municipal corporation. Whilst public education in this country is now deemed a public duty in every state, and since before the first federation was regarded as a proper public enterprise, it has never been looked upon as being at all a matter of local concern only. On the contrary, it is regarded as an essential to the preservation of liberty—as forming one of the first duties of a democratic government.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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The place assigned it in the deliberate judgment of the American people is scarcely second to any. If it is essentially a prerogative of sovereignty to raise troops in time of war, it is equally so to prepare each generation of youth to discharge the duties of citizenship in time of peace and war. Upon preparation of the younger generations for civic duties depends the perpetuity of this government. The power to levy taxes is an essential attribute of the sovereignty. That is so because the necessity of conducting the government requires that money be raised for the purpose by some sort of taxation. So is the power to educate the youth of a state, to fit them so that the state may prosper; else the taxes raised could scarcely meet the demands made upon a government in these times. Whilst the power named is older in point of adoption as a legal maxim, the other is modernly found to be of no less importance. It may be doubted if the state could strip itself of either quality of its sovereignty. Certainly it will not be deemed to have attempted it upon language open to debate.

In this state the subject of public education has always been regarded and treated as a matter of state concern. In the last Constitution, as well as in the one preceding it, the most explicit care was evinced to promote public education as a duty of the state. Besides setting apart a very considerable capital sum as an inviolable asset of the school fund, the Constitution provides: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." Const. § 183. In obedience to that requirement the General Assembly has provided a system of common schools, in connection with other branches of public education. The subject requires different provisions for localities differing in density of population. For rural settlements there is the district school. For villages and towns a more extended term may be had, including high schools, because the population makes it practicable to do so. In cities a still more elaborate, and consequently more expensive, system is set up. All have the one main essential—that they are free schools, open to all the children of proper school age residing in the locality, and affording, so long as the term lasts, equal opportunity for all to acquire the learning taught in the various common school branches. The school funds raised directly by the state for common school purposes are apportioned ratably among them all. In the cities the government of the public schools is committed to boards of education. Each city of certain classes, including the class to which Louisville belongs, is made a separate school district. Local taxation is provided for in every instance to supplement the fund paid to the district out of the state money. In some it is left to the option of the voters of the district; in others, to the discretion of the trustees; while in others it is left to the city council and board of education. But in none is the question left entirely to the locality whether a public school shall be maintained for it. Nor does the state take its hands off the control of the school system, by allowing, or by requiring, the different localities to take steps toward supplementing the general appropriation by local taxation. The school is none the less a state institution for that matter. If the public schools of Louisville were local affairs, over which that municipality had the sole control, it may be doubted if it would be competent for the state to levy a tax on its other citizens to help support them. But they are not municipal institutions at all. It was so held in City of Louisville v. Louisville School Board, 119 Ky. 574, 84 S. W. 729, 27 Ky. Law Rep. 211; Id., 32 S. W. 406, 17 Ky. Law Rep. 698; Bamberger Bloom & Co. v. City, 82 Ky. 337, 6 Ky. Law Rep. 258. The city schools, including high schools, are part of the state's common school system. Their trustees are officers of the state. Such is the effect of the decision in City of Henderson v. Lambert, 8 Bush, 610, and in Combs v. Bonnell, 109 S. W. 899, 33 Ky. Law Rep. 219.

Section 181 of the Constitution refers to matters municipal. The state could as well have required the schools of Jefferson county, including Louisville, to have been under the supervision and control of the county fiscal court, and that body required to levy a fixed tax, or one between minimum and maximum rates, as have left the tax rate with the city council. The section in question does not pertain to municipal affairs, nor does it attempt to levy a tax therefor. It is competent for the state to administer its government through such agencies as the Legislature may choose, when the Constitution does not expressly provide otherwise. In the establishment and maintenance of an efficient system of common schools, the Legislature was left a free hand as to the details of management and government, as well as the matter of levying taxes. It was therefore competent for the Legislature to have laid all the taxes for that purpose directly, or, as it did, to levy part directly and provide for the raising of the residue through other agencies which it established. The cities of the commonwealth are agencies of government. Unlike cities of old, the municipalities now partake but slightly of the nature of private corporations. They are expressly prohibited from participating in commercial ventures not also governmental. The state does in many matters use these agencies in executing government on behalf of the state at large. There is perceived no reason why in the particular of schools these instrumentalities may not be employed to gather the taxes to be laid on their citizens and property, saving to the state, as well

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as to the taxpayers, the expense of employing additional officials to do what these are well qualified and prepared to do. If the state can use them to collect its taxes, it may equally employ them to assess the property and levy the necessary tax. The city councils are in frequent session. The state Legislature meets biennially. Conditions may arise—do arise—varying each year, and which call for special and local attention. City councils, not less than fiscal courts or boards of education, are peculiarly situated and qualified to exercise that discretion on behalf of the state called for by the varying conditions in the different cities and towns. The plan is simple of execution, is inexpensive, and brings the subject of local taxation to the attention of a common body of men selected for that purpose, who are thus given a better opportunity for knowing of the whole sum required to be raised in the municipality for needs that are local, so that the entire budget may be regulated on a known basis and system.

It is next insisted that the statute violates subsection 15 of section 59 of the Constitution, reading: "The General Assembly shall not pass local or special acts concerning any of the following subjects or for any of the following purposes, viz.: * * * (15) To authorize or regulate the levy, the assessment or collection of taxes." Classification is a necessary feature and power of legislation, as it is impossible for any extensive code of laws to apply to every person or subject in the state. The Constitution itself provides for the classification of the cities and towns of the commonwealth. That fact alone establishes such classification as reasonable as to matters susceptible of treatment upon the basis of density and extent of population. The fact that only one city now belongs to the first class detracts nothing from the propriety of such allotment. Indeed, when the Constitution was adopted, but one city could possibly have been included in the first class under the requirement as to population fixed by the Constitution—a fact known to the convention. Time and again this court has declared that subjects susceptible of classification according to population might be classified so as to apply only to cities of the first class, notwithstanding there was but one such, and that it did not violate the provisions of section 51 to do so.

Section 181 of the Constitution requires that taxes must be uniform and assessed against all property within the territorial limits of the authority levying the tax. It is argued for appellant that, if the Legislature is levying this tax, it is not uniform upon all property within its authority, and that the city cannot be said to be levying the tax, because the city is left no discretion in the matter. Treated on its broader ground, we think the section was aimed to equalize the burden of taxation upon the subjects paying it and to be benefited by it. This section is held not to be infringed in levying street improvement taxes in cities upon only parts of the city, that property particularly benefited by the improvement, although the authority levying the tax was coextensive with the city and covered considerable territory and property not affected by the tax. Gray's Limitation of the Taxing Power, § 424 et seq.; Holzhauer v. Newport, 94 Ky. 407, 22 S. W. 752, 15 Ky. Law Rep. 188; Marshall v. Donoven, 10 Bush, 683; Smith v. Simmons, 110 S. W. 336, 33 Ky. Law Rep. 503. But, if it be preferred to rest the matter upon the narrower ground—that is, whether the levy of the tax was made by the municipality—we think it can be done. The Legislature may and does provide for much of the state government through agencies such as counties and cities. Maintaining the public highways is a necessary function of state government. Yet this state has set over that whole matter to two local agencies. The counties, through their fiscal courts, levy the taxes in the county outside the cities for road purposes. The cities levy the taxes in the territory within the city for the maintaining of the city highways. The Legislature requires the tax to be levied. This is a levy by the local tribunal. That the city or county is mandatorially required to levy a specific rate is not more objectionable as an infringement of power than if they were simply required to levy at some rate in their discretion. If the state can adopt an agency for carrying on some part of its government, it may delegate to the agency the power to do what is required of it. If it may delegate discretionary power, it may likewise delegate the power shown of the discretion, as the latter is less than the former. It is not denied that the state can limit the rate of taxation in all these matters as to the maximum. So it can limit it as to the minimum. It is wholly discretionary with the Legislature, where the Constitution is silent upon the subject.

Finally, it is contended by appellant that the statute violates the spirit of local self-government which pervades our system. Not so. If it did, then the requirement of the Constitution that the Legislature should establish and maintain an efficient system of common schools was vain; for in that event all the Legislature could do would be to advise the various cities, towns, and counties to maintain good schools. A city has not, under the plea of home rule, the exclusive right to do all within its territory that the state can do outside. No case has gone that far; and none could without destroying the autonomy of the state government.

Our conclusion is that the statute is a valid exercise of legislative power and dis-

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cretion. The council should have levied at least the minimum rate fixed by the statute. Their refusal was a failure to obey an express requirement of law. The writ of mandamus was the proper remedy, and was correctly applied (Lexington v. Board of Education, 65 S. W. 827, 23 Ky. Law Rep. 1663), including for the year of 1909, which was manifestly intended to be embraced by the terms of the act.

Judgment affirmed.

OLDHAM et al. v. McELROY, Sheriff, et al.

(Court of Appeals of Kentucky. June 18, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 330*)—INDIVISIBLE REAL ESTATE—SALE—ADMINISTRATION SUIT.

Where land belonging to a decedent's estate is indivisible without impairing its value, Civ. Code Prac. § 489, authorizes a sale thereof in a suit to settle the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1366; Dec. Dig. § 330.*]

2. JUDGMENT (§ 218*)—INFORMALITY—EFFECT.

Where a decree for the sale of real estate was within the court's jurisdiction and within the issues, but was erroneous because based on an objectionable deposition, the decree was not void; but, having been set aside, a subsequent judgment, based on competent proof, ordering the first decree to be executed as the then judgment of the court, though informal, and not commendable practice, was not void.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 218.*]

3. EXECUTORS AND ADMINISTRATORS (§ 351*)—SALE OF LAND—BOND.

A suit to sell an ancestor's land to pay debts is excepted from Civ. Code Prac. § 493, providing for a bond on behalf of infants in certain sales of real property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 351.*]

4. EXECUTORS AND ADMINISTRATORS (§ 351*)—SALE OF LAND—PAYMENT OF DEBTS—LIEN.

Where land in which infants are interested is sold to pay debts of the ancestor, a lien is retained by law on the land for the infants' share, for the excess above the intestate's debts, until bond is executed on behalf of the infants, by Civ. Code Prac. §§ 493, 497.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 351.*]

5. EXECUTORS AND ADMINISTRATORS (§ 351*)—REAL ESTATE—SALE—DEBTS—BONDS.

Where real estate owned by decedent in common with another was sold to pay debts, and certain infants were interested in the surplus proceeds of the sale of decedent's share, the court should not collect the sale bonds, in excess of the amount going to the co-tenant and enough of the remainder to pay the debts and expenses of administering decedent's estate, before requiring the execution of a bond to protect the infants' share of the surplus, as required by Civ. Code Prac. § 493.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 351.*]

6. DOWER (§ 62*)—SALE OF LAND OF DECEDENT — RES JUDICATA — ESTOPPEL OF WIDOW.

Where a widow appeared, in an action to sell land for the payment of her deceased husband's debts and expenses of administration, and made no claim that she was entitled to dower in the land, she was estopped as against the purchaser to thereafter claim dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 203, 204; Dec. Dig. § 62.*]

7. EXECUTORS AND ADMINISTRATORS (§ 351*)—SALE OF REAL ESTATE—NONRESIDENT HEIRS—BOND—JUDGMENT.

Failure to execute the bond required by Civ. Code Prac. § 410, before decree of sale of a deceased ancestor's land to pay debts and expenses of administration, as against nonresident heirs, did not render the judgment void, but only erroneous.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 351.*]

Appeal from Circuit Court, Fayette County

"To be officially reported."

Suit by Marion H. Oldham and others against John McElroy, as Sheriff of Fayette County, and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Forman & Forman, for appellants. Shelby & Shelby, Chas. Kerr, and H. E. Ross, for appellees.

O'REAR, J. Appellant Marion H. Oldham was the purchaser of a lot and warehouse in Lexington at decretal sale of the Fayette circuit court in the action of Stivers v. Herndon's Adm'r and Others. The sale was confirmed without exception, and she was placed in possession of the lot. An order was entered directing the collection of the purchase bonds. This suit was brought to enjoin the collection of the bonds. The sheriff, in whose hands was an execution on the bonds, and the master commissioner, to whom the bonds were made payable under the decree of the sale, are made defendants. But we deem it unnecessary—indeed, not permissible—to notice any of the grounds urged against the judgment save such as attack the judgment of sale as void. If the proceedings were merely erroneous, the sale would stand as against a collateral attack by anybody who had been a party or privy to the record. The circuit court refused the injunction. Hence this appeal.

Herndon was a Virginian and a tobacconist. He became the owner of a lot and warehouse thereon in Lexington, Ky., which was designed for use as a tobacco warehouse. He sold and conveyed to Luther Stivers an undivided half of the warehouse and lot. Shortly thereafter he died intestate, a resident of Richmond, Va. His widow qualified as domiciliary administratrix, while the Union Bank & Trust Company of Lexington was appointed ancillary administrator in Kentucky. Stivers, claiming to be a creditor of Herndon, brought a suit for settlement of Herndon's

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estate in the Fayette circuit court against the Kentucky administrator and another creditor in Kentucky of Herndon, joining the widow and the five infant children of Herndon as defendants. The widow and infants were brought before the court by constructive process only. The petition alleged that plaintiff was a creditor of Herndon; that he had died intestate in Virginia, leaving debts unpaid in Kentucky, and leaving no personalty in this state; but that he was the owner of an undivided half of the warehouse lot, which was indivisible without materially impairing its value. The prayer of the petition prayed a marshaling of the assets and liabilities of the estate, and that the lot of land described in the petition be sold; that the proceeds be partitioned, and the Herndon half be first applied to the payment of the debts of that estate, and the balance be distributed among his real representatives of the defendants. A Kentucky creditor, the First National Bank of Lexington, asserted in the action a debt, a note of $1,360 and interest, which it claimed was unpaid. The Kentucky administrator answered that no personal estate of the intestate had come to its hands and that there was none in Kentucky known to it. The deposition of a witness, Porter, was taken on the plaintiff's behalf, showing the indebtedness to the First National Bank and that the property was indivisible. Thereupon a decree for the sale of the lot was entered, and the lot sold. Upon exceptions filed by both the Kentucky and Virginia representatives, the sale was set aside, and exceptions were sustained to the deposition of Porter, because not taken upon interrogatories as required by the Code, where the defendants were constructively summoned. The deposition was retaken, this time on interrogatories. The case was again submitted for judgment. The decree was that the former judgment be now executed, with some modifications as to advertising the sale. It was at this last sale that appellant Marion H. Oldham became the purchaser.

The judgment of sale is attacked as void, because, it is claimed, it is subject to the same vices that marked the proceedings in Elliott v. Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. Law Rep. 1676. The suit of Stivers against Herndon's administrator may be treated either as solely for the purpose of settling the intestate's estate or as combining with that object the additional one of having a decree of sale of the lot of land because of its indivisibility without impairment of its value, as allowed by section 489 of the Civil Code of Practice. If the lot was indivisible, as stated, then we think all that was necessary was the suit to settle the decedent's estate. In Elliott v. Fowler there was this essential difference from the case of Stivers v. Herndon: The former estate was a large farm, susceptible of partition without impairment of its value, and not necessary to be sold to pay the decedent's debts. The suit to settle the decedent's estate did not, therefore, bring into the case any more of the decedent's estate than was necessary to pay his debts and the cost of administration. In Herndon's Case, as the lot could not be sold in parcels without entailing a loss upon the owner whose interest was so sold, it was competent, the other joint owner assenting, to sell it as an entirety, subsequently treating the surplus proceeds of the decedent's estate as realty. Section 494, Civ. Code Prac.; Rodgers v. Rodgers, 31 S. W. 139, 17 Ky. Law Rep. 358. Thus tested, the petition stated a cause of action. The necessary averments were sustained by the proof. The decree that was actually executed should have been entered and executed. Although the first judgment was based upon a deposition which was subject to exceptions because of the manner in which it was taken, the decree was not on that account void. But, even if void, when a subsequent judgment was entered, based upon competent proof, ordering the first decree to be executed as the then judgment of the court, though informal, and not a commendable practice, it was nevertheless not void.

It is claimed, too, that the judgment in the Stivers suit was void because the bond required by section 493, Civ. Code Prac., was not executed on behalf of the infants. The suit to sell the ancestor's land for his debts is excepted from the requirement of the Code concerning that bond. A lien should have been, and by law is, retained on the land for the infants' share of the excess above the intestate's debts, until bond is executed on behalf of the infants as required by sections 493 and 497, Civ. Code Prac. Rodgers v. Rodgers, supra; Todd v. Dowd's Heirs, 1 Metc. 282; section 497, Civ. Code Prac.; Foley v. Graham's Guardian, 110 S. W. 839, 33 Ky. Law Rep. 627. The circuit court reserved control of the entire proceeds of the sale. No deed has yet been made to the purchaser. So the court can, and doubtless will, enter such further orders as may be necessary to protect the interests of the infants and purchaser in the case. It would be error for the court to collect the sale bonds, in excess of the one-half going to Stivers and enough of the remainder to pay the debts and administration costs of Herndon's estate, before the bond required by section 493 is executed. Com. v. Catlin, 112 S. W. 665, 33 Ky. Law Rep. 1049.

Both Herndon and Stivers were married men. Mrs. Herndon joined in her husband's deed to Stivers; but it is claimed the notary's certificate of the acknowledgment to her deed is not sufficient. It is feared her dower in the lot was not conveyed. But she appeared in the Stivers-Herndon Case when she filed exceptions to the commissioner's report. She was then discovered. Not objecting then or

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thereafter in that suit that her interest as dowress was being included in the sale, she is estopped as against the purchaser to now question the fact. Besides, she is here by her counsel, who urges in his brief on her behalf that the judgment in this case be affirmed. Her dower has passed by the sale to appellant. Mrs. Stivers was not a party to the suit of Stivers v. Herndon. But she is in this suit, and by quitclaim conveyed her potential dower in the lot to appellant. So that eliminates her claim.

The bond required by section 410, Civ. Code Prac., to be executed before a judgment can be rendered against a nonresident constructively summoned, was not given. It is claimed that rendered the judgment of sale void. Whether that bond is required before a judgment can be rendered against nonresident heirs, decreeing a settlement of their deceased ancestor's estate, is not necessary to be now decided. If it was required, but not executed, the judgment would not be void but erroneous only. Allen v. Brown, 4 Metc. 342; Harris v. Adams, 2 Duv. 141; Atcheson v. Smith, 3 B. Mon. 502; Thomas v. Mahone, 9 Bush, 111; Tatum v. Gibbs, 41 S. W. 565, 19 Ky. Law Rep. 695; Morgan v. Wickliffe, 70 S. W. 680, 24 Ky. Law Rep. 1039.

The record does not show that the appellant did not get a good title to the lot.

Judgment affirmed.

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HACKNEY et al. v. TUCKER et al.

(Court of Appeals of Kentucky. Sept. 24, 1909.)

1. WILLS (§ 634*) — "VESTED" OR "CONTINGENT" REMAINDERS.

That an estate is to take effect after the termination of an intervening estate will not prevent both estates from being vested at the same moment; it being the present capacity of taking effect, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited determines, that distinguishes a vested from a contingent remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*

For other definitions, see Words and Phrases, vol. 8, pp. 7305–7307, 7828, 7829; vol. 2, pp. 1503–1506, 7615.]

2. WILLS (§ 634*)—VESTED REMAINDERS.

An estate in remainder will be held vested where it can be fairly done without too great violence to the language used.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

3. WILLS (§ 634*)—VESTED AND CONTINGENT REMAINDERS—WILLS—CONSTRUCTION.

Testator directed that M. and testator's daughter should have 200 acres of land, and that the rest should go to testator's wife, and, at her death, should fall back to them (meaning M. and his daughter). The daughter died before her mother without heirs. *Held* that, since the remaindermen were certain and had present capacity of taking in possession, if at any time the possession should become vacant, they took a vested remainder, though through subsequent contingencies the land might pass to persons other than those intended by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by Lucy A. Hackney and others against T. H. Tucker and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. P. Evers and T. J. Murphey, for appellants. W. J. Webb, for appellees.

CLAY, C. This controversy involves the construction of the will of G. Z. Edwards, who died in the year 1894, domiciled in Graves county, Ky. The will is as follows: "Feb'y. 11th, 1875. This 11th day of Feb'y. 1875, this is my last will that E. McLoed and Martha, my daughter, shall have two hundred acres of land in the west side of my land and the rest is my wife, and at her death is to fall back to them. The stock is my wife's. The cash and notes to be divided equally between her and Martha and any other property that I may have then." In the year 1898 the testator's daughter, Martha, died, leaving no heirs except her mother, Mary A. Edwards, who was then living. The latter died in the year 1906. This action was instituted by appellants, Lucy A. Hackney and others, against appellees, T. H. Tucker and others, to recover certain lands located in Graves and Marshall counties, which by the aforesaid will were conveyed by the testator to his wife, and at her death to E. McLoed and Martha, the testator's daughter. The appellants are the brothers and sisters, and their descendants, of G. Z. Edwards, testator, while the appellees T. H. Tucker and others are the heirs of the testator's widow, who, after the testator's death, married another.

It is the contention of appellants that the estate devised to the testator's daughter, Martha, was subject to be defeated by her death before that of her mother. On the other hand, it is the contention of appellees that the estate devised to the daughter, Martha, was a vested remainder, and upon her death, without other heirs capable of inheriting, passed to her mother. Thus the mother had not only a life estate in the lands devised to her, but became invested on the death of her daughter with the fee simple title to her daughter's one-half of the lands in question, subject to the right of courtesy in her daughter's husband. The trial court adopted the view of appellees, and accordingly sustained their demurrer and dismissed the petition.

The following elementary rules for determining the character of estate deeded or devised have been frequently approved by this court: The mere fact that an estate is to take effect and be enjoyed after the termination of an intervening estate will not prevent both estates from being vested at the same moment. It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks the distinction between a vested and contingent interest. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. There can be no question that the tendency of the more recent decisions is clearly in favor of holding an estate in remainder vested where that can be fairly done without too great violence to the language used. Mercantile Bank of New York v. Ballard's Assignee, 83 Ky. 481, 4 Am. St. Rep. 160; 4 Kent's Commentaries, 206; 2 Chitty's Blackstone, 169, note 10; Walters v. Crutcher, 15 B. Mon. 10; 2 Redfield on Wills (3d Ed.) 232; Weil v. King et al., 104 S. W. 380, 31 Ky. Law Rep. 1010.

Applying these rules to the language of the will before us, we find that the testator conveyed the lands in question to his wife, and upon her death to E. McLoed and Martha, the testator's daughter. Thus the wife was given a life estate, while E. McLoed and Martha were given the remainder interest. As the persons to take were certain, and as they had the present capacity of taking possession if the possession should at any time become vacant, there can be no doubt that they took a vested remainder. The fact that through

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subsequent contingencies not provided for by the testator the land devised went to parties other than those who the testator intended should have his property is no reason for giving to the will a construction different from that which the language itself plainly indicates. If such a rule of construction were to be adopted, the meaning of a will would be determined, not by the language employed, but by unforeseen contingencies not provided against by the testator. In the case before us the language of the will is plain and certain. It is not susceptible of two constructions. We therefore conclude that the lower court properly sustained the demurrer to the petition.

Judgment affirmed.

PHENIX JELLICO COAL CO. v. LEMP.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

1. APPEAL AND ERROR (§ 524*)—RECORD—CONTENTS—MAPS.

When a map or diagram is used at a trial, it should be incorporated in the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2375; Dec. Dig. § 524.*]

2. MASTER AND SERVANT (§ 150*)—INJURIES—NEGLIGENCE.

Where a blast was set off in the main entry of a coal mine at a place where work was being done, and which miners were compelled to pass in entering and leaving the mine, the company's failure to give all miners notice of the time when such blast would be fired was negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 300; Dec. Dig. § 150.*]

3. TRIAL (§ 143*)—DIRECTION OF VERDICT—CONFLICT IN EVIDENCE.

Where the evidence was conflicting upon material facts, a peremptory instruction was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 842; Dec. Dig. § 143.*]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Jacob Lemp against the Phenix Jellico Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sam C. Hardin, for appellant. Williams & Evans, for appellee.

CARROLL, J. The appellee, Lemp, a miner, while working in a mine owned by the appellant company, was injured by the discharge of a blast in the main entry of the mine. To recover damages for the injuries sustained, he brought this action, and was awarded $600 by the jury that tried the case. The chief—in fact, only—ground upon which a reversal is asked is because the trial judge refused to direct the jury to return a verdict for the company, or grant a new trial upon the ground that the verdict was flagrantly against the evidence.

It is earnestly insisted by counsel for appellant that the evidence was entirely insufficient to authorize a submission of the case to the jury, and, further, that when the trial judge overruled the motion for a peremptory he should, upon the return of the verdict, have granted a new trial upon the ground that the verdict was flagrantly against the evidence.

A map or diagram of the mine, showing the location of the entries and rooms, was used on the trial of the case, and referred to by all the witnesses in describing localities in the mine; but this map, although put in evidence, is not in the record, and its absence has caused us considerable labor that could have been avoided by its presence. A map or diagram used in the trial of a case and referred to by the witnesses is as helpful to this court as it is to the jury and trial judge that hear the case below; and when a map or diagram is used in the trial of a case it should be incorporated in the record made out for this court.

The evidence introduced in behalf of Lemp conduced to show that it was the custom in the mine to notify miners when blasts would be made, and to begin the blasts at the head or end of the entry, and then discharge them in the order of their location from that point to the mouth of the main entry, so that the miners could safely go out ahead of the smoke and gas that follow an explosion. Lemp was familiar with this custom, and testified that he knew blasts would be made at the time he started from his room to go down the main entry and out of the mine. He further testifies that he believed the blasts would begin at the head or end of the mine, as was the custom, and that he did not know that a blast would be set off in the main entry between the room in which he was working and the mouth of the mine. The evidence upon his knowledge touching this vital issue in the case is very conflicting, and it may be conceded that the weight of it is to the effect that Lemp knew, or should have known, from the information given to him, and from his knowledge of the custom of setting blasts off in the mine, that the blast in the main entry where the special work was being done would be set off at the time it was. But his evidence upon this point, corroborated as it is by some other circumstances, was sufficient to take the case to the jury, and we are not prepared to say that the jury did not have the right to accept as true his evidence in preference to that offered to contradict him. The blast by which Lemp was injured was set off in the main entry, where some special work was being done, and at a place where the miners, in going in and out of the mine, were obliged to pass. It was, therefore, of the highest importance that the company should give to all persons engaged in the mine reasonably sufficient notice of the time when blasts would be set off

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at this place, and the failure to give such notice was actionable negligence.

Although Lemp may have been notified of the fact that the time to make blasts had arrived, it is fair to assume from the evidence that he believed the notice referred to the blasts to be made in the rooms, and not to the blast that would be made at the special work in the main entry. If the firing had commenced, as was the usual custom, at the head of the mine, and then proceeded in order towards the main entry, and this action had been brought to recover damages caused by an injury received from a blast in one of the rooms, the contention of counsel that a peremptory should have been given would be well taken, as Lemp, according to his own evidence, had notice that the firing would begin in the rooms, and hence would have been obliged to take care to protect himself from injury. But Lemp was not injured by a blast in one of the rooms, but by a blast in the main entry, where the special work was in progress; and there is conflict in the evidence as to whether Lemp had notice that this blast would be fired at the time he went from his room to the main entry on his way out of the mine, and there is also conflict upon the point as to whether or not the firing commenced in the last room and proceeded in order towards the main entry, as it should have been done. Some of the witnesses say that the blast in the main entry was the last discharged, as it should have been, and that the firing was in regular order from the head of the mine. Others say that the blast in the main entry was discharged before all the others had been fired. Whether or not Lemp had sufficient notice of the fact that the blast was to be made in the main entry was a question for the jury.

We have carefully read and considered the record, and our conclusion is that the evidence was sufficient to take the case to the jury, and to support the verdict, and therefore the judgment is affirmed.

ADAMS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. CARRIERS (§ 347*)—INJURIES TO PASSENGERS — FALLING BAGGAGE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A passenger wearing a heavy crepe veil boarded defendant's train, and was taken to a seat by the brakeman, and her ticket taken by the conductor. After three or four stops, the passenger was injured by the fall of a suit case belonging to another passenger from the parcel rack above her, which she had not previously seen. *Held*, that whether she was negligent in not observing the suit case or in sitting under it without objection was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1370, 1402; Dec. Dig. § 347.*]

2. CARRIERS (§ 284*)—INJURIES TO PASSENGERS—ACTS OF OTHER PASSENGER.

A carrier is not responsible for injury to a passenger from the acts of another passenger, unless the circumstances are such that, by the exercise of ordinary care, he could have anticipated the danger and guarded against it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1125; Dec. Dig. § 284.*]

3. CARRIERS (§ 320*)—INJURIES TO PASSENGERS — FALLING ARTICLES — NEGLIGENCE — QUESTION FOR JURY.

Where a passenger was injured by the fall of a suit case from the parcel rack where it had been placed by another passenger in such a position that the oscillation of the train was liable to cause it to fall as it did, and it had remained in the rack prior to the accident for a sufficient length of time to warrant a finding that the carrier's employés should have taken notice of its dangerous position, whether the carrier was negligent in not doing so and in failing to remove or secure it was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. § 320.*]

Appeal from Circuit Court, Boone County.

"To be officially reported."

Action by Mary Adams against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. G. Tomlin and J. L. Vest, for appellant. Benjamin D. Warfield, for appellee.

HOBSON, J. Mary Adams was a passenger on a train of the Louisville & Nashville Railroad Company from Latonia to Walton. Several other members of her family were with her. She had on a heavy crepe veil. Her son-in-law had died, and they were taking the corpse to Walton. The brakeman helped her upon the train, and took her to a seat, which was near the front end of the car. When she had ridden about 12 miles in this seat, and as the train was pulling out of Bank Lick station, a suit case which had been placed in the rack overhead before she got upon the train fell out of the rack upon her, inflicting, as the proof for her tends to show, a serious injury, to recover for which she brought this action. She did not know that the suit case was in the rack until it fell upon her. It belonged to a lady who sat just behind her and had placed it there before she got on the train. The rack in which the suit case was placed was 34 inches long, 8½ inches wide, and 8 inches deep. It was rounding at the corners. The suit case which fell was not produced at the trial, but the plaintiff produced another which she said was just like it, only the one that fell was two or three inches longer. The suit case which was produced was 21 inches long, 14 inches high, and 7½ inches wide. The train had made three or four stops, and the conductor and brakeman had each been through the car at each of these stops; but neither of them had in fact seen or noticed the suit case, and neither of them knew of its fall on Mrs. Adams or of her being hurt, she having gotten off the train without complaining to them, apparently supposing at the time that she had suffered no substantial injury. On

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these facts the circuit court instructed the jury peremptorily to find for the defendant, and, the plaintiff's petition having been dismissed, she appeals.

Whether the plaintiff was guilty of contributory negligence in not observing the suit case or in sitting under it without objection was clearly a question for the jury. She had on a heavy crepe veil, and, having been invited by the brakeman to take the seat, would naturally follow his direction without looking around at the rack to see if it was safe; for she had a right to assume that the brakeman would not invite her to a seat that was unsafe. It remains to determine whether there was any evidence of negligence on the part of the servants of the railroad company. The rule is if there is any evidence the question is for the jury. When a carrier has provided a sufficient vehicle, it is not responsible for an injury to one passenger from the acts of another, unless the circumstances are such that by the exercise of ordinary care he should have anticipated the danger and guarded against it. In Hutchinson on Carriers, § 920, the rule is thus stated: "Where the carrier has provided properly constructed vehicles and established reasonably proper rules for their management, he will not be liable for an injury to a passenger caused by an article brought into the vehicle by another passenger, unless such injury could reasonably have been foreseen by him and provided against."

The question that we have before us is, then, ought the carrier by the exercise of ordinary care in this case to have anticipated the danger to Mrs. Adams from the falling of the suit case upon her; for, if the circumstances were such as to make it his duty to anticipate that the suit case might fall upon her, he should have guarded against the danger. In Morris v. N. Y., etc. R. R. Co., 106 N. Y. 678, 13 N. E. 455, a clothes wringer which was wrapped up in a piece of paper fell out of a rack upon a passenger and injured him. It was held that, the wringer being so wrapped up and concealed as not to show what was in the package, the railroad men, having no notice that there was any danger from it, were not guilty of negligence in not requiring it moved from the rack, and so the company was held not liable. In Whiting v. N. Y., etc., R. R. Co., 97 App. Div. 11, 89 N. Y. Supp. 584, the plaintiff was injured by the falling upon her of a telescope satchel as in this case, but there she saw the telescope in the rack, and knew it was there. It projected over the edge of the rack a few inches; but the appearance of the telescope as placed in the rack did not suggest that there was any danger from it, and the court held the railroad company not responsible on the ground that at no time before it fell was there anything in its appearance to indicate that it was likely to fall. The court said: "The necessary inference from the evidence is that the satchel was properly placed in the rack at the start, and that the ordinary and usual motion of a fast train in the course of 2½ hours had gradually moved it until the center of gravity projected beyond the edge of the rack. I cannot see how this fact in itself, without some evidence of a situation calculated to excite apprehension existing for an appreciable period before the accident, justifies a charge of negligence on the part of the conductor or the trainmen. There was no evidence that any of them saw the satchel at all. Still less that a sight of it at any time before the moment that it fell would have suggested danger. The rack was there for the purpose of receiving just such baggage." The decision of this court in Clarke v. L. & N. R. R. Co., 101 Ky. 34, 39 S. W. 840, rests upon the same ground. In that case a passenger was burned by the explosion of a can of gasoline which a fellow passenger had taken into the car, and it appeared that there was nothing to show that any officer of the defendant knew that the can was there or that it contained gasoline, or had any reason to anticipate any danger. The case of Gulf, etc., R. R. Co. v. Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, is to the same effect. In that case a fellow passenger had a jug containing alcohol. The jug fell out of the sack, the alcohol was spilt on the floor, and took fire. But none of the trainmen knew that there was a jug of alcohol in the sack, and there was nothing in the appearance of the sack to indicate danger. The authorities are uniform that it is incumbent upon the carrier to protect a passenger from injury at the hands of a fellow passenger, where, by the exercise of ordinary care, he should anticipate and guard against it. 2 Hutchinson on Carriers, § 981. In like manner, it has been held that the carrier is liable to a passenger who stumbles over an obstruction in the aisle, where by ordinary care he should have known of the obstruction and made the aisle safe, and that this is ordinarily a question for the jury. See Railroad Co. v. Buckmaster, 74 Ill. App. 575.

If the plaintiff's testimony is true, the suit case when lying flat upon the rack would protrude beyond its edge between five or six inches. The rack was composed of metal bars uniting in a metal rim at the outside. If an object was placed entirely within the rack, the rim would hold it in; but, if it protruded beyond the rim, there would be nothing to stay it when moved by the oscillation of the cars. If a suit case protruded as much as 5 or 6 inches beyond the edge of the rack, and was 14 inches wide, a very slight movement of the suit case from the oscillation of the train would throw its center of gravity outside of the rack. The fact that the trainmen did not see the suit case in the rack is not conclusive that the defendant is not liable. It was incumbent upon them, not only to exercise ordinary care to have a safe car when they started, but to see that the car continued safe during the journey. Those

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in charge of a passenger train cannot shut their eyes to the condition of the car as the train goes along. They must exercise ordinary care for the safety of the passengers, and, although the trainmen had not in fact seen the suit case in the rack, still, according to the evidence of the plaintiff, it was not placed there after she got on the train, and had been there the whole time that she occupied the seat. Both the trainmen had been through the car three or four times while she was riding there. The brakeman had taken her to the seat, and the conductor had taken up her ticket there. If there was anything in the appearance of the suit case to indicate danger of its falling, the condition of things had existed long enough for it to be a question for the jury whether, by the exercise of ordinary care, they should have observed it. As the suit case protruded so far beyond the rack and the center of gravity would so easily be thrown beyond its edge, it was a question for the jury whether the trainmen by the exercise of ordinary care should not have apprehended danger to a passenger sitting beneath. In matters of this sort the trainmen are only required to exercise such care as may be reasonably expected of persons of ordinary prudence under the circumstances, and as to what should be expected of a person of ordinary prudence a jury of 12 men, coming from the different walks of life, and putting together their common experiences, are peculiarly qualified to judge. The facts shown do not make out a case where it may be declared as a matter of law that the defendant's servants exercised ordinary care, and that there is no room for a difference of opinion on the subject. We do not hold that the defendant is liable. We only hold that the question of negligence is for the jury. The plaintiff's proof by Mr. Davies, the defendant's superintendent, is to the effect that the car racks were alike in all the cars of this class, and therefore the measurements which the plaintiff made of the racks of another like car on the road were properly admitted.

Judgment reversed, and cause remanded for a new trial.

NOE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

CRIMINAL LAW (§ 1020*)—COURT OF APPEALS—APPELLATE JURISDICTION.

Under Cr. Code Prac. § 347, providing that the Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors in the following cases only, viz.: "If the judgment be for a fine exceeding fifty dollars or for imprisonment exceeding thirty days"—there is no appeal to the Court of Appeals from a judgment for a fine of $50 and 10 days' imprisonment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020.*]

Appeal from Circuit Court, Harlan County.

"To be officially reported."

Pearl Noe was convicted of violating the local option law, and appeals. Dismissed.

W. F. Hall, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. The appellant, Pearl Noe, was indicted, tried, and found guilty of violating the local option law in Harlan county, Ky., and his punishment fixed at a fine of $50 and 10 days' imprisonment.

We do not find it necessary to consider the merits of this appeal, as we are clearly without jurisdiction to entertain it. Section 347 of the Criminal Code of Practice, in so far as applicable to the matter before us, is as follows: "The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors, in the following cases only, viz.: If the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days." The money part of the punishment in this case does not exceed $50, nor does the imprisonment part exceed 30 days. Both branches of the verdict are, therefore, below the point which gives jurisdiction to this court.

In Bailey v. Commonwealth, 92 S. W. 545, 29 Ky. Law Rep. 105, we held, following Anderson v. Commonwealth, 77 Ky. 171, that this court was without jurisdiction where a judgment is rendered against a defendant for a fine of $50. Norris v. Commonwealth (Superior Court) 7 Ky. Law Rep. 515, involved the precise question we have here. In that case the judgment was for $25 in money and that the defendant be confined 10 days in the county jail. The appeal was dismissed for want of jurisdiction, it being said that, where the judgment is for both fine and imprisonment, either the fine must exceed $50 or the imprisonment must exceed 30 days.

Appeal dismissed.

CITY OF MADISONVILLE v. STEWART.

(Court of Appeals of Kentucky. Sept. 24, 1909.)

1. MUNICIPAL CORPORATIONS (§ 785*) — DEFECTIVE SIDEWALKS—NEGLIGENCE.

Where a city permitted a hole so large that a pedestrian could step his foot into it to a depth of eighteen inches to remain for several months, near the edge of a sidewalk at the intersection of a street within its corporate limits, it was negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1636, 1637; Dec. Dig. § 785.*]

2. MUNICIPAL CORPORATIONS (§ 821*) — DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A pedestrian injured by stepping into a hole in the sidewalk at night when it was very dark and the street was unlighted was not negligent as a matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754–1756; Dec. Dig. § 821.*]

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3. MUNICIPAL CORPORATIONS (§ 821*)—INTOXICATION OF PERSON INJURED—QUESTION FOR JURY.

Whether plaintiff, who was injured by stepping into a hole in a defective sidewalk at night, was intoxicated at the time *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754–1756; Dec. Dig. § 821.*]

4. EVIDENCE (§ 132*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE—DRUNKENNESS.

In an action for injuries to a pedestrian by defect in a city sidewalk, evidence as to plaintiff's habit of drunkenness was inadmissible on issues as to plaintiff's intoxication at the time of the injury.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 132.*]

5. APPEAL AND ERROR (§ 1051*)—EVIDENCE—PREJUDICE.

Where the dangerous character of a city sidewalk at the time of plaintiff's accident was amply proved, and not controverted, the city was not prejudiced by the court's erroneous admission of evidence of the subsequent changes in the walk to show, by contrast, wherein the walk in its present condition differed with its condition at the time of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

6. MUNICIPAL CORPORATIONS (§ 804*)—DEFECTIVE SIDEWALKS—INJURIES—INSTRUCTIONS.

An instruction that, if plaintiff at the time he was injured by a defect in a city sidewalk was drunk from the voluntary use of intoxicating liquors, that fact did not relieve him from exercising ordinary care to protect himself from injury, was correct.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1676; Dec. Dig. § 804.*]

7. DAMAGES (§ 131*)—PERSON—INJURY—AMOUNT OF RECOVERY—EXCESSIVENESS.

Plaintiff, a brick manufacturer and contractor, earning from $10 to $25 a day, was injured by a defect in a city sidewalk so that he was kept from work at least two months. His leg entered the hole in the walk to a depth of eighteen inches, greatly lascerating the flesh, and causing a small fracture in the leg, injuring the hip and wrenching the back. *Held*, that a verdict allowing him $275 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357–367, 370, 371; Dec. Dig. § 131.*]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by George A. Stewart against the City of Madisonville. Judgment for plaintiff, and defendant appeals. Affirmed.

Jonson & Jennings, for appellant. Gibson & Kincheloe, for appellee.

SETTLE, J. Appellee recovered of appellant in the court below a verdict and judgment for $275 by way of damages for injuries sustained to his person caused by the alleged negligence of appellant in permitting a hole to exist and remain within its corporate limits in or near the edge of its sidewalk at the intersection of Sugg and Seminary streets into which appellee fell, his right leg entering into the hole to a depth of 18 inches, thereby greatly lacerating the flesh, causing a slight fracture of the small bone of the leg, injuring the hip of that leg, and wrenching his back. The accident occurred between 8 and 9 o'clock p. m., as appellee was going to his home on Seminary street. It seems to be now admitted by appellant that the hole existed at the place and was of the width and depth claimed in the petition, and that the electric lights of the city were not burning when the accident happened. But it is denied in its answer that it was negligent in maintaining it, and averred that appellee was intoxicated when his injuries were received, which condition, together with his negligence in walking too near the edge of the sidewalk, caused his injuries. Both the intoxication and negligence thus charged were controverted by the reply. Appellant was refused a new trial, and, being dissatisfied thereat and with the judgment rendered, has appealed.

Without discussing the evidence in detail, we think it clearly shows that appellee was injured in the manner and to the extent claimed. We think it equally clear that appellant was negligent in permitting the existence of the hole into which appellee fell. There can be no doubt of appellant's knowledge of the hole, for it was made by its agents and employés and had existed several months, during which time one Clark, owner of an adjacent lot, called the attention of one of the appellant's officers to it, and warned him of its dangerous character. It does not appear from the evidence that appellee was not exercising ordinary care for his own safety at the time of the accident. According to the evidence, the electric lights provided by appellant for lighting its streets had been turned off previous to the accident, and, the night being exceedingly dark, it was not surprising that appellee fell into the hole complained of, and the fact that he did so creates no inference that he was drunk or negligent. Four or more witnesses who saw him immediately after the accident and helped to extricate him from the hole testified that he was not then intoxicated, though perhaps as many as two of them admitted that they detected the odor of whisky upon his breath. Appellee admitted, when testifying, that he had taken two or three drinks of whisky that evening; but denied that he was drunk. It is true several witnesses who saw appellee when being carried home, or after he got there, testified that they believed him intoxicated, but we think the weight of the evidence tends to show that he was not intoxicated. At any rate, the question of whether he was drunk or sober was one to be decided by the jury, and that matter, together with its bearing upon the question of a recovery, was properly submitted to them by the instructions.

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There is no just ground for the complaint made by appellant that the trial court erred in refusing to permit them to prove that appellee had the habit of drunkenness. Such testimony would have been incompetent. It was sufficient and proper to show, if it could be done, that appellee was drunk when he received his injuries. Appellant was allowed to introduce all the evidence on that question it offered, but further than this it could not legally go.

Appellant also complains that the court erred in allowing appellee to prove that certain changes had been made by it in the plank way over the sewer at the point where appellee was injured since his injuries were received. The evidence was admitted by the court, as was explained by it to the jury, for the purpose of showing by contrast wherein the sidewalk in its present condition differs in width from its condition at the time of the accident; it being in the opinion of the court necessary for the jury to be fully informed in that way of the former condition of the sidewalk before being sent to view it. The incompetency of such evidence has frequently been declared by this court. The trial court should have confined the evidence to showing accurately what the condition of the sidewalk was at the time appellee was injured; but, as the dangerous character of the place at the time of the accident was so well established by other proof introduced by appellee and was not controverted by the proof of appellant we do not think the testimony complained of was prejudicial to appellant, and for that reason will not reverse the judgment on account of its improper admission. Appellant complains also that the court failed to instruct the jury that appellant was required to use only ordinary care to keep its sidewalks in a reasonably safe condition for the use of the public. The objection is not well taken. While the instructions do not in specific terms contain the words "ordinary care," in meaning and effect they told the jury that such care was all that was required and in addition defined the words "ordinary care," besides imposing upon appellee the duty of exercising like care in his use of the sidewalk.

We find no merit in appellant's criticism of instruction No. 3, which told the jury that, if plaintiff at the time of his injury was drunk from the voluntary use of intoxicating liquors, that fact would not relieve him from the duty of exercising ordinary care for his own protection from injury. This was a proper statement of the law as declared by this court in several of its former opinions. L. & N. R. R. Co. v. Cummins' Adm'r, 111 Ky. 333, 63 S. W. 594, 23 Ky. Law Rep. 681.

There is no ground whatever for appellant's final complaint that the verdict is excessive in amount, or that it was the result of passion or prejudice on the part of the jury. According to the proof, appellant's injuries were sufficient to confine him to his home, or keep him from work at least two months, and the measure of recovery as defined by the instructions required the jury to confine his compensation to the loss of time, physical and mental suffering, and reasonable surgeon's bills caused by the injuries received; no compensation being claimed by him for any permanent impairment of his ability to earn money. It appears from the evidence that he is a brick manufacturer and contractor, and that his earnings amounted to from $10 to $25 a day, in view of all which we are of opinion that the amount of the verdict was altogether reasonable, and therefore could not have been superinduced by passion or prejudice on the part of the jury.

Judgment affirmed.

COMMONWEALTH v. ESTES.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

GAMING (§ 87*)—INDICTMENT—SUFFICIENCY.

Ky. St. § 1960 (Russell's St. § 3558), imposes a fine and imprisonment for conducting a keno bank, faro bank, or other contrivance or machine used in betting. Section 1967 (section 3564) imposes a fine for permitting any game or table, bank, machine, etc., mentioned in section 1960 to be conducted in any house, etc., in one's occupation or under his control. *Held* that, upon indictment under section 1967 for setting up, etc., a machine or contrivance not mentioned by section 1960, it must be alleged that the machine was such as was ordinarily used for gaming for money or property; and an indictment charging that accused suffered a slot machine used in betting whereby money and other things may be won and lost to be set up, etc., was insufficient.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 235–240; Dec. Dig. § 87.*]

Appeal from Circuit Court, Henry County.

"Not to be officially reported."

Jack Estes was convicted of unlawfully permitting a machine used in betting to be conducted in a house in his control, etc., in violation of Ky. St. § 1967 (Russell's St. § 3564). The verdict was set aside, and the prosecution dismissed, and the Commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Chas. H. Sanford, for the Commonwealth. W. O. Jackson, for appellee.

NUNN, C. J. Appellee was indicted in the Henry circuit court in the year 1906 for the violation of section 1967 of the Kentucky Statutes (Russell's St. § 3564). One trial was had, and the jury failed to agree upon a verdict, and another was had in the year 1908, which resulted in a conviction and the assessment of a fine of $250. On motion the

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court set aside the verdict, sustained a demurrer to the indictment, and dismissed the prosecution, from which judgment the commonwealth prosecutes this appeal.

The record, as presented to this court, does not contain any of the testimony given on either of the trials referred to. The sole question before this court is: Does the indictment charge an offense against appellee? The indictment is as follows: "The grand jurors of the county of Henry, in the name and by the authority of the commonwealth of Kentucky, accuse Jack Estes of the offense of unlawfully suffering and permitting a machine or contrivance used in betting, whereby money and other things may be won or lost to be set up and conducted, kept and exhibited in a house and on premises in his occupation and under his control committed in manner and form as follows, to wit: The said Jack Estes in the said county of Henry on the ——— day of July, 1903, and before the finding of this indictment and within the five years last past, did unlawfully suffer and permit a machine or contrivance, to wit, a slot machine used in betting whereby money and other things may be won and lost, to be set up, conducted, kept, and exhibited in a house and on premises in his occupation and under his control, and upon said slot machine so set up, kept, conducted, and exhibited as aforesaid money and property of value was then and there bet, won, and lost, against the peace and dignity of the commonwealth of Kentucky." It will be observed section 1960, Ky. St. (Russell's St. § 3558), to which section 1967 refers for the names of the machines or contrivances the setting up, keeping, conducting, and exhibiting of which is made an offense, does not mention slot machines. Therefore it was necessary to be alleged in the indictment that the slot machine was ordinarily used for gaming. In the case of Commonwealth v. Monarch, 6 Bush, 298, Monarch was indicted for procuring to be set up and kept a "keno table" in a house in his occupation and under his control; it being a contrivance for betting, at which and whereby money and property was bet, won, and lost. In considering the sufficiency of the indictment in that case the court said: "It is not averred that this is a contrivance ordinarily used for gaming; nor that it was indeed a banking game kept for the ordinary purpose of betting, winning, and losing. This kind of table or contrivance is not specifically named in the statute. * * * The statute denounces by name the setting up and keeping a faro bank, at which money is won and lost. Therefore a legal signification is given to that contrivance, and it is specifically prohibited. But not so as to the keno table. This is denounced under the general prohibition of all contrivances set up for the purpose of gambling, and, not being named, some averment showing it to be within this general prohibition is essential." In the case of Ritte v. Commonwealth, 18 B. Mon. 35, in construing the statute, the court said: "To convict, under this section, it should appear that the table, machine, or contrivance was such as is ordinarily used for gambling for money or property. A literal construction of the law would bring within its purview all species of games for pastime and amusement, and subject to punishment and infamy every one who should unfortunately have permitted a backgammon, chess, or draft board, or a set of dominoes to occupy a place upon his parlor table or in his house." To the same effect are the cases of Commonwealth v. Schatzman, 118 Ky. 624, 82 S. W. 238, 26 Ky. Law Rep. 508, Waddell v. Commonwealth, 84 Ky. 278, 1 S. W. 480, Commonwealth v. Shaurer, 4 Ky. Law Rep. 342, and Jarboe v. Commonwealth, 127 Ky. 848, 107 S. W. 227, 32 Ky. Law Rep. 755. This court has uniformly adhered to the rule that to convict a person under the section of the statute referred to, when the machine or contrivance is not named in section 1960, it should be alleged and proved that the table or contrivance was such as is ordinarily used for gambling for money or property. The indictment in this case is defective in this respect, and the lower court did not err in sustaining a demurrer to it.

For these reasons, the judgment of the lower court is affirmed.

CORNETT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

1. INDICTMENT AND INFORMATION (§ 87*) — TIME OF OFFENSE.

The indictment, which was found October 26, 1908, alleged that accused on the 26th of October, 1909, before the finding of this indictment and in the county and state aforesaid, having a wife then living as named, to whom accused was legally married in June, 1903, did unlawfully marry another, etc. *Held*, that accused could not have been misled by the patent error in alleging that the offense was committed on a date after the indictment was found, in view of the further allegation that it was committed before the indictment was found.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 246; Dec. Dig. § 87.*]

2. BIGAMY (§ 2*)—PROSECUTION—DEFENSES.

Under Ky. St. § 1216 (Russell's St. § 3200), providing that whoever, being married, the first husband or wife being alive, shall marry another, shall be confined in the penitentiary, etc., a bona fide belief by one who married another while his first wife was living that she was dead was no defense.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 8, 17; Dec. Dig. § 2.*]

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3. BIGAMY (§ 17*) — PROSECUTION — PUNISHMENT—MITIGATION.

A bona fide belief by one who married while his first wife was living that she was dead could be considered by the jury to mitigate the punishment in a prosecution for bigamy.

[Ed. Note.—For other cases, see Bigamy, Dec. Dig. § 17.*]

Appeal from Circuit Court, Harlan County.

"To be officially reported."

Lloyd Cornett was convicted of bigamy, and he appeals. Affirmed.

W. F. Hall and W. C. L. Huff, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. This appeal is from a conviction under the following indictment: "The grand jury of Harlan county, in the name and by the authority of the commonwealth of Kentucky, accuse Lloyd Cornett of the crime of bigamy, committed in manner and form as follows, viz.: The said Lloyd Cornett on the 26th day of October, 1909, before the finding of this indictment and in the county and state aforesaid, having a wife then living by the name of Sarah Cornett, whose name before she married him was Sarah Lewis, to whom the said Lloyd Cornett was lawfully married on the 5th day of June, 1903, in the county of Harlan, state of Kentucky, did unlawfully marry Frankie A. Creech, against the peace and dignity of the commonwealth of Kentucky." Appellant filed a demurrer to this indictment, which was overruled. He then entered a plea of not guilty, and upon a trial before a jury he was convicted and sentenced to three years' confinement in the penitentiary. Appellant asks a reversal for the following reasons: First, the court erred in overruling his demurrer to the indictment. Second, the evidence shows his second marriage was consummated under the belief on his part that his first wife was dead. Third, the court failed to instruct the jury as to the whole law of the case. Fourth, the court erred in instructing the jury as to what weight should be given certain evidence introduced. We will consider these propositions in the order stated.

It appears from the indictment, as copied, that it was alleged that appellant committed the offense of bigamy on the "26th day of October, 1909," by marrying Frankie A. Creech, when he at that time had a wife living to whom he was married on the 5th day of June, 1903. The indictment was found on the 26th day of October, 1908, which was 12 months before the date of the commission of the offense as alleged in the indictment. Of course, it was not possible that this could have happened, and it is patent that it was an error on the part of the grand jury in fixing that date. It was also alleged in the indictment that the offense was committed by appellant at a date before the finding of the indictment and after his first marriage on June 5, 1903. This made the indictment good, and appellant could not have been misled by the patent error referred to. In the case of Faustre v. Commonwealth, 92 Ky. 34, 17 S. W. 189, 13 Ky. Law Rep. 347, it was alleged in the indictment that Faustre committed the offense therein charged on a certain day in September, 1891, in Kenton county, Ky.; that he on that day had a living wife, Caroline, to whom he was lawfully married on the 19th of September, 1891, in Ontario, Canada. In discussing this question the court said: "Evidently the figures '1891' were by mistake used instead of '1881' to designate the date of the first alleged marriage, for it is not probable both occurred in September, 1891, or that it was intended to be so stated in the indictment. But section 129, Cr. Code Prac., provides that the statement in the indictment as to the time an offense was committed is not material further than as a statement it was committed before the time of the finding of the indictment, unless the time be a material ingredient in the offense."

The time of the commission of the offense was not material in this case. All that was necessary for the commonwealth to allege and prove was that the offense was committed before the finding of the indictment, and that appellant had a wife living at the time, naming her, to whom he was lawfully married, giving the place and date of marriage, if known. This matter was explicitly alleged in the indictment under consideration. Therefore the court did not err in overruling appellant's demurrer thereto. The evidence produced upon the trial shows clearly that appellant married Frankie A. Creech on March 8, 1908, and that his first wife, Sarah, to whom he was married on the 5th of June, 1903, was then living, which shows clearly that the allegations of the indictment were sustained by the evidence, and that the statute against bigamy had been violated. But it is proper to state that the testimony of appellant shows without contradiction that he had reasons to and did believe that his first wife, Sarah, was dead at the time he married Frankie A. Creech, she having left him within a few months after their marriage in June, 1903, and gone with another man to a point in West Virginia about 200 miles from Harlan county. Some of the members of her family went with her, and her sister Mary wrote to her half brother, Ben Dixon, who remained in Harlan county, that she, Sarah, was dead, and the letter was shown to appellant, which led him to believe that she was dead, and that he had a right to and did consummate a second marriage. After learning, however, that his first wife was not dead, he insti-

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tuted a proceeding for and obtained a divorce from her, and was remarried to his second wife. It appears from the testimony that appellant had no intention of or knowledge that he was committing a wrong by his second marriage, and he complains that the court erred in not submitting that phase of the case to the jury. This court in the cases of Davis v. Commonwealth, 13 Bush, 318, Rogers v. Commonwealth, 68 S. W. 14, 24 Ky. Law Rep. 119, and Rice v. Commonwealth, 105 S. W. 123, 31 Ky. Law Rep. 1354, construed section 1216 of the Kentucky Statutes (Russell's St. § 3200), the section under which appellant was indicted, and said: "In the crime of bigamy the felonious intent is not an element in the crime; a person might be guilty of bigamy who in good faith believed that he or she had been lawfully divorced." The section of the statute above referred to is as follows: "Whoever, being married, the first husband or wife, as the case may be, being alive, shall marry any person, shall be confined in the penitentiary not less than three nor more than nine years. * * *" Under the statute the only question to be considered was: Did appellant have a wife living, from whom he had not been divorced, at the time he married his second wife, Frankie A. Creech? And this was shown without contradiction. Under the statute and the decisions construing it appellant should have sought executive clemency instead of prosecuting this appeal. The lower court permitted appellant to introduce proof showing his good faith in believing that his first wife was dead when he married the second time, but admonished the jury, in effect, not to consider it as a defense to the prosecution, but only in mitigation of the punishment to be inflicted upon him if they should find him guilty. This was proper, and is the matter complained of in the fourth ground for reversal.

For these reasons the judgment of the lower court is affirmed.

COLLETT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1909.)

1. CRIMINAL LAW (§ 412*)—EVIDENCE—DECLARATIONS OF ACCUSED.

Evidence of a statement by accused that he thought he would have to kill decedent in the house, but got him started to the barn, but had to kill him before he got him as far as he wanted, which accused denied making, was admissible as substantive evidence, and not merely as affecting accused's credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 894; Dec. Dig. § 412.*]

2. CRIMINAL LAW (§ 684*)—TRIAL—RECEPTION OF EVIDENCE—REBUTTAL.

Evidence of a statement by accused that he thought he would have to kill decedent in the house, but got him started to the barn, but had to kill him before he got as far as he wanted to, was admissible in chief, and should not have been introduced in rebuttal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1618; Dec. Dig. § 684.*]

3. CRIMINAL LAW (§ 684*)—TRIAL—ADMISSION OF EVIDENCE IN REBUTTAL—DISCRETION OF COURT.

The court may in its discretion reject or admit upon terms of substantial justice evidence offered in rebuttal which should have been offered in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1618; Dec. Dig. § 684.*]

4. CRIMINAL LAW (§ 1168*)—APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE.

The Supreme Court will not reverse a conviction where it cannot say that the result was affected by the admission of evidence in rebuttal which should have been introduced in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3136; Dec. Dig. § 1168.*]

5. CRIMINAL LAW (§ 1168*)—APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE—ORDER OF ADMISSION.

The irregularity of admitting in rebuttal, instead of in chief, evidence of a statement by accused that he thought he would have to kill decedent in the house, but got him out, but had to kill him before he wanted to, was not reversible, in view of Cr. Code Prac. § 340, forbidding reversals except for errors prejudicing accused's substantial rights; accused having been asked when he was a witness if he made the statement, and the evidence warranting a finding that the killing was not in self-defense as claimed, and the statements admitted not bearing on the question of self-defense, but only showing malice, of which the jury acquitted accused by finding him guilty of manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3136; Dec. Dig. § 1168.*]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Skelt Collett was convicted of manslaughter, and he appeals. Affirmed.

N. J. Weller, A. G. Patterson, O. V. Riley, and W. G. Colson, for appellant. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Black, Black, Golden & Black, for the Commonwealth.

HOBSON, J. Skelt Collett was married to Rosa Bingham in February, 1907. In July following the wife had typhoid fever, and was removed to the house of her father, Elisha Bingham. On a Sunday not long after she was removed to her father's, her husband, Skelt Collett, came to the house in company with his brother, John Collett, and Bealer Thompson. They had been drinking together before they came, and brought a bottle of whisky with them. Dan Bingham, Than Bingham, Thomas Cox, and John Matt Pursiful were at the house when they came; Dan and Than Bingham being sons of Elisha Bingham and brothers-in-law of Collett. The party at the house had also been drinking, and, when Skelt Collett and his friends came, all of them drank of the whisky which they brought. The whole party were more or less under the influence of whisky. Some words implying more or less of bad feeling

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passed between Skelt Collett and Than Bingham at the house after they had drunk together. Finally Skelt Collett and his companions left the house to go to a neighbors to dinner, and the other party who were at the house went along with them by invitation. When they had gotten a short distance from the house, Mrs. Bingham sent a messenger after them to say that dinner was ready, and they must come back to dinner, but, before the messenger reached them, a difficulty had arisen. When Skelt Collett came up to the house, he had shot off his pistol, and, when he left the house and had gotten a little distance up the road, he again shot it off, shooting in the ground and near Than Bingham's feet. The evidence is not entirely clear as to what occurred here. The weight of the evidence is to the effect that Than Bingham said: "Boys, you know I am disarmed. Skelt, if you had shot in the yard, pa would have killed you, and, if he had not, I would, and you know it." Collett said: "I would have shot in the house, if I had got right." And Than said: "Yes; you always know where to get right." At this Collett shoved Than, and Than said: "Don't be shoving me, Skelt." Collett had his pistol in his hand, and said to Than with an oath: "Hit the grit." Than said: "You can kill me, but you can't run me." Than ran his hand in his pocket, and Collet said: "Don't you draw a knife here, Than." Some words were spoken at this juncture by other members of the party about separating them and not letting them fight; but they seem to have concluded that they were not going to hurt each other. Than pulled his hand out of his pocket, and had in it a pair of brass knucks. Collett shoved him again, and he struck at Collett with the knucks, striking him in the chest. Collett pushed him back and shot him with the pistol, the ball striking him near the chest, and he died from the wound not long afterward. Collett was indicted for the homicide charged with murder. On a trial of the case he was found guilty of manslaughter, and his punishment fixed at 21 years in the penitentiary. To reverse this judgment he appeals.

When Skelt Collett was on the stand as a witness in his own behalf, he was asked if he did not tell James Fuson as they went to Pineville after the shooting that he thought that he was going to have to kill Than there in the house, but he did not want to kill him in the presence of his wife; that he got him out and started to the barn, but had to kill him before he got him as far away from the house as he wanted him. Collett denied making the statement to Fuson. In rebuttal the commonwealth introduced Fuson as a witness, and proved by him that Collett had made the statement. When this proof was made, the court did not charge the jury that the evidence could only be considered on the question of the credibility of Collett as a witness, and the commonwealth attorney in arguing the case to the jury was allowed to argue this as substantive evidence over the objections of the defendant. It is insisted on the appeal that for this a new trial should be granted, and this is practically the only ground insisted on for a reversal. We have held in a number of cases, where testimony is introduced by the commonwealth in rebuttal to contradict a witness showing that the witness has stated out of court things inconsistent with his testimony given on the trial, that it is error for the court not to charge the jury that the evidence is only to be received to contradict the witness, and not as substantive testimony. But that is not this case. Where a third person says out of court that a certain thing occurred, his statement out of court that the thing did occur is not evidence against the defendant that the fact was as stated. The defendant is to be tried by the evidence in court, and not upon what persons say out of court. What the witnesses may say out of court so far as it is inconsistent with what they testify in court may be considered by the jury on the question of their credibility. But what the defendant says out of court is evidence against him. His statements as to what he did when made in court or out of court may be shown; and therefore the testimony of James Fuson as to what the defendant said to him was competent evidence in the case as substantive testimony. It was competent as evidence in chief. So the case comes to this: The evidence was introduced in rebuttal which should have been introduced in chief, and the court allowed the attorney to argue it to the jury as substantive proof. Regularly the evidence should have been introduced in chief. The introduction of it in rebuttal was an irregularity, but the court may in its discretion allow testimony which has been omitted in chief to be introduced after the defendant's evidence is introduced. In this case the thing complained of is the testimony on a single point, and we do not see that the order in which the testimony was introduced could have had any substantial effect upon the result of the trial. The jurisdiction of this court in criminal cases is wholly statutory. We have only such jurisdiction as the law confers. One of the limitations upon our jurisdiction is that a judgment of conviction shall not be reversed for an error of law appearing in the record, unless, upon a consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby. Cr. Code Prac. § 340. When Skelt Collett was on the stand, he was asked if he had not made the statement referred to, and he was not therefore taken by surprise when the evidence was offered. When evidence which should have been offered in chief is offered in rebuttal, the court may in its discretion decline to admit it, or admit it under such terms as the ends of substantial justice require. He

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has a discretion in such matters, and this court will not reverse a judgment of conviction where no injustice has been done, and where upon the whole record it cannot see that the result of the trial was affected by the ruling. There were a number of witnesses present at the homicide. Skelt Collett was 33 years old, Than Bingham 20. He was smaller than Collett, and Collett knew that he had no arms but the brass knucks. The weight of the evidence tends strongly to show that, when Collett shot him, he was not striking at him with the knucks, but that some time had lapsed after he had struck him, and the party had moved on up the road; Bingham being at a little distance from Collett. The jury were well warranted in concluding from all the evidence that the difficulty would not have occurred but for the intoxication of Than Bingham and Collett, and that Collett, the aggressor, was, in fact, in no danger at the hands of Bingham at the time he shot him. Collett claimed that he shot Bingham in self-defense. The statement of Collett proved by Fuson threw no light on this question. It only went to show malice on the part of Collett, and the jury did not find him guilty of shooting with malice. On the contrary, they concluded that the shooting was the result of bad blood arising between the parties when they were drinking. The evidence in question threw no light on the question of self-defense, which was the turning point of the case.

Judgment affirmed.

CITY OF GEORGETOWN v. GEORGETOWN WATER, GAS, ELECTRIC & POWER CO.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

WATERS AND WATER COURSES (§ 196*)—WATER SUPPLY—CONTRACT WITH PRIVATE COMPANY—INSTALLATION OF FILTER.

Where a city furnished the source of water supply, conveying it to a private company, with the distinct understanding that water furnished from it should be used for fire protection and domestic purposes, and the water became impure, not from negligence of the company, but because of bacteria in the source of supply, the company could not be compelled to install a filter plant where the contract with the city was silent on the subject.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Action by the City of Georgetown against the Georgetown Water, Gas, Electric & Power Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

B. M. Lee, for appellant. J. F. Askew, for appellee.

CLAY, C. This is an action by the city of Georgetown against the Georgetown Water, Gas, Electric & Power Company to require the latter to install a filtration plant for the purpose of enabling it to furnish pure and wholesome water to the inhabitants of Georgetown. It appears from the record that in the year 1889 the chairman and board of trustees of Georgetown, Ky., entered into a contract with E. B. Patterson and John Nichols, by which the latter were given the right to take into possession and use for waterworks purposes the Big Spring in Georgetown. In consideration of the right thus granted and the prices provided by the contract, Patterson and Nichols and their assigns agreed to erect and maintain a certain number of hydrants in the city, and to furnish water for fire protection and domestic use. At the same time the city of Georgetown executed a conveyance to Patterson and Nichols, by which the latter were given the right to enter upon the ground where the Big Spring was located, and to pump water therefrom. Some time thereafter one D. J. Hauss, who had become the assignee of the original company and assignee of the original rights to the water from Big Spring, purchased from the city of Georgetown a franchise giving him and his assigns the right to furnish water for fire protection, and for the use of the inhabitants of Georgetown. In consideration of the right thus granted, Hauss and his assigns agreed to expend $23,000 in new machinery, extension of mains, pumps, buildings, boilers, electric apparatus, etc., for the purpose of putting the plant in first-class condition. Appellee, the Georgetown Water, Gas, Electric & Power Company, succeeded to the rights of Hauss, and is now engaged in furnishing water for the use of the city of Georgetown and its inhabitants. In this action the city of Georgetown charges that it was contemplated by the parties to the contract that appellee should furnish pure and wholesome water for use of the citizens of Georgetown; that, as a matter of fact, the water furnished by appellee is impure and filled with bacteria, and the use of it by the inhabitants of Georgetown has resulted in spreading disease among them. The petition concludes with a prayer for a judgment determining it to be the duty of appellee to forthwith put in a good and sufficient filter plant, and that it be compelled by the court to do so and to deliver to the plaintiff and its citizens pure and wholesome water for drinking and domestic purposes. Appellee interposed a demurrer to this petition and also filed an answer. The demurrer to the petition was sustained, and, appellant declining to plead further, the petition was dismissed, from which judgment this appeal is prosecuted.

The contracts between the city of George-

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town and appellee and his predecessors nowhere provide for the erection of a filter plant. It was not only contemplated by the parties that the water furnished to the city of Georgetown should be procured from the Big Spring, but the latter was actually conveyed to appellee's assignors for the purpose of being used to furnish water. Thus the source of supply of the water was actually furnished by the city of Georgetown. It is not charged in the petition that the pollution of the Big Spring was due to any act of omission or commission on the part of appellee. That being the case, the impurity of the water is due, not to any negligence or carelessness on the part of appellee, but to the impure source from which the water itself is furnished. As the city furnished the source of the water supply, with the distinct understanding and agreement that the water so furnished by it should be used for fire protection and domestic purposes, we are unable to see upon what ground it can be contended that it is the duty of appellee when the contracts are silent upon the subject to go to the additional expense of furnishing a filter plant. To impose this duty upon appellee would be in effect to make a new contract between the parties, which the courts have no power to do.

The appellant relies upon the case of City of Harrodsburg v. Harrodsburg Water Co., 73 S. W. 1032, 24 Ky. Law Rep. 2193. There is a broad distinction, however, between the facts of that case and the facts of the case under consideration. There the city of Harrodsburg merely had knowledge of the fact that the water company would take its water from Salt river. This court held that the mere knowledge of the city that the water would be taken from Salt river did not relieve the water company of its obligation to furnish pure and wholesome water for domestic purposes. This is not a case of mere knowledge on the part of the city, but the city actually furnishes the water, while appellee acts as a distributing agent of the water so furnished. Thus an entirely different question is presented. When a city as part of its contract with a company furnishing water to its citizens agrees to and does furnish the water so used, and that water becomes impure, not because of any acts of omission or commission on the part of the water company, but because of bacteria in the source of the water supply, it cannot, in the absence of a contract to that effect, impose upon the water company the duty of constructing a filtration plant for the purpose of purifying such water. Under such circumstances the question is not one for the courts, as herein presented, but for efforts on the part of public-spirited citizens of the city and the water company to reach a just and equitable agreement in the matter. We therefore conclude that the trial court properly sustained the demurrer to the petition.

Judgment affirmed.

DAVIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

1. CRIMINAL LAW (§ 721½*)—TRIAL—ARGUMENT—COMMENTS OF COUNSEL—FAILURE TO PRODUCE WITNESSES.

It is proper for the state's attorney to comment upon accused's failure to introduce a witness whose testimony the other evidence shows would have been material and important for accused, so that the state's attorney could comment on accused's failure to introduce for himself one jointly indicted with him for murder, though such comment would be improper if accused had offered his alleged abettor as a witness, and he declined to testify as he might.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

2. COURTS (§ 74*)—PLACE OF SESSIONS.

If a witness who has been subpœnaed is unable to appear and testify because of illness, the court in the exercise of a sound discretion may upon motion of the party desiring the evidence permit the jury, together with counsel and parties, to go to the witness if convenient, and there take his testimony.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 257; Dec. Dig. § 74.*]

3. CRIMINAL LAW (§ 595*) — CONTINUANCE — ABSENT WITNESS.

Refusal to grant a continuance to procure an absent witness when the state's attorney refused to permit an affidavit for continuance to be read as the evidence of the absent witness, which stated that accused could prove by such witness that he was directly in front of the building in which decedent was killed by being shot through a hole in the door, saw and heard the shooting, was well acquainted with accused, and knew he was not near the place and did not do the killing, was reversible error, where no witness testified who saw the person do the shooting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1323; Dec. Dig. § 595.*]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Jeff Davis was convicted of murder, and he appeals. Reversed, and new trial granted.

S. H. Patrick, John Howard, S. E. Patton, and J. D. Arnett, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant and one Cal Miller were indicted for the murder of Andrew Bush. The indictment contained two counts. In one it was charged that the appellant shot and killed Bush; Miller being present, aiding and abetting. In the other Miller was named as the principal, and appellant as the aider and abettor. Appellant demanded a separate trial, and, being convicted and his punishment fixed at imprisonment for life, he asks a reversal for reasons that will be presently stated.

Briefly, the facts shown by the record are

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these: Bush was in the house of Abraham Lunsford, his brother-in-law, in company with Rachael Lunsford, the wife of Abraham Lunsford, and two other persons. While seated in the house he was killed by some person on the outside, who fired the pistol with which the fatal wound was inflicted through a hole in the door. No witness was introduced who saw the person fire the shot; but Rachael Lunsford testified that, immediately after the shot was fired, she went to a window, and, looking out, saw and recognized the appellant, Cal Miller, and another man, standing near where the shot came from. Other witnesses were introduced in behalf of the commonwealth who testified that they saw the appellant and Miller in the neighborhood of the Lunsford house about the time the homicide was committed. Appellant in his own behalf testified that he did not do the shooting, nor was he present at the time it was done; but, on the contrary, was in the town of Jackson, a half-mile away. Other witnesses were introduced who corroborated his statement that he was in Jackson at the time Bush was killed. A singular feature of the case is that there is no evidence whatever conducing to show any motive or reason on the part of appellant for taking the life of Bush. Why he killed him, if he did so, is not shown.

A reversal is asked upon three grounds: First, error in refusing to grant a continuance, and in declining to permit an affidavit showing what an absent witness would state to be read as his deposition; second, permitting the jury to go to the residence of a witness nearby the courthouse to hear his testimony in behalf of the commonwealth; and, third, for improper argument of the commonwealth's attorney.

The alleged improper argument of the commonwealth's attorney consisted in comments upon the failure of the appellant to introduce in his behalf Cal Miller, who was jointly indicted with him. The record does not show whether the appellant offered Cal Miller as a witness or not. If he had offered him, and Miller had declined to testify, as he might have done upon the ground that his testimony might have incriminated him, it would have been improper for the commonwealth's attorney to comment to the prejudice of appellant upon his failure to testify. But, if the appellant did not offer to introduce Miller as a witness, the remarks of the commonwealth's attorney were not objectionable, as it is proper to comment upon the failure of the accused to introduce in his behalf a witness whose testimony might be obtained, when there is other evidence that the testimony of the absent witness would be material and important for the accused.

During the trial, when James L. Stidham, who had been subpœnaed, was called as a witness for the commonwealth, it was announced that he was at home sick and unable to attend as a witness. Thereupon the court, upon motion of the attorney for the commonwealth, permitted the jury to go to the residence of Stidham, a short distance from the courthouse, for the purpose of receiving his testimony. The jury was accompanied by the trial judge, the defendant and his counsel, and the attorney for the commonwealth. In our opinion this practice was proper. If during the trial of a case it appears that a witness who has been subpœnaed, and whose testimony is desired by either one party or the other, is unable on account of sudden illness to appear in court and give his evidence, the court in the exercise of a sound discretion may upon motion of the party desiring his evidence permit the jury in company with the counsel and parties upon both sides of the case to go to the place, if it be convenient, where the witness is, and there permit the jury to receive his evidence. If this practice were not allowable, it might happen that a party would be deprived of the evidence of an important witness in his behalf.

In the affidavit for a continuance the appellant stated that he could prove by Chester Back, an absent witness whose attendance due diligence had been used to obtain, that "he was present and directly in front of the grocery and whisky shop in which the deceased was killed; that he saw and heard the shooting in which deceased lost his life; that he was well acquainted with the defendant Jeff Davis and Cal Miller, and knows that neither one of the said defendants did the shooting, and was not at or near the place at the time of the killing." And he asked that the affidavit be read as the evidence of this witness. When the commonwealth's attorney refused to permit this affidavit to be read as the evidence of the absent witness, the court should have granted the continuance, and the failure to do so was prejudicial error. This testimony was exceedingly important for the defendant. It was directed to a vital issue in the case, and no other witness was introduced who supplied the testimony it was averred this witness would make.

The judgment is reversed for a new trial in conformity with this opinion.

WILSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 22, 1909.)

1. CRIMINAL LAW (§ 753*)—TRIAL—DIRECTION OF VERDICT.

Where the evidence wholly failed to connect one with the crime, the court properly directed his acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727–1730; Dec. Dig. § 753.*]

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2. CRIMINAL LAW (§ 1159*) — APPEAL — VERDICT—CONCLUSIVENESS.
The Supreme Court cannot interfere with a conviction which was supported by some evidence.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.
Testimony that another told witness that accused had done one thing he said he would, as he said he would kill decedent, and that such other told witness that accused told him that he would have intercourse with decedent's wife, and shoot decedent, were inadmissible as hearsay.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. § 419.*]

4. WITNESSES (§ 388*)—IMPEACHMENT.
Testimony that R. told witness that accused told such R. that he would have intercourse with decedent's wife and kill decedent, which accused denied, was not justified as contradicting R., where R. did not testify until after the witness had testified, and no foundation was laid therefor by first asking R. whether he made such statements.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233; Dec. Dig. § 388.*]

5. HOMICIDE (§ 338*)—APPEAL—ADMISSION OF EVIDENCE—HEARSAY.
Hearsay testimony that another told witness that accused told him that he would have intercourse with decedent's wife and kill decedent and of statements by witness' informant that accused had done one thing he said he would by killing decedent, were highly prejudicial and reversible, where no other witness than witness' informant testified that accused made such statements, which accused denied.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709–713; Dec. Dig. § 338.*]

6. HOMICIDE (§ 116*)—SELF-DEFENSE.
An instruction that if accused killed deceased, but, when he did so, he believed, and had reasonable ground to believe, that decedent was then about to inflict death or great bodily harm upon him, or such reasonably appeared to him, and it further reasonably appeared that the only reasonable means of protecting his life or person was to kill decedent, which he did, the killing was excusable as in self-defense, and the jury should acquit, is proper.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158–163; Dec. Dig. § 116.*]

Appeal from Circuit Court, Owen County.
"Not to be officially reported."
Ed. Wilson was convicted of voluntary manslaughter, and he appeals. Reversed and remanded for new trial.

J. H. Settle, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. Appellant shot and killed Anderson Webster in the city of Owenton. The indictment returned against him for the homicide charged murder, but his trial thereunder resulted in a verdict from the jury finding him guilty of voluntary manslaughter, and fixing his punishment at confinement in the penitentiary 21 years.

Appellant is a negro, and deceased also belonged to that race. The homicide occurred at the residence of appellant's brother, Herndon Wilson, who was jointly indicted with appellant as an accomplice, but as the evidence wholly failed to connect him in any way with the crime the trial court, upon its conclusion, very properly instructed the jury to acquit him, which was done accordingly. The only eyewitnesses to the killing were appellant, his brother, and another colored man, Frank Brown. The latter, however, was too far from the place of the killing to hear anything that was said at the time by the parties. According to some of the evidence, the deceased was jealous of his wife from whom he had shortly before his death separated, after placing her in a house in a suburb of Owenton known as "Dog Hill." He seemed to suspect appellant of maintaining improper relations with his wife, and had on one occasion ordered him to stay away from "Dog Hill," and on several occasions threatened his life. At least one of these threats was made by him to appellant and others to persons who forthwith communicated them to appellant. Deceased was informed that appellant had the day before the homicide visited a colored church festival attended by his (deceased's) wife, and while there "treated" her and two other women to ice cream, at which deceased seemed to take fresh offense. Appellant in testifying on the trial admitted that he obtained shortly before the killing of deceased a pistol which he carried and with which he shot deceased, but claimed that he thus armed himself to protect his life from deceased, believing from the threats and conduct of the latter that he would attempt to take his life. According to the testimony of appellant and his brother, deceased a few minutes before his death asked appellant at the house of his brother if he was not carrying a pistol for him, and, without awaiting an answer, said he would go to his own home, get his pistol and return, that he and appellant might "shoot it out," after which statement he immediately left for his own home, from which he shortly returned to the home of appellant's brother, where appellant had remained during deceased's absence. Just before reaching the house deceased was met by appellant's brother, who advised him to return to his own house and give no trouble, but he refused to do so, and went on to the house of appellant's brother, where he was shot and killed in front of the door by appellant who was at the time standing within the house. Appellant and his brother further testify that immediately before and when shot deceased was endeavoring to draw a pistol from his pocket, and that while in the act of doing so he was standing in front of the door, and looking at appellant. According to the testimony, a pistol was found in one of deceased's pockets clasped in one hand. Upon these facts appellant based his claim of self-defense, and insisted that he

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shot deceased under the belief that the latter was about to shoot him and that he would have done so but for appellant's obtaining the first shot which proved to be fatal.

It was shown by the testimony of Cal Riddle, a witness introduced by the commonwealth, that a short time before the killing appellant told him he intended to have intercourse (using an indecent word to indicate the act) with deceased's wife and then shoot him. Appellant denied the statement attributed to him by Riddle, but the jury evidently accepted its truth, and rested their verdict upon it and the further fact that, in waiting at his brother's residence for deceased to go to his own house, arm himself, and return, appellant meant to accept and did in fact accept the challenge of deceased to "shoot out" their differences, thereby making the transaction a mutual combat or affray. We are not, however, concerned with the reasons of the verdict, nor can we interfere with the verdict upon the ground that it finds no support from the evidence, as there was some evidence authorizing it.

While numerous grounds were assigned by appellant for a new trial, and are now urged for a reversal, our examination of the record convinces us that but one material error was committed by the trial court. This error arose from the improper admission by the court of so much of the testimony of Laura Ware as related to a conversation she had with Cal Riddle about the homicide the night following its occurrence. That is to say, the witness was allowed to testify that Riddle then said to her: "Ed [meaning appellant] has done one thing he told me he would do. He said he would kill him" (meaning deceased). Also the following: "He [Riddle] did tell me on the street near Gibson's that Ed said he would ——— his [deceased's] wife, and shoot him." These statements of Laura Ware were purely hearsay evidence, and therefore clearly incompetent. Their admission is attempted to be justified on the ground that they served to contradict Riddle. This cannot be true. Riddle did not testify until after Laura Ware had been introduced and testified. No foundation was laid for such contradiction by first asking Riddle whether he had made to Laura Ware the statements in question. Moreover, the latter's testimony did not contradict Riddle. On the contrary, he admitted that he said to Laura Ware on the night following the homicide and near Gibson's house that appellant said to him, "Anderson [meaning deceased] is jealous. I'll ——— his wife, and shoot him." Riddle did not deny the other statement attributed to him by Laura Ware, viz., "Ed has done one thing he told me he would do. He said he would kill him" (deceased). Indeed, he was never questioned as to this statement. It is manifest that what Laura Ware stated had been told her by Riddle served to corroborate Riddle, and was apparently introduced for that purpose alone. It needs no citation of authority to demonstrate the gross incompetency of such testimony, and that its effect was hurtful and highly prejudicial to appellant cannot be doubted in view of the fact that no witness other than Riddle testified that appellant made any such statement as to the wife of deceased, or threat against deceased, as Riddle claimed to have heard from him. In other words, the only corroboration of Riddle's testimony was furnished by the incompetent statements of Laura Ware, whose only information came from the previous declarations of Riddle himself. The admission of the incompetent testimony of Laura Ware alone compels the reversal of the judgment in this case.

The instruction as to self-defense given by the court, though perhaps not on the whole incorrect, is inaptly expressed. Upon a retrial of the case the circuit court, in lieu of it, should give the following: "Although the jury may believe from the evidence beyond a reasonable doubt that the defendant shot and killed deceased, yet if they further believe from the evidence that when he did so he believed and had reasonable grounds to believe that deceased was then about to inflict upon him death or great bodily harm, or it reasonably appeared to him that such was the case, and it further reasonably appeared to him that the only reasonably safe means of protecting his life or person from such danger real or to him apparent was to shoot deceased, and the shooting and killing of deceased was done under these circumstances, the same was excusable on the ground of apparent necessity in the defense of himself, and the jury should acquit defendant."

For the reasons indicated, the judgment is reversed and cause remanded for a new trial consistent with the opinion.

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BOGGS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 22, 1909.)

1. INTOXICATING LIQUORS (§ 148*) — LOCAL OPTION LAW — SALE — PERSONS TO WHOM SOLD.

Under Ky. St. 1909, § 2558a (Russell's St. § 3646), Acts 1904, p. 160, c. 76, as amended by Act March 21, 1906 (Acts 1906, p. 363, c. 87), and Act March 19, 1908 (Acts 1908, p. 55, c. 15), making it unlawful to sell intoxicants in any town, etc., where such sale has been prohibited under the local option law, except by manufacturers selling their own liquor at the place of manufacture to a wholesale or licensed retail dealer, a manufacturer could not sell liquor to one not a wholesale or retail dealer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.*]

2. STATUTES (§ 253*)—ENACTMENT—TIME EFFECTIVE.

Act approved March 19, 1908 (Acts 1908, p. 55, c. 15), relating to the violation of the local option law, would not apply to a transaction made in March of that year; Const. § 55, providing that no act shall become a law until 90 days after adjournment unless an emergency clause is attached.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 335; Dec. Dig. § 253.*]

3. INTOXICATING LIQUORS (§ 148*)—LOCAL OPTION LAW—SALE BY DISTILLER.

Acts 1904, p. 160, c. 76, as amended by Act March 21, 1906 (Acts 1906, p. 363, c. 87), making it unlawful to sell intoxicants in any town, etc., where such sale has been prohibited under the local option law, except by manufacturers selling their own liquor at the place of manufacture, was enacted to permit manufacturers to dispose of their own product at the place of manufacture, and the fact that a distillery was not in operation at the time a sale was made at the distillery did not make the sale in violation of the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.*]

Appeal from Circuit Court, Lawrence County.

"To be officially reported."

Nelse Boggs was convicted of violating the local option law, and he appeals. Reversed and remanded for further proceedings.

M. S. Burns, for appellant. Jas. Breathitt, Atty. Gen., and T. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HOBSON, J. Nelse Boggs was indicted in the Lawrence circuit court for violating the local option law in selling five gallons of whisky to T. W. Hill. On the trial of the case the proof for the commonwealth was as follows: "I purchased from the defendant, Nelse Boggs, five gallons of whisky, and paid him for it. He gave me the whisky in a five-gallon keg all at the same time, and I took it all away from his distillery at that time, and did not drink any of it on the premises. I think this sale occurred in the early spring of 1908. My wife was very low with typhoid fever, and the doctors told me I must get some whisky, as her life probably depended upon it. I first tried to get a half of a gallon from Mr. Boggs, the defendant, and told him that I wanted it for my wife, but he would not let me have any amount less than five gallons, and said he had no right to sell any less, but could sell me five gallons or more as a distiller of his own manufacture. I was not a retail liquor dealer at that time." The defendant was introduced on his own behalf, and testified as follows: "I know Mr. Hill the witness for the commonwealth, and sold him the whisky he spoke of. I sold him a five-gallon keg of whisky of my own manufacture. The whisky was in the original package, and was all delivered to witness at the same time, and he took it all away, and did not drink any of it on the premises. Mr. Hill first asked for a half gallon, but I refused to let him have any amount less than five gallons, and he agreed to buy the five-gallon keg, and I sold it to him. I had formerly run and operated a distillery, but about 1907 I shut down my distillery, and did not manufacture any more whisky thereafter. This whisky I sold him was my own manufacture, but I was not then manufacturing whisky. I had shut down my distillery some time before this sale, and at the time of the sale was not manufacturing any whisky at all. I could not say whether Mr. Hill, the witness, was a retail liquor dealer when I sold him the whisky or not, but he had been and had a retail license." On this evidence the court instructed the jury in substance that, if they believed from the evidence beyond a reasonable doubt that Boggs had sold whisky to Hill, they should find him guilty. He also gave them the following instruction: "Although the jury should believe from the evidence beyond a reasonable doubt as defined in instruction No. 1, yet if they further believe from the evidence that the defendant at the time he sold said liquors, if he did so, was a manufacturer of liquors, and said liquor was of his own make and was in good faith sold by him in the usual course of trade by the wholesale in quantities of not less than five gallons delivered at one time, and not to be drunk on the premises, and not with a view to its immediate division into smaller quantities, they will find the defendant not guilty." The jury found the defendant guilty, fixing his fine at $100, and he appeals.

The indictment was first found on May 8, 1908, and, a demurrer having been sustained to it, a new indictment was found. The sale relied on therefore was made before May 8, 1908, and, as Mr. Hill says, in March of that year. The prosecution is based on section 2558a, Ky. St. 1909 (Russell's St. § 3646). That section as originally adopted read as follows: "It shall be unlawful to sell by wholesale any spirituous, vinous, malt or other intoxicating liquors, regardless of the name by which it is called (except manufacturers selling liquors of their own make) in any county, district, precinct, town or city, where the sale of such liquor has been prohib-

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ited by special act of the General Assembly, or by vote of the people under the local option law. Any person violating this act shall be deemed guilty of violating the local option law, and shall be subject to trial and punishment according to the provisions of the same and its amendments." See Acts 1904, p. 160, c. 76. By the act of March 21, 1906, the words "at the place of manufacture" were added after the words "of their own make." See Acts 1906, p. 363, c. 87, by the act of March 19, 1908, the words "to a wholesale dealer or a licensed retail dealer" were added after the words "at the place of manufacture," so that the section in its present form reads as follows: "It shall be unlawful to sell by wholesale any spirituous, vinous, malt or other intoxicating liquors, regardless of the name by which it is called, except manufacturers selling liquors of their own make, at the place of manufacture to a wholesale dealer or a licensed retail dealer in any county, district, precinct, town or city where the sale of such liquors has been prohibited by special act of the General Assembly or by vote of the people under the local option act. Any person violating this act shall be deemed guilty of violating the local option law and shall be subject to a trial and punishment according to the provisions of same and its amendments." See Acts 1908, p. 56, c. 15. As Hill was not a wholesale or retail dealer, Boggs had no right to sell the whisky to him under the act of 1908; but that act contained no emergency clause, and did not take effect until 90 days after the adjournment of the Legislature. See Constitution, § 55. The act was approved March 19, 1908, and was therefore not in force when the transaction in contest took place. The court properly so held. The instructions given the jury were based on the act of March 21, 1906. The court, in substance, told the jury that the defendant was guilty, unless at the time he made the sale he was a manufacturer of whisky. This instruction under the proof that he had shut down his distillery some time before, and was not then manufacturing whisky, induced the verdict. The evidence was conclusive that the whisky was of his own make, and was in good faith sold by him by the wholesale in a quantity not less than five gallons, delivered at one time, and not to be drunk on the premises. There was nothing indicating an evasion of the local option law. The whisky was sold at the distillery where it was made. The fact that the distillery was not then in operation is wholly immaterial. The purpose of the statute was to give manufacturers the right to dispose of their product at the place of manufacture. To limit the right to the time the distillery is in operation would be to add to the terms of the statute and to defeat the purpose for which it was enacted; for few, if any, distilleries run throughout the year, and many plants are shut down when the product on hand unsold is as large in amount as the operator deems he can safely risk. Under the evidence the court should have instructed the jury peremptorily to find the defendant not guilty.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

HINTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

1. CRIMINAL LAW (§ 1159*) — APPEAL — WEIGHT OF EVIDENCE.

Where the evidence justifies submission to the jury, a judgment of conviction will not be reversed because in the opinion of the Court of Appeals a preponderance of the evidence was in favor of accused's innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

2. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF CRIME—CONSTRUCTION OF STATUTE.

Under Ky. St. 1909, § 1180 (Russell's St. § 3714), providing that, if one be convicted of offenses described in preceding sections (including false swearing), he shall be disqualified from being a witness in any case, a person on trial for murder who had previously been convicted of false swearing was disqualified from testifying in his own behalf, notwithstanding Cr. Code Prac. § 223, subd. 1, providing that in criminal prosecutions accused on his own request shall be allowed to testify in his own behalf.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 114; Dec. Dig. § 48.*]

3. CRIMINAL LAW (§ 722½*)—TRIAL—MISCONDUCT OF COUNSEL.

In a murder trial, where the state had prevented accused from testifying in his own behalf because of his previous conviction of false swearing, and his counsel in argument had complained that the state by objecting to accused's testimony was keeping some of the evidence from the jury, language in the county attorney's argument that: "We are not responsible for Wes Hinton [accused] being a perjurer, and being thus deprived of the right to testify in his own behalf. We are sorry for him and sorry for his family, but it is a matter in which we are not to blame"—was not improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1675; Dec. Dig. § 722½.*]

4. CRIMINAL LAW (§ 723*)—TRIAL—MISCONDUCT OF COUNSEL.

In a murder case, where accused's counsel made an appeal to the jury not to convict his client and send him to the penitentiary, and thus deprive his wife and little girl of the companionship of the husband and father, it was not improper for the county attorney in his argument to state that: "We do not think he is a fit associate for his wife and sweet little girl."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.*]

5. CRIMINAL LAW (§ 715*)—TRIAL—ARGUMENT OF COUNSEL.

In a murder case, it appeared that shots had been exchanged between decedent and accused, and witnesses had testified that there was a difference in the sound of the two pistols used. The defense showed that the pistol which made the loudest report was first fired, and that decedent had the pistol of largest caliber. *Held*, that the exhibiting of certain pistol cartridges ranging in caliber from 32 to 38 by the county attorney during his argument to illustrate his

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contention that, though accused had the smaller pistol, if he was using a long cartridge while decedent was using a short cartridge, the pistol of smaller caliber would make a louder report than the larger one, was not prejudicial to accused, though the cartridges had not been used in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1666; Dec. Dig. § 715.*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Wes Hinton was convicted of voluntary manslaughter on a charge of murder, and he appeals. Affirmed.

Walker Wilkins and J. L. Rogers, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. The appellant, Wes Hinton, was indicted by the grand jury of Muhlenberg county, charged with the willful murder of Roy Greer. The petit jury which tried the case found him guilty of voluntary manslaughter included in the indictment, and fixed his punishment at confinement in the penitentiary for the term of five years. To reverse the judgment enforcing this verdict he is here on appeal.

The appellant and Roy Greer, with several others, had been engaged in gambling and drinking just prior to the tragedy which resulted in the death of Greer. A quarrel arose between appellant and Greer, for which no satisfactory reason is given in the evidence. Both men were armed, and after some words opened fire upon each other, with the result above stated. We do not deem it necessary to say as to the facts more than that the evidence fully justified the submission of the case to the jury, and, this being true, under our well-setfled rule, we will not reverse the judgment because in our opinion a preponderance of the evidence was in favor of the innocence of the accused. His guilt or innocence being, as we have often said, a question peculiarly within the province of the jury, we will look into the evidence only to ascertain whether or not there was sufficient to authorize the trial court to give the case to the jury at all. The appellant does not complain of the instructions given by the trial judge, and, indeed, these seem to be beyond the reach of adverse criticism.

The first error relied on for reversal is the refusal of the court to allow the defendant to testify in his own behalf. When the defendant offered himself as a witness, he was asked upon the voir dire examination whether he had not been convicted and sentenced in this state for the crime of false swearing, to which he answered in the affirmative. Thereupon the court sustained the objection of the commonwealth to the competency of the appellant as a witness. The ruling of the court was based upon the language of section 1180, Ky. St. (section 3714, Russell's St.), which is as follows: "If any person be convicted of either of the offenses described in the seven preceding sections (one of these being false swearing), he shall ever afterward be disqualified from giving evidence in any judicial proceeding, or from being a witness in any case whatever." The appellant insists that the first subsection of section 223 of the Criminal Code of Practice authorized him to testify in his own behalf, notwithstanding the provision of the statute above quoted. Subsection 1 is as follows: "That in all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this commonwealth the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her." This provision of the Code was enacted for the general purpose of allowing parties charged with crime to testify in their own behalf; such persons, before the enactment of the provision, being incompetent to testify against the commonwealth. But it does not follow that persons charged with crime who are specifically disqualified by the provisions of the statute are nevertheless made competent by the provision of the Code; and especially is this true when we bear in mind that the statute was enacted subsequently to the provision of the Code relied upon by appellant. The same process of reasoning, if applied to section 605 of the Code of Civil Practice, would render section 1180 of the Statutes entirely nugatory. Section 605 is as follows: "Subject to the exceptions and modifications contained in section 606, every person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered." Now, here is a general law which in language is quite as comprehensive as that of the Code of Criminal Practice which renders every person (except in certain specified cases not here involved) competent to testify for himself or another. Prior to the enactment of this section, parties in interest were incompetent to testify for themselves in any case, and it was the object of the statute simply to remove this general incompetency. Section 1180, Ky. St., as said before, was enacted subsequently to the Code provisions, and therefore is neither repealed nor modified by them. The language of the statute is so comprehensive that it leaves no room for doubt that it was intended by the Legislature to disqualify all persons convicted of any of the various branches or grades of perjury or false swearing from testifying, or in any way giving evidence in any judicial investigation. This disqualification is a part of the punishment for the commission of the

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offense, and there is no good reason why the courts should hesitate to enforce it.

Appellant complains that the county attorney was guilty of misconduct in the closing argument in commenting upon the fact that he was not allowed to testify. The language complained of is as follows: "We are not responsible for Wes Hinton being a perjurer, and being deprived of the right to testify in his own behalf. We are sorry for him and sorry for his family, but it is a matter in which we are not to blame. We do not think he is a fit associate for his wife and sweet little girl." The county attorney filed his own affidavit, admitting the use of the language complained of, but showing that it was said in response to the argument of defendant's counsel that the state, by objecting to Hinton's testifying, was keeping some of the evidence from the jury; that to meet this charge he used the language complained of. We think this was proper, and, indeed, do not see how the commonwealth could have met the charge made by counsel for defendant in any other way. The affidavit of the county attorney also shows that the counsel for defendant made an appeal to the jury not to convict his client and send him to the penitentiary, and thus deprive his wife and little girl of the companionship of the husband and father. To meet this plea the representative of the state said: "We do not think he is a fit associate for his wife and sweet little girl." We do not see why, under the circumstances, this was not a legitimate argument. The defendant had been convicted of perjury, and was then being tried for killing a human being in a quarrel which originated while he and his victim were drinking and gambling.

There was other language used by the county attorney which is complained of, but the use of this language was denied, and the trial court evidently found in favor of the commonwealth upon the issue thus raised. The language itself was of a similar character to that already set forth, and, even had it been used, was justified by the facts. The county attorney also exhibited during his argument certain pistol cartridges ranging in caliber from 32 to 38. This was done to convince the jury that a long 32-caliber cartridge would make as loud a report as a short 38-caliber cartridge; in other words, that a long 32-caliber cartridge had as much powder in it as a short 38-caliber. These cartridges had not been used in evidence, but we are unable to see that the defendant was unjustly injured by what took place. Some of the witnesses had testified that there was a difference in the sound of the two pistols used, and the defense showed that the pistol which made the loudest report was fired first, and that the decedent had the pistol of largest caliber. The county attorney was undertaking to show that, although the appellant had the smaller pistol, if he was using a long cartridge, while the decedent was using a short cartridge, the pistol of smaller caliber would make a louder report than the larger one. Whether there was anything in this argument or not we do not undertake to say; but the exhibition of the cartridges added nothing to its value, and could not in our opinion have been prejudicial to the interest of the defendant.

Upon the whole case, we are satisfied that the defendant had a fair and impartial trial, and has no just ground of complaint of the result.

Judgment affirmed.

KREBS v. BLATZ.†

(Court of Appeals of Kentucky. Sept. 22, 1909.)

1. BILLS AND NOTES (§ 42*)—CERTIFICATES OF DEPOSIT—NATURE OF INSTRUMENT.

A writing issued by a bank certifying that a certain person has deposited a sum payable to his order within a certain time on the return of the certificate was, in effect, a promissory note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 62; Dec. Dig. § 42.*]

2. BILLS AND NOTES (§ 280*)—LIABILITIES ON TRANSFER—LIABILITY AS ASSIGNOR.

One who placed his name on the back of a certificate of deposit, and delivered it to another, became liable thereon as assignor; nothing further appearing.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 280.*]

3. PAYMENT (§ 39*)—APPLICATION—ELECTION.

Defendant wrote his name on the back of certificates of deposits which he delivered to plaintiff, and after the bank failed leaving a part of them unpaid, and plaintiff was advised that defendant's liability on the certificates was that of assignor, the parties agreed that defendant waived his right to require plaintiff to first sue the bank on the certificates to fix defendant's liability as assignor, and that plaintiff should give defendant time thereon, and, as the certificates matured, defendant paid them and thereafter paid annual interest on certain notes executed at the same time, without claiming that the payments applied to the certificates should have been applied to the notes. *Held*, that defendant should have denied liability on the certificates as assignor when he knew that plaintiff intended to hold him as such, and had applied the payments to the certificates, and, having acquiesced for 14 years in such application, he could not then claim that the payments were made upon the notes, and not upon the certificates.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104–114; Dec. Dig. § 39.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by M. A. Blatz against Andrew Krebs. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin F. Washer, for appellant. O. A. Wehle and L. B. Wehle, for appellee.

HOBSON, J. In the year 1893 Andrew Krebs and M. A. Blatz were the only stockholders of the Blatz-Krebs Stone Company

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† Rehearing denied November 9, 1909.

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which had a paid up capital stock of $80,000. About the middle of March of that year, Krebs proposed to Blatz to buy him out. The proposition was accepted. The amount coming to Blatz under the proposition was $51,246.35. Krebs paid $1,000 of this by check and delivered to Blatz interest-bearing certificates of deposit, which he held against the Louisville Deposit Bank amounting to $19,226.17; also, a note for $1,000 on Thornton and Johnson. He wrote his name on the back of the note and on the back of the certificates of deposit, and delivered them to Blatz. For the remainder of the purchase money he executed to Blatz three notes for $8,000 each and one for $5,027.93 which were secured by mortgage on certain real estate. Numerous payments were made upon these notes, but, a considerable sum being unpaid, Blatz brought this suit against Krebs on February 24, 1908, to recover judgment for the balance of the debt, and to enforce the mortgage. The circuit court entered a judgment in favor of Blatz, and Krebs appeals.

The only thing practically in contest on the appeal grows out of the certificates of deposit in the Louisville Deposit Bank assigned by Krebs to Blatz. Blatz collected about one-half of the certificates from the bank, but, before the others matured, the bank failed. After Blatz got the certificates he presented them to the bank and demanded payment. The bank declined to pay those that were not due unless he would accept the amount without interest, and this he declined to do. When the bank failed, Blatz consulted counsel as to what he should do. He was advised by his attorney that the certificates of deposit were simply promissory notes on which Krebs was liable to him as assignor, and that to hold Krebs as assignor he must bring suit against the bank, and get a judgment and return of no property against it promptly after each certificate fell due. Thereupon a meeting was held between him and Krebs and their respective attorneys. At this meeting Krebs signed a writing waiving the right to require Blatz to sue the bank. While there is some contradiction in the evidence as to what took place at this meeting, the weight of the evidence shows that Blatz then said that he did not wish to press Krebs, and would give him time if necessary, and that Krebs wished time to be given him. As the certificates fell due, Krebs gave Blatz a check for the amount and took them up. These certificates were then filed by him as part of his claim against the Deposit Bank, and the pro rata allowed thereon was paid to his attorneys. When this suit was brought, Krebs insisted that Blatz took the deposit certificates as cash, that the sums which he had thus paid Blatz were paid upon the notes in suit, and he sought credit therefor. The chancellor disallowed this claim, and of this Krebs complains.

The certificates were alike except in amount. One of them read as follows: "Louisville, Ky., Jan. 28, 1903. This is to certify that Andrew Krebs has deposited in this bank $1,473.32 payable to his order six months after date on the return of the certificate, with interest at the rate of four per cent. per annum, interest then to cease. [Signed] J. B. Ohligschlager, Cashier." Similar papers have often been held by this court to be in effect promissory notes. Kalfus v. Watts, 16 Ky. 197; Harrow v. Dugan, 36 Ky. 341; Carson v. Lucas, 52 Ky. 213; Kendall v. Lewis, 10 Ky. Law Rep. 362; Carnegie v. Beattyville Trustees, 13 Ky. Law Rep. 431. When Krebs placed his name on the back of the paper and gave it to Blatz, nothing else appearing, he became liable to Blatz as the assignor; and, when the bank failed, and he knew that Blatz was looking to him as assignor, it was incumbent upon him to choose what course he would follow. If he had then denied liability as assignor, Blatz in a suit then brought might have been able to prove many facts which after the lapse of 14 years he is now unable to show. He then acquiesced in Blatz's claim that he was liable as assignor. He got time. He paid the amounts to Blatz as called for in the certificates, and, after making these payments, he continued to pay annual interest on the notes without claiming that these credits should have been applied on the notes, and thus reduce the annual interest. His conduct was such as to leave Blatz to understand that this money was paid in satisfaction of the deposit certificates, and not upon the notes. One who elects to follow a certain course, and thus pays money which he knows is applied in a certain way, will not be allowed years afterward to withdraw the election he then made, and insist that the payment should have been applied to another debt. If he was not satisfied with the way the payment was applied, he should have complained at the time. To allow him to complain after 14 years, and after time has obscured or destroyed much of the evidence that might then have been produced, would be to allow him to mislead Blatz to his prejudice, and to ignore the equity rule that he who is silent when he ought to speak will not be allowed to speak thereafter to the prejudice of him whom he has thus misled. This conclusion makes it unnecessary for us to pass on other questions discussed.

Judgment affirmed.

FRENCH v. BRANGER.

(Court of Appeals of Kentucky. Sept. 23, 1909.)

1. ADVERSE POSSESSION (§ 70*)—OPERATION.

A son, after purchasing land in 1882, did not deed it to his father, but immediately placed him in possession of it, and he remained in adverse and continuous possession until his death in 1897. The father in payment of the land

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gave the son a note held against him, which amounted to substantially as much as the land was worth. *Held*, that the verbal sale and the adverse possession vested the father with a good possessory title at his death.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 70.*]

2. ESTOPPEL (§ 90*)—ACCEPTANCE OF BENEFITS.

Where one of the heirs consented to a division of decedent's land, and accepted the share allotted to him, he was estopped from asserting title to or interest in the shares allotted to the other heirs.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 249; Dec. Dig. § 90.*]

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Action by Gust. Branger against Alexander French. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. Montgomery and S. H. Bush, for appellant. R. L. Stith, for appellee.

CARROLL, J. The appellee brought this suit to quiet his title to a tract of land containing about 4 acres, averring that the appellant, French, was wrongfully asserting ownership to it. The appellant in an answer and counterclaim denied that the appellee was the owner of the 4 acres, and asserted title to it in himself, and also asked that he be adjudged the owner of an undivided one-seventh interest in the land described in appellee's petition. In 1882 the appellant purchased at judicial sale a tract containing 40 acres that adjoined a 25-acre tract owned by his father, Raymond French. One of the questions in the case is whether or not the appellant surrendered this 40-acre tract of land to his father; and the other one is whether, after the death of Raymond French, the land he owned was divided, and appellant placed in possession of that portion allotted to him.

The appellant, after purchasing the 40 acres, did not convey it to his father by deed, but the weight of the evidence establishes that immediately after his purchase he placed his father in possession of it, and that he remained in the adverse and continuous possession of it until his death in 1897, and that appellant received, in payment of the land, from his father a note his father held against him that amounted to substantially as much as the land was worth. We, therefore, conclude that the verbal sale, and the adverse possession under it, was sufficient to vest Raymond French with a good possessory title to the land at the time of his death. As it is conceded that the 4 acres in controversy is a part of this 40-acre tract, the appellant has no claim to it under or by virtue of his purchase in 1882. When Raymond French died, appellant as one of his children became entitled to an undivided one-seventh interest in the land of which he was possessed, which embraced the 40 acres heretofore mentioned. So that the next question is, was there a division of this land between the heirs, including appellant, and in this division did appellant get his share of the land? Upon this point the evidence is to the effect that soon after the death of Raymond French his children, including the appellant, procured the services of a surveyor and divided the land between them. In this division appellant was allotted 12½ acres, which he afterwards mortgaged or conveyed, and the other heirs were allotted their portions. Some of the heirs received conveyances to the interests allotted to them, and others did not. Among those who did not receive deeds was C. M. French, who sold his interest, containing some 25 acres, to John Sweet, who afterwards conveyed the same to the appellee. Branger. The conduct of appellant, Alexander French, in consenting to a division of the land, and accepting the share allotted to him, estops him from asserting title to or interest in the shares allotted to the other heirs. As the appellee owns the interest set apart to C. M. French in the division, it follows from what we have said that the court properly adjudged him the owner of it.

Wherefore the judgment is affirmed.

NEW YORK LIFE INS. CO. v. VAN METER'S ADM'R.

(Court of Appeals of Kentucky. Sept. 22, 1909.)

1. INSURANCE (§ 367*)—LIFE POLICY—PREMIUMS—LOANS.

A premium note provided for forfeiture except as to the right to the surrender value, or paid-up policy which might be provided for in the policy or by statute. *Held* that, the policy having provided for extended insurance as one of the surrender values, the nonpayment of the note did not bar insured's right to extended insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 935; Dec. Dig. § 367.*]

2. INSURANCE (§ 367*)—LIFE POLICY—FORFEITURE—"INDEBTEDNESS."

A policy provided that if any subsequent premium was not paid, and the policy was not surrendered, the insurance, after repayment of any "indebtedness," would be extended without request or demand for a term specified in an accompanying table. A premium note provided that in settlement of any claim or benefit under the policy before the note should become fully paid the amount thereof should be deducted from the amount otherwise payable by the company. *Held*, that the term "indebtedness," as used in such nonforfeiture provision, did not include premium notes.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 367.*

For other definitions, see Words and Phrases, vol. 4, pp. 3528–3536.]

3. INSURANCE (§ 367*)—LIFE POLICY—NONFORFEITURE—EXTENDED INSURANCE.

A nonforfeiture provision in a policy provided that if any subsequent premium was not paid, and the policy was not surrendered, the insurance should be extended without request or demand therefor, for the amount of its face during the term specified in the attached table, payable only if the insured died within the

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term, and that at the end of which time if the insured was living the policy should terminate. *Held* that, on insured's failure to pay a subsequent premium, he had a vested right to extended insurance, without demand or act on his part, in accordance with the table for a term specified therein.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 367.*]

4. ACCORD AND SATISFACTION (§ 1*) — ELEMENTS.

Under the rule that accord and satisfaction applies only in cases where the amount due is in dispute or unliquidated, the acceptance by insured of less than one-third of the cash value of his policy during his life, both the cash value and extended insurance value being fixed by the policy, did not constitute an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 1–13; Dec. Dig. § 1.*]

5. COMPROMISE AND SETTLEMENT (§ 8*) — CAPACITY OF PARTIES—FRAUD.

Insured, while mentally incapable of attending to business, was falsely notified by the insurance company that he had failed to avail himself of the provisions of his policy for nonforfeiture, and that it was no longer in force, when, in fact, he was entitled to extended insurance, which would have carried the policy beyond the date of his death. The letter containing such information inclosed a check for $10.70, stating that it was the full cash surrender value of the policy, when, in fact, the surrender value was more than twice that sum. *Held*, that insured's acceptance of the check did not constitute an available compromise and settlement.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 17–31, 33; Dec. Dig. § 8.*]

Appeal from Circuit Court, Green County.

"To be officially reported."

Action by Pilson Smith, as administrator of Ross M. Van Meter, against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. McIntosh, Wm. Marshall Bullitt, Wm. W. Gaunt, and Bullitt & Bullitt, for appellant. Noggle & Graham, for appellee.

CLAY, C. Plaintiff, Pilson Smith, as administrator of Ross M. Van Meter, instituted this action against defendant, New York Life Insurance Company, to recover on an insurance policy for $1,000. Judgment was rendered in favor of plaintiff, subject to credit by $10.70 and interest, and by the amount of a note executed by insured, and defendant appeals.

The policy was issued on October 6, 1898. The annual premium thereon was $30.30, payable on the 6th day of October in each year thereafter. Van Meter paid the annual premium for the years 1898, 1899, and 1900. For the fourth annual premium he executed his note to appellant due in 12 months. On this note he paid one year's interest in advance. For the fifth annual premium he paid the insurance company $8.45 in cash and executed a note for $21.85, due March 6, 1903. On March 6, 1903, he paid on said note the sum of $10.33 and executed his note for $12, due in three months. Said note was not paid, and no further premiums were paid on the policy. On November 20, 1903, the company wrote the following letter to Van Meter:

"New York, November 20, 1903.

"Ross M. Van Meter, M. D., Greensburg, Ky.—Dear Sir: Default having been made in the payment of premium and interest due on October 6, 1902, under the above policy, and default having also been made in availing yourself of the provisions of the policy applicable in such event, the policy is no longer in force, and has been closed out on the Company's books for the customary cash surrender value allowed by the Company under such policies. As shown by statement below, the balance of cash surrender value is $10.70, for which we hand you enclosed the Company's check No. 52534 to the order of Ross M. Van Meter. Yours truly, John C. McCall, Secretary.

Cash surrender value	$41.00
Lien note	30.30
Interest	30.30
Balance	$10.70

The check inclosed in the letter was as follows: "No. 52534. New York, Nov. 20, 1903. The New York Security and Trust Company, 46 Wall St. Pay to the order of Ross M. Van Meter, Ten $^{70}/_{100}$ dollars, in full settlement of surrender value Policy No. 893686. $10–$^{70}/_{100}$ F. H. Shipman, Asst. Treasurer. Theo. M. Banta, Cashier."

Van Meter retained the check and used it to pay his hotel bill. After that time the company wrote him several letters, suggesting that he have the policy reinstated.

The policy in question contains the following benefits and provisions:

"1. Loans—With Interest at the Rate of Five Per Cent. Per Annum.

"The Company will make advances to the insured as loans on this Policy within the month of grace allowed in payment of premiums, on application to the Home Office, at the third or any subsequent anniversary of the insurance, within the Accumulation period, under the terms of the Company's loan agreement then in use, and the following conditions:

"First. That premiums have been paid in full to the time when the loan is made, including the premium for the entire insurance year then beginning.

"Second. That the amount loaned at any time shall be such as the insured may desire, not be exceed the sums shown in the table on the preceding page. The amount of any loan shall include any previous loan then unpaid.

"Third. That this policy shall be duly assigned to the Company as collateral security for the loan, and deposited at the Home Office. A duplicate of the Loan Agreement,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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which is also a receipt for the policy, will be furnished to the insured.

"Fourth. That interest in advance at the rate of 5 per cent. per annum shall be paid on all loans from the date of the loan to the next anniversary of the insurance, and annually in advance thereafter, if the loans are renewed, until they are paid off.

"Fifth. That the loans shall be made for the period ending upon the next succeeding anniversary of the insurance, and may then be renewed simply by payment of the insurance premiums falling due and interest in advance, as above. Thus the loan may be renewed from year to year, at the option of the insured, until the completion of the Accumulation period.

"2. Nonforfeiture.

"This policy cannot be forfeited after it shall have been in force three full years as hereinafter provided:

"First. If any subsequent premium is not duly paid, this Policy will be endorsed for the amount of paid-up insurance payable at the death of the insured, specified in the table on the preceding page, less the value of any indebtedness on this Policy, provided demand is made therefor with surrender of this Policy within six months after such nonpayment; or,

"Second. If any subsequent premium is not duly paid, and if this policy is not surrendered as provided in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of One Thousand Dollars, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, this Policy shall cease and determine.

"Third. The insurance provided for in the two preceding clauses shall be based upon completed insurance years only, and shall be subject to the conditions of this Policy, but without further payment of premiums and without loans, participation in surplus, or premium-return."

Then follow other provisions, which it will be unnecessary to consider.

The table referred to in the nonforfeiture provision is as follows:

"Table of Loans and of Surrender Values in Paid-Up Insurance, or Extended Insurance, Under the Conditions Specified on the Next Page.

At End of	Loans	Surrender Values.	
		Paid-up Insurance	Extended Insurance for $1,000 for the Term of
3rd year	$41	$150	4 years, 8 months.
4th year	57	200	7 years, 6 months.
5th year	75	250	10 years, 4 months.
6th year	92	300	12 years, 7 months.

The premium lien note executed by decedent on October 6, 1901, for $30.30, is as follows:

"Premium Lien Note.

"30.30. Louisville, Ky., October 6th, 1901.

"Twelve months after date I promise to pay to the order of the New York Life Insurance Company, at the office of the said company in the city of New York, the sum of thirty and 30/100 dollars, with interest in advance at the rate of five per cent. per annum (for value received); being for premium due Oct. 6, 1901, on policy No. 893686 issued by said Company on the life of Ross M. Van Meter.

"It is understood and agreed:

"1. That this note may be renewed, if the interest thereon and subsequent premiums on said policy are duly paid.

"2. That unless said interest and premiums are duly paid, said policy and its accumulations shall immediately become forfeited and void, except as to the right to a surrender value or paid-up policy, which may be provided in said policy or by the statute.

"3. That in the settlement of any claim, or any benefit under said policy, before this obligation shall have been fully paid, the amount thereof shall be deducted from the amount otherwise payable by said Company.

"Signature of the person for whose benefit the insurance is effected: Estate.

"Signature of the person whose life is insured: R. M. Van Meter."

The blue note executed by Van Meter on March 6, 1903, was as follows:

"Pol. 893686. March 6th, 1903.

"Without grace, three months after date I promise to pay to the order of the New York Life Insurance Company, twelve ——— dollars, at Bank of Commerce, Louisville, Ky., value received, with interest at the rate of 5 per cent. per annum. This note is given in part payment of the premium due 10/6/02 on the above policy, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company if this note is not paid at maturity, except as otherwise provided in the policy itself.

"$12.00 Name: Ross M. Van Meter.

"Address: Greensburg, Ky."

The provisions of this note are the same as those contained in the blue note for $21.85 executed October 6, 1902.

It is the contention of counsel for appellant (1) that the acceptance of the check for $10.70 by Dr. Van Meter was a full and complete settlement of all his rights under the policy of insurance; (2) that Dr. Van Meter used the reserve on his policy for the purpose of paying premiums, and, having

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applied the reserve in that way, he could not afterwards apply it to the purchase of extended insurance; that being the case, the policy was not in force at the time of his death. We will first discuss the second proposition.

In the case of Drury's Adm'x v. New York Life Insurance Co., 115 Ky. 681, 74 S. W. 663, 25 Ky. Law Rep. 68, 61 L. R. A. 714, 103 Am. St. Rep. 351, the policy of insurance was almost identical with the policy involved in this action. The premium note executed by Drury was identical in terms with the premium note executed by Dr. Van Meter. Drury had paid three annual premiums on his policy. He then executed a premium note for the fourth annual premium. He failed to pay the principal or interest on the note at its maturity, and also failed to pay any part of the premium of $29.70 for the ensuing 12 months. In that case it was the contention of the company that Drury was entitled only to a paid-up policy; that by the execution of the premium note and his failure to pay the interest thereon and the succeeding premiums he had forfeited his right to extended insurance. In discussing this question this court said: "It will be observed that extended insurance for the full amount of the policy is one of the surrender values expressly provided for, and the only one which, under all conditions, is not forfeitable. Paid-up insurance is also a surrender value, but, to enable the insured to take advantage of this provision, the policy requires that the insured should within six months after failure to pay a premium surrender his policy and demand paid-up insurance. If the contention of the company is a sound one, the effect of the failure of the insured to pay the interest and premium note at maturity is to exactly reverse these conditions of the policy. In other words, it forfeits automatically the provision for extended insurance, and revives the provision for a paid-up policy, which had been forfeited by the assured's failure to make demand therefor and surrender his policy within six months. The law does not favor forfeitures, and will not assume that the assured intended by the execution of the note of July, 1900, to forfeit the right to extended insurance, which he had already acquired by the payment of three annual premiums on the policy. The only reasonable construction which can be put upon the language of the policy and note is that, on the forfeiture of the policy by the nonpayment of interest, assured forfeited all right to further participate in accumulations to receive dividends to be reinstated after the lapse of the policy, etc.; but did not surrender his right to extended insurance for the term earned by the premiums paid. Nor can we doubt that, if the insured had made a demand for paid-up insurance at the time of his default in the payment of the premium note and interest, the company would have been prompt to claim that he was not entitled to a paid-up policy, as he had failed at the proper time to make demand therefor, but only to such extended insurance as his interest in the policy would purchase after the payment of his indebtedness to the company."

But counsel for appellant contend that the reserve on the policy was used for the purpose of paying premiums, and that the insured was entitled to extended insurance only after the payment of any indebtedness. Conceding the proposition that the reserve could not be used for paying premiums and then for the purpose of purchasing extended insurance, the question arises: Was the reserve on the policy under discussion used for the purpose of paying premiums? Dr. Van Meter did not secure a loan on his policy and assign the policy to the company. If he had, he would have paid the fourth premium instead of executing his note therefor. The reserve was sufficient, after the payment of three premiums, to extend the policy for a period of four years and eight months; and yet, if appellant's position be correct, it was only sufficient to purchase extended insurance for two years at the most. But it is insisted that extended insurance is available only after the payment of any indebtedness against the policy. For the purpose of determining whether the indebtedness referred to covers a premium note, we have but to consider the terms of the note itself. The second provision of the note provides for a forfeiture except as to the right of a surrender value or paid-up policy, which may be provided in said policy or by statute. One of the surrender values referred to is extended insurance. Therefore the note was given with the distinct agreement and understanding that its nonpayment did not affect the insured's right to extended insurance. Futhermore, the third provision of the note provided that, in the settlement of any claim or any benefit under the policy before the note should become fully paid, the amount thereof should be deducted from the amount otherwise payable by the company. Thus it will be seen that the term "indebtedness," used in the second of the nonforfeiture provisions, was not intended to cover premium notes. Of course, the company might have provided for extended insurance after the payment of any indebtedness, including premium notes, loans on the policy, etc.; but we have no such case here. The very terms of the note itself show that it was to be deducted from the amount otherwise payable by the company, and was not considered such an indebtedness as would preclude the insured from obtaining extended insurance. Dr. Van Meter had a vested right to extended insurance for four years and eight months. The reserve on his policy was not used for paying premiums. He did not forfeit his right to extended insurance by executing premium notes which

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were not paid. We therefore conclude that appellant's contention on this point is without merit.

We next come to the plea of accord and satisfaction. It is the contention of appellant that the acceptance of the check for $10.70 and the appropriation of the money by Dr. Van Meter to his own use present a case of accord and satisfaction, and preclude his administrator from recovering on the policy. Appellee defends against this plea by charging that Dr. Van Meter was not at the time of the alleged settlement in fit mental condition to transact business. Upon this point the proof for appellee is to the effect that for several days prior thereto and at the time of the acceptance of the check Dr. Van Meter had been on a protracted spree, and that his mind was not in a condition to know and appreciate his rights. On the other hand, the witnesses for appellant declare that his mind was perfectly clear, and that he was capable of attending to business. In this connection we may say that a simple computation, based upon the policy itself and the payments made thereon, shows, first, that the extended insurance value of the policy was sufficient to extend the policy beyond the time of Dr. Van Meter's death; second, that the cash value of the policy was more than twice $10.70, the amount claimed by appellant to be the cash value and sent by it to Dr. Van Meter. Furthermore, the policy itself does not provide for a cash settlement. Th. only two settlements provided for by the policy are paid-up insurance or extended insurance. Not having applied for paid-up insurance within six months after the default in the payment of premium, Dr. Van Meter was by the terms of the policy entitled, without demand or request therefor, to extended insurance in accordance with clause two of the nonforfeiture provisions. The rule in regard to accord and satisfaction is that it is only in cases where the amount due is in dispute or unliquidated that the acceptance of a less sum than is due precludes a recovery of the balance. Cunningham v. Standard Const. Co. (Ky.) 119 S. W. 765. In this case there was nothing in dispute. Both the extended insurance value and the cash value of the policy were fixed. The appellant paid Dr. Van Meter only a little over one-third of the cash value of his policy. Certainly the acceptance of this sum did not constitute accord and satisfaction.

But it may be contended that the acceptance of the check was at least an election to accept a cash settlement, and that all his administrator is now entitled to is the balance of the cash surrender value due at the time of the alleged settlement. There might be some merit in this contention if it appeared that the insured, with full knowledge of his rights, elected to settle on a cash basis. In nearly every case all the facts with reference to the value of an insurance policy are peculiarly within the knowledge of the company. The company should therefore deal with its policy holders in perfect good faith. In this instance the company did not notify Dr. Van Meter that the value of the policy in extended insurance was so much, while its cash value was so much. On the other hand, it simply notified him that he had failed to avail himself of the provisions of his policy, and it was therefore no longer in force and had been closed out on the books of the company. Accompanying the letter was the check for $10.70, stating that it was in full of the cash surrender value of the policy. As a matter of fact, Dr. Van Meter did not fail to avail himself of the provisions of the policy. At the time of the alleged settlement he was entitled, without demand or request therefor, to extended insurance which would have carried the policy beyond the day of his death. Here, then, the company, whether knowingly or by mistake, actually misled the insured as to his rights under the policy; and that, too, at a time when he in the opinion of many witnesses was incapable of attending to business. We therefore conclude that a settlement made under such circumstances should not be upheld in whole or in part.

Judgment affirmed.

NUNN et al. v. PAGE.

(Court of Appeals of Kentucky. Oct. 7, 1909.)

1. HOMESTEAD (§ 103*) — LIABILITIES ENFORCEABLE AGAINST HOMESTEAD—JUDGMENT FOR ATTORNEY'S FEES AND COSTS.

Under Ky. St. 1909, § 900 (Russell's St. § 2687), providing that in actions for divorce the husband shall pay the costs of each party, a judgment against a husband for attorney's fees and costs in a suit for divorce brought by the wife, and subsequently dismissed, cannot subject to its satisfaction the homestead of the husband exempt under section 1702 (Russell's St. § 4661), against any debt except mortgages, purchase-money liens, etc.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 157, 158; Dec. Dig. § 103.*]

2. HOMESTEAD (§ 101*)—LIABILITIES ENFORCEABLE AGAINST HOMESTEAD—ALIMONY.

Ky. St. 1909, § 1702 (Russell's St. § 4661), exempting the homestead from the payment of any debt except one created by mortgage, purchase-money lien, etc., must be construed to permit the wife as between herself and husband, when abandoned by the husband, to share in the enjoyment of the homestead, and this can only be done by setting apart for her use a portion of it for maintenance, or divesting him of title to so much of it as is necessary to satisfy a decree for alimony.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 161; Dec. Dig. § 101.*]

Appeal from Circuit Court, Barren County.

"To be officially reported."

Action by B. H. Page against W. J. Nunn and another. From a judgment for plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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riff, defendants appeal. Reversed, with directions.

Porter & Sandidge and Allen Sandige, for appellants. Baird, Richardson & Summers, for appellee.

CARROLL, J. An action for divorce and alimony instituted by the wife of appellant W. J. Nunn against him was dismissed by her after an answer had been filed and a number of depositions taken. When the action was dismissed, an order was made allowing her attorneys a fee for services, and a judgment was entered against W. J. Nunn in favor of the attorneys for the amount of their fee and in favor of the officers of the court for the amount of their costs, and an execution awarded. The execution was levied upon a tract of land owned by Nunn, which was sold to satisfy the execution, and purchased by the appellee Page, and thereupon Page instituted proceedings under the statute to recover possession of the land purchased by him. To this proceeding Nunn and his wife, who had resumed their marital relations when the suit was dismissed, filed a response setting up that, when the execution was issued and the land sold under it and at all times since, they were occupying the land, which was worth less than $1,000, as a homestead, and they asked that it be adjudged exempt from seizure and sale under the execution. The lower court in its judgment found as a matter of fact that Nunn had never abandoned or lost his homestead right in the land sought to be subjected, but ruled that he could not claim or hold the land under the exemption laws as against the judgment for attorneys' fees and costs in the suit of his wife against him for divorce.

Accepting as correct the finding of the lower court that Nunn was a bona fide housekeeper with a family residing upon the land, and would be entitled to it as a homestead against any other debt created or contracted at the time the judgment was entered or when the action for divorce was instituted, it only remains to determine whether or not his right to a homestead is available against the character of judgment under consideration in this proceeding. Section 900 of the Kentucky Statutes (Russell's St. § 2687) provides that: "In actions for alimony and divorce, the husband shall pay the costs of each party, unless it shall be made to appear in the action the wife is in fault and has ample estate to pay the same." And it has been held by this court that an attorney's fee for the wife is a proper item of cost under this section, and that the allowance must be made in the divorce suit, and, further, that the court has power to compel the payment of the costs and attorney's fee allowed by execution, rule, or attachment, and, also, that the fact that the parties become reconciled before a trial and the action brought by the wife is dismissed does not release the husband from liability for the fee of the wife's attorney. Williams v. Monroe, 18 B. Mon. 514; Powell v. Lilly, 68 S. W. 123, 24 Ky. Law Rep. 193; Steele v. Steele, 119 Ky. 466, 84 S. W. 516; Ballard v. Caperton, 2 Metc. 412; Evans v. Stewart, 38 S. W. 697, 18 Ky. Law Rep. 941. But in our opinion neither the statute nor the cases construing it authorize the subjection of the homestead of the husband to the payment of the attorney's fee and costs. It is, however, insisted by counsel that these charges stand on the same footing as alimony and maintenance, and that, as the homestead may be subjected to the payment of maintenance and alimony, so it may be to attorney's fees and costs incurred by the wife in securing alimony and maintenance. It may be conceded, although that question is not presented by this record, that where the wife is awarded maintenance pending a divorce suit, or alimony upon its termination, that the land of the husband as between these two alone can be subjected to the payment of it, although claimed as a homestead. The exception in favor of a claim of this nature may be put upon the ground that the wife is entitled to an interest in the homestead as it is partially at least set apart as exempt for her use and benefit as a member of the family; and so, when the husband has compelled her to abandon his home, and by his wrongful act deprived her of the enjoyment of it, he should not be allowed to hold the whole of it as against her claim for maintenance or alimony. In this connection, however, it is well to notice that although in Tyler v. Tyler, 99 Ky. 31, 34 S. W. 898, the court held that under a judgment for alimony the husband might be divested of his fee-simple title to real estate by a sale under execution, yet this cannot be done where it is sought only to recover maintenance, as section 2123 of the Kentucky Statutes (Russell's St. § 73) provides in part that, although the court may make orders for the maintenance of the wife and child, "no such order for maintenance of children or allotment in favor of the wife shall divest either party of the fee simple title to real estate."

But there is a wide distinction between court costs and attorney's fees and maintenance or alimony. The attorney's fees and costs are allowed by the statute as a claim against the husband in favor of the attorney and officers rendering the service to the wife. They are not different from any other claim that might be presented against the husband, nor is a judgment rendered for them of higher dignity than a judgment rendered for any other debt; and there does not appear to be any good reason why the husband should not be allowed a homestead against these demands. The homestead is allowed to an actual bona fide housekeeper

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with a family, and by the terms of the Kentucky Statutes, § 1702 (Russell's St. § 4661), it cannot be subjected to the payment of any debt except one created by a mortgage or purchase-money lien, or growing out of a liability existing prior to the purchase of the land, or the erection of improvements thereon. It will thus be seen that the statute is broad enough to save the homestead even as against maintenance or alimony adjudged the wife. But, to enable the wife to participate in the homestead, we think the statute should be so construed as to permit her when abandoned to share in the enjoyment of it, and this can only be done by setting apart for her use a portion of it for maintenance, or divesting him of title to so much of it as may be necessary to satisfy the alimony awarded. Whether or not the court would subject the whole of the homestead or any part of it to the satisfaction of a judgment in favor of the wife for alimony or maintenance, if the rights of children were involved, we need not express any opinion. It is sufficient for the purposes of the question before us to say that as between husband and wife alone the husband will not be permitted to abandon his wife or refuse to contribute to her support, and then hold as against her claim for maintenance or alimony land under the pretense that he is entitled to it as a homestead. But we are not disposed to so enlarge by judicial construction the exceptions contained in the homestead statute as to subject the homestead to the satisfaction of a judgment rendered for attorney's fees and costs.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

WOODBINE CHILDREN'S CLOTHING CO. v. S. GOLDNAMER & SON.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. SALES (§ 201*)—PASSING TITLE—DELIVERY TO CARRIER.

Where goods are ordered and shipped by a common carrier selected by the buyer, or where by the course of trade delivery to a common carrier is intended to pass title, the property passes as soon as the goods are put in the carrier's possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 535; Dec. Dig. § 201.*]

2. SALES (§ 161*)—PASSING TITLE—SELECTION OF CARRIER.

Where a buyer of clothing directed it to be delivered for the spring trade and be shipped over a certain railroad, a delivery by the seller to a different railroad for transportation did not constitute a delivery to the buyer, though the carrier named had no connection with the point of shipment, the seller not having notified the buyer and given him an opportunity to select another carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377–380; Dec. Dig. § 161.*]

Appeal from Circuit Court, Hardin County.

"To be officially reported."

Action by the Woodbine Children's Clothing Company against S. Goldnamer & Son. Judgment for defendants on a counterclaim, and plaintiff appeals. Affirmed.

L. A. Faurest, for appellant. H. L. James and R. L. Stith, for appellees.

NUNN, C. J. Appellant in the month of October, 1907, was engaged in manufacturing children's clothing in Woodbine, N. J.; and on the same date appellees were engaged as merchants in the city of Elizabethtown, Ky. On the 23d of that month appellant's agent solicited appellees to make an order for some clothing from appellant, which they did, the order amounting to $253. The order was made to supply the spring trade of 1908, and it was stated therein that the goods should be delivered to appellees on or about April 1, 1908. It was directed by appellees, and so stated in the order, that the goods were to be shipped by appellant to appellees over the Merchants' Dispatch in care of the Louisville & Nashville Railroad. About the middle of March, 1908, appellant shipped by the West Jersey & Seashore Railroad $218 worth of the goods ordered by appellees, but they did not arrive in Elizabethtown until about the last of May, which was the close of the season for the sale of such goods, and appellees refused to receive them. This action was instituted to recover of appellees the $218 for the goods so shipped. Appellees defended upon the ground that they did not owe the bill or any part of it; that the goods were not shipped in accordance with their order which was accepted the previous October by appellant; that the goods were shipped by the West Jersey & Seashore Railroad instead of the Merchants' Dispatch in care of the Louisville & Nashville Railroad. They also made their answer a counterclaim, and asked damages of appellant on account of its failure to deliver the goods according to contract. The testimony was heard, and the court instructed the jury to find against appellant on its claim of $218, and properly instructed them as to appellees' counterclaim. The jury found against appellant on its claim, and found for appellees $50 in damages.

Appellant contends that, when it delivered the goods to the West Jersey & Seashore Railroad in Woodbine, it amounted to a delivery to appellees, and that they took the risk of the goods being delivered to them in Elizabethtown, and, if they suffered damages by reason of the loss of the goods or on account of the failure to deliver the goods according to contract, the carrier was responsible to them for the damages. The authorities are conflicting, but the weight thereof seems to be that where goods of a cer-

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tain character are ordered, and the buyer directs that they be sent by a common carrier, or where, by course of trade, delivery to a common carrier to be sent to the buyer is the evident intent, in such cases the property passes as soon as the goods are put in the carrier's possession. But, if the purchaser designates a particular carrier to which the goods should be delivered for shipment and the seller fails to deliver the goods to such carrier and selects some other, or if it appears that it was not the intention of the parties at the time of the sale that a delivery of the goods to the carrier by the seller was to be considered a delivery of the goods to the purchaser, then the rule does not apply. If delivery is made by the seller to a carrier designated by the buyer, it is a delivery to the buyer, and he takes the risk of the delay and loss. 24 Am. & Eng. Ency. of Law, 1071; Commonwealth v. Russell, 11 Ky. Law Rep. 576; James v. Commonwealth, 102 Ky. 108, 42 S. W. 1107, 19 Ky. Law Rep. 1045; Macgruder v. Gage, 33 Md. 344, 3 Am. Rep. 177. In the case at bar appellant agreed, as directed by appellees, to ship the goods by the Merchants' Dispatch in care of the Louisville & Nashville Railroad, and it violated this agreement when it shipped the goods over the West Jersey & Seashore Railroad. It undertook to excuse itself in this by showing that the Merchants' Dispatch had no connection with Woodbine, N. J., claiming, therefore, that it had a right to ship by any carrier of its selection. This would be true if it had notified appellees of this fact before the shipment, thereby giving them an opportunity to select a carrier other than the Merchants' Dispatch, if they desired to do so, and, in the event they failed to make their selection, appellant would have been authorized to have shipped the goods as it did. Appellant had plenty of time to have given this notice, for it knew in October the route over which appellees had directed these goods shipped, and it did not ship the goods until March 19, 1908. Therefore we are of the opinion that the court committed no error in directing the jury to find against appellant on its claim.

There was evidence introduced authorizing the verdict of $50 for appellees on their counterclaim.

For these reasons, the judgment of the lower court is affirmed.

GILLUM v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. HOMICIDE (§ 310*)—CUTTING WITH INTENT TO KILL—INCLUDED OFFENSES—SUBMISSION.

Defendant was indicted for maliciously cutting and wounding with intent to kill, prohibited by Ky. St. 1909, § 1166 (Russell's St. § 3184), providing that the penalty for such offense shall be imprisonment in the penitentiary for not less than one nor more than five years. Section 1242 (Russell's St. § 3185) defines the offense of cutting and wounding in sudden heat or passion, and fixes the penalty at a fine of not less than $50, nor more than $500, and confinement in the county jail for not less than six months nor more than one year, or both, in the discretion of the jury. *Held*, that the offense defined by section 1242 was a degree of that defined by section 1166, and hence the court properly submitted it to the jury.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 310.*]

2. HOMICIDE (§ 313*)—VERDICT—CERTAINTY.

Ky. St. 1909, § 1166 (Russell's St. § 3184), defines malicious cutting and wounding with intent to kill, and prescribes a penalty of imprisonment in the penitentiary for not less than one nor more than five years. Section 1242 (Russell's St. § 3185) defines the offense of cutting and wounding in sudden heat or passion, and fixes the penalty at a fine of not less than $50, nor more than $500, or confinement in the county jail. *Held* that, under Cr. Code Prac. § 257, subsec. 2, declaring that a general verdict on a plea of not guilty is "guilty" or "not guilty," and, if guilty, fixing the offense and the punishment in cases in which the jury is required to fix the punishment, a verdict, "we the jury, find defendant guilty and fix his punishment at confinement for 2 years in the penitentiary," was not void for uncertainty, but sufficiently indicated that accused was convicted of the offense denounced by section 1166.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671–675; Dec. Dig. § 313.*]

3. CRIMINAL LAW (§ 894*) — VERDICT — CERTAINTY — CORRECTION — OBJECTIONS — WAIVER.

Where a verdict is not sufficiently specific, it is the duty of accused to move to have it reformed before the jury is discharged, a failure to do which will be deemed a waiver of formal defects therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2115; Dec. Dig. § 894.*]

4. CRIMINAL LAW (§ 1163*) — APPEAL — REVIEW—VERDICT—INFORMALITY.

Where accused failed to move for the reformation of an alleged defective verdict before the jury were discharged, prejudice to his substantial rights must affirmatively appear, in order to justify a reversal of a conviction on that ground.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1163.*]

5. CRIMINAL LAW (§ 1122*)—APPEAL—RECORD —INCLUDED OFFENSES—FAILURE TO CHARGE —PREJUDICE.

Where, in a prosecution for maliciously cutting and wounding with intent to kill, the appeal record did not contain a bill of the evidence, an objection that the court erred in failing to charge the law of assault and battery as an included offense would not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2942; Dec. Dig. § 1122.*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Mat. Gillum was convicted of maliciously cutting and wounding with intent to kill, and he appeals. Affirmed.

Tye & Siler, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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O'REAR, J. Appellant was indicted and tried, charged with malicious cutting and wounding with intent to kill. Section 1166, Ky. St. (Russell's St. § 3184). The penalty created by the statute is confinement in the penitentiary not less than one nor more than five years. Another statute (section 1242 Ky. St. [Russell's St. § 3185]) defines the offense of cutting and wounding in sudden heat or passion. The penalty fixed by that statute is a fine not less than $50, nor more than $500, or confinement in the county jail not less than six months, and not more than one year, or both, in the discretion of the jury. The circuit court instructed the jury under each of the statutes above named. That was proper, as the offense defined by section 1242 is a degree of that defined by section 1166. The jury returned this verdict: "We, the jury, do agree and find the defendant guilty and fix his punishment at confinement for two years in the penitentiary." Appellant's contention on this appeal is that, as the jury failed to say in the verdict which offense the defendant was guilty of, there was a mistrial. It is required by section 257 (subsection 2) Cr. Code Prac., that "a general verdict upon a plea of 'not guilty' is 'guilty,' or 'not guilty'; or if 'guilty,' fixing the offense and the punishment in cases in which the jury is required to fix the punishment. Now the contention here is that the jury did not fix the offense, or the degree of the offense, of which the accused was found guilty, and that they may have applied the wrong penalty for the offense that the defendant did commit, and which the jury found him guilty of.

This precise question arose in Hays v. Commonwealth, reported in 14 S. W. 833, 12 Ky. Law Rep. 611. Hays had been convicted under an indictment charging murder, a degree of which is manslaughter. The verdict read: "We, the following jury, find the defendant guilty, and fix his punishment at five years in the penitentiary." Speaking of that form of verdict and its sufficiency, the court said: "Certainty is highly important to a proper administration of the criminal law, but it should not go so far as to sacrifice substance to form. Under our law one indicted for murder may be convicted of manslaughter. The jury were told if they found the accused guilty of murder, they must fix his punishment at death, or confinement in the penitentiary for life, but, if guilty of manslaughter, at not less than 2 nor more than 21 years in the penitentiary. It is therefore absolutely certain from the verdict that the jury intended to, and did, find the accused guilty of manslaughter. While properly the verdict should have said so, yet it substantially does by the verdict adopted." If a verdict is not as specific as desired, the correct practice is to then and there, before the jury is discharged, have them reform it. Allowing the jury to be discharged without objection, and without motion to have them correct or extend their verdict, will be deemed a waiver of formal defects in it. And it must then affirmatively appear that the substantial rights of the accused have been prejudiced by the informality. The presumption will not be indulged that his rights were prejudiced.

Another complaint was that the trial court did not instruct the jury as to the law of assault and battery, which is also a degree of the main offense charged. There is not a bill of evidence in the record. We cannot assume that the facts disclosed warranted any instructions save those given.

There is no prejudicial error on the face of the record. The judgment is affirmed.

CORYDON DEPOSIT BANK v. McCLURE et al.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

BILLS AND NOTES (§ 430*)—PAYMENT BY RENEWAL NOTE—EFFECT OF INVALIDITY.

A payee of a note executed by the maker and a surety accepted in good faith a renewal note executed by the maker and a third person as surety, and delivered to the maker the original note. It was subsequently determined that the third person was not liable on the renewal note. *Held*, that the payee could sue the maker and the surety on the original note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251–1256; Dec. Dig. § 430.*]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by the Corydon Deposit Bank against H. D. McClure and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

See 110 S. W. 856, 33 Ky. Law Rep. 679.

Vance & Heilbonner, for appellant. Thos. E. Ward, for appellees.

CARROLL, J. In August, 1902, the appellees H. D. McClure and G. W. Cook, as his surety, executed to the appellant bank their promissory note for $225, due four months after date. In April, 1903, the bank accepted a new note from H. D. McClure, with Mary H. McClure as surety, for $1,115.75. This note embraced several notes that H. D. McClure owed the bank as principal, including the note for $225, upon which Cook was surety. When the note for $1,115.75 was accepted by the bank, it delivered to McClure the $225 note. In September, 1903, Mrs. Mary McClure died, and in a suit to settle her estate the bank filed its note for $1,115.75. The validity of this note as a charge against her estate was contested, and it was finally adjudged that her estate was not liable upon the ground that

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her name was signed to the note by H. D. McClure without legal authority. McClure's Ex'r v. Corydon Deposit Bank, 106 S. W. 1177, 32 Ky. Law Rep. 772. A short while after this judgment was entered, the bank brought this action against H. D. McClure and G. W. Cook, the former being insolvent, to recover from them the amount of the note, $225. This action was based upon the ground that the bank in good faith accepted the $1,115.75 note, believing that Mary McClure was bound as an obligor thereon; and, as it developed that she was not liable, it had the right to recover from the payees of the notes embraced in the $1,115.75 note the amounts respectively due by them.

The question presented in this case was before this court in Corydon Deposit Bank v. McClure, 110 S. W. 856, 33 Ky. Law Rep. 679. In that case it appears that one of the notes embraced in the $1,115.75 note was a note for $440 executed by H. D. McClure with Mary McClure as his surety; and soon after the judgment was rendered releasing the estate of Mary McClure from the payment of the $1,115.75 note the bank instituted an action against her estate to recover $440, the amount due upon the note theretofore executed by her, and against which no defense could have been interposed by her. In considering that case, this court in the opinion supra stated fully the facts, and, after reviewing the authorities, held that her estate was liable for $440.

We are unable to distinguish this case from that, and therefore the judgment of the lower court must be reversed, with directions to enter a judgment in favor of the bank against McClure and Cook for the amount due on the note for $225.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. MAXBERRY.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. PLEADING (§ 418*)—FAILURE TO DELIVER DEATH MESSAGE—COMPLAINT—SUFFICIENCY.

Where, in an action against a telephone company for failing to deliver to plaintiff a message announcing his sister's death, and calling him to the phone for the purpose of notifying him of the time of the burial, defendant did not stand on a demurrer, but joined issue on the facts alleged in the petition, the petition was not defective for failing to charge that plaintiff, on receiving the message, would have come to the phone, and that he or the sender would have paid the costs of the message.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403–1406; Dec. Dig. § 418.*]

2. CHAMPERTY AND MAINTENANCE (§ 4*)—CONTRACTS.

Ky. St. 1909, § 209 (Russell's St. § 1776), provides that all contracts made in consideration of services to be rendered in the prosecution, or in aid of the prosecution, of any suit, by any person not a party on record in such suit, whereby the thing sued for, or any part thereof, is to be received by such person for his services or assistance, shall be void. Section 216 (Russell's St. § 1783) provides that neither party to such contract shall have any right of action thereon. *Held*, that the statute only renders void the champertous agreement, and not the cause of action, and hence that plaintiff agreed with one not his attorney to divide the proceeds of any judgment against defendant did not deprive plaintiff of his cause of action.

[Ed. Note.—For other cases, see Champerty and Maintenance, Dec. Dig. § 4.*]

3. TELEGRAPHS AND TELEPHONES (§ 37*)—DELIVERY OF MESSAGES—BEYOND ORDINARY LIMITS—CARE REQUIRED.

That a telegraph or telephone company accepts a message for delivery beyond its ordinary delivery limits, and exacts a fee in advance, does not impose on the company any greater diligence than is required in the case of a message directed to one within the delivery limits; the company's full duty being performed when it uses all reasonable diligence or ordinary care to deliver the message within a reasonable time.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 29; Dec. Dig. § 37.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*)—DELIVERY OF MESSAGE—CARE REQUIRED OF COMPANY—INSTRUCTIONS—FORM.

In an action against a telephone company for failing to deliver a message, form of instruction as to care required of defendant prescribed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.*]

5. TELEGRAPHS AND TELEPHONES (§ 74*)—DELIVERY OF MESSAGE—DUTY OF COMPANY—INSTRUCTIONS—FORM.

In an action against a telephone company for failing to deliver a message, form of instruction as to duty of defendant to deliver the message under the contract prescribed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.*]

6. TELEGRAPHS AND TELEPHONES (§ 74*)—FAILURE TO DELIVER DEATH MESSAGE—DAMAGES—INSTRUCTIONS—FORM.

In an action against a telephone company for failing to deliver a death message, form of instruction as to damages prescribed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.*]

Appeal from Circuit Court, Carlisle County.

"To be officially reported."

Action by J. M. Maxberry against the Cumberland Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and cause remanded for new trial.

John E. Kane, for appellant. Shelbourne & Smith, for appellee.

CLAY, C. Appellee, J. M. Maxberry, instituted this action in the Carlisle circuit court against appellant, Cumberland Telephone & Telegraph Company, to recover damages for the failure of the latter to deliver to him a message announcing the death

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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of his sister, and calling him to the phone for the purpose of notifying him of the time of the burial. Maxberry claims that he was thereby deprived of the opportunity of viewing his sister's remains and attending her funeral. He asked damages in the sum of $1,000. Upon the trial of the case the jury returned a verdict in his favor for the sum of $250. From the judgment based thereon the Cumberland Telephone & Telegraph Company appeals.

The facts are as follows: J. M. Maxberry, who formerly lived in Ballard county, Ky., with his brothers and sisters, went to Muhlenberg county several years ago, and located about five miles from the little town of Bolton, where he resided at the time his cause of action arose. Maxberry had an invalid sister, who resided with her brother-in-law, N. T. Denton, in Carlisle county, Ky. Some time in March, 1908, he visited this sister, who, at the time was in a very low state of health. Before leaving for his home in Muhlenberg county he arranged with Denton to telephone him at once in the event of the serious illness or death of his sister. On the evening of the 7th of June, 1908, his sister, who, at that time was at a health resort in Illinois, was taken suddenly ill, and died on the morning of the 8th of June, about 8 o'clock. N. T. Denton got into communication with appellant's operator in Bolton, and told her that Maxberry's sister was dead, and he wanted Maxberry to come to the phone. According to the testimony for appellee, the operator agreed, on behalf of the company, to deliver the message to appellee and call him to the phone if Denton would pay the cost of delivery, amounting to $1.50. Maxberry was at his home on the 8th day of June, and the message was not delivered to him for several days. If he had received the message he would, and could, have reached the place of the funeral in time to view his sister's remains and attend her funeral. The sender of the message was informed that Maxberry was on his way to the phone. The evidence for appellant is to the effect that the operator did not know where appellee lived. Denton asked that the operator inquire of the people around there. This was done, and the operator informed Denton that appellee was in the tie woods at a point about three miles from Bolton. There was a liveryman in the town, who agreed to go to the tie woods for the sum of $1.50. When this sum was paid by the sender of the message the operator procured the liveryman to take the message. The liveryman did not agree to go anywhere else except to the tie woods. He went to the tie woods, and spent about an hour and a half there looking for appellee, but could not find him. He then delivered the message to a man who worked in the tie woods, who subsequently informed appellee's son that his father's sister was dead, and that his father was wanted at the phone. The evidence also shows that this boy was crippled in one of his feet, and unable to reach his father's house, which was some three miles away.

It is first insisted that the petition is fatally defective because it does not charge that appellee upon receiving the message would have come to the phone, and that the sender or appellee would have paid the costs of the message. In the first place, appellant did not stand on the demurrer, but joined issue on the facts alleged in the petition. Moreover, we regard this objection as highly technical, for the reason that the evident purpose of the sender of the message was to acquaint appellee with his sister's death.

During the progress of the case it developed that appellee and N. T. Denton had agreed to divide the proceeds of any judgment that might be obtained against appellant. It is insisted by appellant that this agreement was void, and deprived appellee of his right of action against it. It is true the contract so made is void under section 209, Ky. St. (Russell's St. § 1776). Neither party had any right of action predicated upon the contract so made. By the terms of the statute the champertous agreement itself is rendered null and void—not the cause of action, which was the subject of the champertous agreement. This question was before this court in the case of Wehmhoff, etc., v. Rutherford, 98 Ky. 91, 32 S. W. 288, 17 Ky. Law Rep. 659. There the court said: "Under section 2, c. 11, Gen. St. (section 209, Ky. St.), all contracts made in consideration of services to be rendered in the prosecution, or in aid of the prosecution, in or out of court, of any suit, whereby the thing sued for or in controversy is to be received by such person for his services or assistance, shall be null and void. Section 8, c. 11, Gen. St. (section 216, Ky. St.), provides 'that neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon.' This does not mean that when a party has a cause of action existing at the time he makes the champertous contract, he shall forfeit his right to recover thereon, but that neither he nor the champertor shall have any right of action or suit on the contract made in violation of the statute for the prosecution of the cause of action then existing. In other words, the statute does not cause the creditor who enters into a champertous contract to forfeit to his debtor the debt which was the subject of the champertous agreement. The statute does not declare the cause of action which was the subject of the champertous agreement null and void, but declares the champertous agreement null and void. A champertous contract (other than one relating to real estate) for the prosecution of a cause of action is no defense, and the champerty can only be set up by a party thereto when the champertous agreement is sought to be enforced. Burnes v. Scott, 117 U. S. 588,

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6 Sup. Ct. 865, 29 L. Ed. 991; Robison v. Beall, 26 Ga. 27; Small v. C., R. I. & P. R. Co., 55 Iowa, 582, 8 N. W. 437; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785. However, should a creditor transfer his cause of action to an attorney, or other person, under an agreement that the suit should be prosecuted in the name of the attorney, or such other person, and for thus prosecuting the suit the attorney or such person was to have a part thereof for such services, then it would be available as a defense, because it would be an action the direct effect of which would be the enforcement of the champertous agreement." We, therefore, conclude that the agreement between appellee and Denton presented no defense to this action.

It is next insisted that the trial court erred in its instructions to the jury. The instructions are as follows: "The court instructs the jury that if they believe from the evidence that defendant company contracted and agreed with N. T. Denton that it would deliver to plaintiff, J. M. Maxberry, a message bearing the news of the death of plaintiff's sister, and you believe that the agents or servants of defendant company failed to use extraordinary diligence to deliver same within an usual and ordinary time after receiving same, and you believe from the evidence that plaintiff was prevented from attending the funeral of his sister, then you will find for him the damages sustained thereby; the measure of damages being for any mental pain or anguish suffered or endured by plaintiff, if any, because he was deprived of attending his sister's funeral, and an opportunity to view the remains of his said sister, not exceeding the sum charged in the petition, $1,000. (2) The court instructs the jury that, unless they believe from the evidence that defendant company contracted and agreed to deliver the message to J. M. Maxberry in person, then they were required to use only ordinary diligence or efforts to reach him, or if you believe from the evidence the defendant only agreed and contracted with N. T. Denton to deliver the message to the tie woods, and that the $1.50 paid by Denton only contemplated the delivery of the message to the tie woods, then the law is for the defendant, and you should so find. (3) The court instructs the jury that ordinary care is that degree of care that a majority of ordinarily prudent men would be expected to exercise when surrounded by the same or similar circumstances as were plaintiff and defendant's servants and agents in this case; that negligence means a want of ordinary care. Extraordinary care is that degree of care that a majority of ordinarily prudent men would be expected to use in those situations or cases where they have contracted to do a specific thing and are required by the emergencies of the situation to use the utmost diligence in performing the thing contracted; and you are further instructed that in this connection you must take into consideration the same or similar circumstances as surrounded plaintiff and defendant's agents in this case."

In the instructions above given the trial court seems to have proceeded upon the idea that if appellee's testimony were true, appellant agreed to deliver the message at all events, and such agreement placed upon it the duty of using extraordinary care. Such is not the rule in this state, nor, in fact, the general rule. When a telegraph or telephone company accepts a message to be delivered beyond its ordinary limits for delivery of messages, and exacts a fee in advance, this fact does not impose upon the company any greater diligence than is required in the case of a message directed to a party within its delivery limits. The company's full duty is performed when it uses all reasonable diligence, or, as some authorities express it, ordinary care to deliver the message within a reasonable time. Western Union Tel. Co. v. Elliott (Ky.) 115 S. W. 228; 27 Am. & Eng. Encyc. of Law, p. 1030. We, therefore, conclude that the court's instructions were not a proper presentation of the case. Upon the return of the case the court will, if the facts be the same, instruct the jury as follows: "(1) If you believe from the evidence that the defendant company contracted and agreed with N. T. Denton that it would deliver to plaintiff, J. M. Maxberry, a message bearing the news of the death of plaintiff's sister and calling him to the phone, and that the agents or servants of the defendant company failed to use reasonable diligence to deliver the same within a reasonable time after receiving same, and that plaintiff was thereby prevented from attending the funeral of his sister and viewing her remains, you will find for plaintiff. Unless you so believe you will find for the defendant. (2) If you believe from the evidence that the defendant agreed and contracted with N. T. Denton merely to deliver the message to the tie woods, and that the $1.50 paid by Denton only contemplated its delivery at that point, you will find for the defendant. (3) If you find for the plaintiff, you will award him such damages, not exceeding $1,000, as you believe from the evidence will fairly and reasonably compensate him for any mental pain or anguish which you may believe he endured by reason of being deprived of viewing the remains of his sister and attending her funeral."

The judgment is reversed, and cause remanded for a new trial consistent with this opinion.

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McCORMICK v. McCORMICK'S ADM'R et al.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. WILLS (§ 616*) — CONSTRUCTION — ESTATE DEVISED—LIFE ESTATE.

Where a will gave testator's realty and personalty to his wife for life, and at her death to be equally divided among his heirs, the next paragraph, which gave his wife the right to sell any or all of his property any time she thought best, did not enlarge her life estate, so that, where she sold land and invested the proceeds in other land, she continued to have only a life estate in the land purchased.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418–1430; Dec. Dig. § 616.*]

2. TRUSTS (§ 358*)—FOLLOWING TRUST PROPERTY.

No change in the form of trust property will prevent the beneficiary from reaching it if it is not so commingled with other money or property that it cannot be identified as a distinct fund or specifically separated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 553; Dec. Dig. § 358.*]

Appeal from Circuit Court, McLean County.

"Not to be officially reported."

Action by S. R. McCormick against Alice McCormick's administrator and others. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Taylor & Clarke, for appellant. J. H. Miller, for appellees.

HOBSON, J. F. V. Johnson died a resident of McLean county July 6, 1904, leaving surviving him his wife, Alice Johnson, and four infant children. His will, which was duly admitted to probate, is as follows:

"This is to certify that I, F. V. Johnson, being of sound mind, have this day made this, my last will and testament as follows, viz: I give and bequeath to my wife, Alice Johnson, all of my personal property and real estate during her natural life, and at her death to be equally divided among my bodily heirs.

"I also give to my wife, Alice Johnson, the right to sell or transfer any or all of my property, personal or real, at any time she thinks best."

After his death, the widow, Alice Johnson, married S. R. McCormick. On December 14, 1906, she and her husband, McCormick, conveyed the real estate owned by F. V. Johnson to one Ashley for $2,300, and with $2,200 of this money she purchased and paid for two other tracts, and had the land conveyed to her in fee simple. Shortly thereafter she died, and S. R. McCormick instituted this action in the McLean circuit court to have one-third of the land set apart to him for life as surviving husband under the statute. This was resisted by the guardian of the four Johnson children, and upon a final trial of the action the court held that Alice McCormick under the will of her first husband took only a life estate in the land devised by him, and that she having sold this land, and having invested the proceeds which represented the land in the two tracts in controversy, she had only a life estate in these two tracts. He therefore dismissed the petition of S. R. McCormick, and adjudged the land to the four infants absolutely. S. R. McCormick appeals.

The will of F. V. Johnson is very clearly expressed. It requires the aid of no technical rules of construction to ascertain the intention of the testator. He gave the property to his wife during her natural life, and at her death to his children equally. He also gave her the right to sell any of the property at any time she thought best; but the power of sale given the life tenant in no wise enlarged her life estate. When she sold the land, she had only a life estate in the proceeds. Anderson v. Hall, 80 Ky. 91; Embry v. Embry, 102 S. W. 239, 31 Ky. Law Rep. 295. When the proceeds of the land were invested by her in other land, this simply stood in the place of the original tract; for, so long as the proceeds of trust property may be identified, the chancellor will enforce the trust. In 2 Pomeroy's Equity, § 1058, the rule is thus stated: "No change in the form of the trust property effected by the trustee will impede the right of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated."

Judgment affirmed.

HARDY BUGGY CO. v. ROYAL BODY CO.

(Court of Appeals of Kentucky. Oct. 5, 1909.)

COMPROMISE AND SETTLEMENT (§ 19*) — IMPEACHMENT.

Where a buyer had ample opportunity to inspect the goods, and actually did so, before an adjustment of the damages for the seller's failure to comply with the contract of sale, he could not urge that the claim for damages presented by him did not cover all the loss sustained.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 67, 71–75; Dec. Dig. § 19.*]

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by the Hardy Buggy Company against the Royal Body Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. Campbell, Jr., and Campbell & Campbell, for appellant. Eaton & Boyd, for appellee.

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CARROLL, J. This action was instituted by the appellee, Royal Body Company, against the appellant, Hardy Buggy Company, to recover from it $390.60, alleged to be the balance due on the purchase price of a lot of buggy bodies and seats sold and delivered to the Hardy Buggy Company in February and March, 1908. The amount of sales during these months was $1,168, but various credits reduced it to the amount before mentioned. The Hardy Buggy Company in its answer set up that the contract under which the goods were purchased stipulated that the bodies and seats should be made of first-class material, thoroughly dried and seasoned, and finished in a first-class, workmanlike manner, and averred that the bodies and seats furnished it were not made of first-class material, thoroughly dried or seasoned, or finished in a first-class workmanlike manner, and that it was damaged by reason of this breach of the contract in the sum of $1,000. It further averred that it refused to receive the bodies and seats because they did not fulfill the contract, and thereupon it was agreed between the parties that the Hardy Buggy Company should receive the goods and have them put in the condition required by the contract at the expense of the Royal Body Company.

It appears from the evidence that the goods were delivered to the Hardy Buggy Company at various times between February 21 and March 21, 1908, and that, upon complaint of the Hardy Buggy Company that the goods did not comply with the contract, an adjustment of the differences growing out of this claim for damages was made between the parties, and the Hardy Buggy Company on April 8, 1908, was allowed a credit on its account by $436.50, that being the amount of the damages it was entitled to on account of defects in the bodies and seats theretofore furnished, as shown by the written claim for damages presented to it by the Royal Body Company on that date. This writing mentions all of the goods received by the Hardy Buggy Company included in the account sued on. It is thus apparent that, when this letter was written, the Hardy Buggy Company had inspected all of the goods, or at least had ample opportunity to do so. That it did is further shown by the evidence of Mr. Hardy, manager of the Hardy Buggy Company. As the Hardy Buggy Company not only had ample time and opportunity to inspect all of the goods received by it prior to April 8, 1908, but did so, it is not in a position to complain that the claim for damages presented by it did not cover all the loss it sustained.

There is no error assigned except that the verdict is against the evidence. The only issue in the case is whether or not the Hardy Buggy Company should be allowed damages for defects in the goods furnished in addition to $436.50. Upon this issue the jury did not in our opinion make any mistake except against the Royal Body Company in awarding it $300, when it was entitled to $390.60.

The judgment is affirmed.

LIVINGSTON COUNTY BANK et al. v. FIRST STATE BANK.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

1. SALES (§ 68*)—CONSTRUCTION OF SALE—PROPERTY PASSING.

Defendant bank contracted to sell to plaintiff bank its entire capital stock, and all notes, bills of discount, cash, etc., which might be on hand on January 1, 1907, together with its banking house, fixtures, books, papers, and property of every kind belonging to defendant, but the contract provided that defendant, in addition to the purchase price, should have all its earnings up to and including December 31, 1906, and should continue the business to January 1st, and no longer. *Held*, that defendant's property of every description passed under the contract, and two judgments which were obtained theretofore, and had been considered practically worthless, but which were sold in December, 1906, and the proceeds distributed to defendant's stockholders before January 1st, passed under the contract, so that plaintiff was entitled to the proceeds, they not being "earnings" within the meaning of the contract, which word, construed to effectuate the intention of the parties, meant earnings of the bank in the ordinary course of its business between November 1st and January 1st, and plaintiff was also entitled to that part of the interest on notes, discounted by defendant after November 1st, which matured after January 1st, which represented the time between January 1st and their maturity irrespective of when such interest was collected by defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 184; Dec. Dig. § 68.*]

2. CORPORATIONS (§ 155*)—STOCK DIVIDENDS—PERSONS ENTITLED.

Dividends belong to the owner of corporate stock at the time they were declared.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 569; Dec. Dig. § 155.*]

Appeal from Circuit Court, Livingston County.

"Not to be officially reported."

Action by the First State Bank against the Livingston County Bank and others. From the judgment, defendants appealed, and plaintiff took a cross-appeal. Affirmed on the original appeal, and reversed on the cross-appeal for further proceedings.

Hendrick, Miller & Marble, Wilson & Landrum, and John K. Hendrick, for appellants. C. C. Grassham and Berry & Thelkeld, for appellee.

CARROLL, J. On the 1st day of November, 1906, the First State Bank and the Livingston County Bank entered into a written contract, by the terms of which the state bank purchased all the assets and property of the Livingston bank. So much of the contract as is material to the issues here involved is as follows: "This contract and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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agreement made and entered into this 1st day of November 1906 by and between the Livingston County Bank, * * * and the First State Bank * * * Witnesseth: That for and in consideration of $140 per share of $100 each, the Livingston County Bank has this day sold and does hereby sell and convey unto the First State Bank the entire capital stock of $15,000, of the said Livingston County Bank, together with all notes, papers, bills of discount, cash and accounts which belong to the party of the first part which may be on hand January 1st, 1907; and its banking house and lot in the town of Smithland, Kentucky, together with all its furniture, safe, vaults and banking fixtures, books, papers, and property of every kind and character belonging to the said Livingston County Bank. The Livingston County Bank, in addition to the $140 per share of $100 each, shall have all earnings of said Livingston County Bank up to and including the 31st day of December 1906. The Livingston County Bank by virtue of the above sale and conveyance agrees to turn over to the First State Bank on the 1st day of January 1907, the $3,000 surplus fund it now has on hand, and all cash that may be on deposit in the said Livingston County Bank, and due from its correspondent banks of which after said date the party of the second part shall hold the same for its depositors and persons entitled thereto, and for which it shall be responsible. The Livingston County Bank shall continue its business as a banking institution up to the 1st day of January 1907 and no longer; and its stockholders shall have all the earnings of said bank up to and including the 31st day of December 1906."

In April, 1907, the First State Bank filed its petition in equity against the Livingston County Bank, in which, after setting up the contract, it averred that the Livingston bank refused to deliver to it two judgments, aggregating $2,600 it had obtained against parties upon notes executed by them to the bank. It further averred that between July 14, 1906, and the 1st day of January, 1907, the Livingston bank had discounted a large number of notes and bills that did not fall due until after January 1, 1907, and it failed and refused to pay over to the state bank any part of the discount received and collected on these notes, although it was entitled to such proportion of the discounts as was represented by the time the bills and notes ran after January 1, 1907, until maturity. With the petition was filed a statement showing each note that did not mature until after January 1, 1907, and the amount of interest or discount which should have been paid by the Livingston bank between January 1, 1907, and the maturity of the paper. The answer of the Livingston bank was substantially a traverse of the averments of the petition, and a denial that the state bank was entitled to recover from it anything on account of the matter set up in the petition. The case having been submitted in the lower court upon the pleadings and evidence, it was adjudged that the state bank was not entitled to recover anything on account of the claim for interest, but was entitled to have transferred to it the two judgments, or, if this could not be done, to recover the amount received for the judgments from the persons to whom it sold them in December, 1906.

Taking up first the matter of the judgments, we agree with the lower court in its conclusion respecting them. These judgments were obtained by the Livingston bank long before it entered into the contract with the state bank, and at that time they were regarded as practically worthless, as the bank had made a number of efforts, but without success, to collect them, but in December, 1906, it sold these judgments for $260. That these judgments were embraced in the contract we have little doubt. At the time the contract was entered into these judgments, although considered uncollectible, were the property of the Livingston bank and a part of its assets. The fact that they were treated as practically worthless does not affect the question. That they were not entirely worthless is evidenced by the fact that the bank received for them in December, 1906, $260. With the single exception of the earnings of the Livingston bank between November 1st and December 31st, all the property and assets of every kind and character that it had or owned on November 1, 1906, passed under the contract to the state bank, to be delivered to it on January 1, 1907. The language of the contract, by which the Livingston bank sold its banking house and lot, together with all its furniture, safe, vaults, banking fixtures, books, papers, and property of every kind and character belonging to the Livingston bank, makes it plain that it was intended by the parties that every species of property owned by or in which the Livingston bank had an interest was transferred to the First State Bank. Nor was the $260 received by the Livingston bank for these two judgments a part of its earnings within the fair meaning of the contract. The word "earnings" contemplated the earnings of the bank in the usual and ordinary course of its business transacted between November 1 and January 1, 1907. If the bank after November 1, 1906, had collected the full amount of these judgments, we have no doubt that the money so collected would have passed under the contract to the state bank. Although the Livingston bank had the right under the contract to carry on its business until January 1, 1907, all of its assets and property passed to the state bank on November 1st, subject to the right of the Livingston bank to carry on business in its own name the same as before the contract was made, and retain whatever money it earned after November 1st.

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The point is made by counsel for the Livingston bank that it was to deliver to the state bank all notes and bills of discount, cash, and accounts which belonged to it, and which should be on hand January 1, 1907; and it is argued that the $260 received for these two judgments was not on hand on January 1, 1907, as it had been distributed to the stockholders to reimburse them in part for the dividends they had previously lost by reason of the failure to realize on these judgments. We are not impressed with the soundness of this argument. The Livingston bank could not, after November 1, 1906, convert into money any of the property it owned on November 1st, and distribute the same among its stockholders, and then set up that because the money so distributed was not on hand on January 1, 1907, the First State Bank was not entitled to it. The Livingston bank had as much right and authority to convert into money any note or bill in its vault, and distribute the proceeds among its stockholders and refuse to account for it to the First State Bank, as it did to dispose in this way of the money realized on these judgments. They were as much the property of the state bank as any other asset owned by it on November 1, 1906.

In considering whether or not the state bank is entitled to that part of the interest that accrued after January 1, 1907, on notes taken prior to December 31st, we may with propriety look to the purpose the parties had in mind in entering into the contract, with a view to ascertaining the meaning of the word "earnings" as used in the writing between them. It was contemplated by the parties, and so expressed in the contract, that the Livingston bank should cease to do business on January 1, 1907. On that day its functions as a banking institution terminated, and all of its assets and property of every description was delivered to the state bank. This being true, it cannot fairly or reasonably be said that it had the right to retain the interest that was earned after that date, although the interest may have been collected by it prior to that time. The contract gave to the Livingston bank the right to retain any earnings made by it in the usual course of business between November 1, 1906, and January 1, 1907; but on January 1, 1907, as all its notes and bills then on hand were surrendered to and became the property of the state bank, this bank was entitled to interest on all the notes and bills that accrued after it became the owner of them. If the argument of the Livingston bank is sound, and a correct interpretation of the contract, then the officers of this bank could, in December, 1906, have used all of the obtainable money of the bank in purchasing or discounting paper that would not fall due for 6 or 12 months after January 1, 1907, and thereby deprive the state bank of any income from this paper until its maturity. But it seems to us that the contract is not capable of a construction that would authorize this method of depriving the state bank of the interest it should receive after January 1, 1907. The word "earnings" in the contract is not a technical term, nor was it used in a technical sense. It was employed by the parties for the purpose of conferring upon the Livingston bank the right to what it might earn up to January 1, 1907, when under the contract it should cease to do business. If the Livingston bank on December 1, 1906, lent $1,000 for six months, and retained $30 as discount or interest for the period the note was to run, this $30 represented the earnings derived from the loan or discount from its date until its maturity. The $1,000 did not earn in one month $30. It only earned in that time one-sixth of $30, and the other five-sixths was earned in the remaining time before the maturity of the note. The time when the interest was taken out or collected is not the controlling feature of this contract. It was not material whether it was retained in advance or collected at the maturity of the paper. The interest charged for money, whether it be collected when the loan is made or when it matures and is paid, is not really earned until the maturity of the paper. It is exacted as compensation for the use of the money for the time it is lent, and the money loaned earns for the lender interest every day until it is returned to him. If the Livingston bank, on July 1, 1906, had lent $1,000 for a year, not taking out or collecting the interest in advance, but letting it run to be paid at the maturity of the paper, or on July 1, 1907, the state bank would not be entitled to all the interest merely because it was collected by it, but would be obliged to account to the Livingston bank for interest for six months, or until January 1, 1907, as that much of the interest was earned by the Livingston bank.

The word "earnings" in the contract should be given such a meaning as will effectuate the intention of the parties when the contract was entered into, and manifestly it could not have been in the contemplation of the parties that the Livingston bank, on January 1, 1907, might hand over a lot of noninterest-bearing paper, or rather paper upon which the state bank would not receive any interest at all. Unless it was the intention of the parties to limit the interest or discount the Livingston bank was entitled to have that portion of it that accrued from the date of the note to January 1st, there was no reason why the contract should expressly confine the earnings to December 31, 1906. If the Livingston bank should be allowed to retain the interest collected by it for the full time the notes were to run, and upon notes that did not mature until after January 1st, it would be retaining interest that was not fully earned before January 1, 1907. If the contract stipulated that the

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Livingston bank should have all discount or interest collected by it to January 1, 1907, the contention of its counsel would be correct, but the contract does not so read. The word "earnings" cannot be given the same meaning as the words "interest collected" or "discount collected." Nor does the fact that the Livingston bank on December 31, 1906, declared a dividend, and distributed among the stockholders all the interest and discount collected between November 1, 1906, and January 1, 1907, affect the question. The Livingston bank had a right to declare a dividend of all its earnings up to January 1st, but this did not carry with it the authority to declare a dividend on earnings after January 1, 1907. There is no controversy about the legal proposition that dividends declared belong to the owner of the stock at the time the dividend is declared. But this authority is not applicable to this case, which must be adjudged upon a fair construction of the contract entered into. And giving to this contract such construction, our conclusion is that the state bank was entitled to receive from the Livingston bank, on all notes and bills discounted by it after November 1, 1906, and that did not mature until after January 1, 1907, that proportionate part of the interest that was collected or received by the Livingston bank for the time between January 1st and the maturity of the notes.

Wherefore the judgment is affirmed on the original appeal, and reversed on the cross-appeal, with directions to proceed in conformity with this opinion.

LOUISVILLE & N. R. CO. v. FREPPON.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. RAILROADS (§ 282*)—DEFECTIVE APPLIANCES—INJURIES TO THIRD PERSONS—KNOWLEDGE OF DEFECT.

Where the servant of a consignee of a car load of coke was injured by the fall of a defective car door as he attempted to open the car to unload it, the petition was not objectionable for failure to allege that the railroad company knew, or by ordinary care could have known, of the defect, and that plaintiff did not know thereof, and by ordinary care could not have known it, since it is only in actions by a servant against his master to recover for the master's negligence that it is necessary to aver knowledge on the master's part and want of knowledge by the servant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 910; Dec. Dig. § 282.*]

2. RAILROADS (§ 275*)—UNSAFE APPLIANCES—INJURIES TO THIRD PERSONS—DUTY OF RAILROAD.

Plaintiff, the servant of a consignee of a car load of coke, was injured while attempting to open the door of the car after it had been placed on the consignee's switch for unloading, by the fall of the car door, which was defective, upon him. The car was owned and used by the railroad company, and the consignee had nothing to do with it except to unload it. It also appeared that at the time the car was placed the railroad company had knowledge of the defect. *Held*, that the railroad company was bound to keep its cars in a reasonably safe condition, and was therefore liable to plaintiff for his injuries while exercising ordinary care in unloading it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873–877; Dec. Dig. § 275.*]

3. RAILROADS (§ 282*)—DEFECTIVE APPLIANCES—INJURIES TO THIRD PERSON—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, the servant of a consignee of a car load of coke, was injured by the fall of the car door on him as he attempted to open it to unload the car, and it did not appear that he knew or had reasonable grounds to believe that the door would fall when he knocked out the pin which held it shut, whether plaintiff himself was negligent was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 917; Dec. Dig. § 282.*]

4. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Where plaintiff sustained serious and painful injuries resulting from the fall of a defective car door on him, and the only physician examined testified that his ability to labor, though not totally destroyed, was permanently impaired, and that his injured limb would never be as good as it was before the injury, a verdict for $2,700 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372–385, 396; Dec. Dig. § 132.*]

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by George Freppon against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Yeaman & Yeaman, Benjamin D. Warfield, and Chas. H. Moorman, for appellant. Montgomery Merritt and W. P. McClain, for appellee.

CARROLL, J. The appellant company delivered to the Henderson Tobacco Extract Company at its factory one of its cars loaded with coke. The car was loaded at a mine on the line of the railroad company, and carried from there by it on its line of railroad to Henderson, its destination, and was then placed by it on a switch owned by the railroad company that ran from the line of the railroad to the factory to be unloaded. A short while after the car was placed at the factory the appellee, Freppon, an employé of the extract company, in attempting to open the car door for the purpose of getting the coke out, was severely injured by the falling of the door upon him. To recover damages for the injuries thus sustained he brought this action, and the jury assessed the damages at $2,700. The company in asking a reversal of the judgment entered upon the verdict insist, first, that the petition was defective; second, that the injuries were the result of his own neg-

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ligence; and, third, that the recovery was excessive.

It is argued that the petition is defective because it fails to aver (1) that the company knew of the defect in the car door, or by the exercise of ordinary care could have known it; (2) that Freppon did not know of the defect, and by the exercise of ordinary care could not have known it; and (3) because it does not contain any averment showing that the company owed a duty to Freppon that would make it liable to respond in damages to him for any injuries received.

The action is not based upon the assumption that the relation of master and servant existed between the company and Freppon: but proceeds on the theory that the railroad company was under a duty to have the car in reasonably safe condition, and that he was injured by its negligence in having and permitting the door of the car to be and remain out of repair and in a dangerous condition. It is only in actions by a servant against his master to recover damages growing out of negligence in respect to the failure of the master to perform some duty owing to the servant that it is necessary to aver that the master knew, or by the exercise of ordinary care could have known, of the defects in the appliances or premises that caused the injury, and that the servant did not know, and could not by the exercise of ordinary care have known, of such defects. The necessity for an averment like this in actions by the servant against the master grows out of the fact that, generally speaking, the servant assumes the ordinary risks of the employment, and cannot maintain an action for injuries sustained by a breach of a duty on the part of the master, unless the master knew, or by the exercise of ordinary care could have known, of the unsafe appliances or place that brought about the injury, and the servant did not know and by the exercise of ordinary care could not have discovered the danger. But Freppon was not a servant of the railroad company; and so it is not necessary to further consider this phase of the argument of counsel, or the line of authorities fixing and defining the relative duties of master and servant. As the rule of pleading noticed has no application to an action brought by a person not a servant, and there is no other reason for holding the petition defective, it must be held to state a good cause of action.

It is, however, earnestly insisted that the company owed no duty whatever to Freppon, and therefore was not responsible to him in damages for an injury sustained by reason of the defective condition of its car, however negligent it may have been in failing to discover and repair the defect. This argument is put by counsel upon the ground that Freppon at the time he was injured was not in the employment of the railroad company or performing any service for it, but was an employé of the extract company, to which the car had been delivered for the purpose of unloading; and that, as there was no contractual relation existing between Freppon and the railroad company, it was under no obligation to furnish him safe appliances or a safe place in which to work for the extract company. This feature of the case presents an interesting legal question that in the light of the authorities we will endeavor to dispose of in harmony with the principles of law prevailing in this state and applicable to the matter in hand. In order that there may be no confusion or misunderstanding as to the issue, we will state the pertinent facts concerning which there appears to be no conflict in the testimony. First. The car by which Freppon was injured was owned and used by the railroad company, and was placed by it on the switch only for the purpose of being unloaded. Second. The extract company had no control over the disposition or movement of the car, or anything to do with it, except to unload it at the place where it was placed by the railroad company. Third. Freppon was not in any capacity a servant of the railroad company. He was an employé of the extract company, and as such undertook for it to assist in unloading the car. Fourth. The car door that fell upon him was in an unsafe and dangerous condition when it was placed at the unloading point by the railroad company, and its defective condition was at that time known to the employés of the railroad company.

So that, upon these facts, the question may be thus stated: Is a common carrier under a duty to maintain its cars in a reasonably safe condition when they have been placed by it in the course of its business at a point for the purpose of being loaded or unloaded, and therefore liable to respond in damages for a failure to perform this duty to a person not an employé of the railroad company, but who is engaged in loading or unloading the car as the servant of the person for whose use the car has been so placed? Or is the common carrier when it places the car at the disposal of the consignee or consignor for the purpose of being unloaded or loaded relieved from all obligation to have the car at the time it is so placed in a reasonably safe condition for the purpose for which it is to be used, and free from liability for injuries received by the consignee or consignor or their servants while loading or unloading the car? If the railroad company owed no duty to Freppon under the circumstances stated, it is plain that the verdict in his behalf should be set aside and the action dismissed, but we do not agree with counsel for the railroad company that a common carrier is relieved from the obligation of keeping its cars reasonably safe during the time they are being loaded or unloaded merely because during such

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time they are under the control of the person loading or unloading them, at least in so far as it may be necessary to perform this service. When a carrier delivers a car to a consignor to be loaded, or a consignee to be unloaded, it must have the car in a reasonably safe condition for the purpose for which it is intended to be used. In the absence of an express agreement, the law will raise an implied contract to this effect, and, under and by virtue of this implied contract, a recovery for a breach of it may be had by any person injured while engaged in loading or unloading the car and exercising ordinary care for his own safety. The duties and obligations of a common carrier to the public are not suspended during the time that its cars are being used by its patrons for purposes of loading or unloading. When it delivers a car for this purpose and invites its customers to use it, it undertakes that the car is in a reasonably safe condition to be used for the purpose intended. There is no sort of doubt about the proposition that a carrier must keep its depot grounds and premises in reasonably safe condition for use by persons having business at such places with it; and that its failure to keep them in such condition is actionable negligence for which it may be required to respond in damages to any person injured on account of such failure. This duty and corresponding liability is based upon the doctrine that, as the carrier invites the public to use its stations and platforms and premises thereabouts, it must keep them in a reasonably safe condition for use by the persons it has thus invited. Hutchinson on Carriers, § 928; 2 Shearman & Redfield on the Law of Negligence, § 410. And there seems to be no sound distinction between its duty in these respects and its duty to persons to whom it furnishes cars in the course of its business for the purpose of being loaded or unloaded. Its obligation to keep its station platforms and approaches in a reasonably safe condition for use by persons lawfully enjoying them by its invitation is no greater than its duty to keep a car in a reasonably safe condition that it furnishes to a shipper and invites him to use. In each instance the person using the premises or appliances furnished to him by the carrier for the purpose of enabling him to transact business with it has a right to assume that the premises and appliances so furnished will be reasonably safe for his use. It would be a distinction without a difference to hold that a carrier must keep its depot platform reasonably safe for use by persons getting on and off its trains, and yet that it might deliver to a shipper for the purpose of being loaded or unloaded a car that was in an unsafe and dangerous condition. When the railroad company placed the car on the switch for the purpose of being unloaded by the employés of the extract company, these employés while so engaged were neither trespassers nor licensees. They were at least impliedly invited by the railroad company to engage in unloading the car it had placed there for that purpose to be unloaded by them.

As said in 3 Elliott on Railroads, § 1248: "One who comes upon the premises of a railroad company in the usual course of business with it for the purpose of loading or unloading, or delivering and receiving freight, is not a mere licensee, but is entitled to the care due one who is invited to come upon the premises of another." In Southern Railway Company in Kentucky v. Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. Law Rep. 675, the court cited with approval the following extract from Cooley on Torts: "When one expressly or by invitation invites others to come upon its premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." White v. Cincinnati, etc., Railway Company, 89 Ky. 478, 12 S. W. 936, 7 L. R. A. 44, was an action by the employé of a shipper of stock who was injured by a defective stock chute while engaged in loading stock, and, in holding that he had a good cause of action, the court said: "The rule is well settled by a uniform current of decisions so numerous that citation is unnecessary that a railroad must keep its platforms and approaches to which the public do or will naturally resort in doing business with it in a safe condition for such use. * * * The appellant had a right to be where he was, and engaged as he was, when he was injured. The company had invited his presence by holding itself out as a carrier of stock. It had impliedly said to the public, 'The platform is safe for the purpose intended, if reasonable care be exercised in its use.' * * * In this case the company had provided but the one chute and the one apron for the shipment of stock at the station. It was inviting patronage in this way by the public, although it knew the means provided for the purpose were unsafe."

A case very much in point is Sheltrawn v. Michigan Central Railroad Co., 128 Mich. 669, 87 N. W. 893. In that case the railroad company had placed a number of flat cars on a switch for the purpose of being loaded with logs. Sheltrawn, who was engaged in loading the logs, as an employé of the owner of the logs, was injured by reason of the cars being supplied with defective or unsafe brakes. It is true the petition charged that the railroad company knew the use to which the cars would be put, but this does not seem to have been a material issue in the case; the court proceeding upon the theory that it was the duty of the rail-

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road company to furnish cars in a reasonably safe condition for the use intended. In considering the case the court said: "It does not appear to be questioned that the relation of the defendant to this operation was such as that it owed a duty of reasonable care to the plaintiff, as to which question, see Roddy v. Missouri Pacific R. Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333." Risque v. Chesapeake & Ohio Railway Co., 104 Va. 476, 51 S. E. 730, relied on by counsel for appellant, we do not regard as applicable to the case we are considering. In that case Risque, who was an employé of the Alleghany Ore & Iron Company, was injured in a collision between an engine of the ore and iron company and a passenger train of the Chesapeake & Ohio Railway Company. It seems that the collision was caused by the fact that the railroad company furnished the iron and ore company with cars without brakes to be used by the latter company in its yards. In the course of the opinion the court said: "The declaration shows that the cars were delivered by the railway company to the ore and iron company on the side track to be moved and either unloaded of freight belonging to the ore and iron company or loaded with the product of that company. If these cars were without brakes, or equipped with unsound brakes, it was the duty of the ore and iron company to ascertain the fact by inspection and either remedy the defect or decline to use the cars. No relation of employer and employé existed between the defendant company and plaintiff's intestate; and, if he suffered any injury by reason of the cars in question being without brakes or equipped with unsound brakes, the liability, if any, would rest upon his master, the Alleghany Ore & Iron Company, for failing to make proper inspection, and not upon the railway company." It will thus be seen that the defective cars that caused the injury to Risque had been turned over to the ore and iron company by the railway company to be used by the ore and iron company in its business, and they were being so used by it at the time of the injury, and were under the control and management of the ore and iron company. When this company accepted the cars from the railroad company, it took them in the condition they were delivered to it, and thereupon assumed the duty of protecting its employés from injury on account of the defective or dangerous condition of the cars. This idea is well illustrated in Louisville & Nashville R. R. Co. v. Williams, 95 Ky. 199, 24 S. W. 1, 15 Ky. Law Rep. 548, 44 Am. St. Rep. 214, where the court said: "When one company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employés required to handle the car; and, when such defects are patent and an injury occurs to the employés by reason of the defect that is unknown to the party injured, the company is responsible." To the same effect is L. & N. R. R. Co. v. Veach, 46 S. W. 493, 20 Ky. Law Rep. 403. Roddy v. Missouri Pacific R. Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, is also relied on by counsel for the appellant, but a careful reading of the case shows that it is not in conflict with the views we have expressed. Roddy was an employé of Pickle, who owned and operated a stone quarry. The railroad company furnished cars to the quarry to be loaded with stone. Roddy was injured by the failure of the railroad company to have the cars furnished the quarry people equipped with brakes, and in an action against the railroad company for its failure to furnish cars provided with suitable brakes Roddy recovered damages. In considering the case the court, after stating that there was no contractual relation between Roddy and the railroad company, nor the relation of master and servant, said: "What, then, was the true relation between these parties? And what, if any, duty did it owe to plaintiff Roddy as the employé of Pickle? Defendant was engaged in the general business of a common carrier. It operated a railroad between St. Louis and Kansas City. Pickle was the owner of large and valuable stone quarries situated some distance from the defendant's road. * * * It thus became a matter of mutual interest and profit to defendant and Pickle to provide means for the transportation of this merchandise from the quarry to points at which it could be sold. A contract was entered into between them, by which defendant built a branch or spur road from its line to the quarries, and also tracks from this spur into the quarries. These were paid for by Pickle. In order to facilitate the transportation of stone, which was beneficial to both parties, it was agreed that defendant should, when cars were needed, place them on the quarry tracks or conveniently near to them, and that Pickle should move them when needed into position for loading, and, when loaded, defendant should take them out and transport them to their destination. Plaintiff was employed by Pickle, and a part of his duties consisted in moving and handling these cars. * * * Under this evidence, it is clear that what was to be done by the respective parties under the contract was for their mutual profit, and each was a contractor with the other to perform a particular part of the work necessary to carry out the common purpose. * * * We think each of these contracting parties owed to the other and his employés the duty of properly discharging his part of the joint undertaking in respect to any matter exclusive-

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ly devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was intrusted entirely to defendant. They were intended for the use of Pickle and his servants in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use. * * * While the relation of master and servant did not exist between these parties, defendant owed to plaintiff the observance of reasonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing his servant with the instrumentalities for carrying on its business." We have reached the conclusion that under the facts stated the railroad company owed a duty to the extract company and its employés to furnish the car in a reasonably safe condition to be unloaded, and that under the evidence it failed to perform this duty.

The point is further made that Freppon was guilty of contributory negligence sufficient to defeat a recovery. But the facts do not authorize this assumption. There is no evidence that he knew or had reasonable grounds to believe that the car door would fall if he knocked the pin out, or that he failed to exercise ordinary care for his own safety. The question of whether or not he was guilty of contributory negligence was fairly submitted to the jury in an instruction telling them, in substance, that if they believed from the evidence that the plaintiff failed to use ordinary care in unloading the car, and was careless and negligent in so unloading the same, and that but for his own carelessness and negligence the accident and injury would not have occurred, they should find for the defendant.

It is further urged that the verdict is excessive, but the evidence does not warrant us in so holding. The injuries received by Freppon were very serious and painful, and the only doctor who testified in the case said that, although his disability to labor was not totally destroyed, it was permanently impaired, and that his injured limb would never be as good as it was before the injury. Under these circumstances the verdict is not in our opinion excessive.

Perceiving no substantial reason why the verdict should be interfered with, the judgment of the lower court is affirmed.

CREAGER'S ADM'R v. ILLINOIS CENT. R. R. CO. et al.†

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. RAILROADS (§ 376*)—OPERATION—INJURY TO TRESPASSER.

Train employés were not bound to maintain a lookout for a trespasser upon the track and owed him no duty until he was discovered, but, if his peril was discovered before he was struck, they were bound to exercise ordinary care to use all reasonable means to prevent striking him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1276; Dec. Dig. § 376.*]

2. NEGLIGENCE (§ 121*)—PRESUMPTION.

Negligence is not presumed, but must be directly proved, or the facts shown from which it may be reasonably inferred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217–220, 224–228; Dec. Dig. § 121.*]

3. RAILROADS (§ 400*)—INJURY TO TRESPASSER—ACTION—SUFFICIENCY OF EVIDENCE—DISCOVERY OF PERIL.

In an action for the death of a trespasser by being struck on defendant's tracks, evidence *held* not to show that the train employés discovered intestate's peril in time to prevent his death by exercising ordinary care, so that a verdict was properly directed for defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1375; Dec. Dig. § 400.*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by D. B. Creager's administrator against the Illinois Central Railroad Company and another. From a judgment for defendants upon a directed verdict, plaintiff appeals. Affirmed.

A. Jones and Robert Hardison, Jr., for appellant. Taylor & Evans, for appellees.

SETTLE, J. One of appellee Illinois Central Railroad Company's fast passenger trains on March 16, 1907, ran against D. B. Creager in Muhlenberg county 1½ miles south of Rockport, Ky., and so injured him as to immediately cause his death. The appellant Charles Creager, as administrator of the decedent's estate, thereafter brought suit in the court below against the railroad company and Andy Fraley, engineer in charge of the train at the time of the accident, seeking to recover of it and him $15,000 damages for the mental and physical suffering of the intestate between the time of the infliction of the injuries and his death; it being alleged in the petition that the same were caused by the negligence of the appellee Illinois Central Railroad Company and its engineer, Fraley. The separate answers of the appellees denied the negligence charged in the petition, alleged that appellant's intestate was a trespasser upon the railroad track at the time of the accident, that his presence thereon was not discovered by those in charge of the train in time to have prevented his injuries, and that the injuries and death of the intestate were caused solely by his own negligence. The affirmative matter of the answer was controverted by the reply. On the trial the circuit court, deeming the appellant's evidence insufficient to authorize a recovery, peremptorily instructed the jury to find for appellee, which was done and judgment entered accordingly.

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† Rehearing denied November 9, 1909.

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It is insisted for appellant that this was error, on account of which and the refusal of the court to grant him a new trial he asks a reversal of the judgment. It is conceded that the intestate when injured was a trespasser upon appellee's railroad track, and, this being true, no duty rested upon appellee's servants in charge of the train to maintain a lookout for him, nor did they owe him any duty whatever until his presence on the track was actually discovered by them, but, if his peril was discovered by them before the train struck him, it was their duty, in the exercise of ordinary care, to use all reasonable means at their command to prevent the train from striking him. It is further conceded that the intestate's collision with the train occurred at or near the end of a trestle; that the train was several hours behind its regular time, and running at a speed of not less than 60 miles an hour; and that it passed through a cut ending with a curve in the track and crossed a public road before striking the intestate. It is claimed by appellant, and some of his evidence tended to prove, that a person walking on the railroad at the point where the intestate was killed could have been seen by the engineer or fireman of the train, if maintaining a lookout, a distance of 750 feet or 250 yards before reaching him. This may be true, and yet the fact would not authorize a recovery, in the absence of evidence conducing to prove that the engineer or fireman did see the intestate, and, after discovering his peril, might by the exercise of ordinary care have prevented the train from striking him.

The only eyewitness to the accident was Dr. Elliott, who, though several hundred yards distant, saw, as he thought, the intestate step from the track out of the way of the train just as it reached him, but did not see him before the train reached him. He, of course, learned immediately afterwards that the intestate did not escape the train at all, but was struck and killed by it. Whether the intestate had stepped upon the track just before he was killed, or had previously been walking or sitting upon it, does not appear from the evidence, and no witness testified that he was ever seen on the track or at all, by either the engineer or fireman, before the train struck him. It is, however, argued by counsel for appellant that the fact that the locomotive whistle was blown twice or more before the train struck the intestate, and the further fact that the view along the track, after the train left the cut, was unobstructed for a distance of 750 feet before the train struck the intestate, afforded some evidence that they saw him on the track. Moreover, that there was some evidence from two expert trainmen that the train could have been stopped short of 750 feet, and that these facts or circumstances, however inconclusive, entitled the appellant to have his case go to the jury. Three or four witnesses testified that they heard the train whistle. Some said it gave two shorts blasts, others more; but a careful analysis of the evidence will show that none of the witnesses could precisely locate the whereabouts of the train when the whistling was done. Whether it was to indicate the approach of the train to the cut, the sharp curve near the mouth of the cut, or was a signal for the public crossing, or trestle, or to stop the train after it struck the intestate, cannot be told from the evidence.

Negligence is not to be presumed. It must be directly proved, or the facts established from which it may reasonably be inferred. In a case where the person injured and killed is a trespasser on the railroad company's track, the decisive question is, not whether those in charge of the train might have seen the trespasser by maintaining a proper lookout, but did they see him and know of his peril, and, if so, could they by the exercise of ordinary care have prevented injury to him? The doctrine applicable to the facts of the instant case is well expressed in an opinion of the court in the case of Nashville, C. & St. Ry. Co. v. Bean's Ex'r, 128 Ky. 758, 110 S. W. 328, 33 Ky. Law Rep. 303, as follows: "Nor is there any direct testimony conducing to show when or where the deceased came upon the railroad track, or how long he had been walking on the track before he was struck, or when his peril was discovered by the persons in charge of the train, or that after actually discovering his peril they could, by the exercise of ordinary care, have stopped the train in time to avoid the injury to him. * * * The fact * * * that, if deceased had been walking on the track the engineer, if keeping a lookout, must have seen him in time to have stopped the train, if he exercised ordinary care, falls far short of showing when the peril of the deceased was actually discovered by the trainmen, or that, in the exercise of ordinary care, by the use of all reasonable means at hand, they could have prevented striking him after his peril was so actually discovered. We cannot supply the failure in the evidence for appellee to show the existence of these facts so indispensable to a recovery by assuming that, as the track was straight, the persons in charge of the engine must have discovered the peril of deceased in time to prevent injury to him by the exercise of ordinary care on their part. * * * And they were under no duty to discover it any sooner than they did, whenever that was. They may not have been keeping a lookout, or, if keeping one, may have concluded that the deceased, if he was either at the south or north end of the trestle, would get off the track in time to avoid being injured. In cases like this, where it is sought to recover for injury to a trespasser on the track, there must be some evidence conducing to

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show two things: First, when the persons in charge of the train actually discovered his peril; and, second, that after the discovery they could, by the exercise of ordinary care, with the use of all reasonable means at hand, prevent injury to him." The following additional authorities will demonstrate that the doctrine in question has repeatedly been approved by this court: C. & O. Ry. v. Nipp's Adm'r, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131; Cummings' Adm'r v. I. C. R. R. Co., 110 S. W. 809, 33 Ky. Law Rep. 584; Adams' Ex'x v. L. & E. R. R. Co., 104 S. W. 363, 31 Ky. Law Rep. 987; Early's Adm'r v. L. H. & St. L. Ry. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. Law Rep. 1807. Becker v. L. & N. R. R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. Law Rep. 1893, 53 L. R. A. 267, 96 Am. St. Rep. 459, and L. & N. R. R. Co. v. Bell, 108 S. W. 335, 32 Ky. Law Rep. 1312, the two cases relied on by appellant as sustaining his contention that his case should have been submitted to the jury, are readily differentiated upon the facts from the instant case and those supra. In the Becker Case it was made to appear that the engineer of the train was looking out of the cab window and at the bridge where Becker was killed for 960 feet before the bridge was reached by the engine, during the whole of which time Becker, in plain view, was trying to rescue his companion who had fallen between the ties of the bridge. In the Bell Case two witnesses saw the engineer of the train which caused the injuries of Miss Bell looking toward the trestle from which she jumped, a distance of 325 yards, before she did so; the young lady being in plain view of those on the engine all the while. In addition, it was proved that the train was a light one, and that the alarm whistle was repeatedly blown before the train reached the trestle. The facts in these two cases were properly held to furnish some evidence that those in charge of the engines discovered the peril of the persons struck by the trains in time to have prevented, by the exercise of ordinary care, their injuries. Therefore the cases were submitted to the jury.

In the case at bar there was no evidence which conduced to prove that those in charge of the train discovered the peril of appellant's intestate in time by the exercise of ordinary care to prevent his death. The trial court, therefore, properly instructed the jury to find for the appellees.

Wherefore the judgment is affirmed.

PHILLIPS v. RATLIFF.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. ELECTIONS (§ 285*)—CONTESTS—ACTIONS—VERIFICATION OF PETITION.

A motion to dismiss an election contest because of the failure of plaintiff to verify the petition must be overruled where it appears by the affidavits of plaintiff, his attorney and a notary, that the original petition, which was later lost, was verified, though the amended petition was not.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 285.*]

2. ELECTIONS (§ 285*)—CONTESTS—ACTIONS—VERIFICATION OF PETITION.

A defendant in an election contest who answered the petition before complaining of plaintiff's failure to verify it waived the right to compel its verification.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 285.*]

3. ELECTIONS (§ 285*)—CONTESTS—ACTIONS—VERIFICATION OF PETITION.

The court should not dismiss an election contest because of the failure of plaintiff to verify the petition without first giving him time and opportunity to verify it.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 285.*]

4. PLEADING (§ 340*)—AMENDMENTS—SUBSTITUTED PETITION AND AMENDMENTS—ALLOWANCE.

Where the petition and amended petition were lost without plaintiff's fault, the court properly permitted the filing of a substituted petition and amended petition constituting substantially correct copies of the originals.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1027; Dec. Dig. § 340.*]

5. ELECTIONS (§ 288*)—CONTESTS—PLEADINGS—AMENDMENTS.

Ky. St. 1909, § 1596a, subsec. 12, providing that the petition in an election contest shall state the grounds of the contest relied on, and no other ground shall afterward be relied on, does not prevent an amended petition correcting a mistake in the original petition in the statement of the number of votes received by the candidates for the office.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 288.*]

6. PLEADING (§ 343*)—JUDGMENT ON PLEADINGS.

Where the petition in an election contest gave the number of votes received by each party, showed plaintiff's election, stated specifically the number of illegal votes cast and counted for defendant, together with the names of the voters and the grounds of the illegality of the votes, and the answer made an issue as to such votes, without indicating what illegal votes, if any, were received by plaintiff, and alleged that the judge of the election failed to deposit in the ballot box the ballot of a voter, and that such officer was guilty of misconduct without showing what differences were made in the result, defendant was not entitled to judgment on the pleadings, though plaintiff did not file any reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1049; Dec. Dig. § 343.*]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by Floyd Ratliff against John F. Phillips. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Flanery, A. F. Childers, and Roscoe Vanover, for appellant. L. J. Williamson, J. F. Butler, and J. J. Moore, for appellee.

SETTLE, J. Appellant and appellee were candidates for school trustee in district No.

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45, Pike county, at an election held August 1, 1909. The election officers gave appellant a certificate declaring him elected to the office, and he thereupon qualified and undertook the performance of the duties thereof. Thereafter, appellee, by a petition filed in the Pike circuit court, contested appellant's right to the office in question, and claimed to have been elected to it himself by a majority of the votes cast in the election.

The grounds of contest set forth in the petition were, in substance, that appellee received 12 and appellant 10 votes, which entitled the former to the office of school trustee in district 45, and made it the duty of the election officers to issue him a certificate declaring him duly elected thereto. But that they illegally refused him the certificate, and fraudulently gave it to appellant instead. It was further alleged in the petition that four of the ten votes cast and counted for appellant were illegal, and should not have been received or counted by the election officers—the names of the persons casting the four illegal votes and the reasons urged for their rejection being stated in the petition—and that the exclusion of these four illegal votes would have reduced the total number of legal votes cast for appellant to six, and given appellee a majority of six by actual count. It was likewise alleged in the petition that at the close of the polls, and after the election officers had inspected and counted the ballots, tabulated the vote, and publicly announced the result showing appellee elected by a majority of two votes, the clerk of the election fraudulently transferred one of the votes which had been legally cast and counted for appellee to the column of votes counted for appellant, thereby making an apparent tie under color of which, by lot or otherwise, the latter, instead of appellee, was given the certificate of election. By the prayer of the petition a recount of the ballots was asked, and that the court, by proper judgment, declare appellee entitled to the office in controversy and place him in possession thereof.

Before appellant's answer was filed, appellee tendered and was permitted to file an amended petition, in which it was averred that the statements of the original petition that appellant received 10 and appellee 12 votes in the election for school trustee in district No. 45, was a mistake, and that in point of fact appellee received 23 votes and appellant 20 votes. The answer of the appellant traversed the averments of the petition as amended, and, in addition, alleged that illegal votes were cast and counted for appellee in the election for school trustee, but did not indicate by whom the alleged illegal votes were cast, how many there were, or upon what grounds they should have been excluded. The answer also charged George Deskins, one of the judges of the election, with fraud and misconduct in connection with the custody of the ballot box after the election. The answer was made a counterclaim and judgment asked declaring appellant the rightful incumbent of the office in controversy. After the filing of the answer appellee took the depositions of several witnesses, including that of Deskins, one of the judges of the election, in support of the grounds of contest, but no proof was taken by the appellant. Upon the hearing the circuit court rendered judgment declaring appellee entitled to the office in question, and giving him possession thereof. The judgment shows that it was rendered after a recount by the court of the ballots and ascertainment from such recount, and other evidence furnished by the depositions appearing in the record, that there were 43 votes actually cast in the election for school trustee, 23 of which were cast for appellee, and 20 for appellant; that one of the votes received by appellant—that of Harlan Maynard—was illegally cast and counted for him, Maynard having voted by marking his ballot on a table in the presence and in view of the officers of election without being sworn as required by law of one unable, as he was, to read. The throwing out of Maynard's vote left appellant with but 19 votes, which, subtracted from the 23 votes received by appellee, left a majority in his favor of 4 votes. Appellant, being dissatisfied with the judgment, has appealed.

He contends that the circuit court should have sustained his motion to dismiss the contest because of the alleged failure of appellee to verify the petition. The motion was properly overruled, as it was made to appear by the affidavits of appellee, L. J. Williams, his attorney, and George Pinson, a notary, that the original petition, which was later lost, had been verified by appellee. Besides, it appears from the record that appellant's answer was filed before complaint of appellee's failure to verify the petition was made. This being the case, he waived the right to compel a verification of the petition. And, had the objection to the want of verification been made in time, the court should not have dismissed the petition without first giving appellee time and opportunity to verify it.

Appellant complains that the court should not have allowed the substituted petition and amended petition to be filed over his objection. This contention is without reason. It clearly appears from the record that the petition and amended petition were unaccountably lost, and certainly without fault on appellee's part. The case could not well proceed without the substituted pleadings. It was indispensably necessary that they be filed; and it does not appear that they are not substantially correct copies of the originals. Manifestly their rejection by the court would have been error.

Appellant also contends that the court

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should not have allowed the amended petition to be filed. This contention is based upon subsection 12, § 1596a, Ky. St., which provides that the petition "shall state the grounds of the contest relied on and no other ground shall afterwards be relied upon." As previously stated, the only purpose of the amendment was to correct a mistake made in the original petition as to the number of votes received by appellant and appellee, respectively, in the election for school trustee; the mistake consisting in the charge in the original petition that the number of votes received by appellee was 12 and by appellant 10, whereas the true number, as averred in the amended petition, was 23 for appellee and 20 for appellant. The averments of the original petition as to the illegality of four of the votes cast for appellant and as to other grounds for contest were not withdrawn or changed by the amendment, nor did it set up any new ground of contest. We are aware of no rule of law or practice that will in any case forbid the filing of an amendment to correct a mistake. The court did not, therefore, err in permitting the filing of the amendment in this case. Wilson v. Hines, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148.

Finally, it is contended by appellant that, as the affirmative matter of his answer and counterclaim was uncontroverted by a reply or of record, he was by reason of that fact entitled to a judgment on the face of the pleadings. We cannot sustain this contention. While it is true that the affirmative matter of appellant's answer is uncontroverted, it presents nothing of a material character not put in issue by the averments of the petition and the denials of the answer. In other words, the petition states specifically the number of illegal votes that were cast and counted for appellant, gives the names of the voters, and states the grounds upon which the votes should be held illegal. An issue is made as to these votes by the denials of the answer, but the answer does not indicate what illegal votes, if any, were received by appellee. In other words, it does not attack as illegal any vote that was cast or counted for appellee. It is true paragraph 8 of the answer alleges that George Deskins, a judge of the election, received the ballots from the voters and placed them in the ballot box, and that he failed to deposit in the box the ballot of one voter. But who was the voter whose ballot Deskins failed to deposit in the ballot box, and for whom had the ballot been cast? The answer does not state. Manifestly the averments referred to are mere conclusions, a denial of which was unnecessary.

It is likewise true that the fourth paragraph of the answer contains a charge that Deskins, a judge of the election, had in his custody the ballot box and key to same, and that he opened the box and changed some of the ballots. But it is not alleged that his custody of the box was illegal or unauthorized, or how many or whose ballots he changed or the manner of doing it. Nor does it appear from the averments of the pleading in whose interest the ballots were changed, or whether such alleged changes made any difference in the result. Obviously no facts are here alleged with respect to which appellee was required to take issue; for, as said in Preston v. Price, 70 S. W. 623, 24 Ky. Law Rep. 1090, also a contested election case, "even if the affirmative averments of the answer be taken as true, the contestant might still recover, if he proved the averments of the petition. * * *" In other words, the vague and indefinite affirmative matter pleaded in the third and fourth paragraphs of the answer, even though taken as confessed, is not sufficient to overcome the averments of the petition.

In view of what has been said, it is manifest that appellant was not entitled to a judgment on the face of the pleadings. The circuit court, therefore, properly considered the proof in the record and its consideration, together with the recount of the ballots, removed all doubt as to the correctness of the conclusions expressed in the judgment. Indisputably appellee did receive 23 and appellant 19 votes in the election for school trustee. The ballot box had not been tampered with, and was properly delivered to the county superintendent of schools, and the ballots were all signed by the clerk of the election whose handwriting also appears on the stub book. The only errors that occurred in the election were committed against appellee. The attempt on the part of a majority of the election officers to make a tie in the votes cast was unauthorized by the ballots or the count they made of them. No effort was made by the appellant to prove his right to the office, or to disprove the right of appellee thereto.

The judgment being in all respects correct, it is hereby affirmed.

GATZ v. HARRIS.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—DIRECTED VERDICT FOR DEFENDANT.

Where there was a peremptory instruction for defendant, plaintiff for the purpose of testing the correctness of the instruction is entitled to have the testimony for him taken as true, including such reasonable inferences as it warranted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3746; Dec. Dig. § 927.*]

2. MALICIOUS PROSECUTION (§ 21*)—DEFENSES—ADVICE OF COUNSEL.

Advice of counsel is not a defense to an action for malicious prosecution unless the facts

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are fully and fairly laid before the counsel, and such advice will constitute probable cause only when reasonable diligence is used to learn the facts on which the advice of council is sought.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 41–44; Dec. Dig. § 21.*]

3. MALICIOUS PROSECUTION (§ 71*)—ACTION—QUESTION FOR JURY—REASONABLE DILIGENCE TO LEARN FACTS.

In an action for malicious prosecution, where the defense was advice of counsel, whether defendant had, before obtaining plaintiff's prosecution for disorderly conduct, laid the facts fully and fairly before his counsel, *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 165; Dec. Dig. § 71.*]

4. MALICIOUS PROSECUTION (§ 21*)—DEFENSES—ADVICE OF COUNSEL.

The advice of counsel when properly obtained is a defense to an action for malicious prosecution, however erroneous the advice may be.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 41–44; Dec. Dig. § 21.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Robert E. Gatz against C. H. Harris. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

Greene & Tilford, for appellant. Kohn, Baird, Sloss & Kohn, for appellee.

HOBSON, J. Dr. Robert E. Gatz, a physician of Louisville, brought this suit against Dr. C. H. Harris, who is also a physician practicing there, to recover damages for malicious prosecution. At the conclusion of the evidence on both sides the court instructed the jury peremptorily to find for the defendant, and, the plaintiff's petition having been dismissed, he appeals.

As the case went off on a peremptory instruction, the plaintiff, for the purpose of testing the correctness of that instruction, is entitled to have the testimony for him taken as true, including such reasonable inferences as it warranted. The proof before the jury was somewhat conflicting; but we will only state the facts as shown by the evidence for the plaintiff as it must here be taken as true. On the evening of December 31, 1907, Mrs. W. H. Merz and her daughter were injured in a street car collision. About 8 o'clock Dr. Gatz received a telephone call from James Kinnarney, telling him that a woman had been hurt about 7 o'clock, and that he must come at once to Thirty-Fourth and Pflanz avenue and wait upon her; that it was very important, and he must hurry. He was told to go to High street and a man would meet him there and take him to the house, as Pflanz avenue was an out of the way street, and a number on High street was given him. He went to that house, which was the house of one Guenther. Guenther took him to the Merz house. Mr. Merz met them, and the doctor asked Mr. Merz whether he had sent for him, and he said he had. He took him into the room where his wife was, and, on examining her, he found a piece of gauze over the wound, and asked if there had been a doctor there. They said, "Yes," but they did not know his name. They said Dr. Harris had also been there, but he did not put the dressing on. He saw the wound needed attention, as hair was dipping into it. He clipped the hair, washed the wound, and dressed it. He found the patient's heart action bad. He gave a heart stimulant; and, as her feet were cold, had hot water bottles put to her feet. With this he left, telling them to tell the doctor, whoever he was, to call him up. The next morning Dr. Harris called him up, and told him he was the doctor who had put on the original dressing. Some talk was had between them. Dr. Harris seemed angry, and something was said about their meeting at the Merz house that evening. Before Dr. Harris had seen Dr. Gatz, or anything further had taken place between them, he went to attorneys, and, upon his statement of what had taken place, a warrant was sworn out against Dr. Gatz, J. L. Richardson, and James Kinnarney charging them with disorderly conduct. On a trial of the warrant before the police court they were all three discharged, and this suit by Dr. Gatz against Dr. Harris follows for malicious prosecution.

James Kinnarney was a detective, and a part of his business was the looking up of damage suits. He went to the Merz house soon after Dr. Harris left, and obtained a contract from W. H. Merz employing J. L. Richardson as attorney to bring a suit for his wife against the street car company. Kinnarney named to Merz several lawyers, and finally at his suggestion Richardson's name was put into the contract. He also suggested to Merz to have another doctor called, and, Merz agreeing to this, Kinnarney called up his family physician, Dr. Roberts, and, not being able to get Dr. Roberts, he got Dr. Gatz, whom he also knew. Richardson knew nothing about the matter at all, and Dr. Gatz knew nothing more than what he was told over the telephone. Dr. Harris' statement as to what took place between him and Dr. Gatz over the telephone was as follows: "Then I called up Dr. Gatz over the telephone, and asked for the doctor, and he replied that that was him, and I said: 'Did you go down to see Mrs. Merz last night—the injured woman?' He said, 'Yes.' I said, 'Who sent you down there?' He said, 'The Kentucky Detective Bureau.' Well, I said: 'Doctor, I am the man who applied the first dressing down there, and how does it come that you went in on my case?' Well, he

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said: 'Mr. Kinnarney sent me there to take charge of it.' I said: 'Did you have a lawyer down there with you too?' and he said, 'Yes; had a lawyer.' I said, 'Who was the lawyer?' He said, 'Judge Richardson.' Well, I said: 'Suppose you have the judge down there again to-day. Would that suit you?' He said, 'Yes; you call him up.' And he gave me his telephone number. It is double 83. The conversation ended at that." Dr. Gatz says that he did not tell Dr. Harris that Richardson was there, or that he would have him there. His statement on this subject is as follows: "No, sir; he asked me something to this effect—whether I knew who the lawyer was—and I told him that the people had inquired of me whether Mr. Richardson was a good lawyer or something to that effect, or that they were going to have Mr. Richardson. I paid little attention to that. That is all I informed Dr. Harris."

The attorney whom Dr. Harris consulted gave this testimony: "Of course, I do not undertake to give the exact language nor all that was said, but substantially it was that these men had gone down there in the ambulance chasing business before the woman. Well, she was in a very nervous condition, and that this doctor had gone up there and taken these dressings off which another doctor had put on there, as he must have known, and put the woman through the cruel treatment of having those dressings taken off, and he putting on his own dressings, and got a contract from the woman for a contingent fee for a lawyer to bring suit against the street car company almost before they could say Jack Robinson, and I said that was certainly in my judgment disorderly conduct, and they ought to be arrested and ought to be punished for it. Q. And you so advised Dr. Harris? A. I so advised Dr. Harris."

On this evidence the court instructed the jury peremptorily to find for the defendant on the ground that the warrant was sworn out on the advice of counsel.

It is evident from the proof that Dr. Harris took no steps to inform himself as to what the facts were after he had talked with Dr. Gatz over the telephone before he went to the lawyer's office and had the doctor arrested. He did not go to the Merz house and see if any disorderly conduct had occurred there, or learn why Dr. Gatz had gone there, or what condition he found when he reached there. The proof shows that Dr. Gatz was not only not disorderly at the Merz house, but, if the testimony for him is true, was acting at the direction of the husband, and giving the patient attention which she needed. It is also apparent that there is a sharp contradiction between the testimony of Dr. Gatz and Dr. Harris as to what took place between them over the telephone, and, when Dr. Harris in stating the facts to his attorney stated them according to his version of what took place over the telephone, he did not state to the attorney the real facts of the case if Dr. Gatz's version of that conversation is true. Advice of counsel is hot a defense in an action for malicious prosecution unless the facts are fully and fairly laid before the counsel. If the real facts are not laid before the counsel, his opinion is no defense to an action for malicious prosecution. Crawford v. Keyser, 5 Ky. Law Rep. 693; Burke v. Rhodes, 13 Ky. Law Rep. 431; Anderson v Columbia Finance & Trust Company, 50 S. W. 40, 20 Ky. Law Rep. 1790; Ahrens & Ott Manufacturing Co. v. Hoeher, 106 Ky. 692, 51 S. W. 194, 21 Ky. Law Rep. 299. In addition to this, the advice of counsel will constitute probable cause only when reasonable diligence is used to learn the facts on whch the advice of counsel is sought. In the case last referred to the court said: "He who consults an attorney about a matter affecting a third person ought to use that care which men of ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith. Of course, it is absolutely necessary in questions of this sort that people should act upon the advice of counsel; but they must exercise in doing so reasonable care to get the truth before the counsel." Upon the evidence it was a question for the jury whether Dr. Harris laid the facts fully and fairly before his counsel, and whether he had used reasonable diligence to learn what the actual facts were when he laid the matter before his counsel. The advice of counsel, when properly obtained, is a defense to an action like this, however erroneous the advice may be.

Judgment reversed and cause remanded for a new trial, and for further proceedings consistent herewith.

DIUGUID et al. v. ROBERTS.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

1. PLEADING (§ 245*)—AMENDMENT—TIME.

In a suit to set aside a deed, the court had power to permit an amendment of the petition after the court had handed down an oral opinion in plaintiff's favor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 666–667; Dec. Dig. § 245.*]

2. APPEAL AND ERROR (§ 1041*)—PLEADING—AMENDMENT—PREJUDICE.

Defendants were not prejudiced by the allowance of an amended petition after the court had handed down its opinion in plaintiff's favor, where the original petition was sufficient to sustain a decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

3. PLEADING (§ 129*)—DENIAL—IMMATERIAL OR IMPERTINENT ALLEGATIONS.

The code provision that all material allegations not denied by a responsive pleading are

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to be taken as true does not apply to immaterial or impertinent allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–271; Dec. Dig. § 129.*]

4. ACTION (§ 7*)—RIGHT TO SUE—MOTIVE.

Where complainant was sui juris and set forth a cause of action to set aside a deed, defendant could not question or deny her right to prosecute the cause on the ground that she was under the domination of another.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 8; Dec. Dig. § 7.*]

5. DEEDS (§§ 210, 211*)—EXECUTION—CAPACITY—EVIDENCE.

Evidence *held* to sustain a decree canceling a deed from plaintiff to her daughter on the ground of want of consideration and undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635–647; Dec. Dig. §§ 210, 211.*]

6. APPEAL AND ERROR (§ 1009*)—EQUITY PROCEEDING—JUDGMENT OF CHANCELLOR.

The Court of Appeals in a proceeding to set aside a deed will rely with confidence on the judgment of the chancellor in passing on the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Suit by Phebe J. Roberts against G. C. Diuguid and others. Judgment for complainant, and defendants appeal. Affirmed.

G. C. Diuguid and Wm. Marble, for appellants. Hendrick & Corbett, for appellee.

BARKER, J. On July 19, 1907, the appellee, Phebe J. Roberts, executed and delivered to her daughter, the appellant Anna M. Diuguid, a deed, by which she conveyed to the latter certain real estate in the city of Paducah, Ky., in which the vendor had a life estate in the whole, and owned an undivided one-half interest in fee simple. Shortly after the conveyance was recorded in the clerk's office of the McCracken county court, the appellee instituted this suit in equity for a cancellation of the deed and a rescission of the contract by which it was made. In general terms the allegations of the petition are that the vendor was over 70 years of age, that, by reason of her age and physical weakness, she had yielded to the entreaties and misrepresentations of her daughter and husband, and under the influence of duress, and wholly without consideration, she had made the deed which she prayed to have canceled and surrendered. The defendants Anna M. Diuguid and George C. Diuguid, her husband, filed an answer by which they denied all the material allegations of the petition, and then pleaded affirmatively that this action was not the voluntary act of the plaintiff, but was instituted under the influence and by reason of the threats of her two sons, who were really forcing her against her will to maintain it. No reply was filed to this answer. After the evidence was all in, and the court had heard the arguments of counsel and delivered a verbal opinion in favor of the plaintiff, the latter by counsel tendered an amended petition, which, over the objection of the defendants, was allowed to be filed by the court. After this was done, a judgment was entered in favor of the plaintiff, which fully granted the prayer of the petition. Of this judgment the defendants (now appellants) are complaining.

The appellants, as grounds for a reversal of the judgment, in addition to urging that it is not supported by the evidence, advance two technical objections. The first is that the court erred in allowing the amended petition to be filed after the opinion had been delivered, but before judgment was finally entered, and much reliance is placed upon the fact that the pleading is not verified as required by the Code. We think the action of the trial court could be upheld under the general latitude allowed by the Code in the matter of amending pleadings; but in the present case we think this objection may be disposed of by saying that in our opinion the amendment was entirely unnecessary, as the general language of the petition amply sets forth a cause of action in favor of the plaintiff to have the deed in question canceled and surrendered up; that, the amendment being unnecessary, the action of the court in allowing it in no wise injured the substantial rights of the defendants.

The appellants also urge that the failure of the plaintiff to deny the affirmative allegations in the answer that she was not prosecuting the suit of her own volition, but was under the influence and domination of her sons, entitled them to have these allegations taken as true, and, being true, the petition should have been dismissed. It is true that, under the provisions of the Code, all material allegations which are not denied by a responsive pleading are taken to be true; but this rule has no application to immaterial or impertinent allegations. Whether or not the plaintiff was asserting her cause of action in compliance with the request or under the domination of some one else is entirely immaterial. The real question is whether she has a good cause of action; and, that being granted, it does not lie in the mouths of the defendants to question her right to assert it against them. It would be a novel rule of pleading, indeed, which would permit the defendant to inquire into the reason for the assertion by the plaintiff of his cause of action. As long as the plaintiff is sui juris, the defendant cannot question or deny his right to prosecute any lawful cause of action which he may have. The court did not err, therefore, in disregarding the af-

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firmative allegations of the answer, although they were not denied by reply.

On the merits of the case, we think the evidence of the plaintiff, if true, is amply sufficient to show that the deed in question should have been canceled. The plaintiff, as said before, was more than 70 years old, of forgetful memory, and somewhat enfeebled frame. The appellant Anna M. Diuguid was her daughter, and the only consideration for the deed was the nominal dollar and the natural love and affection which the vendor had for her daughter. The husband of the daughter, George C. Diuguid, is a practicing attorney at the Paducah bar, and as son-in-law of the aged vendor occupied a position of vantage in advising her as to what she should do with her property. To an impartial mind it would appear that the answer filed by the defendants in this case of itself shows or tends to show the very incapacity to contract or manage her affairs upon which the appellee relies to cancel the deed involved in this litigation, for it is distinctly alleged that, after solemnly making the deed as she desired in order to convey her property to her daughter in a few days, under the influence of her sons she brought this suit to cancel it. This shows, or tends to show, that the aged appellee is controlled or dominated by those who happen to have charge of her at the particular time. But passing this, and without setting forth the evidential facts with any minute particularity, we deem it sufficient to say that the evidence of the neighbors, friends, and acquaintances of the appellee shows that her mind was feeble, her memory bad, and that she was easily swayed by those upon whom she relied for advice. Undoubtedly the evidence of the appellants contradicts that of appellee, and, if true, would entirely break down her cause of action; but this conflicting evidence was before the chancellor, who, presumably, knew the witnesses, and was in a much better position to pass upon the facts than we are. The rule of this court in a case such as this has been uniformly to rely with great confidence upon the judgment of the chancellor, and we have been able to find nothing in this record which would tend to induce us to depart from this well-settled rule.

Judgment affirmed.

COMMONWEALTH v. RUDISIE.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

CRIMINAL LAW (§§ 1063, 1065*)—APPEAL—FAILURE TO MOVE FOR NEW TRIAL—EFFECT.

Without a motion for new trial and action thereon by the trial court, the commonwealth cannot appeal from a judgment of dismissal in a misdemeanor case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676–2685; Dec. Dig. §§ 1063, 1065.*]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Lawrence Rudisie was tried for a misdemeanor. From a judgment of dismissal, the Commonwealth appeals. Affirmed.

J. H. Shelton and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

O'REAR, J. This prosecution for misdemeanor was submitted to the judge of the circuit court without the intervention of a jury. Judgment was rendered dismissing the case. There was not a motion for a new trial, and not an exception to any ruling of law made by the judge. Without the motion for a new trial, and action on it by the trial court, the commonwealth cannot prosecute an appeal from the judgment. Louisville Chemical Works v. Commonwealth, 71 Ky. 179; Commonwealth v. Tarvin, Judge, 114 Ky. 877, 72 S. W. 13.

Judgment affirmed.

VINCENT et al. v. BLANTON et al.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

JUDGMENT (§ 720*)—RES JUDICATA—ISSUES.

Where the title to and right of possession of a body of land was in issue in a prior suit, in which it was necessary to define the boundary of the land which plaintiffs therein were seeking to recover, and this was done, the judgment was res judicata as to the location of the boundary, under the rule that a prior judgment is res judicata, not only as to all that was in issue in the previous suit, but all that should have been in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

Appeal from Circuit Court, Edmonson County.

"To be officially reported."

Action by John W. Blanton and another against John L. Vincent and another. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

See, also, 85 S. W. 703, 27 Ky. Law Rep. 489.

Milton Clark, for appellants.

O'REAR, J. Blanton, the trustee of school district No. 42 in Edmonson county, and Higgs sued appellant Vincent and the sheriff to restrain the execution of a writ of possession issued upon a judgment of the Edmonson circuit court in the suit of Wood Vincent's Heirs v. Blanton et al. The appellant J. L. Vincent was a party to that suit. So were all the appellees here (the plaintiffs above named). The subject-matter of the former suit was the title and right of possession to a certain body of land in Edmonson county, described as containing about 35 acres. Blanton claimed that he owned the land, and had sold part of it to

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Higgs and a part of it to the school district. Issue upon the ownership was joined. This court decided that Vincent's heirs owned the land. See Vincent v. Blanton, 85 S. W. 703, 27 Ky. Law Rep. 489. The writ of possession was issued in behalf of the Vincents upon the judgment directed to be entered by this court in that opinion.

This suit proceeded upon the idea that the old suit did not present the question, nor was it decided, where the dividing line between the two tracts in controversy was located. It was necessary in the first suit to define the boundary of the land which the plaintiffs (the Vincents) were seeking to recover. That was done. If that boundary was not correctly represented, an issue should have been tendered by the other parties. The rule is, not only is all that was at issue in the previous suit concluded by its judgment, but all that should have been at issue in that suit is likewise concluded, else we would have the trial of lawsuits by piecemeal. There would be no end to a litigation. The plea in bar in this case should have been sustained.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

CINCINNATI, N. & C. RY. CO. v. COOKE.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. STREET RAILROADS (§ 117*) — INJURIES — ACTIONS — JURY QUESTION — NEGLIGENCE.

In an action for injuries by being thrown to the ground by catching plaintiff's foot under a rail while crossing over a pile of old rails, ties, etc., which defendant street railroad company had piled along the street in making repairs, pursuant to ordinance, whether defendant had the right to make the repairs in that manner, and used more of the street than was necessary in piling its material, or kept it there for an unreasonable length of time *held* for the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

2. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child is only bound to exercise the care of those of its own age and understanding.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121–129; Dec. Dig. § 85.*]

3. TRIAL (§ 143*)—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

Where the weight of the evidence for plaintiff and defendant is equal on a disputed question of fact, a motion to direct a verdict is properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Ida Cooke, by next friend, against the Cincinnati, Newport & Covington Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. J. Crawford, for appellant. Horace W. Root and B. F. Graziani, for appellee.

O'REAR, J. The city of Newport by ordinance directed the reconstruction of Eleventh street, between Patterson and Isabella. Appellant had a double track street railway traversing that part of Eleventh street. It was required to conform that part of the street occupied by its tracks to the residue of the street, and found it expedient also to reconstruct its track with new and improved material during that work on the street. Appellant took out the old rails and ties, putting in new ones as the old ones were removed. The old ones were piled along the street, by the curb line, and some of them upon the edge of the sidewalk. In this way the sidewalk was occupied for one-half or more of its width (according to some of the witnesses), and as to the street, according to these witnesses, it was practically impassable for crossing to its other side, except with the utmost caution. Appellee, Ida Cooke, a child eight years old, came to town to visit her married sister, who lived on the south side of Eleventh street. The morning she arrived she was sent out on an errand to the butcher shop across the street. Returning, and as she was attempting to cross the pile of old rails, ties, and other rubbish, her foot was caught under a rail, and she was thrown violently to the pavement, breaking her arm and otherwise injuring her. This is her suit for damages for the personal injury. The evidence in her behalf disclosed the foregoing facts. The verdict and judgment were in her favor. The only question presented on this appeal is whether a peremptory instruction should have been granted in appellant's behalf, upon the theory that the danger was open, obvious, and avoidable, and that the plaintiff's injuries were therefore attributable directly to her want of proper care.

The question was properly submitted to the jury as to the right of the city and of the appellant company to make the repairs in question, and to use so much of the street for piling the material as was necessary for a reasonable period of time. The child was held to the care of those of her age and understanding. The jury's verdict necessarily found that the appellant used more of the street than was necessary to store its material, or kept it there an unreasonable length of time, fixing upon it negligence as to pedestrians using the street. The plaintiff's evidence was equiponderant with the defendant's upon the points at issue. The motion for peremptory instruction was therefore properly overruled.

Judgment affirmed, with damages.

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DEMOCRATIC EXECUTIVE COMMITTEE OF LINCOLN COUNTY et al. v. BAUGHMAN.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. ELECTIONS (§ 154*)—PRIMARY ELECTIONS—CONTEST—HEARING—MANDAMUS.

Where a primary election contest is instituted before the county executive committee, the court's power is limited to compelling the committee to act when it refuses to hear the contest; the court being without power to review the committee's action, or force it to try the case in any particular manner, or decide it as the court may think proper.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 138; Dec. Dig. § 154.*]

2. ELECTIONS (§ 152*)—PRIMARY ELECTIONS—CONTEST—DETERMINATION.

A county executive committee having sustained a demurrer to notice of primary election contest after hearing, the contest was at an end.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 134; Dec. Dig. § 152.*]

3. ELECTIONS (§ 150*)—PRIMARY ELECTIONS—CONTEST—NOTICE—COUNTING BALLOTS.

Where a notice of primary election contest did not refer to petitions in certain precincts requesting a recount of the ballots, and there was no contest pending when the petitions were filed with the chairman of the committee requesting such recount, contestant was not entitled to have a recount under such petitions in the contest proceeding.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 131; Dec. Dig. § 150.*]

Appeal from Circuit Court, Lincoln County.

"To be officially reported."

Action by M. S. Baughman against one McCarty and the Democratic Executive Committee of Lincoln County. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Geo. D. Florence and W. S. Burch, for appellants. Robert Harding and P. M. McRoberts, for appellee.

NUNN, J. There was a Democratic primary election held in Lincoln county on the 6th day of February, 1909, for the purpose of nominating candidates for the county offices to be voted for at the November election 1909. It appears that appellee, Baughman, and appellant McCarty, were the only persons candidates for the nomination for the office of sheriff of the county. This record indicates that they are both unusually good men and popular in the county, and that they each, with their friends, made a vigorous fight for supremacy. When the primary was over and the votes counted, appellant McCarty was declared to have received 1,095 and appellee Baughman 1,081 legal votes, and the committee gave the certificate of nomination to McCarty. Within the time prescribed by the statutes Baughman gave to his successful opponent a notice of contest, in which he stated that the officers of the election and the committee had wrongfully counted more than 200 illegal votes as having been received by McCarty, and specified 10 or 12 precincts by name at which they were cast, giving the names of the voters in each precinct and the reasons why they were illegal. McCarty answered this notice of contest by a counter notice, in which he denied that 200 or any illegal votes had been cast and counted for him in the primary, and denied specifically that certain voters named by Baughman were illegal voters for the causes named or for any cause. He agreed with Baughman that certain other voters named in his notice of contest were illegal voters, but denied specifically that they voted for him, and alleged that they had voted for Baughman. He also gave the names of many other persons, and alleged that they were illegal voters, and that they had voted for Baughman at the primary election. He alleged that his real majority over Baughman was much greater than reported by the committee. The affirmative matter in this notice was denied by reply. The county committee met on a day fixed and adopted rules for the conduct of the contest, and on that day, after adopting the rules, McCarty, by counsel, filed a demurrer to Baughman's notice of contest. Argument of counsel for the parties on this demurrer was commenced before noon and resumed and finished after noon. After the argument, the committee left the courtroom, and went to the circuit court clerk's office to consider and decide the question submitted. After considering the matter, the committee decided, by a vote of seven to five, to sustain the demurrer and dismiss the proceeding; and the chairman alone returned to the courtroom and announced the result of the committee's action, and all parties then separated, going either to their homes or places of business. There was no effort by either Baughman or his counsel to file an amended notice or pleading. Within a few days after the action of this committee this action was instituted against McCarty and the members of the committee, in which Baughman alleged that the committee had failed and refused to give him a trial of his contest, and asked the court to grant him a mandamus compelling the committee to reassemble and try his contest, alleging that they had failed and refused to do so. He also set forth facts and circumstances which, if true, would have authorized the committee to declare him the nominee of the Democratic party, instead of his opponent, McCarty. The court heard the testimony with reference to the action of the committee, which showed, in effect, the facts related above, and awarded appellee the mandamus. McCarty and the members of the committee prosecute this appeal from that judgment.

There can be no doubt that the committee did meet and act as a body upon appellee's

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contest by hearing and considering a demurrer filed to his proceeding, which demurrer they sustained and dismissed the contest. This ended the matter in so far as the committee was concerned. This court has no power to review the action of the committee. The court's power in such a case is limited by law to compelling the committee to act when it refuses to hear and determine the contest. The court cannot force the committee to try such cases in any particular manner, or to decide it as the court may think proper. The case under consideration is similar to the case of Democratic Executive Committee of Harrison County, Ky., v. Dougherty, 120 S. W. 343, the opinion in which was delivered June 18, 1909. In that case the committee sustained a demurrer to the contestant Dougherty's notice of contest, and he sought a mandamus from the circuit court to compel the committee to reassemble, hear, and try his case. The circuit court granted the mandamus and the committee and contestee, Mason, appealed to this court. In the opinion in that case the court said: "It is conceded by the parties to this litigation that the only question to be determined upon this appeal is whether or not the committee heard and determined the contest between Mason and Dougherty. It is also conceded that the courts have no power to correct the decision of the committee in such a matter, however erroneous it may be. The only power which the courts have is to force the committee to decide, but they cannot review their decision." This is conclusive of the case at bar. See, also, the case of Beasly v. Adams, 118 Ky. 695, 82 S. W. 249, and the cases there cited.

Counsel for Baughman contend that, conceding all that we have said to be true, still their client is entitled to have the committee reassemble, open the ballot boxes, and count the ballots in three of the voting precincts for the following reason: That within 10 days after the primary election there was filed with the chairman of the county committee a petition from these precincts signed by 10 per cent. or more of the voters in the precincts participating in the primary election, requesting a recount of the ballots cast in those precincts. The rules governing such matters, which were adopted by the Democratic party in the last state convention, provide, in substance, that in case of a contest the committee shall open the ballot boxes and recount the ballots in those precincts in which at least 10 per cent. of the voters have signed a petition requesting that it be done. The difficulty in the way of appellee, Baughman, is that he did not make these petitions a part of his notice or proceeding. He did not refer to them in any way so as to give the committee notice that he relied upon these petitions to aid him in his contest proceeding; and, further, there was no contest proceeding pending when these petitions signed by the voters of the three precincts referred to were filed with the chairman requesting a recount of the ballots.

For these reasons, the court erred in awarding appellee the mandamus. The judgment of the lower court is reversed and remanded, with directions to dismiss appellee's petition.

BURCHEL v. WITHERS et al.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. VENDOR AND PURCHASER (§ 27*)—BOND FOR TITLE—CONSTRUCTION.

A paper dated April 3, 1851, and reciting that it was to certify that the signer had that day sold to W. all interest in a lot in West Point, bought by P. and F., the signer's interest to be secured by P., and is assigned by P. to the signer in a bond held by F., having received of W. $75 in full for the above interest, duly signed and attested by W., was not a valid bond for title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 27.*]

2. QUIETING TITLE (§ 29*)—LACHES.

W. obtained a writing in April, 1851, purporting to contract for a conveyance to him of an interest in a lot in controversy, but, though he lived until 1882, neither he nor his heirs exercised any acts of ownership over the lot, except for a short period in 1860, when W. had it rented, until the commencement of the suit in 1903. F., under whom defendant claimed, had a good paper title to an undivided half of the lot by deed executed to himself and P. in 1853, and there was evidence that in 1874 F.'s heirs sold the entire lot to defendant's vendor. There was also evidence that such vendor claimed to be the owner of the whole lot from 1874 until his sale to defendant, and that during a part of the time he rented it out. *Held*, that the claim of W.'s heirs was stale, and that defendant had a valid paper title to one-half of the lot and a better possessory title to the other half; the burden being on such heirs to exhibit a paper or possessory title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Suit by L. M. Withers and others against Kate Burchel. Judgment for plaintiffs, and defendant appeals. Reversed, with directions to dismiss.

H. L. James, for appellant. L. A. Faurest and L. F. Withers, for appellees.

CARROLL, J. The appellees in this action in equity against the appellant sought to have allotted to them the undivided one-half of lot No. 93 in the town of West Point, averring that they were the owners and entitled to the possession thereof, and that the appellant was the owner of the other undivided one-half. The appellant in her answer, after denying title in the appellees, asserted that she was the owner of the whole of the lot, and that she and those under whom she claimed had been in the open, continuous,

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and adverse possession thereof for more than 15 years. The case, after being prepared for trial, was heard by the lower court, and a judgment rendered awarding to appellees one-half of the lot in controversy. The appellant complains of this judgment, and asks its reversal for reasons that will be noticed in the course of the opinion.

The first objection to the judgment is that the appellees failed to exhibit any record title to an interest in the lot, and in this connection the point is made that under the pleadings they could not rely upon title by adverse possession. It is further insisted that, as the appellant was in possession, to entitle the appellees to recover, they must rely on the strength of their title, and show either a record or possessory title to the one-half interest in the lot. It must be confessed that the record title exhibited by the appellees is in itself not sufficient to show that they have an interest in the property. The only paper under which they assert ownership reads as follows: "April 3, 1851. This is to certify that I James W. McCarty have this day sold to Louis Withers all my interest in a lot in West Point, bought by James Pate and Robert Fletcher. My interest is to be secured by James Pate, and is assigned by Pate to me in a bond held by Fletcher; having received of Louis Withers $75.00 in full for the above interest. James W. McCarty. Attest: Louis Withers." This paper was never put to record, and, in fact, was not a recordable instrument. But there is evidence that Louis Withers had it in possession. We find that in 1853 Robert Fletcher and James Pate obtained a conveyance to lot No. 93 in the town of West Point, and there is some testimony conducing to show that Louis Withers by virtue of his purchase from McCarty claimed to be the owner of an undivided one-half interest in this lot, and that in 1860 he leased it to Simon Arnold, who as a part of the rental contract inclosed it with a fence. Arnold only remained in possession of the lot for a few years, and, after he abandoned it, the fence rotted down, and for many years prior to the institution of this action in 1903 the lot was vacant, and of trifling value. In 1893 the heirs of Robert Fletcher conveyed this lot to W. W. Fletcher, and in the same year W. W. Fletcher sold and conveyed by general warranty deed an undivided one-half interest in this lot to the husband of appellant, Mrs. Burchel. It was stipulated in this deed that Fletcher would convey by quitclaim deed to the husband of appellant the remaining one-half of the lot at any time within six months upon the payment of $30; and in accordance with this stipulation Fletcher did in April, 1894, convey to Mr. Burchel by quitclaim deed the undivided one-half the lot. It does not appear that Pate ever conveyed his interest in the lot to McCarty, who, the Withers claim, was the vendor of their father. Nor is there any writing showing that McCarty ever owned or sold any interest in the lot except the paper before mentioned. Although this paper recites in an awkward way that McCarty had bought the interest of Pate in the lot, it appears that two years after the execution of this paper the parties from whom Pate and Fletcher purchased the lot conveyed it to them; there being no mention of McCarty or Withers in the conveyance. Louis Withers died in 1882, and, with the exception of the evidence to the effect that about 1860 he leased one-half this lot to Arnold, it does not appear that Withers ever exercised any acts of ownership over it. And from the time of his death until 1903, a period of 21 years, neither his children nor heirs ever took any steps looking towards the recovery of it, although in 1893 Burchel took possession of the lot and enclosed it by a fence. W. W. Fletcher, who sold to Burchel, testifies that he took possession of the entire lot in 1874 under a purchase from the heirs of his brother Robert Fletcher, the joint vendee in the deed with Pate, and retained possession of it until he sold it to Burchel in 1893, and during this time rented it out for a few years.

Briefly stated, the facts as we gather them from the record are these: (1) In 1851 McCarty sold an interest in a lot in West Point that he had bought from James Pate, who with Robert Fletcher owned the lot; but McCarty never obtained any deed to the lot, nor did he ever convey it to any person unless the writing of April 3, 1851, can be treated as a bond for title. (2) In 1853 a deed conveying the lot was made by Helm and others to James Pate and Robert Fletcher, but there is no writing showing that Pate ever conveyed his interest in the lot to any person. (3) Louis Withers never had any paper title to the lot in controversy, as we do not think the writing of April 3, 1851, is at all sufficient to invest him with title to an interest in it. (4) Although Louis Withers lived until 1882, it does not appear that he ever exercised any acts of ownership over the lot, except for a short period during which he had it rented to Arnold about 1860. (5) During the 21 years that elapsed from his death until the institution of this action his heirs did not take any steps towards recovering the lot or do anything to indicate that they owned it. (6) Robert Fletcher did have a good paper title to an undivided one-half of the lot by virtue of the deed made to himself and Pate in 1853, and there is evidence to the effect that in 1874 his heirs sold the entire lot to W. W. Fletcher, the vendor of Burchel. (7) There is evidence that W. W. Fletcher claimed to be the owner of the whole lot from 1874 until his sale to Burchel, and that during a part of this time he rented it out.

On these facts, we conclude that the claim

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of the Withers heirs is not only stale, but unsupported by record evidence or such possession as would invest them with a possessory title. On the other hand, Burchel has a good paper title to one-half of the lot, and a better possessory title to the other one-half than have the Withers heirs.

As it was necessary to a recovery by the Withers heirs that they should exhibit a paper or possessory title, and as they failed to do either, the judgment of the lower court is reversed, with directions to dismiss their petition.

WEIL v. KREUTZER.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

1. JURY (§ 110*)—COMPETENCY OF JURY—WAIVER OF OBJECTION.

Where, after the court, over defendant's objections, had selected a jury, partially composed of disinterested bystanders, another jury regularly drawn from the box became available for the trial, but defendant declined the court's offer to substitute it for the other jury, he cannot, after an adverse verdict, object to the trial before the jury partially drawn from the bystanders.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 518; Dec. Dig. § 110.*]

2. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A verdict for $1,000 for personal injuries, which, though not entirely incapacitating plaintiff from labor, made him permanently a partial cripple, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372–385, 396; Dec. Dig. § 132.*]

3. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—INJURY TO PEDESTRIAN—AUTOMOBILE—NEGLIGENCE.

Where a chauffeur saw that a pedestrian in the street was confused as to which way the automobile was going to turn after having been warned of its approach, and each turned several times in the same direction as the other turned to avoid collision, the chauffeur had no right to continue zigzagging in the street, in view of the danger of collision, but should have stopped.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

4. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—CARE REQUIRED—AUTOMOBILES.

Possession of dangerous instrumentalities always requires the use of great care, and, since an automobile is almost as deadly as, and even more dangerous than, a street or railroad car, greater care is imposed upon the driver in propelling it along the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

5. NEGLIGENCE (§ 3*)—CARE REQUIRED.

The degree of care required is in direct proportion to the degree of danger and of injury which would probably be caused by negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 5; Dec. Dig. § 3.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—INJURY TO PEDESTRIAN—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries by being struck by defendant's automobile in the street, whether defendant was guilty of negligence in operating the machine *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

7. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries sustained by being struck by defendant's automobile in the street, whether plaintiff was guilty of contributory negligence at the time of the collision *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by George Kreutzer against Jesse Weil. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Mocquot, for appellant. R. T. Lightfoot, for appellee.

BARKER, J. The appellant, Jesse Weil, while propelling his automobile along Kentucky avenue, in the city of Paducah, collided with the appellee, George Kreutzer, who was walking across the street, inflicting upon his body severe injuries. To recover damages for the injuries so inflicted Kreutzer instituted this action, alleging in his petition that the collision and resulting injury were occasioned by the negligence of the appellant, Jesse Weil. To this action the defendant (appellant) filed an answer controverting the material allegations of the petition, and in the second paragraph pleading contributory negligence upon the part of the plaintiff. The issues having been completed by reply, a trial was had, which resulted in a verdict in favor of the plaintiff (appellee) for $1,000. To reverse the judgment based upon this verdict this appeal is prosecuted.

It is insisted by the appellant that the judgment should be reversed because the court failed and refused to give him a jury properly drawn from the jury box, but, instead, impaneled a jury made up in part of bystanders. The bill of exceptions shows that the court had two juries impaneled; that at the time this case was called for trial one of them was out considering a case which had been submitted to it, and that it was necessary, or thought to be necessary by the trial judge, to impanel a jury partially made up of bystanders, and this was done over the objection of the defendant. After the case had been stated, the jury which had theretofore been out came into court and reported a verdict in the case it was considering. Thereupon the trial judge offered to set aside the order impaneling the jury of bystanders and to give the defendant a jury drawn from the box in accordance with the provisions of the statute. This was declined by the defendant, who objected to the proposition of the court,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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and thereupon the case proceeded to judgment, with the jury partially made up of bystanders. We think the offer of the court to recede from its erroneous position in regard to the jury was all the defendant had a right to demand under the circumstances; and, if he wanted a jury drawn from the box according to the letter of the statute, he should have accepted the court's offer to furnish him such a jury, although the case had proceeded somewhat before the improperly organized jury. The refusal of the defendant to accept the offer of the court for a properly constituted jury estops him from now complaining of the jury of bystanders. He cannot legally trifle with the court by experimenting with the bystanders' jury, and, when unsuccessful, complain of an error which his own obstinacy prevented from being corrected.

The verdict of $1,000 was not excessive. The evidence shows that the plaintiff's injury will be permanent, and, while not altogether incapacitated from labor, he will never be entirely well or strong. In other words, he will always be partially a cripple.

There is no serious complaint of the instructions given by the court to the jury, and, indeed, these seem to be beyond successful criticism, assuming that the plaintiff had a case to go to the jury at all.

The real cause of appellant's complaint, however, is the failure of the court to peremptorily instruct the jury to find in his favor. The evidence shows without contradiction that the appellant was going along the street in his automobile; that he saw appellee crossing the street some 75 or 100 feet off; that he sounded his horn as a warning to the appellee; that thereupon the appellee undertook to go back across the street to the side from which he originally came, but in the meantime the appellant had changed his course, and this brought him again in the direction of the appellee; that the appellee, seeing this, again changed his course, but the appellant, in order to avoid running over the appellee, also changed the course of his automobile. What happened was a confusion of minds of the parties. Each was trying to avoid the other, but each was getting in the way of the other, and as a result the collision took place. The negligence of the defendant consisted in his failure to recognize the great danger that would accrue to the plaintiff from the collision. He had no right, it seems to us, after he saw the confusion of mind which was taking place between him and the plaintiff, to continue zigzagging in the street at the imminent hazard of colliding with the pedestrian. Greater care was incumbent upon him by reason of the deadliness of the machine he was propelling along the highway. The possession of deadly or dangerous instruments always entails great care upon the possessor. One who walks along a crowded thoroughfare with a sharp scythe in his hand must use greater care in handling this instrument than would be required of him if he held an umbrella or small cane. The degree of care one must use always bears a direct ratio to the degree of injury which would probably be caused by negligence. When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train. We do not feel at liberty under the evidence in the case to say that the defendant was free from negligence in failing to so check the speed of his machine as to give him sufficient control of it to avert the injury to appellee, or to stop it entirely if that was necessary; nor, on the other hand, can we say that the plaintiff was guilty of such contributory negligence as entitled the defendant to a peremptory instruction. Certainly it was a question for the jury to say, under all the circumstances, which of the parties was guilty of negligence. Therefore the trial court correctly submitted the case to the decision of a jury as to the disputed facts.

Judgment affirmed.

MONTGOMERY'S TRUSTEE v. BROWN.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. WILLS (§ 762*)—CONSTRUCTION—ADVANCEMENTS—EQUALIZATION BETWEEN LEGATEES.

Where testator's will indicated an intent to divide his property equally among his widow and two children, and to charge each with advancements made, the proper method of settlement was to place as in hotchpot the advancement and the property specifically devised and valued in the will, and divide the sum by three, the quotient representing the value each should receive, and then deduct from the share of each the value of the advancement made, and, if such value in addition to the property specifically devised exceeded one-third of the whole, the devisee receiving the excess should pay the one who received less than the third a sum sufficient to equalize.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1970–1975; Dec. Dig. § 762.*]

2. WILLS (§ 744*) — DEVISEE'S INTEREST — MORTGAGE—NOTICE.

Where a devisee of real estate charged with advances was required to execute a note to his mother for $506.41, to equalize their shares under the will, and then mortgaged his interest in the property devised, the mortgagee was bound to take notice of the public records con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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taining the will, and was charged with knowledge of such facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1913; Dec. Dig. § 744.*]

3. WILLS (§ 758*)—ADVANCEMENTS—"DEBT."
Though an advancement is not a "debt" in any sense, testator may nevertheless impose such conditions on his devise to the beneficiary advanced as he sees proper and as are not unlawful.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1957; Dec. Dig. § 758.*

For other definitions, see Words and Phrases, vol. 2, pp. 1864–1886; vol. 8, p. 7628.]

4. WILLS (§ 759*)—ADVANCES—EFFECT.
A provision charging a devisee with a specified sum as an advancement was equivalent to requiring him to account to the estate in the final settlement for such sum as a condition to receiving the devise and to charge the amount as a lien on the real estate devised to him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1961; Dec. Dig. § 759.*]

5. WILLS (§ 759*)—"ADVANCEMENT."
Where testator devised certain real estate to his son charged with advancements made to him, the term "advancement" was used in its popular, and not in its technical, sense.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1961; Dec. Dig. § 759.*

For other definitions, see Words and Phrases, vol. 1, pp. 218–222; vol. 8, p. 7567.]

6. DESCENT AND DISTRIBUTION (§ 109*)—ADVANCEMENTS—PARTITION.
In case of intestacy, advancements must be brought in hotchpot if the heir would participate in the partition of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 416; Dec. Dig. § 109.*]

7. WILLS (§ 762*)—ADVANCES—PAYMENT OUT OF RESIDUUM.
Where, in the settlement of an estate, one of the devisees in order to equalize his mother's share executed a note to her for $506.41, having received as advancements more than his share of the estate, and it also appeared that the estate had been completely settled, and that the note remained unpaid, it would be presumed that the devisee's interest as residuary legatee was insufficient to pay the note.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1970; Dec. Dig. § 762.*]

Appeal from Circuit Court, Spencer County.

"To be officially reported."

Suit by Sue C. Montgomery's trustee against C. C. Brown to stay a mortgage foreclosure sale until plaintiff's alleged lien and its priority could be ascertained. From an order sustaining a demurrer to the petition and dismissing it, plaintiff appeals. Reversed and remanded, with directions.

J. B. Weaver, Peak & Holland, and Edwards, Ogden & Peak, for appellant. E. E. McKay and Geo. S. & Jno. A. Fulton, for appellee.

O'REAR, J. The will of J. R. Montgomery is in these words:

"I, J. R. Montgomery, Sr., of the town of Taylorsville, County of Spencer, and State of Kentucky, do make and publish this my last will and testament, to-wit:

"1st.—I desire all my just debts and funeral expenses to be paid out of my estate.

"2nd.—I give to my son J. R. Montgomery, Jr., my encyclopedia.

"3rd.—I desire that the remaining portion of my library be divided equally between my beloved wife, Sue Montgomery, and my daughter, Mattie V. Vandyke.

"4th.—It is my will and desire that the residue of my estate be divided equally between my wife, Sue C. Montgomery and my two children, Mattie V. Vandyke, and J. R. Montgomery, the same to be held for their use and benefit in the following prescribed manner, namely, That portion of my estate that shall fall to my wife, Sue C. Montgomery, whether it be real or personal, I desire the same to be placed in the hands of the Louisville Trust Company, whom I appoint as trustee for my said wife. The said Louisville Trust Company is to take control and management of said estate that shall go to my wife, whether it be real or personal. If my wife so desire she shall be allowed to retain and hold as a home my house and lot where we now reside, at a valuation of One Thousand Dollars. The said Louisville Trust Company shall collect all rent, interests, etc., and pay the same over to my wife, (less their commission) so long as she may live. At her death, it is my wish that her portion of my estate shall revert back to my two children, and be divided equally between them, and to be held for their use and benefit as is hereinafter provided in this paper.

"5th.—The portion of my estate that shall go to my daughter, Mattie V. Vandyke, it is my will and desire that the same shall be placed in the hands of my brother-in-law, E. D. Bourne, whom I appoint as her trustee.

"Now, whereas, I have invested the sum of twelve hundred dollars and hold a title for the same in what is known as the Barker farm, I therefore desire to charge her with the said twelve hundred dollars so paid, and direct that after my death the title to the said tract of land shall be conveyed to her, and to be held in trust for her use and benefit. However, if it is thought by her trustee that it will be to my daughter's best interest to sell the Barker land and reinvest the money with any and all other money due her from my estate, then he is not only empowered, but he is earnestly requested to do so, but only by her consent shall this be done. It is my will and I so direct that all my daughter's interest in my estate shall be invested in good real estate, that it will make for her a good and permanent home during her life.

"At her death, then it is my will that it shall go to her children; should she be bereft of children by death, then I desire that her interest in my estate shall revert back to my estate, and be distributed between my legal heirs.

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"6th.—Now, whereas, I have advanced to my son, James R. Montgomery, the sum of Nine Hundred Dollars, with which to go into business, I hereby charge him with that amount in this writing. I also will and bequeath to my said son, one store house now in course of erection, with the lot on which it stands, on the south side of Main street in the town of Taylorsville, Ky. The cost of construction of said house will be about sixteen hundred dollars, which amount I desire that my son shall be charged with by my executor. I desire that my said son shall have and hold said house and lot, and have the use and benefit of same during life. At his death should he die without children to revert back to my estate, and be divided between my legal heirs. Any other property belonging to my estate, not herein named, whether real or personal, I desire the same to be equally divided between my heirs so as to make them all equal.

"This is the 14th day of Feb'y 1899.

"J. R. Montgomery, Sr.

"Attest:—

"W. M. Black.

"Joseph Tucker."

Codicil.

"I do now make and publish this codicil to my foregoing will:

"First:—It is my desire that the portion of my estate bequeathed to my daughter, Mattie V. Vandyke, shall be her separate estate free from the control, use or liabilities of her husband.

"Second.—Since completing the store house bequeathed to my son, J. R. Montgomery, I find that it cost more than I expected, and now fix the value of said house at twenty-five hundred dollars, and desire that my said son be charged with $2500.00 by my executor in place of $1600.00 named in my will, and I desire that the estate given to my said son shall go to his wife, Sade D. Montgomery for her use and benefit during life, should she survive him, and at her death to revert to my estate as in my will provided, however, should she again marry, the estate is to revert back just as if she had died.

"This codicil is not to affect the control of the trustee hereinbefore given, and Sadie D. Montgomery is to take her interest under the same conditions provided for her husband.

"This August 14th 1900.

"J. R. Montgomery, Sr."

Upon a settlement made between the executor and devisees it was found that James R. Montgomery, Jr., the devisee, had received $506.41 more than one-third in value of the testator's estate, and that the widow of the testator had received that much less than her one-third. To equalize them, James Montgomery, Jr., executed his note to the executor for $506.41, and the executor assigned the note to the trustee of Mrs. Sue C. Montgomery, the widow. In the meantime James Montgomery, Jr., had executed a mortgage to appellee Brown upon the former's life estate in the lot and storehouse in Taylorsville. Brown sued to foreclose his mortgage lien, but failed to make Mrs. Montgomery and her trustee parties. A decree of sale was entered, enforcing the lien of Brown, and the master was about to execute the judgment when this suit was filed by Mrs. Montgomery's trustee, appellant, to stay the sale until her lien for the $506.41 was adjudged and its priority ascertained. The court sustained a demurrer to the petition, and dismissed it.

It becomes necessary, first, to determine the quality of the estates devised to J. R. Montgomery, Jr., and to Sue C. Montgomery, the widow. Each took a life estate in the property devised by the will to them (except the specific personal items mentioned in the first three items), with remainder over. The intent expressed in the will is clear that the testator intended an equal division of his estate among the three devisees named—his widow, son, and daughter. While he gave to each certain specific real property, it was valued in the will with the intention that the devisees should be equalized. Equality is the dominant idea in the will. So, when it was declared that the son was to be charged with an advancement of $900 which had been made to him, it was the testator's intention that that sum should be accounted for in the division in order to accomplish the equality aimed at. If the testator's intention had been to devise the storehouse and lot to Jas. R. Montgomery, Jr., unconditionally, except as to his having a life estate only in it, it would not have been necessary to have valued it in the will, unless there was considerable estate comprised in the residuum. But it is not shown that there was a surplus of any considerable quantity. The correct method of settlement was to place, as in hotchpot, the advancement and the property specifically devised and valued in the will, then divide the sum by three. The quotient would represent the value each was to receive. Then deduct from the share of J. R. Montgomery the advancement made to him. Each should have received the property specifically devised. But if that, as valued by the will, gave to any one of them more than a third of the whole, that one would have been required to pay to the one or those receiving less than a third each a sum sufficient to equalize them. Such, substantially, we gather from the record, was the course pursued. In that way the result was that James R. Montgomery was shown to have received $506.41 more than, and Mrs. Sue C. Montgomery less than, a third of the whole. When James R. Montgomery, Jr., executed his note to the executor for the difference in values, and the latter assigned it to Mrs. Montgomery, the effect was that result aimed at by the will.

Appellee contends that he is an innocent purchaser for value without notice of the

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equity of Mrs. Montgomery. Conceding that a mortgagee stands in the same relation as a purchaser, still he was not without notice; for he must take notice of the public records containing the will.

Appellee further contends that an advancement is not a debt due to the testator, and that it can never be the basis of a recovery against the heir or devisee to whom the advancement had been made. It is true that an advancement is not a debt in any sense. But the testator had a right to impose such conditions upon his devise as he saw proper, and that were not unlawful. When he required the $900 to be charged to J. R. Montgomery, Jr., as an advancement, it was equivalent to requiring him to account to the estate in a final settlement for that sum as a condition to his receiving the devise made to him. When Jas. R. Montgomery, Jr., elected to take under the will, he was required to take subject to its conditions. The condition that he was to be charged with the $900 in ascertaining the shares due each devisee was equivalent to making that sum a charge upon the property devised to him, and in behalf of the one or ones who received less than a third each.

In using the term "advancement" the testator did not intend to restrict its meaning to its technical, but intended to employ it in its popular, sense. In the case of wills, when advancements are spoken of, the term is not taken in its technical sense. Barker v. Comins, 110 Mass. 477; Eisner v. Koehler, 1 Dem. Sur. (N. Y.) 277; Hammett v. Hammett, 38 S. C. 50, 16 S. E. 293, 839.

In case of intestacy advancements must be brought in hotchpot if the heir would participate in the partition of the estate. Haden v. Haden, 7 J. J. Marsh. 168; Nelson v. Bush, 9 Dana, 104. As in intestacy equality is the bottom of the law of descent and distribution, so, where the will manifests the same purpose requiring advancements to be accounted for, they should be treated as in case of intestacy. It is said by appellant that Jas. R. Montgomery, Jr., may have accounted for, and ought to have been required to account for, his advancement out of the residuum devised. Even so. But the petition alleges that the estate had been completely settled, and that Jas. R. Montgomery had never accounted for any part of the $506.41 of the advancement. From this allegation we gather that there was not a sufficient residuum to satisfy Jas. R. Montgomery, Jr.'s, advancement, and that the balance of $506.41 is the part of the $900, charged in the will against the devisee which has not been satisfied, and to satisfy which there was no other estate but his interest in the storehouse and lot.

The judgment is reversed, and cause remanded, with directions to overrule the demurrer to the petition.

BRUFF v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. CARRIERS (§ 287*)—PROSPECTIVE PASSENGER—INJURIES—NEGLIGENCE.

Plaintiff went to a flag station to take a train, which he expected to stop by waving a torch of burning newspaper. He had some difficulty in lighting the torch, and the time was insufficient after the torch was waved for the railroad operatives to do more than sound the whistle. The next instant, the speed of the train had carried it beyond the station, and the suction blew off plaintiff's hat, and on his reaching for it the train, struck his extended fingers, so that his arm was broken in two places. *Held*, that the carrier was not negligent.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 287.*]

2. CARRIERS (§ 316*)—PASSENGERS—RES IPSA LOQUITUR.

The rule that a passenger's injury unexplained will be presumed to have resulted from the carrier's negligence applies only where the injury is caused by a breaking of some part of the train, or by the manner of its operation, and does not include a case where a prospective passenger went to a flag station at night and endeavored to stop the train by a flaming torch; the train having passed and injured him before he could escape, and the operatives being in ignorance of his presence or intention until after he was injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1283; Dec. Dig. § 316.*]

3. CARRIERS (§ 327*)—PROSPECTIVE PASSENGER—CONTRIBUTORY NEGLIGENCE.

A prospective passenger having gone to a flag station, and taken a position of peril to flag a train, and having stayed there until it was too late to extricate himself and was injured, was negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1364; Dec. Dig. § 327.*]

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by S. F. Bruff against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Hanbery & Fowler, for appellant. Trabue, Doolan & Cox, S. Y. Trimble, and Trimble & Bell, for appellee.

O'REAR, J. Green's crossing is a flag station on the appellee's line of railroad in Christian county. There is not a depot there, nor is there an agent. Those who contemplate becoming passengers on appellee's trains from the station flag the train they want to stop. Otherwise the trains do not stop there, unless there are passengers to get off at that point. At night the trains are flagged by the waving of a lantern or lighted torch across the track in sight of the engineer on the coming train. On the night of December 16, 1906, appellant intended to take passage on appellee's train due to pass that station at 6 o'clock p. m. He repaired to the station, but without a lantern. He had a couple of newspapers twisted up, and some matches, with which he expected to make a torch to flag the train.

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What transpired is told by him on his testimony in this case (a suit for his personal injury because his hand was struck by the train and his arm broken) in this language: "Q. Mr. Bruff, what part of the train did you see first? A. The headlight was the first thing I saw. Q. That train was going toward Hopkinsville, going from Gracey? A. Yes, sir. Q. When you saw that headlight, what did you do? A. It blew when I saw it first. When I first noticed it, I struck a match and tried to light my torch, but the match went out, and I struck another one and lit my torch, and —— Q. Wait a minute, now. Which hand did you have the torch in when you went to light it? A. In my left hand. Q. You were lighting your torch in your left hand when your match went out, the first match? A. Yes, sir. Q. Then what did you do? I mean after that match went out? A. Struck another one and lit the torch, all that I could do, and then I —— Q. How much did that torch burn? A. As long as my hand or more. Q. You mean the flame was that long? A. Yes, sir. Q. Well, tell the jury what you did with the torch after you lit it? A. I waved it back and forward on the railroad track, and they blowed one long blast and two short ones, and I thought they were going to stop, and I tried to get out of the way, and, before I could do it, it hit me and knocked me down. Q. Did you get off the railroad track? A. Yes, sir. Q. Where did you get to? A. Upon the streamer that runs along the edge of the platform to hold the rock up there and keep it from rolling off on the track. Q. That's right on the edge of the platform? A. Yes, sir. Q. There to keep the screenings from getting on the track, I believe you say? A. Yes, sir; I suppose that's it. Q. Where did it strike you? A. On the tips of my fingers. Q. What else did it do for you? A. It broke my arm, too. Q. Where? A. In two places. Here, and up here. [Exhibiting his broken arm to the jury.] Q. What became of you? A. It knocked me down, and I laid there. Q. What became of your torch? A. I don't know where it went to. * * * Q. When you signaled this train, how many times did you wave this light across the track? A. Several times, but I don't know how many. Q. Did you stop waving it until it answered your signal? A. I waved it until it answered me. Q. It answered with one long blast and two short ones? A. Yes, sir. Q. What did you expect when you received that signal? A. I expected it to stop and take me on. Q. Did you expect it to slow down? A. Yes, sir; but it didn't do it. Q. Did you get out of the way just as quick as you could? A. Yes, sir. Q. Where had you gotten when it struck you? A. I had got upon the streamer right close to the track. Q. What were you doing when it struck you? A. Getting out of the way of the train as fast as I could. Q. How much further would you have had to go before you would have been clear of that train? A. One step. Q. If that train had obeyed your signal, would you have had plenty of time to take that step and been out of the way? A. Yes, sir; I would. Q. Did it stop at all? A. No, sir. Q. Did it hesitate? A. No, sirree; just came flying by."

On cross-examination the witness testified as to the infliction of the injury: "Q. Were you standing on that timber when you flagged the train, or were you standing with your feet against the railing? A. I was standing with my feet against the railing. I reached over to make the signal, kind o' this way [indicating his stooping posture]. I was afraid to get on that track. The train was on it. Q. You were standing with your feet on the track next to John Green's? A. Yes, sir. Q. Standing right at the platform? A. Yes, sir. Q. Did you stand straight up when you made that signal? A. No, sir; I leaned over kind o' this way, I said [showing the jury his position]. Q. You leaned over the track? A. Yes, sir. Q. You stooped down nearly to the ground? A. Yes, sir. Q. Was it raining? A. No, sir. Q. Was it a dark night? A. Yes, sir; it had been raining and was as dark as could be. * * * Q. Where did it strike you, Mr. Bruff? A. On the tips of my fingers. Q. Which hand? A. This one; my left hand. Q. You were facing toward the train? A. Yes, sir. Q. It was moving toward Hopkinsville? A. Yes, sir. Q. You were stooping with your left hand toward the train that was approaching? A. Yes, sir. Q. How was it that it simply hit the tips of your fingers? A. I can't tell about that. Q. If you had been standing up straight, then would it have hit you? A. No, sir; it would not. Q. I want to ask you if you don't distinctly remember that when this train passed that your hand was out this way [showing the witness]? A. No, sir; I will tell you how it was: My hat tipped off, and I must have grabbed at my hat. Q. Ain't that the way you hit that train? Wasn't you catching at your hat? A. I didn't catch my hat at all. Q. Didn't you catch at it? A. Yes, sir."

Re-examination: "Q. Now, about this hat. Did it blow off, or did it fall off as you jumped over that track? A. It must have blown off from the air from the train."

There was no other evidence touching the infliction of the injury. At the conclusion of the evidence offered by the plaintiff the court sustained the defendant's motion for a peremptory instruction.

This testimony uncontradicted establishes, we think, these facts: The trains of appellee were in the habit of stopping on flags by burning torches or lanterns waved across the track; that is, at right angles to it, and upon or beside it at the station. (We did not copy the evidence on that point.) The first that appellant knew of this train's approach was when he heard the locomotive whistle. It does not matter how far he might have seen the headlight upon the straight track.

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He did not see it until he heard the whistle. He then stepped to the side of the track, and attempted to light his torch. He made two efforts before succeeding. That necessitated reaching for his matches and striking and applying them. When his flame was large enough, as large as his hand, he waved it across the rail, the locomotive again whistled an alarm of three blasts—one long and two short. He jumped away to the platform, his left arm still outstretched. Before he could get to a place of safety, he was struck. Whether he was struck while still waving his torch, or because of the involuntary movement of his arm to catch his hat blown off by the suction caused by the rapidly moving train, seems to us not material. Those on the locomotive could not know of his presence or purpose until they saw his waving torch. It was therefore not negligence as to him for them to run the train by that station or to approach it at a high rate of speed unless they saw his torch. According to his testimony, there was not time after his torch was waved to do anything but sound the whistle. The next instant, before he could do more than spring a foot or so, the speed of the train had carried it beyond the station with such velocity that the suction blew off his hat, and the train, striking his extended fingers, broke his arm in two places. We fail to see in these facts any negligence upon the part of those operating the train, the avoidance of which would have prevented the injury.

Appellant urges these principles as applicable to his case: First. That he was a passenger when he went upon the platform intending to take passage upon the train, and that his injury by the train was prima facie negligence. Second. That the engineer actually saw appellant in time to have slackened the speed so as to permit him to reach a point of safety. As to the latter, there was not evidence, unless the blasts of the whistle may be regarded as evidence of the fact. That action may indicate he was seen, but does not even tend to show that he was seen in time to have prevented his injury by any action within the power of those on the engine. As to the first proposition, while one may be regarded as a passenger from the time he enters the depot or goes upon the platform near the time of a train which is due to stop there for the purpose of taking passage on it, it must be under conditions that will apprise the carrier of his presence and intention. Such person injured by a passing train in ignorance of his presence or intention does not come within the rule that a passenger's injury unexplained will be presumed to have resulted from the negligence of the carrier. That applies only when the injury is caused by a breaking or wrecking of some part of the train or track, or the manner of its operation by which those upon the train are injured. But there is no place for presumptions of fact in any case where the evidence shows the facts unless it be in a matter of estoppel. Here the facts are shown, and refute the supposed presumption of negligence. If the trainmen saw appellant or his torch, it could not have been until the torch was lighted and waved as a signal. A time too short to permit him to spring a few feet away, acting promptly as he said he did, was likewise too short to admit of stopping or materially checking the speed of a heavy railroad train running as fast as this one then was. Appellant having placed himself in a position of peril, and having stayed there from whatever cause until it was too late to extricate himself and not warning those in charge of the train in time to allow them an opportunity to stop or check the train to save him, his injury is the result of his own act, not their negligence. These facts presented only a question of law; that is, admitting them as true, and deducing from them every possible reasonable inference, was there actionable negligence on the part of the railroad operatives? The trial court thought there was not. So think we.

Judgment affirmed.

HARTFORD MILL CO. v. HARTFORD TOBACCO WAREHOUSE CO.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. EVIDENCE (§ 399*) — PAROL EVIDENCE — WRITTEN CONTRACT.

Where nothing was left out of a written building contract by either fraud or mistake, and the contract was signed by the parties with full knowledge as to what it contained, evidence of antecedent verbal statements not contained in the writing was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1772–1777; Dec. Dig. § 399.*]

2. TRIAL (§ 252*) — INSTRUCTIONS — ISSUES — SUBMISSION TO JURY.

Where, in an action for breach of a building contract, there was no evidence in support of an issue that certain statements by the builder concerning the building had been omitted from the contract by fraud or mistake, the court erred in submitting such issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. § 252.*]

3. CONTRACTS (§ 280*)—BUILDING CONTRACT—MATERIAL AND WORKMANSHIP—QUALITY.

Where a building contract was silent as to the quality of material and workmanship, an obligation on the part of the builder to use reasonably good and suitable material and reasonably skillful workmanship in constructing the building would be required by law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1252; Dec. Dig. § 280.*]

4. DAMAGES (§ 123*)—BUILDING CONTRACTS—BREACH—NATURE OF DAMAGES.

In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skillful workmanship.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 322; Dec. Dig. § 123.*]

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5. CONTRACTS (§ 280*)—BUILDING CONTRACT—BREACH—DEFENSES.

In an action for breach of a contract for the construction of a tobacco warehouse, the builder was not liable for the breaking down of the structure if caused by the owner's unreasonable overloading thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1252; Dec. Dig. § 280.*]

6. CONTRACTS (§ 305*)—BUILDING CONTRACT—ACCEPTANCE OF BUILDING.

Where the owner of a warehouse accepted it as a sufficient compliance with the terms of the contract after full examination, with knowledge of the kind of material used and the workmanship exercised in its erection, he could not recover as for a breach of the builder's contract on its subsequent breaking down.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1398; Dec. Dig. § 305.*]

7. CONTRACTS (§ 304*)—BUILDING CONTRACT—POSSESSION—ACCEPTANCE.

Taking possession of the building by the owner does not constitute a final acceptance thereof as between the owner and the contractor, unless intended as such.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1459; Dec. Dig. § 304.*]

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by the Hartford Tobacco Warehouse Company against the Hartford Mill Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

G. B. Likens, for appellant. Heavrin & Woodward, for appellee.

BARKER, J. This action was instituted for the purpose of recovering damages for an alleged breach of the following contract entered into between appellant and appellee:

"Articles of agreement between the Hartford Mill Co. and Hartford Tobacco Warehouse Co., both of Ohio county, Ky., in which the Hartford Mill Co. is to build an addition to their present warehouse in Hartford, of the following dimensions, to wit:

"The building is to be the same height, length, and width as the old one and the roof the same shape, and all the floors on a level. The new building is to have a basement story inclosed by a brick wall 1½ brick thick with a fillister two bricks square every ten feet and be six feet six in. in the clear, including the sills.

"The basement floor to be laid with rough lumber on sleepers 4 in. square and the joints to be broken with thin strips. The first floor to be No. 1 common pine; the second floor to be No. 2 common pine; the third floor to be rough lumber not stripped or jointed. The joists of the 1st and 2nd floors to be 2x10" and rest on girders 8x10" and be 16" apart. Said girders to be supported by posts 8x8" and 16 feet apart with caps same size and six feet long. The 3rd or top floor to rest on joists 2x8" and 24" apart, and to be well supported by posts and girders. The racking to be substantial and be two feet from the wall all around and run cross-wise with the house. The roof is to be roll cap steel of good quality. The studding and rafters to be 2x4" and 24" apart. The weather boarding to be bevel pine and to have 2 coats of paint. The basement wall next to the old house is to be 9" thick and four feet from the pillars of the old house. The building is to have 44 windows with wood shutters same size as old house, 30 glass windows same size as in old house. Black Diamond Cement to be used one foot each way from top of the ground in outside course of brick. A brick flue is to be run in center of the house and necessary work tables to be put in with suitable ratchways. The base of the brick wall is to be 24", except the 9" wall and the base of it is to be 18". The building is to be 40 ft. wide and 80 ft. long.

"The Hartford Tobacco Warehouse Co. is to pay the Hartford Mill Co. eighteen hundred and fifty dollars for the above described building.

"This Jan. 20th, 1906.

"Warren Lindley,
"David Moreland,
"A. R. Pirtle,
"J. S. Cecil,

"For Hartford Tobacco Warehouse Co.

"J. C. Riley,

"For Hartford Mill Co."

In the execution of this contract the appellant company built the warehouse, of the dimensions specified, and the appellee received it and proceeded to fill it with tobacco, having first paid over to the appellant the full sum of the contract price—$1,850. Some minor defects in the building developed at once, and were perhaps remedied by the appellant, or it gave the appellee money with which to remedy them. These are immaterial. But, after the house was full of tobacco, it was found that the timbers were insufficient to hold the weight to which they were subjected, and the appellee claimed that the giving way of the timbers was caused by the fact that they were decayed or of insufficient material and the whole was put together in an unworkmanlike and unskillful manner. Claiming that there had been a breach of the contract, this action was instituted by the appellee, alleging damages in the sum of $568. The appellant replied, setting up the written contract, and alleging that the building had been erected in the manner and with the materials described therein. The answer also pleaded acceptance of the building on the part of the appellee after full inspection, and the third paragraph charged that the giving way of the building was caused from the fact that it had been enormously overloaded, and thereby subjected to a weight for which the timbers were not designed, and whatever damage had ac-

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crued to the building was caused by this wrongful overloading. The appellee placed in issue all the material allegations of the answer, and by an amendment of its petition alleged that, by mistake or fraud, the writing did not contain all the contract between the parties, but that the appellant had stipulated verbally that the building was to be a first-class structure and the timbers of first-class material, etc., and alleging a breach thereof; that these stipulations were left out of the written contract by fraud or mistake on the part of the appellant. This was controverted by the appellant, and the case proceeded to trial, with the result that the jury awarded a verdict against the appellant, and in favor of the appellee, in the sum of $400 as damages. Complaining of the judgment based upon this verdict, the mill company is here on appeal.

The first complaint which appellant makes is that the court erred in the instructions to the jury by making its defense to turn in part upon the question as to whether or not a part of the contract between it and the appellee had been left out or omitted by fraud or mistake; and it points out that there is nothing in the evidence which warrants the submission of this question to the jury. Undoubtedly the appellant is right in this contention. Not only is there nothing in the evidence upon which the court could base this part of the instructions, but, on the contrary, all of the evidence shows that there was nothing left out of the written contract by either fraud or mistake. It is true, it is shown in the evidence that there was much conversation between the parties as to what the appellant was to do in regard to the building, but the evidence of both parties shows that the appellee agreed to rely upon the verbal statement of appellant, and the articles of agreement were afterwards signed by the parties with the full knowledge on the part of the appellee as to what they contained. The action of the court comes directly within the inhibition of the rule that a written contract cannot be varied or modified or controlled by prior verbal statements or stipulations, unless there is an allegation of fraud or mistake in the pleading, and proof to sustain it if controverted. In the case at bar, while the pleadings allege fraud and mistake, this was placed in issue, and there is nothing in the evidence to support appellee's side of the issue so made. The court, therefore, erred in making the appellee's defense to turn in any way upon the question of fraud or mistake in the preparation of the written contract.

It will be observed that the written contract is silent upon the question of the quality of the material and workmanship to be used in the construction of the warehouse. But, while this is true, the law implies the obligation on the part of the appellant to use reasonably good and suitable material and to exercise reasonably skillful workmanship in the construction of the building, and therefore the jury should have been told that if the appellant constructed the building according to the dimensions stipulated in the contract and of materials of the dimensions set forth therein, that these materials were reasonably sound, and the structure put together in a reasonably skillful and workmanlike manner, the law was for the defendant, and they should so find; and the converse of this proposition in favor of the plaintiff should have been given. The court properly stated the measure of damages, if the jury should find for the plaintiff, to be the difference between the value of the building as it was constructed and what its value would have been had it been constructed in accordance with the written contract, with reasonably sound materials and reasonably skillful workmanship.

The appellant was also entitled to an instruction that if the breaking down of the structure was caused by the unreasonable overloading of it by the appellee, and not by reason of a breach of the contract, in that case the law was for the defendant.

The appellant was furthermore entitled to an instruction that if the appellee, after full examination of the building and knowledge of the kind of materials used and the workmanship exercised in the structure, accepted it as a sufficient compliance with the terms of the written contract, the law in that case was in favor of the defendant, and the jury should so find. Of course, if the taking possession of the building by the appellee was not intended to be a final acceptance of it, the fact that it did so will not redound to the benefit of appellant.

For the reasons above stated, the judgment is reversed for further proceedings consistent with this opinion.

H. KRISH CO. v. RIGSBY.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. COURTS (§ 223*)—JURISDICTION—AMOUNT IN CONTROVERSY.

The amount in controversy on appeal by plaintiff, in an action to enforce satisfaction of a judgment of $269 against a fund of $243, in which plaintiff has judgment for $75, and the balance is held exempt to defendant, is $168, and therefore insufficient, under Ky. St. 1909, § 950 (Russell's St. § 2784), providing that appeal shall not be taken to the Court of Appeals from a judgment for recovery of money or personal property if the value in controversy is less than $200, exclusive of interest and costs.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

2. COURTS (§ 223*)—JURISDICTION—NATURE OF ACTION.

An action to enforce satisfaction of a money judgment against defendant, R., in which L.,

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charged to be indebted to R., is made a defendant, is one for recovery of money or personal property, within Ky. St. 1909, § 950 (Russell's St. § 2784), providing that appeal shall not lie to the Court of Appeals from a judgment for recovery of money or personal property if the value in controversy is less than a certain amount.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

8. COURTS (§ 223*) — JURISDICTION — ATTACHMENT PROCEEDING.

That the action is an attachment proceeding, in which a lien is sought on personal property, is not enough to give the Court of Appeals jurisdiction of appeal from the judgment therein irrespective of the amount in controversy.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Action by the H. Krish Company against Lee Rigsby. From the judgment, plaintiff appeals. Dismissed.

McGuire & McGuire and R. H. Cooper, for appellant. Augustus Arnett, for appellee.

CLAY, C. Appellant, H. Krish Company, recovered a judgment in the Magoffin circuit court against appellee, Lee Rigsby, for the sum of $269.27, with interest thereon at 6 per cent. from the 16th day of July, 1905, and for $13.20 costs. An execution was issued and returned "No property found." Thereupon appellant instituted this action to enforce the satisfaction of the judgment, and made the S. B. Reese Lumber Company, which, it was charged, was indebted to appellee, party defendant. The S. B. Reese Lumber Company answered, admitting an indebtedness due, and to become due, of $243.47. Appellee pleaded his exemptions as a housekeeper with a family resident in the state. Upon hearing the question of exemptions the court entered judgment reciting that the garnishee, S. B. Reese Lumber Company, had paid into court the sum of $213.82, and directed the clerk of the court to pay to appellant the sum of $75.72, and the residue of the attached funds, to wit, $137.50, to appellee, Rigsby. From the aforesaid judgment this appeal is prosecuted.

The appellee having made a motion to dismiss the appeal, we shall first consider the question whether or not this court has jurisdiction. The amount paid into court does not correspond with the amount of indebtedness acknowledged by the S. B. Reese Lumber Company. If we deduct $75.72, the amount directed by the judgment to be paid to appellant from the amount paid into court, the balance is $138.10. If we deduct the $75.72 from the amount of indebtedness acknowledged by the S. B. Reese Lumber Company, to wit, $243.47, the balance is $167.75. Section 950 of the Kentucky Statutes (Russell's St. § 2784) provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest and cost. * * *" There can be no question that the action is one for the recovery of money or personal property. The judgment directs that $75.72 be paid to appellant. Thus the appellant recovered that amount. The question, then, is: How much is in controversy? As the whole attached fund amounted to but $243.47, the amount in controversy would necessarily be the difference between the amount actually recovered, or $75.72, and the whole amount of the attached fund. This difference is $167.75. Where the defendant appeals, the amount in controversy is the amount of the judgment against him. Where the plaintiff appeals, and he recovers nothing, the amount in controversy is the sum sued for; but where he sues for a certain sum, and recovers less than that sum, the amount in controversy is the difference between the amount sued for and the amount recovered. In this case that amount is $167.75, which is not sufficient, under the foregoing sections of the statute, to give this court jurisdiction. The mere fact that this is an attachment proceeding, in which a lien is sought upon personal property, is not sufficient to give this court jurisdiction, regardless of the amount in controversy. Rhodes, etc., v. Frankfort Chair Company, 79 S. W. 768, 25 Ky. Law Rep. 2042; Cabell, Basye & Co. v. Patterson, etc., 98 Ky. 520, 32 S. W. 746, 17 Ky. Law Rep. 836.

For the reasons given, the appeal is dismissed.

COMMONWEALTH v. CALDWELL
(two cases).

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. FALSE PRETENSES (§ 30*) — INDICTMENT — SUFFICIENCY.

An indictment in a prosecution for obtaining money and property under false pretenses, which alleged that accused, by falsely pretending to another that he owned certain timber and had a sum of money in the bank, obtained a certain sum and a horse from him, but for which false pretenses the owner would not have parted with his property, was insufficient for not negativing accused's ownership of the property which he claimed to own.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 37; Dec. Dig. § 30.*]

2. INDICTMENT AND INFORMATION (§ 15*)—DISCHARGE FROM CUSTODY — DISCRETION OF COURT.

Whether accused should be discharged on the direction of a verdict for him at the close of the commonwealth's evidence in a forgery prosecution was a question for the exercise of the sound discretion of the trial court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83–88; Dec. Dig. § 15.*]

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8. CRIMINAL LAW (§ 1134*)—APPEAL—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

On appeal from judgments of acquittal in prosecutions for obtaining property by false pretenses and for forgery, the Supreme Court will not determine whether the indictments therein will bar another prosecution for the alleged wrong upon which the present prosecutions were based; the question being a moot question only.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

L. D. Caldwell was indicted for obtaining property by false pretenses, and for forgery. From a judgment on a directed verdict of acquittal in each case, the Commonwealth took separate appeals. Affirmed.

James Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Joseph B. Snyder, for the Commonwealth. P. W. Hardin, for appellee.

NUNN, J. In the early part of the summer of 1908 appellee, L. D. Caldwell, purchased from one W. J. Reynolds a horse at the price of $100, and borrowed from him $150 and executed a note to Reynolds for $250. It was recited in the note that Reynolds was given a lien on some timber situated on 250 acres of land in Clinton county, Ky. After this, on August 8, 1908, L. D. Caldwell delivered to Reynolds a check for $300 on the "Pine Knot Banking Co." in satisfaction of the note for $250, which was surrendered by Reynolds to him upon the delivery of the check. Reynolds presented the check to the bank, and payment thereof was refused for the alleged reason that Caldwell had no money in the bank and had never had. On March 13, 1909, the grand jury returned an indictment against Caldwell, appellee, charging him with obtaining the horse and the $150 from Reynolds by false pretenses. The indictment is as follows: "The grand jury of Whitley county, in the name and by the authority of the commonwealth of Kentucky, accuse L. D. Caldwell of the crime of obtaining money and property under and by false pretense, committed in manner and form as follows, viz.: The said L. D. Caldwell, on the 8th day of March, 1909, before the finding of this indictment and in the county and state aforesaid did unlawfully, by falsely pretending and representing to W. J. Reynolds that he had a certain boundary of timber in Clinton county, Kentucky, and was possessed of large pecuniary means, timber, real and personal estate in Kentucky, and money, at least three hundred dollars, in the Pine Knot Bank, at Pine Knot, Kentucky, obtained from the said W. J. Reynolds one hundred and fifty dollars in lawful money of the United States and one horse of the value of one hundred dollars, with intent to commit a fraud upon the said Reynolds, and but for which false pretense, representation and fraud the said Reynolds would not have parted with the possession of the said money or property, against the peace and dignity of the commonwealth of Kentucky." On the 17th day of the same month appellee was tried on this indictment. After the commonwealth's evidence was heard, the court, on motion of defendant's counsel, instructed the jury to find for the defendant because the indictment was insufficient to sustain a conviction. On motion of the commonwealth's attorney, appellee was held on bail in the sum of $500 to answer any indictment that might be returned against him for forgery, and, in default of bail, he was placed in the custody of the jailer. On the next day, March 18th, the grand jury returned an indictment against him for the crime of forgery, and thereafter, on the 5th day of April, appellee was placed upon trial under that charge, and, after the commonwealth completed its evidence the court, upon motion of defendant's counsel, instructed the jury to find for the defendant, appellee herein, and again, on motion of the commonwealth's attorney, the court held the defendant to answer any indictment that might be returned against him for false pretenses, and thereafter, on the 7th day of April, the court made an order releasing appellee from custody. The commonwealth appeals from the judgment rendered in each of the cases.

It is difficult for us to understand why these appeals were prosecuted. The Attorney General admits that the first indictment, the one copied herein, was defective and not sufficient to put appellee upon his defense under the charge of obtaining money or property by false pretenses, and that the evidence introduced upon his trial for forgery did not present facts showing that appellee had committed any offense akin to forgery. The first indictment was insufficient for the reason that there was no allegation in it negativing his ownership of the property mentioned in the indictment. It was alleged in the indictment that appellee, Caldwell, stated to Reynolds that he "was possessed of large pecuniary means, timber, real and personal estate in Kentucky, and money, at least $300, in the Pine Knot Bank, at Pine Knot, Ky." To make the indictment good it should have been negatived by special averment that these statements were false; that he did not own this property or any of it at the time he made the statements, and that he knew at the time he made the statements that he did not own it. See the case of Commonwealth v. Sanders, 98 Ky. 12, 32 S. W. 129, 17 Ky. Law Rep. 544.

Appellant's counsel contend that the court erred in discharging appellee from custody, over the objections of the commonwealth, after his trial on the second indictment. This matter addressed itself to the sound discretion of the court, and there is nothing in

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the record showing that he abused it. See the cases of Commonwealth v. Shelby, 38 S. W. 490, 18 Ky. Law Rep. 781, and Commonwealth v. Megibben, 101 Ky. 195, 40 S. W. 694, 19 Ky. Law Rep. 291.

We are asked to say whether the proceedings upon the two indictments referred to will be a bar to another prosecution against appellee for the alleged wrong perpetrated by him. We decline to pass upon this question because it is not presented in the record before us.

For these reasons, the action of the lower court in the two cases is affirmed.

CONRAD SCHOPP FRUIT CO. v. BONDURANT.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

1. COURTS (§ 80*)—RULES—TRIAL OF CAUSE—CONTINUANCE.

A court rule, declaring that no case set down for trial shall be reset or continued without the consent of court, and legal and sufficient reasons shown therefor, was reasonable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 284; Dec. Dig. § 80.*]

2. DISMISSAL AND NONSUIT (§ 62*)—GROUNDS—PREPARATION FOR TRIAL—DISOBEDIENCE OF ORDER.

A stipulation for a continuance having been filed, the court reset the case for a subsequent day, and ruled the parties to prepare for trial on penalty of having their respective petitions dismissed, under a rule that where a case is set down for trial, it shall not be reset or continued by agreement, without consent of the court. On the trial day, the parties not being ready, the court dismissed the petition and defendant's counterclaim without prejudice. *Held*, that such dismissal was authorized by Civ. Code Prac. § 371, subd. 2, authorizing a dismissal for disobedience by plaintiff of an order in the action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 117; Dec. Dig. § 62.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Conrad Schopp Fruit Company against J. K. Bondurant, in which defendant filed a counterclaim. From a judgment dismissing, without prejudice, both plaintiff's petition and defendant's counterclaim, plaintiff appeals. Affirmed.

J. D. Mocquot, for appellant. Wheeler, Hughes & Berry, for appellee.

CLAY, C. The appellant, Conrad Schopp Fruit Company, a corporation of St. Louis, Mo., instituted this action against the appellee, J. K. Bondurant, to recover the value of a car load of apples which it had sold and delivered to the latter. The trial court dismissed appellant's petition, and also appellee's counterclaim, without prejudice, and to test the propriety of the court's ruling this appeal is prosecuted.

The petition was filed in the McCracken circuit court on April 17, 1908. Service was had upon J. K. Bondurant in time for the action to be an appearance case at the April term, 1908. On May 16, 1908, which was during the April term, appellee, Bondurant, filed his answer. On the 6th day of June, 1908, and during the same term, appellant filed a reply. The case was not set for trial at the April term of the court, but went over to the October term, 1908, and was set for trial on the 15th day of that term. On the 6th day of November, and during the October term, an order was entered continuing the case on account of the illness of W. A. Berry, appellee's attorney. The case then went over to the February term, 1909. When the latter term arrived, an order was entered setting the case for trial on the 16th day of that term. On the 18th day of February, 1909, appellee was permitted to file an answer over the objection of appellant. The latter then moved the court for a continuance, and filed an affidavit in support of his motion. The case was then reset for trial on the 22d day of the February term. Thereafter the action was continued and set for trial on the 7th day of the next (May) term of the court. On the 22d day of the May term, 1909, appellant filed a reply to appellant's answer. On May 24, 1909, the following order was made: "This day came the parties herein, and filed agreement. It is ordered by the court that this action be reset for trial, on Saturday, the 18th day of the present term, and jury is awarded, and each and both of the parties to this action are ruled to prepare for trial, on or before said day, under penalty for failure to so prepare of having their respective pleadings dismissed." The following is the agreement referred to in the foregoing order, viz.: "It is agreed between the plaintiff and the defendant in this action, that the action may be continued until the October, 1909, term of this court. J. D. Mocquot, Attorney for Plaintiff. Wheeler, Hughes & Berry, for Defendant."

On June 5th, 1909, the court entered an order dismissing the petition of appellant and the counterclaim of appellee, without prejudice. At the same time, the court made the following statement which is incorporated in the record: "As the controversy in this action is between the court and counsel on each side of the case, and as a question of practice is involved, and the attorneys on each side of the case seem to be in accord, and against the views held by the court, I have thought it not improper to make a brief statement of the reasons for my action as judge of the McCracken circuit court in dismissing plaintiff's petition and defendant's counterclaim. On January 21, 1907, the McCracken circuit court had entered of record the following rule or order, to wit: 'It is ordered by the court that no case set down for trial shall be reset or

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continued by agreement of parties or attorneys without consent of the court and legal or sufficient reasons shown therefor'—and caused same to be posted in conspicuous places in the courthouse and clerk's office. The court made this order for the reason that members of the bar and attorneys on each side of the respective cases to be tried claimed the right, after the action had been set down for trial on a day, to continue same by agreement to another day in the term, or to the next term of court, without showing any legal reason therefor, thus leaving the court and jury nothing to do on some days and the docket overcrowded on other days. The record in this case discloses that this action was instituted on April 17, 1908, and that the issue, saving some amendments thereafter filed, was formed at the April term, 1908, and that the case was continued at that term of court until the September term, 1908, and that at the September term, 1908, said case was again continued until the February term, 1909, when said case was set for the 16th day of the term for trial, and on that date reset for the 22d day, and then continued and set for trial on the 7th day of the present term, when another effort was made to continue the case by agreement, and without any legal reason shown, until some day in the next term of the court, which the court refused to do, but reset the case for to-day, the 18th day of the present term, and made a rule on each party to prepare for trial. Thus it will be seen that this case has been set for five different days on the court's docket, and is now sought to be continued and set for another day by agreement of counsel, and without any legal reason or cause shown therefor. The effort to continue the case has been an agreement, filed upon May 24, 1908, which is as follows: 'It is agreed between plaintiff and defendant in this action that the case may be continued until the October, 1909, term of this court. [Signed.] J. D. Mocquot, Attorney for Plaintiff. Wheeler, Hughes & Berry, Attorneys for Defendant.' So far as it appears to the court there has been no diligence whatever used, or any effort whatever made to comply with the rule of the court heretofore made, or to make any preparation for trial of the action, and no legal reason now being shown, or attempted to be shown, on either side, I, therefore, now direct the clerk to enter an order on the records of this court dismissing plaintiff's petition without prejudice, and also the set-off and counterclaim of the defendant in his answer and amended answer, without prejudice, and the clerk will now enter such an order." If any other reasons for continuing the case were assigned by the parties at the time of the dismissal of the case, they do not appear of record. Furthermore, the statement of the court is to the effect that no legal or sufficient reasons for continuing the case were shown. It may be that reasons were submitted to the court; but, as they do not appear of record, we are unable to pass upon the sufficiency of those reasons.

This brings us to the determination of the question whether or not the rule adopted by the court, as set out above, is a reasonable one, and whether or not it violates any rule of law. Section 371 of the Civil Code of Practice is as follows: "An action, or any cause of action, may be dismissed without prejudice to a future action—(1) By plaintiff. By the plaintiff, before the final submission of the case to the jury, or to the court, if the trial be by the court. (2) By court. By the court—(a) If the plaintiff fail to appear at the trial. (b) For the want of necessary parties. (c) On the application of a defendant, if there be others whom the plaintiff fails to prosecute with diligence. (d) For disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the action, the decision must be upon the merits." In our opinion, the rule in question and the order predicated thereon are fully covered by the language of subsection "d" above quoted. In this case the plaintiff disobeyed the order, and the defendant, who was in effect a plaintiff so far as his counterclaim was concerned, also disobeyed the order. That it was an order concerning the proceedings in the action there can be no question. The commonwealth is put to great expense to maintain its courts. It was not intended that the courts should be at the mercy of attorneys, and be compelled to continue cases whenever agreed to by them. In such cases the court has a discretion, and where that discretion is predicated upon a reasonable rule, adopted by the court for the dispatch of its business, this court will not interfere with the trial court. If attorneys could, upon agreement, secure continuances of cases whenever they so decided, it would greatly interfere with the dispatch of business. As was pointed out in the statement of the trial judge, there would be nothing to do on some days, while the docket on other days would be greatly overcrowded. Thus it is of importance that cases should be so arranged upon the docket that the court and the jury should have plenty to do during the continuance of the term. It would not do to permit attorneys, arbitrarily and without valid reasons therefor, always to continue cases by agreement. While the trial court should as far as possible accommodate the attorneys, he should not do so at the expense of justice. The rule adopted by the lower court is not only reasonable, but is a wise one if adhered to and carried out. Under that rule the court was not bound to continue the case because the attorneys agreed to continue it. If they showed any valid or sufficient reasons why it should be reset or continued, the court would have been bound by its own rule, and

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would have had to reset or continue the case. As said above, the record is entirely silent upon the question of legal or sufficient reasons. So far as the facts are before us, the court had nothing to act upon except the agreement of the attorneys. The court gave fair warning of what its action would be. If the attorneys were unable to try the case at the time it was reset, they should have shown some valid or sufficient reason therefor; their simple agreement to continue the case was not sufficient to require the court to continue or reset the case. We, therefore, conclude that the action of the trial court, in dismissing the petition and counterclaim without prejudice, was altogether proper.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. TEAGUE.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. WITNESSES (§ 243*)—EXAMINATION—LEADING QUESTIONS.

In an action against a telegraph company for failing to deliver a message whereby plaintiff was prevented from attending her sister's funeral, that a question asked plaintiff whether she experienced any suffering and sorrow from being prevented from attending the funeral was leading was not ground for its exclusion; it being the last of many questions, and plaintiff's age and ignorance making it difficult for her to understand what she was being interrogated about.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795–847; Dec. Dig. § 243.*]

2. TRIAL (§ 141*)—PROVINCE OF COURT AND JURY.

Where the facts are undisputed, and but one legitimate inference can be drawn from them, the court, and not the jury, should determine their effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

3. TELEGRAPHS AND TELEPHONES (§ 70*)—FAILURE TO DELIVER MESSAGE—MEASURE OF DAMAGES.

Where defendant telegraph company negligently failed to deliver to plaintiff a message announcing her sister's death, and the hour of the funeral, plaintiff was entitled to such damages as would reasonably and fairly compensate her for mental anguish, if any, resulting from her being deprived of attending the funeral, not exceeding the amount claimed in the petition.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 72; Dec. Dig. § 70.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Susan Teague against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Richards & Ronald and A. B. Bensinger, for appellant. A. B. Young, Campbell & Young, and O'Neal & O'Neal, for appellee.

SETTLE, J. Mrs. Nicie McCoy died on the afternoon of September 25, 1907, in the city of Louisville. About an hour after her death her son, A. H. C. McCoy, delivered to an agent and operator of the appellant, Western Union Telegraph Company, at its chief office in the city of Louisville, for transmission and delivery to the appellee, Mrs. Susan Teague, a sister of deceased, then residing at New Market, Ala., the following telegram: "Mrs. Susan Teague, New Market, Alabama. Nicie passed away today. Interment in Huntsville Monday afternoon. Will pass through New Market at noon. Relatives and friends invited. Notify them. A. H. C. McCoy." The sender of the telegram prepaid to appellant's Louisville agent the charges for its transmission and delivery. The telegram was never delivered to appellee, and she did not attend the burial of deceased, or receive information of her death, or the place of her burial, in time to do so. Thereafter appellee instituted this action against appellant in the court below, claiming damages for the mental suffering alleged to have been caused her by the nondelivery of the telegram; it being, in substance, alleged in the petition that the failure of appellant to deliver it prevented her from being advised of the death and of the time and place of her sister's burial, and that, if the telegram had been delivered according to the contract and undertaking of appellant with the sender, it would have notified her of the death of her sister and of the time and place of the latter's interment in time for her to have been present, and that she could and would have done so. The averments of the petition were traversed by the appellant's answer and the trial resulted in a verdict and judgment in appellee's behalf for $500 damages. Appellant complains of the judgment and of the refusal of the circuit court to grant it a new trial.

By the evidence introduced in her behalf appellee sustained every averment of her petition essential to a recovery. That is to say, it established the facts: (1) That the telegram was delivered by the sender to appellant's agent for transmission and delivery to appellee on the afternoon of Saturday, September 25, 1907, and the charge therefor then paid. (2) That it was never received by appellee, but should have been received by her on the following morning (Sunday), or in any event by noon Monday, September 27th, the day of the sister's burial at Huntsville, Ala., and that, if received as late as noon Monday, appellee was able to go and could have gone on the train containing her sister's remains from New Market to Huntsville, and thereby have attended the burial, and would have done so. (3) That the nondelivery of the telegram prevented appellee from receiving information of her sister's death, or of the time and place of her burial, in time to attend the burial, thereby causing

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her mental anguish and sorrow. Appellant did not attempt to prove a delivery of the telegram to appellee; and, though its Louisville agent and operator admitted receiving the telegram from the sender September 25th, and the payment by the latter of the cost of its transmission, he made no explanation as to its nondelivery further than to say that it reached Atlanta, Ga., on its way to appellee, but offered no excuse for the failure of appellant's agent in that city to forward it to appellee at New Market, Ala.

It appears from the evidence that New Market is 18 miles from Huntsville, Ala., and that the train upon which Mrs. McCoy's remains were carried to Huntsville passed New Market at 1:30 p. m. Monday, September 27, 1907, the time the telegram in question indicated it would do so; that about an hour was required for the train to run from New Market to Huntsville, and that it arrived at the latter place about 2:30 p. m., and it further appears from the evidence that the interment of the body of Mrs. McCoy at Huntsville occurred at 3 p. m. It was also shown by the testimony of appellee, and at least two of her relatives residing at New Market, that she was a resident of and well known in New Market; that she was at her home on Saturday, Sunday, and Monday, September 25th, 26th, and 27th, and that appellant has, and then had, a telegraph office in New Market. She and the relations in question also testified that she nor they did not hear of the death of Mrs. McCoy before the arrival at New Market of the train containing the remains of the latter; that, upon the arrival there of the train, a son of the deceased, who alighted from it to the railroad platform, expecting to meet appellee and other relatives of his mother and to see them take the train for Huntsville to attend the burial, communicated to appellee's nephew, Rogers, who happened to be on the railroad platform, the first information received at New Market of the death of Mrs. McCoy; that Rogers, who was without his coat, in order to learn the particulars of her death, then got upon the train and rode to the next station, returning to New Market in a short time on another train, and appellee did not and could not learn of the death of Mrs. McCoy until shortly after the train bearing her remains left New Market, or know the particulars of her death or that her burial would take place at Huntsville until her nephew returned from the station next to New Market. According to the evidence, no other train following the one bearing Mrs. McCoy's remains ran that day from New Market to Huntsville until 8 p. m., and the distance was too great to make the trip in an ordinary vehicle. It is certain, therefore, that appellee could not, after being thus informed of her sister's death, have gotten to Huntsville in time for the interment. But it appears from her testimony and that of her New Market relatives that if appellant had delivered her the telegram intended to inform her of her sister's death at noon, or as late as 1 p. m., on Monday, September 27th, she could even on so brief a notice have gotten ready and reached the railroad station by 1:30 p. m., the time of the arrival of the train bearing the remains, and by taking it have been present at the burial. The evidence establishing the foregoing facts was uncontradicted, in view of which there was no way for appellant to escape liability for its failure to deliver the telegram. Its negligence was manifest; and the only real question to be determined by the jury was the amount of appellee's damages.

We have not overlooked appellant's contention that whatever mental suffering appellee sustained was caused by the death of her sister, and not because of her inability to attend the burial. But we do not understand appellee's testimony on that question as it seems to be understood by appellant's counsel. It is true that her statements manifest some confusion of mind on the subject, arising, no doubt, from her ignorance of the legal distinction between mental suffering naturally resulting from her sister's death and mental suffering resulting from her inability to attend the sister's funeral, caused by the failure of appellant to deliver the telegram, yet, on the whole, her testimony sufficiently shows such mental suffering as must be regarded as flowing from the latter cause; for, after various questions and answers, interspersed with objections from opposing counsel and explanations from the court, appellee did say when finally asked whether she experienced any "suffering and sorrow" from being prevented from attending the funeral of her sister, "Yes, sir." While the question if first put in that form might have been regarded as leading, as it was the last of many, and her age and ignorance made it difficult for her to understand what she was being interrogated about, we are not inclined to hold that it should have been excluded on that ground. Besides, it is not wide of the mark to say that the conclusion contained in the answer of appellee to the question referred to but expresses what the law naturally implies, that mental anguish in case of such a relationship as she sustained to the deceased will follow the deprivation of the privilege to attend the burial of the latter, where such deprivation resulted solely from the negligence of appellant.

We find no merit in the objection urged by appellant's counsel to instruction No. 1 given by the trial court. But two instructions were given, and they are as follows:

"(1) It was the duty of the defendant, the Western Union Telegraph Company, to deliver the message with reasonable promptness at New Market, Ala., to plaintiff which had been delivered to it at Louisville, Ky., and the court instructs you that the defendant, the Western Union Telegraph Com-

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pany, negligently failed to deliver that telegram in a reasonable time, and the law of this case is for the plaintiff, and you should so find.

"(2) I further instruct you that, in finding for the plaintiff, you will award to her such damages as you believe from the evidence will reasonably and fairly compensate her for mental pain and anguish, if any, caused by her failing to receive the telegram, and caused by her being thereby deprived of attending the funeral services of her sister, the deceased, Mrs. McCoy, not to exceed the sum of $2,000, the amount claimed in the petition. In estimating the damages, gentlemen, the court instructs you that you should not consider or award any damages for the mental pain and suffering and distress which naturally resulted from the death of her sister, your finding to be limited to such mental suffering and distress as resulted from her failure to attend the funeral services of her sister, resulting from the failure to deliver the telegram."

The criticism upon the first instruction is that it assumes as true the facts essential to appellee's right to recover, and takes from the jury the right to pass upon them. This is true, but it must not be overlooked that every fact assumed in the instruction is a matter of evidence uncontroverted, for appellant offered no evidence to disprove them, or to establish other facts that would have put the facts assumed by the instruction in issue. It is a well-known rule of law that where the facts of a case are undisputed, and but one legitimate inference can be drawn from them, the court, and not the jury, should determine their effect. Jones on Telegraph & Telephone Companies, §§ 487–513; L. & N. R. Co. v. Earl's Adm'rx, 94 Ky. 374, 22 S. W. 607; L. & N. R. R. Co. v. Morris, 20 S. W. 539, 14 Ky. Law Rep. 466; Thompson v. Brannin, 40 S. W. 914, 19 Ky. Law Rep. 454.

We do not understand that instruction 2 is objected to. At any rate, it correctly presented the measure of damages, and was therefore necessary.

The record being free from substantial error, the judgment is affirmed.

LANE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1909.)

1. ARSON (§ 18*)—HOUSE BURNING—INDICTMENT.

Ky. St. 1909, § 1170 (Russell's St. § 3180), declares that if any person shall willfully, etc., burn any dwelling house occupied as a residence, he shall be punished, etc. *Held*, that an indictment accusing defendant and others of burning a dwelling house, in that on December 16, 1908, within E. county, they did unlawfully, etc., set fire to and burn one dwelling house occupied as a residence by L., situated near Cedar Grove church in said county, by pouring oil in and on said house and igniting the same with fire, so that it was burned to the ground, sufficiently charged the crime described in such section.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 30–37; Dec. Dig. § 18.*]

2. ARSON (§ 18*)—INDICTMENT—SUFFICIENCY.

The indictment was also sufficient as an indictment for arson as a common-law felony.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 30–37; Dec. Dig. § 18.*]

3. CONSPIRACY (§ 43*)—HOUSE BURNING—INDICTMENT—DESCRIPTION OF PROPERTY.

An indictment that on a specified date in E. county defendant and certain others named conspired to set fire to and burn a dwelling house occupied as a residence and situated near Cedar Grove church in said county, and that while the conspiracy existed, and as a result thereof, and pursuant thereto, defendant H. set fire to and burned the house, and that the other defendants aided, assisted, counseled, encouraged, advised, and hired said H. to set the fire, against the peace and dignity, etc., sufficiently charged conspiracy to burn the house, and, having sufficiently described the same to identify it, was not objectionable for failure to allege the owner.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79–99; Dec. Dig. § 43.*]

4. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—PUNISHMENT—INSTRUCTIONS.

Where accused was indicted for house burning under Ky. St. 1909, § 1170 (Russell's St. § 3180), prescribing the penalty at not less than 10 nor more than 20 years' imprisonment in the penitentiary, he was not prejudiced by the instruction that, if the jury found him guilty, they should assess his punishment under section 1167 (Russell's St. § 3177), prescribing the punishment for arson at from 5 to 10 years' imprisonment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3162; Dec. Dig. § 1172.*]

5. WITNESSES (§ 340*)—IMPEACHMENT—GENERAL REPUTATION.

Evidence that the general reputation of a witness for chastity was bad was competent to impeach her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1121; Dec. Dig. § 340.*]

6. ARSON (§ 31*)—CRIMINAL LAW (§ 673*)—HOUSE BURNING—EVIDENCE—INSURANCE.

In a prosecution for arson, evidence that accused had procured $300 insurance on the house burned about two months before was admissible only as proof of motive, and should be limited thereto.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 67; Dec. Dig. § 31;* Criminal Law, Cent. Dig. §§ 1872, 1874; Dec. Dig. § 673.*]

7. CRIMINAL LAW (§ 511*)—EVIDENCE OF ACCOMPLICE—CORROBORATION.

In a prosecution for arson, evidence *held* insufficient to corroborate the testimony of an accomplice who did the burning to connect accused with the offense and sustain a conviction under Cr. Code Prac. § 241, requiring corroboration of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127–1137; Dec. Dig. § 511.*]

8. CRIMINAL LAW (§ 444*)—EVIDENCE—LETTERS.

Where, in a prosecution for arson, certain letters were alleged to have been written by accused to H., the person who did the burning, urging him to do so, neither the letters produced nor the contents of those claimed to have been

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fact were admissible without proof showing them to have been written or authorized by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.*]

9. CRIMINAL LAW (§ 511*) — ACCOMPLICES — CORROBORATION.

Where two or more accomplices testify, they are not deemed to corroborate each other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1137; Dec. Dig. § 511.*]

10. CRIMINAL LAW (§ 753*)—TRIAL—ACQUITTAL—DIRECTION.

Where, in a prosecution for arson, there was nothing in the record to corroborate the testimony of accomplices intending to connect accused with the crime charged, Cr. Code Prac. §§ 241, 242, made it the duty of the court to direct the jury to acquit.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 753.*]

Appeal from Circuit Court, Estill County.

"To be officially reported."

James Lane was convicted under an indictment charging arson and conspiracy to burn a dwelling house, and he appeals. Reversed and remanded.

Grant E. Lilly, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. Appellant was separately tried in the Estill circuit court under an indictment charging him, his wife, Callie Lane, Jack Hawkins, and Armilda Roberts with the crime of house burning in pursuance of a conspiracy entered into and existing between them; the act of setting fire to the house having, as alleged in the indictment, been assigned by agreement among the conspirators to Jack Hawkins by whom it was performed. The trial resulted in appellant's conviction and the fixing of his punishment at confinement in the penitentiary five years.

The indictment reads as follows: "The grand jury of Estill county, in the name and by the authority of the commonwealth of Kentucky, accuse Jack Hawkins, James Lane, Callie Lane and Armilda Roberson of the crime of burning dwelling house committed as follows, viz.: That said Jack Hawkins, James Lane, Callie Lane and Armilda Roberson, on the 16th day of December, 1908, in the county aforesaid and before the finding of this indictment, did unlawfully, willfully, maliciously, and feloniously set fire to and burn one dwelling house which was occupied as a residence by Jess Lunsford, which dwelling house was situated near Cedar Grove church in said county, by pouring oil in and upon said house and by igniting same with fire so that said house was burned to the ground. Second: The grand jury of Estill county in the name and by the authority of the commonwealth of Kentucky accuse Jack Hawkins, James Lane, Callie Lane and Armilda Roberson of the crime of burning a dwelling house, committed in form and manner as follows: That on the 16th day of December, 1908, in the county and circuit aforesaid the defendants, James Lane, Callie Lane, Armilda Roberson, and Jack Hawkins unlawfully, willfully and maliciously entered into a conspiracy with each other for the purpose and intention to set fire to and burn a dwelling house occupied by Jeff Lunsford as a residence and situated near Cedar Grove church in said county and that while said conspiracy existed, and as a result thereof, and in pursuance thereto the said defendant, Jack Hawkins, did set fire to and burn said dwelling house; that the said defendants, James Lane, Callie Lane, and Armilda Roberson, aided, assisted, counseled, encouraged, advised and hired the said Jack Hawkins to set fire to and burn the said house, against the peace and dignity of the commonwealth of Kentucky."

Appellant complains of the judgment of conviction, and seeks its reversal upon various grounds assigned as error in support of his motion for a new trial filed in the court below. He insists that the indictment is fatally defective, and that his demurrer to it should have been sustained. We cannot sustain this contention. In the first count of the indictment all the defendants named therein are in apt language charged with the crime of house burning as defined by section 1170, Ky. St. (Russell's St. § 3180). The conspiracy to burn the house is properly charged in the second count of the indictment, as is the act of Jack Hawkins in burning it in pursuance of the conspiracy. While the name of the owner of the house is not stated in the indictment, it is therein alleged that the house was situated near Cedar Grove church, in Estill county, and that it was, when burned, occupied as a residence by Jeff Lunsford. As a matter of fact it appears from the proof that the title to the property was in a relative of appellant who held it in trust for him. The omission from the indictment of the name of the owner of the house burned did not vitiate the indictment, in view of the sufficient description and identification of the property and of the offense, in other respects, contained in that instrument. Cr. Code Prac. § 128; McBride v. Commonwealth, 4 Bush, 331. In other words, the indictment contains "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case." Cr. Code, § 122, subsec. 2. Though intending to charge the crime of house burning as defined by section 1170, Ky. St., the indictment is also good as an indictment for arson which is a common-law felony, punishable, however, in this state by confinement in the penitentiary not less than five

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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nor more than twelve years, as provided in section 1167, Ky. St. (Russell's St. § 3177) The trial court evidently treated the indictment as one for arson, as by the instructions to the jury they were told, if they found appellant guilty, they should punish him as prescribed by section 1167, supra, whereas the punishment for house burning under section 1170 is confinement in the penitentiary not less than 10 nor more than 20 years. The course taken by the trial court was doubtless suggested by section 263, Cr. Code, which declares arson and house burning degrees of the same offense, and also section 262, Cr. Code, which provides: "Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree, not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment." If the case should have been submitted upon the evidence to the jury, it is manifest that appellant cannot complain that the jury were instructed if they found him guilty to give him the punishment prescribed by section 1167, Ky. St., for arson, instead of the greater punishment prescribed by section 1170 for house burning.

Appellant also contends that the trial court erred in refusing him permission to prove that the reputation of Lucy Rowland, a commonwealth witness, for chastity, was bad; the avowal as to each witness by whom her reputation was attacked being that her general reputation was that of an unchaste woman, and that she was the keeper of a bawdyhouse. The impeaching evidence was clearly competent. Chastity is recognized by the law books as an essential ingredient of good moral character, and the want of it may be proved, not by special acts, but as a matter of general reputation, for the purpose of attacking the veracity or credibility of the witness assailed.

It is further contended by appellant that the court erred in allowing evidence of the fact that there was insurance of $300 upon the house burned which appellant had procured about two months before the burning. This evidence was competent, as it tended to prove a motive upon appellant's part for the burning of the house, and for entering into the alleged conspiracy to that end; but the court should have admonished the jury that such was the only purpose and effect of its introduction.

Finally, it is insisted for appellant that there was no legal corroboration of the testimony of Jack Hawkins, the self-confessed burner of the house and chief witness for the commonwealth, and therefore the court at the conclusion of the commonwealth's evidence should, as then requested by appellant, have peremptorily instructed the jury to acquit him. The soundness or unsoundness of this contention must be determined from the evidence, which was in brief as follows: Jack Hawkins testified that he burned the house and was employed by appellant to do so, who agreed to pay him for the service $100 of the insurance expected to be obtained by the destruction of the house; that he was provided by appellant at the latter's residence, in Richmond, with a sack containing provisions and a bottle of coal oil to be used in burning the house, and that, leaving Richmond at 4 o'clock p. m., he arrived at Cedar Grove, Estill county, where the house to be burned was situated, about midnight, but did not set fire to it until about daylight the next morning, and did not remain to see whether the house burned; that he then returned to Richmond, informed appellant of what he had done, and the latter rebuked him for not remaining at the place of the burning long enough to see whether the house was consumed. Hawkins also testified that no one beside himself and appellant was present or heard what was said when he was employed to burn the house when he left Richmond on that mission, or when he returned and reported to appellant the result; but claimed that appellant's wife, Callie Lane, and his sister, Mrs. Roberts, talked to him about the burning of the house before it was done. He also testified that appellant wrote him several letters urging him to burn the house, some of which he said were delivered to him by Mrs. Roberts and that she read one or more of the letters to him. The witness produced two letters, one purporting to be signed by appellant and the other containing four cross-marks each in the form of the letter X, and he said Mrs. Roberts told him he would know the meaning of the marks, and they indicated that he was to burn the house. Neither letter is copied in the record, and it is not clear from the record whether the contents of the two letters in question or only the signature and marks were introduced as evidence; but it does not appear that the court permitted Hawkins to testify as to the contents of certain lost letters on the subject of the house burning he claimed to have received from appellant, to which as well as the introduction of the two letters produced appellant at the time objected and excepted. Hawkins did not claim to know the handwriting of appellant, and did not state that he wrote the two letters produced or those claimed to be lost. Appellant denied writing any of the letters, or that his name appearing to one of them had been written by him, or that the letters had been written for him, or at his instance. No identification of the letters or proof that they were in his handwriting was made by any witness during the trial, and Mrs. Roberts in testifying denied all knowledge of the letters or that she read or delivered any such letters to Hawkins, and further declared that she had no knowledge of the burning of the house, and that she never had any conversation with Hawkins on that subject. Manifestly neither the letters produced nor

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the contents of those claimed to have been lost, in the absence of proof showing them to have been written or authorized by appellant, should have been allowed to go to the jury as evidence. The only other evidence introduced by the commonwealth for the purpose of connecting appellant with the burning of the house, or with reference to his procurement of the insurance upon it, was the finding by one witness of a bottle near the place where the house was burned, the fact that Hawkins' wife testified that she saw him in a conversation with appellant on the day he claimed to have left Richmond to burn the house, and the testimony of Lucy Rowland that she saw appellant and Hawkins together and perhaps the latter and Mrs. Roberts in a conversation about the same time. But neither of the two witnesses mentioned claimed to have heard any conversation between appellant and Hawkins, or between the latter and Mrs. Roberts, on the occasion referred to. The bottle found near the place of the burning was according to the testimony of the finder a beer bottle, whereas the one used by Hawkins in burning the house was, according to his testimony, a whisky bottle.

In addition to appellant's own testimony contradicting every material statement of Hawkins which tended to connect him with the burning of the house in Estill county and denying all participation in or knowledge of that crime, his wife and Mrs. Roberts both contradicted Hawkins in so far as his testimony connected them with a conspiracy to burn the house, or knowledge of his doing so, appellant's wife, as did Mrs. Roberts, denying that she ever had any conversation with him on the subject, the testimony of the former being admitted without objection.

It appears from the evidence introduced in appellant's behalf that he, his wife, Callie Lane, and sister, Mrs. Roberts, are persons of excellent character, while much of it showed Hawkins and Lucy Rowland to be persons of bad reputation, the former having before the trial of appellant been convicted of the crime charged in the indictment. It also appears that no attempt was made by appellant to collect the insurance after the burning of the house. We quite agree with counsel for appellant that only the testimony of Hawkins tends to connect appellant with the crime charged in the indictment, and that it was wholly uncorroborated by other evidence tending to show appellant's guilt. If the whole of his testimony should be accepted as true, he was nevertheless a mere accomplice, whose testimony alone was insufficient to establish the alleged conspiracy charged in the indictment, or to authorize the conviction of appellant as an aider and abettor in the commission of the crime for which he was tried. Cr. Code, § 241. "The uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of a crime, or of any of its constituent elements, or to render admissible any confessions or admissions of the parties which depend upon and must be preceded by evidence of a conspiracy, unless other evidence besides that of the accomplice is produced tending to prove a conspiracy, and connect the accused therewith, and evidence merely showing that the offense was committed and the circumstances thereof is as insufficient for that purpose as it would be to connect the accused with the commission of the offense itself." Bowling v. Commonwealth, 79 Ky. 604; Frazier v. Commonwealth, 76 S. W. 28, 25 Ky. Law Rep. 461; also, Howard v. Commonwealth, 110 Ky. 356, 61 S. W. 756, 22 Ky. Law Rep. 1845; Id., 114 Ky. 372, 70 S. W. 1055, 24 Ky. Law Rep. 1225, and authorities therein cited upon this subject. Even where two or more accomplices are produced as witnesses, they are not deemed to corroborate each other. Blackburn v. Commonwealth, 12 Bush, 181. Aside from the uncorroborated testimony of Hawkins, there is nothing in the entire bill of evidence furnished by the record that implicated appellant in the crime charged in the indictment, and, this being true, sections 241, 242, Cr. Code, made it the duty of the trial court to instruct the jury to render a verdict of acquittal, and this should have been done.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

KINNAIRD v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 29, 1909.)

1. INDICTMENT AND INFORMATION (§ 106*)—SETTING OUT WRITING FORMING BASIS OF CHARGE—NECESSITY.

The writing on which an indictment is founded must be set out therein, unless it has been lost or destroyed, or is in the possession of accused, in which case it is sufficient so to state, and set out the substance thereof as near as may be, or unless the writing contains matter too obscene to be perpetuated as a part of the records of the court, in which case the indictment must so allege, and the accused and his counsel must be given an opportunity before the trial to inspect the writing, and on the trial the same must be introduced.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 283; Dec. Dig. § 106.*]

2. OBSCENITY (§ 12*) — INDICTMENT — REQUISITES.

Under Cr. Code Prac. § 122, providing that an indictment must contain a statement of the acts constituting the offense in ordinary language, so that a person of common understanding may know what was intended, an indictment for exhibiting an obscene writing, which alleged that accused unlawfully showed and gave to prosecutrix an indecent, obscene, immoral, and disgusting written article written by him; that accused at the time was an elderly married man living with his wife; that the written arti-

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cle purported to be a love letter to prosecutrix, describing alleged diseases of his wife, predicting her demise, and making love to prosecutrix, and that the grand jury was not in possession of the writing, did not charge a violation of Ky. St. 1909, § 1352 (Russell's St. § 3670), prohibiting the selling or giving away of obscene literature.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 11; Dec. Dig. § 12.*]

3. INDICTMENT AND INFORMATION (§ 150*)—DEMURRER—QUESTION FOR COURT.

Whether or not a writing is obscene in the sense that a prosecution will lie for the publication thereof is a question for the court to dispose of in the first instance where a demurrer to the indictment is filed; and where, in the opinion of the court, the writing is not obscene, the demurrer should be sustained, though the indictment should charge that the writing was obscene, which is merely a conclusion of the pleader.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 497; Dec. Dig. § 150.*]

4. STATUTES (§ 211*)—CONSTRUCTION—TITLE OF ACT.

The court in construing a statute may look to its title, not for the purpose of enlarging, limiting, or modifying the language of the act, but as an aid in ascertaining its intention, and this is especially true where the act and the title are in harmony; the title expressing the purpose of the act and the act carrying out the object as declared in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

5. OBSCENITY (§ 7*)— STATUTES—CONSTRUCTION.

Ky. St. 1909, § 1352 (Russell's St. § 3670), prohibiting the selling, lending, giving away, or showing any obscene literature, when construed in the light of its title "An act to prevent the printing and distribution of obscene literature," etc., does not apply to a letter sent by one to another, and intended to be private and personal, but prohibits the printing and distribution of obscene literature intended for general or public use and reading.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 7; Dec. Dig. § 7.*]

6. OBSCENITY (§ 7*)—STATUTES—VIOLATIONS.

A letter, written by an elderly married man to a young unmarried woman, wherein he expressed his love for her, and stated that his wife was suffering from a disease which would shortly cause her death, etc., is not within Ky. St. 1909, § 1352 (Russell's St. § 3670), prohibiting the selling or giving away of obscene literature.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 7; Dec. Dig. § 7.*]

7. CRIMINAL LAW (§ 369*) — EVIDENCE — ADMISSIBILITY.

Where, on a trial for giving away obscene literature, in violation of Ky. St. 1909, § 1352 (Russell's St. § 3670), by writing and sending an obscene letter, accused admitted that he wrote and sent the letter, letters written by him after the indictment had been returned were incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

Appeal from Circuit Court, Barren County.

"To be officially reported."

T. E. Kinnaird was convicted of violating Ky. St. 1909, § 1352 (Russell's St. § 3670), prohibiting the selling or giving away of obscene literature, and he appeals. Reversed, with directions.

Geo. T. Duff, Duff & Hutcherson, and A. E. Summers, for appellant. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Baird & Richardson, for the Commonwealth.

CARROLL, J. Under an indictment charging him with: "The offense of unlawfully showing and giving away to another person a certain indecent, indiscreet, disgusting, and obscene writing, which was committed as follows, to wit: Heretofore, to wit, on the ——— day of November, 1908, and in the county and commonwealth aforesaid, the said T. E. Kinnaird did then and there unlawfully show, utter, and give to Miss Edith Watson, an unmarried lady, a certain indiscreet, indecent, obscene, offensive, immoral, and disgusting written article, all of which was written by him. At said time said Kinnaird was an elderly married man, living with his wife, and the said written article aforesaid purported to be a love letter to the aforesaid young lady from ———, describing the alleged diseases of his said wife, predicting her demise, and making love to said young lady, all of which was in purport and in language immoral, offensive, indecent, and disgusting. The grand jury is not now in possession of said instrument, and for that reason it cannot be filed herewith"—the appellant was convicted, and his punishment fixed at a fine of $260 and 120 days' confinement in the county jail. The statute under which the indictment was found reads as follows: "Sec. 1352. Any person or corporation who sells, lends, gives away or shows or offers to sell, lend, give away or show, or has in his possession with intent to sell, lend or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story-paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story-paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, publishes or utters, or causes to be written, printed, published or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means, any or what purports to be any, obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing named in this section, can be pur-

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chased, obtained or had." Ky. St. § 1352 (Russell's St. § 3670).

The letter mentioned in the indictment reads:

"Nov. 7, 1908.

"Miss Edy. My. dearley beloved sweet little friend I. avail. my. self of this optunity of writing to you To let you no that you hav. a friend that Loves you most Dearley. Sence the day i first Met you at the corner of The School house in which you teach. yess. i believe I can say, and tell the Truth from the hart That you hav not been often my mind one hour at a time except when I was buisy engaged are a sleep.

"as you Steped from Behind some other girl To exstend to me the hand of acquents you seamed Like a engel Let down From heaven. O, those Sweet eyes Like bright Morning stars seamed To speak in thunder tones I am to bee your next Loving Deare

"yess My Sweet Loving Deare dont you think I hav dun well to keep This a Secret so long Now my Sweet Dear Darling Edy i hope you will not become offended at me for writing This to you.

"For true Love is stronger Then Death and sharper Then a. two edge. Soard and Covers a Multotude of faults

"Now Deare Sweet Darling This is only a step to let you no that i love you and you are constently on My mind. and Desire To win your love and Affection as you have mine For i honstly believe unless thare is a grate change i will bee left a lone in less Then 2 years

"For Trudy is in failing health She is bording on the Bright Deseas The Landrum wiming are verry short lived People and are verry Much subjeck to Prorales. Now my sweet Darling Edy I look a pon you as a True friend and ask you will you try To learn to love me I sometimes think that you do love me a little But not nowing my Mind i cood not exspect you to love me as i do you

"well Sweet Edy i will stop writing fer this Time I hav a heap to Tell you. My future Plans to lay before you o Sweet Edy I wood enjoy going with you to town some day soon so we cood talk The matter over

"If you wish to Reply will you prepair it and hand it to me in pursin. I wood bee glad to git a sweet and Loving Repl

"But we must keep our Corespondence strickly secret. your Loving friend"

During the trial, and over the objection of counsel for the appellant, the court permitted to be read to the jury the following letters written by appellant to Miss Watson after the indictment had been returned against him:

"Nov 23 1908

"Miss Edthie Watson

"My. most hiley esteamed friend It behoes me to wright to you this Letter as i understand you wer some what affended at a former letter Edy i do not Remember all That i wrote in that Letter it seames like a dream it was written on Lection. day and if thare was a Sober man in the country that day it was a man that Dos not drink are one that has no friends are staid at home.

"So Deare Edy i Beg to say to you that if thare was one worde in that letter that Affended you i am willing To git down on my Nees at your feet Kiss the hem off your skirt and ask your forgiveness for Edy you ought to No that i am one of the Best friends you hav on Earth. I wood not hav had The talk started over the Cuntry like wild fire For no sum of money * * *

"Edy i do not blame you I Blame your Counsalmen In the first place it aught Never hav been let git out That i Even wrote you a Letter then in the Next place your father aught to have come To See me and Kniped it in The bud in Stid of going and pooring oil on you For the publick to set fire To * * *"

"Jan 6 1909

"Most hiley Esteamed

Edy Watson

"Miss Edy in all off my Farmer Communication to you I hav all wais address you as a friend this clause I will hav to o mit at this writing

"The objeck of this Letter Deare Edy is to no what is the matter with you what has caused you to turn your Back on one off the best and truest friends you hav on this Earth Exsept mother and father

"Edy what hav you heard That i coud hav said that has. Set you so a gainst Me Edy if you hav Ever heard a word that i hav said Detremental to your good Name and your standing It is a Lye maid out off whole cloth

"Edy. I. did tell Tid pace That you had all wais treated Me with So much respeck Love & Kindness that i cood Not help loving you But Edy this is nothing To become affended at why the Blesed word comands us to love Each as we do our selves off corse this dos not mean Lusty love and no such a thought has Ever Entered my hart for we are warned that to
Look a Pon a woman with Lust is a sin all Ready in the hart. and again we are warned by the word off our Blesed lord & master That he that puttith his wife a way which meanes To cast hur a side and marry a nother commits a duitry and that no a dultries can Enter the Kingdom off god

"So Deare Edy if you hav Ever Conceived of such a thought for my sake and your sake and gods sake Brush it a side for i am as Cleare off harbern such thoughs in my hart as the watter that Drips from the ice that hangs To the hiest clifts off The aerat mountains So Deare Edy what is it I hav said are dun That you will pass me by and never Rais your Eyes Edy i am sorry to hav to Make this compairson But you Remind me of a Deare Brother i hav living In Western organ he is a Big doctor now he came

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To See us a bout 5 years a go he staid six weeks at My house he and his wife and two children. we just worsheped them we all dun all in our power to make Them feel happy and welcom Then I loand him my Seary and team To go a visaten and he keep them 2 weeks let The team Run a way and Seard up my seary and I made no charge for nuthing I dun for him and when he left For home I loaned him $50.00 hav his note with 5 years accumilated intrus and he wont as much as answer my letters when I wright him about the matter * * *

"Edy I want you to turn To the 22 chapter mathew and Read begining at 36 verse & Read down to the 40 verse Then look back and think how you hav treated Me Then turn to Romans 2 chap & first verse and see whether you hav any wright to judge me Edy I dont want to Cote Scripture on you I want you to take Gods word and a guide Edy I want to say a gain That I dont Blame you For but verry little For what has been dun But I ask you to take The word of god and see whether your counslars are going accorden to Gods word are not if you Find thay are not you should Drop them at once * * *

"Edy trudy has given me hailcolumbay sense she found out a bout That letter and Thretten to wright to your mother but I perswaded her not to wright so I don't gess she has Ever wrote yet If she has I never hav heard of it I hope she wont for I think she is a little wrong I no she Is in some things * * *

"But Edy before I close To Show my Love and Esteam for you and to keep down further Disgrase I want to make you a Propersition in consideration that you Return To me those former Letters writen you and your father will Stop the Enditement which can bee very Easly dun if you will Take my counsal in the Matter I will make you a nice presant consisting of the folowing. two $20 gold coins a Butiful $10 skirt & waist and a $5 gold Ring Engraved in it friendship This sertanly shows Deare Edy that I hav a warm place in my hart for you Edy I am not a fraid off the Enditement hurting Me for I can plead my own case and beet it But Edy the Disgrase is what I want to stop * * *"

"2 7 1909

"My. Deare much Esteamed
Edithe Watson

"I wrote you a long letter a bout one month a go I look for some kind of answer But never hav Reseived a word yet so I Now withdraw My proppersition and say That if Nuthing Els will Do you wee will let the court settle it * * *

"Deare Edy I want to ask you a question and I want you to answer it as a honest Lady for my own satesfaction The question is this was it not Paces foaks The caus of you not coming To my house the nite before we come up to your house and was thay not the cause of you not staying all Nite the Evening we Return In short Edy is not old Jim Pace the verry old Rotten Egg Incubater that hatch all this trubble

"I believe he was and will all wais believe it untill you tell me he was not * * *

"in that long letter I wrote you I made a misstake in one of the Scripture Reffernce I ask you to Read I told you to turn to mathew 23 and Read from the 36 to the 40 verse I shood have said the 22 chapter It teaches us how we aught to live and Esteam Each other Edy the boys got a lot off New Reckords Chrisman a mong them was one the title was when the sun shies Nelley and the clouds go Drifting by Dont you. Siey For we. will. bee. happey By. &. By * * *

"Edy wont you pleas answer those question and o blige a true friend

"Yours truly
"T. E. K.
"March 1 1909

"Miss Eadthie Watson

"Next fryday is the day set To try that inditement If I am found guilty of the charges set forth in the inditement the Least fine the court can fix is $50.00 and 10 days in the county jail If you don't want me punished accorden to law let me no it by speaking and Raising your wright hand and if you do want me Punished dont you look at me that day nor Never a gain so good By for this Time Still your Friend

"T. E. Kennaird."

The appellant was an elderly married man, who lived with his wife and children, and Miss Watson a young lady 21 years of age, who taught school in the neighborhood in which appellant resided.

The judgment of conviction must be reversed for four reasons: First, because the court erred in overruling a demurrer to the indictment; second, because the statute supra does not apply to or embrace communications like the one for which the indictment was found; third, the letter mentioned in the indictment is not in the meaning of the statute "obscene, lewd, lascivious, filthy, indecent or disgusting"; and, fourth, for error in admitting the letters written after the indictment was found.

First. The demurrer to the indictment should have been sustained because it failed to set out the writing, or give any sufficient reason why it was not exhibited with the indictment. The statement that "the grand jury is not now in possession of said instrument, and for that reason it cannot be filed herewith," is not sufficient to excuse the failure to set it out in the indictment. The general rule in reference to incorporating in the indictment a writing upon which the indictment is founded is that the writing must be set out in the indictment in words and figures, unless it has been lost or destroyed, or is in the possession of the accused, or contains matter too obscene or filthy to be perpetuated as a part of the records of a court.

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Wharton's Criminal Pleading & Practice, §§ 166, 202; Bishop's Criminal Procedure, § 509; Commonwealth v. McCance, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61; State v. Smith, 17 R. I. 371, 22 Atl. 282; State v. Hayward, 83 Mo. 299; State v. Brown, 27 Vt. 619; McNair v. People, 89 Ill. 441; State v. Zurhost, 75 Ohio St. 232, 79 N. E. 238, 116 Am. St. Rep. 724, 9 Am. & Eng. Ann. Cas. p. 45. A person who is charged with the commission of a penal or criminal offense that grows out of a writing, or alteration in a writing, made by him is entitled, under all the rules of criminal procedure, to be informed by an inspection of the indictment of the nature of the charge, so that he may be prepared to meet it; and he cannot have this information unless the writing alleged to have been executed or altered is incorporated in the indictment. If, however, the writing is lost, and for this reason it cannot be set out in the indictment, it will be sufficient to state the fact, and set out the substance of the writing in words and figures as near as may be done, and so, if the writing is in the possession of the accused, and for this reason cannot be obtained by the grand jury. In either of these events the administration of justice would be defeated, and guilty persons permitted to escape punishment, if the production of the writing was indispensable. And so, if in prosecutions for the publication of obscene matter the averment is made that the matter complained of is so filthy that it would be offensive to public decency to have it made a part of the permanent records of a court, it need not be set out in the indictment, although it must be introduced on the trial of the case, and the accused and his counsel given opportunity before the trial to inspect it.

The averments in the indictment in the case before us do not bring it within any of the exceptions stated that will excuse the production of the writing as a part of the indictment. The charge that the writing was "indecent, obscene, offensive, immoral, and disgusting" is merely a conclusion of the pleader. Whether or not a writing is indecent, obscene, offensive, immoral, or disgusting in the sense that a prosecution will lie for the publication of it is a question for the court to dispose of in the first instance, if a demurrer to the indictment is filed. If, in the opinion of the court the writing is not indecent, obscene, immoral, offensive, or disgusting, although the indictment should so charge, a demurrer should be sustained. The Criminal Code of Practice (section 122) declares that an indictment must contain "A statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the rights of the case." This indictment does not contain any statement whatever of the acts constituting the offense. A person of common understanding cannot read it and know whether or not an offense was committed. In the opinion of the pleader an offense was committed; but it is a statement in ordinary and concise language of the acts done that constitutes the offense, and not the opinion of the pleader. Stowers v. Commonwealth, 12 Bush, 342; Commonwealth v. Williams, 13 Bush, 267; Commonwealth v. Bowman, 96 Ky. 40, 27 S. W. 816, 16 Ky. Law Rep. 222.

Second. Does the statute supra, under which the indictment was found, apply to or embrace a writing in the form of a letter sent or delivered by one person to another, and intended to be a private communication? In considering this feature of the case we may with much propriety inquire into the purpose of the Legislature in the enactment of the law under which the indictment was found, and the reasons that induced its passage. The title to the act reads "An act to prevent the printing and distribution of obscene literature and the sale or exhibition of obscene pictures, and the manufacture or distribution or sale of articles or instruments for immoral use." And it may be looked to, not for the purpose of enlarging, limiting, or modifying the language of the act, but as an aid in ascertaining its intention—especially in view of the fact that the act and the title are in harmony, the title expressing the purpose of the act, and the act carrying out the object as declared in the title. Endlich on Interpretation of Statutes, § 58; 26 Am. & Eng. Ency. of Law, p. 627. Unless the language of the act enlarges the scope of it, as expressed in the title, it is plain that it does not apply to a letter sent by one person to another, and intended to be private and personal, but was enacted for the purpose of preventing the printing or writing and distribution and circulation of obscene literature; in other words, the printing and distribution of such literature intended for general or public use or reading, such as a newspaper, magazine, pamphlet, book, or other printed or written matter. That it was the intention to confine offenses denounced by the act to articles or literature intended for general or public use is we think manifest from the language of the act, which prohibits the selling, lending, giving away, or showing, or having in possession with the intent to sell, lend, give away, or show, any obscene, lewd, lascivious, filthy, indecent, or disgusting book, magazine, pamphlet, newspaper, story-paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character. The number of copies of the objectionable paper containing the offensive written or printed matter sold

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or offered for sale, given away, or shown, or in possession with the intent to sell, offer for sale, give away, or show, is not the test to be applied in determining whether or not the statute has been violated—it is the public quality of the act that constitutes the offense, or the fact that the writing or paper is intended for public or general use, however limited the number of the public for which it was intended. A person who has in his possession an obscene book, writing, or picture, and lends or shows it to the public generally, or even to a limited number of persons, commits an offense against the statute, and so if a person sells, gives away, or offers to sell or give away, any of the writings, pictures, or papers described in the statute, he is guilty. In short, the statute was not designed to prevent the lending, giving away, or showing of an obscene writing, picture or paper to one person, but to prohibit the public or general circulation or distribution of such matter. The letter complained of was written and delivered to Miss Watson for her private and personal use. It was not intended for the public or any other person except herself, and hence, although it should be held to come within the meaning of the words used in the statute, it would not be punishable under it. Under the statutes of the United States prohibiting the use of the mails for the sending of indecent or obscene writings, pictures, or books it is not material whether it is intended for private or public use. The offense by the terms of the statute is committed when the mail is used for the transmission of the objectionable article; but our statute, fairly interpreted, does not reach this far.

Third. Is the letter obscene, lewd, lascivious, indecent, or disgusting within the meaning of the statute? We think not. The letter is vulgar, but not obscene, foolish, but not lewd, ridiculous, but not indecent, amusing, but not disgusting. What the Legislature had in mind was to prevent the circulation and distribution of printed or written matter that had a tendency to corrupt or deprave the morals of those persons into whose possession it came, and, as was said in Commonwealth v. Herald Publishing Company, 128 Ky. 424, 108 S. W. 892, 32 Ky. Law Rep. 1293: "It is difficult to draw the line, in cases of this character, between publications that are permissible and those that come within the condemnation of the statute. Different persons have different views as to what constitutes a lewd, lascivious, or indecent publication. What one would condemn as vulgar, profane, or indecent another might look upon as a legitimate and proper record of the news of the day; although all will readily agree that publications that have a tendency to corrupt the morals and deprave the taste of the people should be punished or suppressed. We may therefore safely say that no general rule can be laid down. Each case must be judged by the evidence presented in it; and to the common sense of the courts and juries must be left the question whether or not the matter complained of, considering all the circumstances of its publication, is within the meaning of the statute." This letter is offensive to good taste. It was highly improper for the appellant to have written it, and it was well calculated to wound the feelings of Miss Watson, but we cannot find anything in the language in the letter either obscene, indecent, or lascivious. It is the product of an illiterate and foolish old man, and is more apt to excite laughter than impure desires or immoral or sensual thoughts. We do not believe that the morals of any person, however open their mind might be to evil influences, could be corrupted by reading this letter, nor is there any thought expressed in it that would have a tendency to create or foster a low or depraved taste. The mere fact that its composition was reprehensible, and its contents liable to hurt the refined sensibilities of a modest, pure-minded young lady, is not sufficient to bring it within the condemnation of the statute. The words employed in the statute to describe the character of books, writings, or pictures the sale or circulation of which is prohibited have no technical meaning, and are to be understood and applied according to their ordinary and popular usage. Their meaning has been defined in dictionaries, and interpreted by the courts; and the uniform current of opinion is that the test to be applied in determining whether or not a writing, picture, book, or paper is objectionable is that it must be of such a character as to deprave or corrupt the minds or morals of the persons into whose hands such matter may come. United States v. Males (D. C.) 51 Fed. 41; United States v. Davis (C. C.) 38 Fed. 326; United States v. Clarke (D. C.) 38 Fed. 732; United States v. Bennett, 24 Fed. Cas. p. 1093; People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635; Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799. A publication, writing, or picture might be so lascivious or obscene as to shock every sense of common decency, and leave no doubt in the mind of any person of ordinary morality that it would have a tendency to debase and corrupt the thoughts of those into whose hands it might fall. On the other hand, a writing, picture, or paper might be of such a character as to make it a matter of doubt whether it was indecent or obscene, depending upon the mental and moral training and characteristics of the person who came to pass judgment upon it. So that, when there is doubt in the mind of an ordinarily upright, well-balanced person as to whether or not a publication comes within the meaning of the statute, it is prop-

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er to submit the question to a jury. But if, as in the case before us, the matter at first impression, confirmed by more careful consideration, appears to be entirely free from the vice the statute was designed to suppress, the court should either sustain a demurrer to the indictment or direct a verdict of acquittal.

Fourth. Upon what theory the trial judge admitted to the jury as competent evidence the letters written by the appellant after the indictment had been returned against him, we are not advised. That these letters were incompetent, and calculated to prejudice the minds of the jurors, there can be little doubt. They did not throw light upon any issue in the case. In fact there was no issue as to the writing and sending of the letter. These facts were admitted, and the only open question was whether or not it constituted an offense within the meaning of the statute.

Wherefore the judgment of the lower court is reversed, with directions to sustain a demurrer to the indictment.

BENNETT v. BENNETT et al.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. DOWER (§ 17*) — PARTNERSHIP PROPERTY — PRIORITY OF FIRM DEBTS.

While, where real estate is purchased with partnership funds, it becomes, as between the partners themselves and between the firm and its creditors, personal property, and to be so treated in the settlement of the partnership or distribution of the property, yet as to the widow of a deceased partner it is not personal property, the rule being that she shall take dower in only so much of his share as may not be required to pay firm debts or in the adjustment of equitable claims as between the partners themselves.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 62; Dec. Dig. § 17.*]

2. DOWER (§ 78*)—PARTNERSHIP PROPERTY—PLEADING—SUFFICIENCY.

In an action by a widow for an allotment of dower, defendant, by answer and cross-petition, averred that the lands in question were not the individual property of decedent at the time of his death, but belonged to a firm formerly composed of defendant and decedent, notwithstanding the title to the whole of it was held by decedent. Though it was alleged that the property was paid for with firm funds, when, how, and to whom, or on what land they were so paid was not alleged, and while certain drafts and checks were referred to, on which it was claimed decedent drew moneys from the partnership, it was not alleged for what purpose they were drawn or used, or that the money obtained on them was used to pay for any of the land in controversy, or that it was not repair or otherwise accounted for by decedent, or that he was not entitled to draw the money from the partnership funds, either as advancement or to reimburse himself for money of his own expended for the firm. *Held* insufficient to show that decedent took or was to hold the title to the lands in trust or otherwise for the partnership.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 78.*]

3. MORTGAGES (§ 37*) — PAROL EVIDENCE — DEEDS—CONTEMPORANEOUS TRUST.

In the absence of fraud or mistake in the execution of a deed absolute in form, the grantor is estopped to deny the bona fides of the transaction, or to impeach the deed by parol evidence that it was coupled with a secret trust contradictory of its terms and meaning.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 98; Dec. Dig. § 37.*]

4. PLEADING (§ 214*)—DEMURRER—SCOPE AND EFFECT.

Admissions arising on a demurrer do not make good the vague and insufficient averments or conclusions of the pleading demurred to or supply its omissions of essential facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

Appeal from Circuit Court, Crittenden County.

"To be officially reported."

Action by Julia E. Bennett against H. B. Bennett and others. From the judgment, said H. B. Bennett appeals. Affirmed.

Miller & Miller and Carl Henderson, for appellant. Blue & Nunn, for appellee.

SETTLE, J. W. L. Bennett died in Crittenden county in 1908 intestate, leaving surviving him his widow, the appellee Julia E. Bennett, and three infant children. October 20, 1908, the widow brought suit in the Crittenden circuit court for the purpose of obtaining an allotment of her dower interest in the real estate left by her husband; he being, as alleged in the petition, the owner at the time of his death of numerous tracts of land situated in Crittenden county and several lots in the town of Dycusburg, all particularly described in the petition. The infant children of the decedent, certain tenants of the lands, and the appellant, H. B. Bennett, a brother of the decedent, who was understood to be making some sort of a claim to a part of the real estate, were all made defendants to the action. At the succeeding term of the court commissioners were appointed to lay off to the widow her dower, and they performed the duty required of them, and later reported the allotment to the court. After this had been done, but before the confirmation of the report, the appellant, H. B. Bennett, a resident of Indiana, entered his appearance to the action, and was permitted to file an answer to appellee's petition, which was made a cross-petition against the children of the decedent, and in which the right of the former to dower in three of the parcels of real estate left by her husband was denied, viz., a tract conveyed the decedent by Mrs. J. Lankston, two lots in Dycusburg, conveyed the decedent by J. C. Rochester, master commissioner of the Crittenden circuit court, and a tract of 250 acres which had been conveyed the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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decedent and appellant, H. B. Bennett, by J. L. Bugg and wife in 1892, and the latter's undivided half he conveyed the decedent September 14, 1901. The answer and cross-petition contained, in substance, the averments that the lands in question were not the individual property of the decedent at the time of his death, but were then and are now the property of a partnership formerly composed of W. L. Bennett and H. B. Bennett, notwithstanding the title to the whole of it was in and held by the former at the time of his death; that the lands were liable for the debts of the partnership, and should be treated as personalty for their payment, after which what might be left, if anything, of the decedent's half of the lands, or their proceeds, would descend to his widow and children as provided by the statutes of descent and distribution, but that not until after a settlement of the partnership matters and payment of the debts would the widow be entitled to dower in the lands, or the children to any interest therein. Appellee interposed a demurrer to the pleading in question, which the circuit court sustained. Appellant then filed an amendment thereto, and, appellee insisting upon her demurrer to the same as amended, the court again sustained it, and entered judgment declaring the decedent the sole owner of the land at his death; that his widow was entitled to dower therein, and confirming the allotment made her by the commissioners. The appellant having refused to plead further, and being dissatisfied with the judgment, by this appeal urges its reversal.

It will not be denied that dower should not be assigned a widow out of partnership property until the partnership debts are paid and partnership liens and equities are adjusted. Where real estate is purchased with partnership funds, the rule seems to be that as between the partners inter se and the firm and its creditors such real estate becomes impressed with the characteristics of personal property, and should be so treated in the settlement of the partnership or distribution of the property. But, as to the widow of a deceased partner, it is not to be treated as personal property; the rule being that she shall take dower in only so much of his share of any real estate of the firm as may not be required to pay the firm debts or in the adjusting of equitable claims as between the partners themselves. It must be confessed that some of the earlier cases decided by this court followed the English rule, which held that, when real estate is bought with partnership funds, it should be treated as personalty, not only as between the partners and the firm and its creditors, but also as to distribution between the administrator, widow, and heirs of the deceased partner. Cornwall v. Cornwall, 69 Ky. 369. But the latter cases in this and other jurisdictions reject this doctrine, and adhere to the rule above stated. Davidson, etc., v. Richmond, etc., 69 S. W. 794, 24 Ky. Law Rep. 699; Carter v. Flexner, 92 Ky. 400, 17 S. W. 851, 13 Ky. Law Rep. 608; Duncan v. Duncan, 93 Ky. 37, 18 S. W. 1022, 13 Ky. Law Rep. 917, 40 Am. St. Rep. 159; Hill v. Cornwall & Bro.'s Assignee, 95 Ky. 524, 26 S. W. 540, 16 Ky. Law Rep. 97; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. Rep. 503; Campbell v. Campbell, 30 N. J. Eq. 415; Uhler v. Semple, 20 N. J. Eq. 288; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Shearer v. Shearer, 98 Mass. 107; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Bates on Partnership, 297; Tiedeman's Real Estate, § 246.

The question presented in this case, however, is: Does the answer and cross-petition of appellant state such facts as would justify the conclusion on the part of the court that the lands in controversy were partnership property, that they were purchased with partnership funds, or that W. L. Bennett held them in trust for the benefit of the partnership? It is contended by appellant that he and his brother W. L. Bennett were partners in the property, and that it was paid for with partnership funds; but when, how, and to whom, or on what land they were so paid is not alleged in the answer and cross-petition. Certain checks and drafts are referred to in the answer and cross-petition upon which it is claimed W. L. Bennett drew moneys from the partnership, though it is not alleged that the money obtained on them was used to pay for any of the lands in controversy. The checks and drafts were not filed as exhibits with the answer of appellant, and it is not alleged for what purpose they were drawn or used. It does not appear from the pleading in question that the checks or drafts referred to were not used for the benefit of the partnership, nor is it alleged that the sums received by W. L. Bennett upon the checks and drafts were not repaid or otherwise accounted for by him, or that he was not entitled to withdraw from the partnership funds the sums they represented, either as an advancement or to reimburse himself for the moneys of his own expended for the firm. It is probable from the averments of appellant's answer and cross-petition that there are matters to be settled between himself and the estate of his late brother and partner, but not easy to tell therefrom what matters of difference or indebtedness there are to settle. The averments of his pleading are insufficient to show any contract or arrangement between himself and W. L. Bennett, to the effect that the latter took or was to hold the title to the lands in controversy in trust or otherwise for the partnership, nor are the facts alleged such as to impress any of the property with such a trust. On the other hand, they more nearly establish such a trust as is condemned by section 2353, Ky. St. (Russell's St. § 2050), which declares that: "When a deed shall

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be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which a grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee in violation of some trust, shall have purchased the lands deeded with the effects of another person." Construing appellant's answer and cross-petition in a light most favorable to him, it must be assumed that if the land conveyed W. L. Bennett by Mrs. Lankston and the town lots conveyed him by Rochester, commissioner, were, as alleged, in part paid for with his (appellant's) money, appropriated from the partnership funds, it was done and the title thus vested in W. L. Bennett with appellant's knowledge and consent, for it is not alleged in the answer and cross-petition that the transaction was not known to him at the time it occurred, or that it was without his consent. This being the case, and no fraud or mistake being alleged in the execution of the deed from Mrs. Lankston or the commissioner, the alleged trust asserted by appellant would seem to be of the character condemned by section 2353, Ky. St.

The conveyances to W. L. Bennett of the 250-acre tract manifest no enforcible trust. The deed by which appellant conveyed him his undivided half of the 250-acre tract carries upon its face apparent evidence of its genuineness and an absolute passing of the title. It says in unmistakable language: "That said party of the first part (appellant) for and in consideration of the sum of $2,500, cash in hand paid, receipt of which is hereby acknowledged, do hereby sell and convey to the party of the second part, his heirs and assigns, the following described property, to wit: His undivided half of all that survey of land conveyed to them jointly by J. L. Bugg and wife January 11th, 1892, on the waters of Langston creek, in Crittenden county." It is not alleged in the appellant's answer and cross-petition that he was overreached in any way by his brother in making this conveyance, or charged that there was any fraud or mistake in the execution of the deed. In the absence of such a charge, he is estopped to deny the bona fides of the transaction, or to impeach the deed by parol evidence that it was coupled with a secret trust contradictory of its terms and meaning.

The statement of appellant's counsel that the demurrer to the answer and cross-petition admits the truth of all its averments states the rule too broadly, and entirely omits an important qualification; for, as said in Newman's Pleading and Practice, § 540: "A demurrer is a pleading which imports that the party filing it objects to pleading further or introducing any testimony until he obtains the judgment of the court whether the statement of facts made by his adversary in his pleading is such as to require him to answer or proceed further. It admits for the purpose of the trial of that question all the facts alleged which are relevant and well pleaded, but does not admit conclusions of law." It cannot be claimed, therefore, that the admissions arising upon the demurrer made good the vague and insufficient averment or conclusions of appellant's pleading, or supplied its omission of essential facts.

On the whole, we find no cause for disagreeing with the conclusions reached by the circuit court, and the judgment is therefore affirmed.

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FARMERS' BANK OF WICKLIFFE v. WICKLIFFE.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. PRINCIPAL AND SURETY (§ 159*)—RELEASE OF SURETY—BURDEN OF PROOF.

In an action against a surety on notes, where the defense was that the surety had been released by the bank extending the notes in consideration of payment of interest in advance, without his knowledge or consent, the burden of proof thereof was upon the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 433; Dec. Dig. § 159.*]

2. BILLS AND NOTES (§ 137*)—EXTENSION.

If interest was paid to a bank on a note in advance at 8 per cent. it will be presumed that the note was to be extended to the end of the period for which it was paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 336; Dec. Dig. § 137.*]

3. WITNESSES (§ 142*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

A cashier of, and stockholder in, a bank was incompetent to testify for the bank as to a transaction with a person since deceased, even though the bank had become insolvent, as he was under the statute personally liable for the debts of the bank to double the amount of his stock.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 580; Dec. Dig. § 142.*]

4. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR.

Where an action has been tried twice, and the parties have produced all their evidence, and defendant's evidence makes out a prima facie case for him, and plaintiff has introduced no competent evidence to overthrow it, a judgment for defendant will not be reversed because of the admission of incompetent evidence not affecting the parties' rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Ballard County.

"To be officially reported."

Action by the Farmers' Bank of Wickliffe against Charles Wickliffe. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 116 S. W. 249.

Nichols & Nichols, for appellant. J. B. Wickliffe, for appellee.

HOBSON, J. The Farmers' Bank of Wickliffe brought this suit against Chas. Wickliffe to recover against him on four notes executed by O. P. Beck and him to the bank, he being Beck's surety. The notes were as follows: July 17, 1905, $3,000, due in 12 months; October 5, 1905, $3,369.60, due in 12 months; February 23, 1906, $4,000, due in 6 months; May 31, 1906, $2,300, due in 3 months. Wickliffe defended on several grounds. A trial was had of the case, which resulted in a judgment in his favor. From that judgment an appeal was taken to this court, and the judgment was reversed. See Farmers' Bank v. Wickliffe (Ky.) 116 S. W. 249. On the return of the case to the circuit court it was tried again; the trial resulted in a verdict and judgment for the defendant, and the plaintiff again appeals.

The only question left open in the former opinion is the defense that Wickliffe, the surety, had been released by the fact that the bank by its cashier on March 9, 1907, in consideration of the payment of the interest on the notes for a year in advance, had extended the time for the payment of the notes for one year without his knowledge or consent. On the former appeal it was held by this court that certain evidence introduced by Wickliffe to prove the novation was incompetent, including a statement testified to by J. B. Wickliffe as to what the cashier said to him several weeks after the transaction occurred. On the second trial of the case the court again admitted this evidence, apparently overlooking the fact that it had been excluded by this court. The evidence should not have been received. Still the question remains whether, if we exclude this evidence, there was sufficient evidence tending to make out the defense to take the case to the jury. The burden was on Wickliffe to show the novation, and the jury should have been instructed peremptorily to find for the plaintiff, unless there was sufficient competent evidence introduced by him to take the case to the jury.

The proof by him is in substance this: J. B. Wickliffe testified that he returned home a few weeks after the transaction, and was a director in the bank; that he found in the bank the following debit:

		Debit	3/9/1907
$4,000	due	Aug. 23—06	
2,300	"	Aug. 31—06	$320
3,000	"	July 17—06	184
3,369.60	"	Oct. 5—06	240
			269.55
$12,669.60			$1,013.55
		Pay roll	200.

He also found on the same day that the interest account was credited by $1,013.55. The interest account, which represented the earnings of the bank, was footed up at the close of the day's business of March 9th, and this sum was included in the footing; that on March 20th the directors met and declared a dividend out of the earnings of the bank, by which they distributed to the different stockholders this interest as part of the dividend. It will be observed that the dates in the debit item are the dates when each of the notes fell due, that the amounts in the left column are the amounts of the notes, and that the figures in the right column represent the interest on these sums for one year at 8 per cent., and the exact sum which these amounts make up was carried on that day to the earning account of the bank, and later was distributed by the bank to its stockholders in the distribution made of its earnings when they declared a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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dividend. When the interest was paid in advance, it must be presumed that time was to be given for the period for which the interest was paid. The notes had not been overdue for a year, and there was no reason for Beck's paying the year's interest at that time, unless he was to get time for it. That the money was paid as interest is shown not only by the debit account, but by the fact that it was credited on the bank's interest account, and paid out on March 20th in dividends. The bank pleaded that Beck proposed to renew the notes for a year and to pay the interest for the time, but that he died after depositing the money, and before he had renewed the notes or the arrangement had been completed. While Burton's subsequent declarations as to what he had done are not competent against the bank, the bank's own actions are admissible against it just as the subsequent conduct of a natural person would be. The bank's act of carrying this sum to the interest account, and in paying out this money in dividends to the stockholders, was equivalent to an acceptance by it of the money as paid on interest; and, if interest was paid in advance at 8 per cent., it will be presumed that time was to be given to the end of the period for which it was paid. Lebus v. Robbins, 8 Ky. Law Rep. 966.

The bank introduced on the trial its cashier, Burton. He was a stockholder in the bank, and, being a stockholder was testifying for himself. Beck, the person with whom he had the transaction, was dead, and he could not testify for himself as to a transaction with one who was dead. See Storey v. First National Bank, 72 S. W. 318, 24 Ky. Law Rep. 1799. It is true the bank had become insolvent, but as a stockholder he was by statute responsible personally for the debts of the bank to double the amount of his stock, and his liability might be materially affected if $12,000, and its interest could be collected of Wickliffe. He was therefore incompetent to testify as to what took place between him and Beck. The statements of J. B. Wickliffe as to what Burton said to him were also incompetent. But as Burton is incompetent to testify as to the transaction between him and Beck, we conclude that the action should not be reversed for the error in admitting the testimony of J. B. Wickliffe. The case has been tried twice; the parties have evidently produced all the evidence they have. The evidence produced by the defendant makes out a prima facie case for him; and, as the plaintiff introduced no competent evidence to overthrow that case, no practical good could come to either of the parties by prolonging the litigation on account of an error which did not affect in any way their rights. Some complaint is also made of the argument of counsel, but we deem it unnecessary to notice these matters for the same reason. The questions which are presented on this appeal were not presented on the former appeal. The answer is at least good after verdict and judgment.

Judgment affirmed.

STATE ex rel. MILLSAPS et al. v. BOARD OF EDUCATION OF BLOUNT COUNTY.

(Supreme Court of Tennessee. Oct. 2, 1909.)

1. MANDAMUS (§ 72*)—GROUNDS—DISCRETION OF BOARDS.

Courts will not by mandamus disturb decisions and actions of boards and officers having discretionary powers, except where they act in an arbitrary and oppressive manner, or act beyond their jurisdiction, or where they refuse to assume a jurisdiction which the law devolves upon them.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.*]

2. MANDAMUS (§ 79*)—GROUNDS—DISCRETION OF BOARDS.

Where a county board of education, under Acts 1907, p. 848, c. 236, § 10, subd. 4, making it its duty to locate schools where deemed most convenient, locates a school at a certain place so as to consolidate two schools, and ultimately three, into one, it acts within its discretion, and its decision will not be disturbed by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 170–176; Dec. Dig. § 79.*]

Certiorari to Court of Civil Appeals.

Mandamus by the State, on relation of Clinton Millsaps and others, against the Board of Education of Blount County. A judgment of the circuit court, Blount county, for defendant, was affirmed by the Court of Civil Appeals, and plaintiffs bring certiorari. Affirmed.

Harrison & Stickley, for relators. Gamble & Crawford, for defendant.

PER CURIAM. A petition was filed in the circuit court of Blount county against the defendant to compel it to locate a schoolhouse in a particular part of the Seventeenth civil district of the county. The relief asked was refused by the circuit court, and on appeal to the Court of Civil Appeals this judgment was affirmed.

We think both courts decided correctly. The defendant board acted under chapter 236, p. 845, of the Acts of 1907. That act provides, among other things, that it shall be the duty of the county board of education "to locate schools where deemed most convenient, having due regard for lessening the number in order to improve the efficiency of the county system of education." Section 10, subd. 4. The county board located the school at a different place for the purpose of consolidating two of the schools, and ultimately three, into one. This was a matter within its discretion. The court cannot control such discretion by mandamus proceedings. Insurance Co. v.

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Craig, 106 Tenn. 621, 639–643, 62 S. W. 155; Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245; White's Creek Turnpike Co. v. John W. Marshall, 2 Baxt. 104, 121, 123; Morley v. Power, 5 Lea, 691.

We know of no exception to the rule that the court will not, by mandamus, disturb the decisions and actions of the boards and officers having discretionary powers, except where they act in an arbitrary and oppressive manner (Williams v. Dental Examiners, 93 Tenn. 619, 27 S. W. 1019), or act beyond their jurisdiction (Insurance Co. v. Craig, supra), or where they refuse to assume a jurisdiction which the law devolves upon them (State ex rel. v. Taylor, 119 Tenn. 229, 104 S. W. 242).

Affirm the judgment.

LANDRETH v. POWELL et al.

(Supreme Court of Tennessee. Sept. 25, 1909.)

ATTORNEY AND CLIENT (§ 189*)—COMPENSATION—LIEN.

Where complainant in a suit to cancel a contract giving defendant an option to purchase real estate abandoned the right of action, and on agreement of defendant to pay the contract price and the costs of the suit conveyed the premises to defendant, the litigation was not compromised, but complainant abandoned the purpose of the suit and determined to perform the contract, and her attorney did not acquire a lien on the real estate for his fee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 407; Dec. Dig. § 189.*]

Certiorari to the Court of Civil Appeals.

Petition by the attorneys of Mrs. Lydia B. Landreth, instituting a suit against F. Powell and another, for a lien on real estate for their fee. There was a decree of the Court of Civil Appeals, affirming a decree of the chancery court, Washington county, granting relief, and defendants bring certiorari. Reversed.

Johnson & Miller and S. E. N. Moore, for complainant. J. B. Cox, for defendants.

PER CURIAM. The controversy in this case arises over a petition filed by the attorneys of the complainant to have charged upon certain property of the defendant a fee of $100, which the complainant promised them for the conduct of the present litigation. The chancellor granted the petition, and on appeal to the Court of Civil Appeals that court affirmed the chancellor. Thereupon a writ of certiorari was sued out, and the case was brought to this court.

We think both of the courts referred to were in error.

The facts are these:

Mrs. Landreth filed her bill in the chancery court of Washington county, charging that the defendant Powell had, by taking advantage of her mental infirmity, arising from great age and illness at the time, procured from her an option upon a certain piece of real estate described, for the consideration of $1 paid at the time, and a promise of $1,549 in case the option should be finally consummated. She sought to have the option canceled because it was procured in the manner just stated. She alleged in her bill that Powell had transferred the option to the Unaka Corporation, and that this latter was insisting upon carrying it out, and was demanding a conveyance of the property. Pending the proceeding, Mrs. Landreth concluded to abandon her right of action, and, upon agreement of the defendant to pay her $1,549, the contract price, and the costs of the cause, she conveyed the property to the defendant corporation and quit the litigation.

It was the opinion of the chancellor, and of the Court of Civil Appeals, that the foregoing amounted to a compromise of the litigation, and that the attorneys for Mrs. Landreth were entitled to a lien for the $100, their fee, on the land conveyed. We think this was an erroneous view. Mrs. Landreth obtained nothing whatever by the litigation. She abandoned the purpose of the suit, and determined to perform the contract from which she had asked relief.

We are of the opinion that the decree of the Court of Civil Appeals, and of the chancery court, should be reversed, and that the attorneys, in whose names the petition was filed, should be taxed with the costs of the petition and of the litigation arising therefrom.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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HARVEY v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. CRIMINAL LAW (§ 187*)—FORMER JEOPARDY—PENDENCY OF APPEAL.

A cause which is pending upon appeal is not such a judgment as will support a plea of former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 381; Dec. Dig. § 187.*]

2. CRIMINAL LAW (§ 673*)—EVIDENCE—OTHER CRIMES.

In a prosecution for indecent exposure, where there was evidence of other simular acts by accused, the court properly instructed that the evidence of such other acts should not be considered as substantive evidence as to guilt, but only as bearing on accused's intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1876; Dec. Dig. § 673.*]

3. CRIMINAL LAW (§ 763*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a prosecution for indecent exposure, where evidence was admitted of complaints of other similar acts by accused, a charge that the evidence of such other acts should not be considered as substantive testimony of guilt, but only as bearing on accused's intent, was not on the weight of the evidence, on the ground that the word "substantive," as used, was calculated to mislead the jury to believe that the court believed that the evidence was sufficient to authorize a conviction without such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770; Dec. Dig. § 763.*]

Appeal from Knox County Court; J. H. Milam, Judge.

F. B. Harvey was convicted of indecent exposure, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Knox county on a charge of exposure of his person in a manner calculated to disturb the inhabitants in a private residence.

When the case was called, appellant interposed the plea of former jeopardy, alleging in substance that he had been convicted for a transaction involving the same offense as that for which he was then called to answer. The plea is well prepared, and on the trial appellant offered evidence to sustain same, which was by the court rejected. This evidence would have been admissible, except for the fact that the court certified that cause No. 620, Harvey v. State of Texas, 121 S. W. 605, upon which the plea of former conviction rested, had been appealed from, and was pending on appeal in this court. Under all the authorities this was not a final judgment, or such a judgment as would furnish a basis for a plea of former conviction.

Upon the trial appellant undertook to show that the exposure of his person, if there was such exposure, was unintentional and accidental. In this state of the testimony, proof was admitted of other similar acts which had been complained of by Thompson, near whose house such indecent exposures occurred. On the trial the court charged the jury, among other things, as follows: "The evidence introduced in this case of acts of the exposure of the person of the defendant, other than the act charged in the information, you cannot consider as substantive evidence as to the guilt of the defendant; but it can only be considered as bearing on the intent of the defendant, and you cannot consider it for any other purpose." This charge of the court is complained of and criticised, in that, as alleged, it is a charge on the weight of the evidence, and called the attention of the jury to the fact that the defendant had committed other exposures of the person, and because the word "substantive," as used in said charge in defining the limitation placed on said testimony, was calculated to mislead the jury; said word meaning "solid, depending on itself," thereby conveying to the jury the idea that the court believed there was sufficient evidence in the cause to authorize a conviction without the aid of such evidence. We think the facts required such a charge as that given by the court, and that it is not subject to any serious objections. It expressly stated the purpose for which this evidence was admitted, and for which it was intended, and tells the jury they cannot consider it for any other purpose. The objection is not substantial, we think.

The only other matter worthy of consideration is the contention that the verdict is not supported by the evidence. We think there was ample evidence on which to rest the verdict of the jury.

Finding no error in the record, it is ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

Ex parte COLLINS.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. PHYSICIANS AND SURGEONS (§ 6*)—REGULATION—LICENSE TO PRACTICE—STATUTES.

Acts 30th Leg. 1907, p. 224, c. 123, provides for the licensing of physicians and surgeons, and declares (section 13) that any person shall be regarded as practicing medicine who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation. *Held*, that one practicing osteopathy was not entitled to practice his profession without a license.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6–11; Dec. Dig. § 6.*]

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2. PHYSICIANS AND SURGEONS (§ 2*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—"MEDICINE."

Const. art. 16, § 31, provides that the Legislature may pass laws prescribing the qualifications of practitioners of medicine and punish persons for malpractice, but that no preference shall ever be given by law to any school of medicine. *Held*, that the word "medicine," as used in the Constitution, embraced the art of healing, by whatever scientific or supposedly scientific method; the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, some thing or method supposed to possess curative power, and hence authorized the passage of Acts 30th Leg. 1907, p. 224, c. 123, requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the public practice of their profession.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 5, pp. 4466, 4467.]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Application for writ of habeas corpus on petition of Ira W. Collins. From an order remanding relator to the custody of the sheriff, he appeals. Affirmed.

Patterson, Buckler & Woodson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Relator, being a physician practicing osteopathy in the city of El Paso, in El Paso county, failed to secure his license to so practice, as had been authorized by Acts 30th Leg. 1907, p. 224, c. 123. Upon failing to secure the license as provided in said act, he was arrested on proper complaint and information filed in the county court of El Paso county, and sued out an application for writ of habeas corpus before the county judge, and upon the hearing of said application relator was remanded to the custody of the sheriff of El Paso county.

The information, which in all respects is in conformity with the affidavit, is as follows: "W. W. Bridgers, county attorney of the county of El Paso, state of Texas, presents to the county court in and for said county, at its January term, A. D. 1909, that on or about the 2d day of September, A. D. 1908, and before the filing of this information, in said county of El Paso, state of Texas, Ira W. Collins, who was then and there a resident of said county of El Paso and state of Texas, did then and there practice medicine upon human beings within the limits of the state of Texas and county of El Paso, without authority of law, to wit: Did then and there, in the manner hereinbefore and hereinafter stated, unlawfully treat a physical disease and disorder, to wit: Did then and there unlawfully treat Julia Ballinger, a human being, for hay fever, said hay fever being a physical disease and disorder, and did charge the said Julia Ballinger therefor, directly, money the value and amount of which is to the county attorney unknown, said treatment being given in the capacity of a physician and doctor, under the system and branch of medicine called osteopathy, by means of a system of doctoring and physical treatment called 'osteopathy,' which treatment consists, and did then and there consist, in manipulating scientifically the limbs, muscles, ligaments, and bones of the human body, and of the said Julia Ballinger, which pressed upon the nerves of the blood supply, so that nature might have free action, the natural blood supply be restored, and the diseased condition thus removed, so unlawfully treating in the county of El Paso, state of Texas, in which the said Ira W. Collins then and there resided, all of which said treatment was given in violation of the provisions of chapter 123, Acts of the 30th Legislature of the State of Texas, without having first registered in the district clerk's office of El Paso county, Texas, the county in which he, the said Ira W. Collins, then and there resided, his authority from the board of Medical Examiners for the state of Texas for so practicing, together with his age, post office address, place of birth, school of practice to which he then and there professed to belong, subscribed and verified by oath, as prescribed and required by the provisions of chapter 123, of the General Laws of the State of Texas, Acts of the 30th Legislature of Texas, page 224 et seq., and against the peace and dignity of the state."

The evidence in the case, as adduced upon the trial of the writ of habeas corpus, substantiated every allegation in the information, and upon this showing relator demands his discharge, on the ground that the act is unconstitutional, which provides that an osteopath should pay a license, because the evidence shows that relator used no medicine or drugs to relieve the patient, and therefore there was no evidence from which the court could conclude the relator should be held in custody upon a charge of practicing medicine without a license. Section 13 of the act of the Thirtieth Legislature above cited reads as follows: "Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." We hold that the court was correct in his decision, and that the statute expressly authorized the court in remanding relator, and

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that the statute in all respects is constitutional.

Relator further insists that section 31 of article 16 of the Constitution, which says that the Legislature may pass laws prescribing the qualifications of practitioners of medicine in this state, and punish persons for malpractice, but no preference shall ever be given by law to any school of medicine, limits the power of the Legislature in authorizing the licensing of practitioners to practitioners of medicine, and that, in view of the fact that relator in practicing osteopathy uses no medicine, therefore relator does not come within the provisions of the act. As we understand relator in his brief and argument, he concedes that the statute is broad enough to cover his offense, but that the constitutional provision just cited limits the power of the Legislature to the regulation of the practice of medicine, and that osteopathy is not practicing medicine. The Constitution, when it demands the regulation of the practice of medicine, was not attempting to say that the Legislature was limited to any mode or method of healing in order to regulate it; but the word "medicine," used in the Constitution, means the art of healing by whatever scientific or supposedly scientific method may be used. It means the art of preventing, curing, or alleviating diseases, and remedying, as far as possible, results of violence and accident. It further means something which is supposed to possess, or some method which is supposed to possess, curative power; but if this definition of medicine is not correct, as stated in the Constitution, yet there is no limitation upon the power of the Legislature in said provision of the Constitution which inhibits the Legislature of this state under its police power to prevent any one practicing any species or character of remedy to cure any real or supposed ill that the body has or is subject to for pay. Acts with somewhat similar provisions to the act of the Thirtieth Legislature now under consideration were held constitutional by the Supreme Court of this state in the case of Dowdell v. McBride, 92 Tex. 239, 47 S. W. 524; also by this court in the case of Logan v. State, 5 Tex. App. 306. So we hold that osteopathy is one of the methods of curing the ills to which human flesh is heir, and is one of the methods of curing covered by the act of the Thirtieth Legislature. In other words, in order for one in this state to practice osteopathy for pay, he must secure a license, as provided for by the act of the Thirtieth Legislature. This relator did not do. We accordingly hold that he must be remanded to the custody of the sheriff of El Paso county, where he will be called upon to answer the complaint and information relied upon in this case.

The judgment is accordingly affirmed.

GOFF v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALES—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a trial for unlawfully selling intoxicating liquors, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from Lamar County Court; Leslie Hardison, Judge.

John Goff was convicted of unlawfully selling intoxicating liquors, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant appeals from a conviction had in the county court of Lamar county on January 8, 1909, wherein he was charged with the unlawful sale of intoxicating liquors in said county. The case was tried before the court without the intervention of a jury, and practically the only question to be considered is the sufficiency of the evidence.

The testimony of the prosecuting witness, Herman Sick, showed that appellant came to his place of business, and asked if he (witness) wanted some good whisky, and showed him a list of liquors he had, and said that "Rye" whisky was good, and if he wanted two quarts he would bring it to him; that about two days after this appellant came to his shop, brought a package containing two quarts of whisky, and carried it behind a curtain, where he (witness) changed his clothes, and when he came out he said: "It will cost you $2.80." Nothing was said about ordering any whisky, and he did not know where appellant got the whisky, and knew nothing about his ordering whisky. Appellant, on the other hand, claimed, in substance, that he had ordered the whisky for witness through the Paris Liquor Company, at Texarkana, and that same had been sent direct from Texarkana on such order. There was considerable evidence offered by appellant tending to sustain his contention. It was shown that a package supposed to contain liquor arrived at the express office at Paris, consigned to Sick, and that this was obtained by appellant, but that Sick never appeared at the express office, and denied having given any order on the express office for same. The case is essentially one of fact, and after hearing all the facts the court found against the contention of the appellant. This judgment of the court is entitled to respect, and if there is evidence in the record which, fairly considered, would support the court's judgment, we should sus-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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tain same. We think there is abundant evidence to sustain the judgment of conviction.

It is therefore ordered that the judgment be and the same is hereby affirmed.

MUMPHREYS v. STATE.

(Court of Criminal Appeals of Texas. June 9, 1909. Rehearing Denied Oct. 6, 1909.)

1. CRIMINAL LAW (§ 596*)—CONTINUANCE—IMPEACHING TESTIMONY.

As a rule continuances will not be granted to secure impeaching testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330; Dec. Dig. § 596.*]

2. CRIMINAL LAW (§ 596*)—CONTINUANCE—ABSENT WITNESS—IMPEACHING TESTIMONY.

Where the witness whom accused proposed to impeach was rather cogently impeached by her own sworn statement made before the justice of the peace, as well as by the testimony of other witnesses, and also by a written statement signed by her and testified to by three witnesses, and the evidence proposed to be proved by the absent witness was practically to the same effect, a continuance was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1330; Dec. Dig. § 596.*]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Lee Mumphreys was convicted of murder, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree; the punishment being assessed at five years' confinement in the penitentiary. The evidence discloses the issues of murder, manslaughter, and self-defense, all of which were submitted by the court to the consideration of the jury.

Error is assigned on the action of the court overruling appellant's first application for a continuance. He sought this for the testimony of his wife. The only question involved in refusing the continuance is whether or not it should have been granted to secure his wife's testimony for the purpose of impeaching a state's witness. As a rule continuances will not be granted to secure impeaching testimony. See White's Ann. Code Cr. Proc. p. 398, § 612, for collated authorities. The witness whom appellant proposed to contradict was rather cogently impeached by her own sworn statements made before the justice of the peace, as well as by the testimony of other witnesses, and also a written statement, signed by her and testified to by Bramlette and the two Wrights. The evidence proposed to be proved by the absent witness is the same as that above mentioned. As presented by this record, we are of opinion the court did not err in refusing to grant the continuance in the first instance, and, further, there was no error in refusing a new trial.

The charge in regard to self-defense is criticised because the jury were not expressly instructed that if there should be a "reasonable doubt" on this theory they should give appellant the benefit of the doubt. The court gave a very full and fair charge on self-defense. The only criticism urged against it is the one stated. The court fully charged reasonable doubt and presumption of innocence, which we think, under the circumstances of this case, is sufficient.

Finding no error in the record, the judgment is affirmed.

ROBBINS v. STATE.

(Court of Criminal Appeals of Texas. June 9, 1909. Rehearing Denied Oct. 6, 1909.)

1. GAMING (§ 72*)—PLAYING CARDS—PLACE—"PRIVATE RESIDENCE OCCUPIED BY A FAMILY."

The place at which defendant, a bachelor and farmer, played cards, a house occupied by him alone, except that a man, who was a stone mason, was stopping with him, was not a "private residence occupied by a family," within the exception to the gaming law (Laws 1907, p. 107, c. 49).

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 183; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 6, p. 5578.]

2. CRIMINAL LAW (§§ 1056, 1063*)—APPEAL.

Misdirecting the jury in respect to the punishment is not available, unless excepted to at the time or challenged in the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2683; Dec. Dig. §§ 1056, 1063.*]

3. CRIMINAL LAW (§ 1064*)—APPEAL—OBJECTIONS BELOW—MOTION FOR NEW TRIAL—SUFFICIENCY.

The ground of motion for new trial, "Because the verdict is not supported by the facts and the judgment is contrary to the law," is not sufficient to point out misdirection in the charge in respect to the punishment, so as to make it available on appeal, in the absence of exception to it at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683; Dec. Dig. § 1064.*]

Appeal from San Saba County Court; G. W. Walters, Judge.

J. P. Robbins was convicted of gaming, and appeals. Affirmed.

P. M. Faver, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by indictment in the county court of San Saba county with unlawfully playing a game of cards in a place other than a private residence occupied by a family. He was upon his trial convicted of this offense, and his punishment assessed at a fine of $10.

1. All the parties admitted that appellant engaged in a game of cards and at a house

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occupied by him. The evidence showed that he was not married, and had never been; that he lived alone, except at the time of the trial a man named Sharp was staying at his place, and that he had been for a short time; that appellant was a farmer, and Sharp a stone mason. This did not constitute a private residence occupied by a family. See Patterson v. State (Tex. Cr. App.) 116 S. W. 1151. It was shown by all of the testimony, including that of appellant, that at or about the time charged he played cards with some of his neighbors nearly all night and for money; in other words, he was gambling. The jury under proper instructions could not have found the place a private residence occupied by a family.

2. Complaint was made that the court erred in its charge to the jury in instructing them with reference to the penalty to be assessed by them, for the reason that under the act of the Thirtieth Legislature the law had been repealed and the punishment changed (Laws 1907, p. 107, c. 49). The punishment was indeed changed by the act of the Thirtieth Legislature. The offense was in no sense repealed, and stands practically unchanged by the law and as it was aforetime. It is true that the penalty for this offense was changed by act of the Thirtieth Legislature, which imposed a severer punishment for an infraction of the law than that which had theretofore existed. We have held, however, uniformly since the rendition of the decision in Manning v. State, 46 Tex. Cr. R. 326, 81 S. W. 957, that it is not reversible error where the charge misdirects the jury in respect to the punishment, unless excepted to at the time or the matter was challenged in the motion for new trial. This was a perjury case, in which the court gave a higher minimum punishment than the law authorized. This decision has been repeatedly followed in this state and is the recognized rule among us.

Referring to the record, it appears that the case was tried on the 26th of May, 1908. The original motion for new trial was filed on the same day. There is an amended motion for new trial, filed May 30, 1908; but the record shows that the judgment overruling the motion for new trial was entered on May 26th of that year, and that on the same day appellant entered into a recognizance for his appearance before this court. Appellant tendered a bill of exceptions, which was filed on June 25, 1908, in which it is stated that he excepted to the charge in respect to the punishment given by the court, for the reason that it was not the law applicable to the offense under the present law. In passing on this matter the court makes this statement: "The objection and exception was not made, or the court's attention called to the supposed erroneous charge as to the penalty, until after the jury returned their verdict, and the error was in favor of the defendant, and the jury gave the defendant the least fine. Wherefore the court overruled the objection, as it could not prejudice the defendant." The matter is not referred to at all in either the original or amended motion for new trial, unless it be in the last ground thereof, which is to the following effect: "Because the verdict is not supported by the facts and the judgment is contrary to the law." This, we think, was not sufficient to point out the error now claimed to exist in the court's charge in this respect, or sufficient to raise the question, so as to be passed on in this court.

3. There are some other questions raised in the record, but they are not of such character as to demand attention.

Believing that there was no error in the record of which appellant could complain, it is ordered that the judgment of conviction be, and the same is hereby, in all things affirmed.

CASSU v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—STATEMENT OF FACTS—EFFECT OF ABSENCE.

In absence of a statement of facts or bill of exceptions containing the testimony, the sufficiency of the evidence to support the verdict cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

Pete Cassu was convicted of a crime, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The record does not contain a statement of facts nor bill of exceptions. The motion for new trial attacks the verdict of the jury and the judgment of the court because not sustained by the evidence. In the absence of the testimony, these matters cannot be reviewed.

The judgment is affirmed.

HERNANDEZ v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

LARCENY (§ 55*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for theft of a mule, evidence *held* to sustain a verdict of conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 149–178; Dec. Dig. § 55.*]

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Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Pedro Hernandez was convicted of theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of a mule, and his punishment assessed at two years' confinement in the penitentiary.

The only question raised by appellant is the sufficiency of the evidence. The evidence shows that appellant was found in possession of the prosecuting witness' mule. The mule was thoroughly identified as prosecuting witness' mule. He gave an explanation to the effect that he had bought or traded for the mule some time before his possession was discovered. He took the mule to Uvalde county, and traded the mule off for a horse. The court charged on circumstantial evidence, and properly presented the law applicable to the facts of this case, and the evidence supports the verdict.

The judgment is affirmed.

TODD v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. CRIMINAL LAW (§ 632*)—DOCKET—ORDER OF TRIAL.

Where cases of a higher number appeared on the trial docket preceding others of a lower number in regular order, the fact that they were called in the order in which they appeared, and that accused was forced to try an indictment for illegal sale of liquor prior to an indictment for running a disorderly house, of a lower number, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1447, 1448; Dec. Dig. § 632.*]

2. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—SIGNING—APPROVAL.

A bill of exceptions, not signed by the trial judge or in any manner approved, cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2836; Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS.

Where a bill of exceptions to the admission of evidence failed to show how the evidence was injurious, or what the facts were, only objecting to the testimony as irrelevant, immaterial, and hearsay, the bill was too indefinite for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2816; Dec. Dig. § 1091.*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Tom Todd was convicted of selling liquor without a license, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. There was but one witness introduced during the trial, to wit, Eb Hanna, who testified positively to a purchase of whisky from appellant.

Bill of exceptions No. 1 recites that before appellant announced ready for trial he called the attention of the court to the fact that this cause was not called in regular order of the setting; that cause No. 12,082 against appellant, wherein he was charged with running a disorderly house, was set down for hearing ahead of this cause. No disposition having been made of cause No. 12,082, it was not postponed or continued, but set on the docket ahead of this cause; but, notwithstanding this fact, the court forced the appellant to trial. The bill is qualified as follows: "That all of the causes were on the setting for said date; that, reading from the top to the bottom of the column in which the setting appears, the causes were in the following order: 12,084, 12,083, 12,082—and in this order they were called by the court and tried, except that cause 12,082 was not tried." This cause was numbered on the county court docket 12,083. As thus explained by the court, we are of opinion there is no injury shown, and deem it unnecessary to discuss the question.

There is what purports to be another bill of exceptions in the record reserved to the refusal of the court to grant a continuance; but it is not signed by the county judge or in any manner approved. It cannot be considered.

There is another bill of exceptions which recites: "While the witness Eb. Hanna was on the stand he was permitted by the court to describe the building and the fixtures and the surroundings in the building, over objection of the defendant on the ground that it was immaterial and irrelevant and hearsay." What the facts were, or how they were injurious, cannot be ascertained from this bill. The recitals are entirely too general, and in every way fail to show how the description, fixtures, and surroundings in the building could have been injurious. As presented, the bill is too indefinite. No error is shown.

We are of opinion that the evidence is fully sufficient to sustain a conviction, and the judgment is affirmed.

TODD v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. CRIMINAL LAW (§ 632*)—TRIAL—DOCKETS—ORDER OF TRIAL.

Where a large number of cases were on the docket for trial on the day accused's case was tried, and, reading from the top to the bottom of the column in which the setting appeared, the causes were in the order, "12,084, 12,083, 12,082," and were called in that order by the court, except that cause No. 12,082 was not tried, accused was not entitled to object

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that he was forced to trial of case No. 12,084 before the trial of No. 12,082.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1447, 1448; Dec. Dig. § 632.*]

2. CRIMINAL LAW (§ 1163*)—TRIAL—DOCKET—CALLING CASES.

In mere matters of procedure and the order of calling cases, an alleged erroneous ruling will not be reversed in any event, unless injury or injustice is clearly shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.*]

3. CRIMINAL LAW (§ 598*)—CONTINUANCE—DILIGENCE.

An indictment was returned into court on January 23, 1909, and on the 27th process was issued for a witness residing within the county, which was returned on the same day not executed, with the statement that the witness was in another city. No further process was asked or issued; but, on the case being called for trial on February 2d, accused applied for a continuance because of the absence of the witness, whose presence could probably have been secured if new process had been promptly issued for him. *Held*, that the continuance was properly denied for lack of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1336–1339; Dec. Dig. § 598.*]

4. INTOXICATING LIQUORS (§ 228*)—WRONGFUL SALE—EVIDENCE.

In a prosecution for wrongful sale of liquor, evidence describing the buildings, fixtures, and surroundings where the liquor was sold was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 282; Dec. Dig. § 226.*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Tom Todd was convicted of selling intoxicating liquors without a license, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Grayson county on a charge of selling intoxicating liquors therein in violation of the law, and his punishment assessed at a fine of $100 and 20 days' confinement in jail. There was only one witness introduced, Eb Hanna, to whom the indictment alleged the intoxicating liquor to have been sold. This witness in express terms proved a sale of beer, which he declared to be intoxicating.

1. The action of the court in trying this case under the circumstances under which it was tried is questioned on the ground, as stated in his bill, that same was not called in the regular order of the setting, in that cause No. 12,082 against appellant, wherein he was charged with running a disorderly house, was set down for hearing ahead of this cause (No. 12,084); that same was not postponed or continued, but set on the docket ahead of this cause, notwithstanding which fact the court forced him to trial in the case in which this conviction resulted. This bill of exceptions was allowed by the court, with the explanation that a large number of cases were on the setting of the docket for the date when called; that, reading from the top to the bottom of the column in which the setting appears, the cases were in the following order: 12,084, 12,083, 12,082; and that in this order they were called by the court and tried, except that cause No. 12,082 was not tried. Under the explanation of the court, it is manifest that appellant is without just cause of complaint. Besides, in mere matters of procedure and order of calling cases, we would not reverse in any event, unless injury or injustice was clearly shown.

2. Appellant also complains of the action of the court in overruling his application for continuance. Appellant applied for a continuance on account of the absence of Luke Skimmerhorn, alleged to have been a resident citizen of Grayson county, and avers that on the 27th day of January of this year he had a subpœna issued for said witness, which was returned on the same day into court not executed, with the statement that he was in Palestine, Tex. The evidence of this witness, as stated in the bill, was important and material, and was in substance to the effect that Skimmerhorn would testify that he was present on the occasion Eb Hanna would testify that the sale was made to him, and that the sale in fact was not made by appellant, and that neither he nor his counsel knew that witness Skimmerhorn was in Palestine. This bill is allowed, with the explanation that the return of the subpœna was made on the 27th day of January, 1909, stating that Skimmerhorn was in Palestine on that date, and that no further process was asked for by appellant, or issued, and that the cause was tried on the 2d day of February, 1909. The record also shows that the indictment was returned into court on January 23, 1909. It is averred in general terms in the application for continuance that counsel for appellant had been busy upon the attendance of the court as a reason why no greater diligence was exercised. We think, in view of all the facts, that appellant was clearly lacking in diligence. If, when the subpœna was returned, process had then been promptly issued for the witness, there could have been no doubt that his presence and attendance would have been secured. This was not done, however, though the record shows his whereabouts, and no additional process was issued for him.

3. There is another bill in the record complaining of the testimony of Hanna in respect to his description of the buildings, fixtures, and surroundings where the intoxicating liquor was sold. This testimony was ad-

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missible, and in no event could have injured appellant.

Finding no error in the record, the judgment of conviction is affirmed.

HART v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. HOMICIDE (§ 190*)—MURDER—ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder, where accused's mother was allowed to testify that decedent had threatened accused's life and had been unduly intimate with accused's 14 year old sister, it was not error to exclude her testimony that she had had decedent arrested for his intimacy with her daughter, offered to show motive of decedent for making the threat, and to show that it was seriously made, and to show the motive for decedent's assault on accused at the time of the homicide; the evidence adding nothing to witness' testimony relative to the matters out of which the homicide grew.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399–413; Dec. Dig. § 190.*]

2. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS.

In a murder case, where it appeared that the difficulty arose over decedent's undue intimacy with accused's sister, testimony of a witness that accused, a few hours before the homicide, came to him and wanted him to have decedent arrested for intimacy with accused's sister and for threats to kill accused, was properly excluded as a self-serving declaration of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928–935; Dec. Dig. § 413.*]

3. HOMICIDE (§ 339*)—APPEAL—REVIEW—HARMLESS ERROR.

In a murder case, where it appeared that the difficulty was the result of illicit relations which decedent had sustained with accused's sister, the exclusion of testimony that, a short time before the homicide, witness and others were with decedent, and that decedent had stated to them that all he wanted was to be with accused's sister, that when he was with her he could do and always had done as he pleased, meaning thereby that he had sustained illicit relations with her at will, if error, was harmless, where accused was only convicted of manslaughter, with the lowest penalty, since the most the evidence could have done would have been to reduce the offense to that of which he was convicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

4. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.

In a murder case, where it appeared that the homicide was the result of illicit relations existing between decedent and accused's sister, testimony of accused's mother that she had had the girl examined by a doctor, who had told her that the girl showed signs of having had intercourse with some man, was properly excluded as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. § 419.*]

5. CRIMINAL LAW (§ 1170½*)—APPEAL—REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Permitting accused, as a witness, to be asked if he had not, during a certain period, run a house of ill fame at a certain place, and came to another place to get women to take there for immoral purposes, was not reversible error, in view of accused's answer in the negative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3130; Dec. Dig. § 1170½.*]

6. HOMICIDE (§ 338*)—APPEAL—REVIEW—HARMLESS ERROR.

In a murder case, where the evidence showed that accused shot decedent while he was retreating, under circumstances eliminating the issue of self-defense, the admission of testimony of accused, in answer to a question whether his house had not been raided by officers as a gambling house and he arrested, and whether he had not pleaded guilty, that his house was not raided, but that he was arrested for shooting craps, and pleaded guilty, was not reversible error, where the court withdrew the evidence from the jury and instructed them not to consider it, and the jury found accused guilty only of manslaughter, with the minimum punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709–713; Dec. Dig. § 338.*]

7. CRIMINAL LAW (§§ 699, 799*)—TRIAL—IMPROPER ARGUMENT OF COUNTY ATTORNEY—DUTY OF COURT.

Where the county attorney in his argument dwells on facts the evidence to prove which has been withdrawn from the jury, the court should reprimand him and charge the jury to disregard the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656, 1944–1946; Dec. Dig. §§ 699, 799.*]

8. HOMICIDE (§ 120*)—MURDER—SELF-DEFENSE.

In a murder case, where it appeared that accused, while in an altercation with decedent, either shot his pistol or it was discharged, and decedent immediately ran 50 or 100 feet, pursued by accused, who was all the while shooting at him, and who finally shot him in the back, defendant could not rely on self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 175; Dec. Dig. § 120.*]

9. CRIMINAL LAW (§ 1171*)—APPEAL—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNTY ATTORNEY.

In a murder case, where there was no issue of self-defense, and the evidence showed that accused shot and killed decedent, the comment of the county attorney on evidence that accused had kept a negro house of ill fame and a gambling house, which evidence had been excluded as incompetent, was not ground for reversal, where the jury gave accused the minimum punishment for manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. § 1171.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Tom Hart was convicted of manslaughter, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

The facts, in substance, show that deceased had debauched the sister of appellant, or at least appellant had every reason to so believe. On the night of the homicide, appellant, who was running some character of store in the suburbs of Alvarado, was engaged in attending to the duties around the

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store, and deceased came in and demanded his clothes; appellant telling him at that time he would not give them to him, as he had to go up town to get some coal oil, but would do so on his return. Some hot words ensued between appellant and deceased, appellant proceeding on his way to town; and subsequently he went to a bank, where he was regularly employed as janitor, to do his usual work. While there engaged in said work, deceased was seen on the outside by appellant, standing in front of the bank. Appellant discovered deceased in front of the bank as he started to go out of same, and returned to a desk in the bank and secured a pistol, and as he started out deceased met him just inside of the bank door. A scuffle appears to have ensued, in which the pistol was discharged; the ball going into the floor. Deceased ran some 20 or 30 feet to the front of a barber shop, where he fell with a wound in his back fired therein by appellant. A can that had contained coal oil was subsequently found on the floor just inside of the door of the bank, corroborating appellant's statement to the effect that he had started home with the coal oil when the difficulty began.

The court in his charge to the jury submitted the issues of murder in the first and second degree, manslaughter, and self-defense. Bill of exceptions No. 1 shows that while Bell Winfield, the mother of appellant, was on the stand, she was asked the following question: "You say you had deceased arrested about July 1, 1908. Now state why you had him arrested, and what complaint, if any, you made against deceased." To this question the county attorney objected. Appellant stated to the court that he could show by said witness, who was the mother of appellant, that she had deceased arrested for having had intercourse with Bessie Hart, the sister of appellant, after the witness had learned that deceased had been having intercourse with said Bessie Hart, who was at that time only 14 years old; that said testimony was offered in explanation of other testimony of said witness Bell Winfield to the effect that, on the day after she had deceased arrested, deceased, upon being discharged from custody, came to the home of said witness, and while there, and in conversation with said witness, had threatened to kill defendant if defendant should interfere between said deceased and Bessie Hart, which threats were afterwards communicated to defendant by deceased. The witness Bell Winfield testified that, after she had deceased arrested, on the following day he was discharged, and came to witness' home, and that deceased admitted that he had been intimate with Bessie Hart, and told witness that she had accomplished nothing by having him arrested, whereupon witness had said to deceased that she wanted him to stay away from and let her daughter alone, and that, if deceased did not do so, witness would tell her son, who was the defendant, all that she knew about the relations between deceased and her daughter, and that defendant would make deceased let her daughter alone, whereupon deceased then said to witness, "Tom is as afraid of me as you are, and, if he interferes with me and Bessie, I will kill him" (defendant). Appellant insists the evidence is admissible to show motive on the part of deceased for making said threat, and to show that said threat was seriously made, and also to show a motive on the part of deceased for making an assault on defendant at the time of the killing, which defendant claimed was made on him by deceased, and that on account of such assault appellant had to kill deceased to save himself from death or serious bodily injury at the time of the killing. This bill is approved with this explanation: "That most of the testimony set out in this bill was allowed to go to the jury. See this witness' evidence set out in statement of facts." The statement of facts shows that the court permitted witness to testify that deceased threatened the life of appellant, and about deceased's conduct towards the daughter of witness and sister of appellant, but refused to permit the witness to testify that she had filed a prosecution against deceased. The ruling of the court was correct. The fact that the witness had deceased arrested would add nothing to the testimony of the witness about the matters out of which this homicide grew.

Bill of exceptions No. 2 shows that appellant offered to prove by Will Ford that appellant, a few hours before the homicide, came to him and wanted him to have deceased arrested for having carnal intercourse with his 14 year old sister and because deceased had threatened to kill him (defendant). The court qualifies this bill with the statement that "the defendant's evidence and his wife's shows that defendant and deceased met at defendant's cold drink stand, and after his mother had informed him of the assault on his sister, and the killing took place at the second meeting of the parties, and hence the proposed evidence was immaterial." We do not think the effort on the part of appellant to have deceased arrested would be admissible, since it would be a self-serving declaration. The court permitted appellant to prove all the misconduct of deceased towards his sister, and all character and kinds of threats that were made by deceased against appellant. This was the only germane testimony touching the motive and animus actuating appellant at the time of the homicide.

Bill of exceptions No. 3 shows the defense offered to prove by John Mathews the following: "If you had any conversation with deceased, George Henry, a short time prior to the homicide, about his relation with Bessie Hart, state what deceased said to you." The county attorney objected to this ques-

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tion, and the court sustained the objection. Appellant stated that they expected to and could prove by said witness, and that he would answer, if permitted, that, a short time before the homicide, witness, with several others, were in company with the deceased, and that deceased had stated to them that all he wanted was to be with Bessie Hart, that when he was with her he could do, and always had done, as he pleased, meaning thereby that he had at his good pleasure had intercourse with said Bessie Hart. This bill is approved, with the same explanation as shown to bill of exceptions No. 2; the killing having occurred at the second meeting, as shown in defendant's evidence. This evidence was immaterial. Defendant was only convicted of manslaughter, with the lowest penalty, and hence this evidence would only reduce the offense to the one that he was convicted of. With the explanation of the court, we think the ruling was correct, or at any rate harmless.

Bill of exceptions No. 4 complains that the court erred in refusing to permit appellant's mother to testify that she had had Bessie Hart, appellant's sister, examined, and that the doctor told her that she showed signs of having intercourse with some man. This testimony was clearly inadmissible, since it was hearsay.

Bill of exceptions No. 5 insists the court erred in permitting the state to ask appellant, while a witness on the stand, if he had not in the fall and winter previous run a whore house in Alvarado, and come to Cleburne to get women and take there for immoral purposes. Appellant answered in the negative. Certainly, in the light of appellant's answer, there was no error authorizing a reversal of this case.

Bill of exceptions No. 6 shows the county attorney propounded to appellant this question: "Is it not a fact that your house was raided as a gambling house by the officers last fall, and that in such raid you were arrested in five cases, and that you then pleaded guilty to the charge?" Over appellant's objection he was forced to answer, and stated that his house was never raided by the officers; that he was arrested last October for shooting craps, and pleaded guilty to the charge. The bill is approved, with the explanation attached to bill of exceptions No. 5. The explanation attached to bill No. 5 is as follows: "That this evidence, and that complained of in bill No. 6, was admitted as affecting the credibility of the witness; but when I came to charge the jury I examined the stenographer's notes, and, the answers of the witness not being as strong as I had thought they were, I withdrew the evidence on that question from the jury, and instructed them not to consider it against the defendant for any purpose." This evidence was not admissible; but, in view of the fact that the court withdrew the testimony from the jury and instructed them not to consider said testimony for any purpose, we would not be authorized to reverse this case, in view of the minimum punishment for manslaughter having been inflicted by the jury.

Bill of exceptions No. 7 complains of the argument of the county attorney, which is as follows: "Gentlemen of the jury, I say to you the testimony in this case shows that this defendant has been running a nigger whore house and gambling house in the town of Alvarado. Why, he comes here to Cleburne, and takes a lot of nigger whores over there, right in the house with his wife. Why, yes that's Tom, the immaculate Tom Hart, who cares no more for the laws of this country than he does for the wind that blows; and if you want him to keep on running his whore house and gambling hell over the good people of this county, why turn him loose. I can stand it." The bill is approved, with this explanation: "The jury were instructed not to consider that evidence." The court should have reprimanded counsel, and charged the jury to disregard this argument, because the evidence going to show the facts upon which the argument was predicated, according to the explanation of the court, had been excluded, and the evidence was clearly inadmissible. But the facts in this case show that deceased and appellant engaged in a difficulty inside of the bank door. Appellant, in an effort to get his pistol out, either shot it, or it involuntarily discharged, and the bullet entered the floor of the bank building. Deceased immediately ran some 50 or 100 feet, pursued by appellant, appellant all the while shooting at the deceased; and the evidence shows that finally one ball struck deceased in the back, killing him, and he fell and expired in front of a barber shop some 50 or 100 feet away from where the difficulty began. This we take it eliminates the issue of self-defense, and, in view of the fact that the jury gave appellant the minimum punishment for manslaughter, the argument of the county attorney is not such error as did or could have so prejudiced the rights of appellant, under the facts of this case, as to authorize a reversal of this case. But we cannot insist too often upon state's counsel staying within the record and not discussing matters that are not admitted as testimony in the trial of the case.

The same may be said of bill of exceptions No. 8, which practically presents the same matter, with practically the same explanation by the court.

The charge of the court, in the light of the special charges given, asked by appellant, is correct. Appellant's special charges, as far as applicable, were covered by the main charge of the court.

Finding no error in this record authorizing a reversal of the case, the judgment is in all things affirmed.

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KIRKPATRICK v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. CRIMINAL LAW (§ 598*) — CONTINUANCE — ABSENT WITNESS.

Code Cr. Proc. 1895, art. 798, provides that depositions of a witness may, at defendant's request, be taken when the witness is aged or infirm. *Held*, that where it appeared that the witnesses for whose absence accused desired a continuance were his mother and aunt, respectively, and were very old and feeble, that accused had lived with them and knew their condition, and that such witnesses were absent at a former term, when a continuance was granted accused for them, and the record did not show that their testimony was of any material character, or would throw any light on the transaction, a continuance was properly refused, though accused did not summon the witnesses, because he relied implicitly on their being present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335, 1336; Dec. Dig. § 598.*]

2. CRIMINAL LAW (§ 539*)—EVIDENCE—TESTIMONY OF ACCUSED AT EXAMINING TRIAL—WARNING—NECESSITY.

While, if accused takes the stand on the examining trial as a witness and is sworn, his testimony may be reproduced against him in any subsequent trial, whether he was warned or under arrest or not, yet where he makes a statement, as required by the statute, in the examining trial, the state, before introducing such testimony, must show a warning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1230; Dec. Dig. § 539.*]

3. CRIMINAL LAW (§ 1091*)—APPEAL—BILLS OF EXCEPTION.

Bills of exception must be certain, and show clearly the exact question complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2828; Dec. Dig. § 1091.*]

4. CRIMINAL LAW (§ 1144*)—APPEAL—BILL OF EXCEPTIONS—PRESUMPTIONS.

Where the bill of exceptions, complaining of the court's action in permitting the state to prove accused's testimony on the examining trial over accused's objection that he was under arrest at the time and was not warned, did not show whether the testimony was taken in the examining trial, or whether it was a statement made by accused after due warning, it would be presumed that the court ruled correctly, and that it was the sworn testimony of accused that was offered in evidence and hence admissible, though accused was under arrest and no warning was given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3029; Dec. Dig. § 1144.*]

5. HOMICIDE (§ 23*)—MURDER IN SECOND DEGREE—ELEMENTS.

Evidence that accused, a stout, vigorous young man, became angered and stabbed to death deceased, an unarmed, feeble old man, because the latter refused to give accused some keys, so that he might procure feed for hogs, clearly made out a case of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40; Dec. Dig. § 23.*]

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Henry Kirkpatrick was convicted of murder, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at ten years' confinement in the penitentiary.

Appellant presented a second application for continuance, which was overruled by the court. Appended to the bill presenting the matter is the following qualification of the court: "The witnesses Kay and Stotts appeared and testified on the trial. The witness Mrs. Thorn is the mother of defendant, and Mrs. Stapler is his aunt. Both are very old and feeble, and defendant lived with them up to a few months ago, and now lives right near and knows their condition. That these witnesses were absent at the former term, when a continuance was granted defendant for them. He, to be diligent, should have taken their deposition." We think this qualification of the court disposes of any merit in appellant's bill of exceptions. Article 798 of the Code of Criminal Procedure of 1895 provides: "Depositions of witnesses may also, at the request of the defendant, be taken in the following cases: (1) When the witness resides out of the state. (2) When the witness is aged or infirm." See Evans v. State, 12 Tex. App. 370. Appellant in his application states the fact that the reason he did not summon said witnesses was because he relied implicitly upon their being present. Yet he further swears they were both old and infirm. In the light of this record, in addition to the above, we do not think the testimony of said witnesses would justify a continuance outside of this fact, since the record does not show their testimony was of any material character or would throw any light upon the transaction. That said witnesses knew of the previous bickerings and ill feelings is a fact testified to by other witnesses, and no one saw the immediate difficulty, except appellant and deceased; and, being the second application, this itself would render harmless the ruling of the court.

The only other bill of exception in the record complains of the action of the court in permitting the state, over appellant's objection, to prove up the contents of the testimony given by the defendant in the examining trial; the ground of objection being that defendant was not warned, and because defendant was under arrest at the time of said trial, and because no warning of any character was proved to have been given the defendant before he made said statement. The bill shows that the original testimony of the defendant in the examining trial had been lost, and the state placed the witness Britton on the stand, who was county attorney at the time of the examining trial, and

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by him proposed to prove up the contents of the lost paper. The bill shows that the objection was not made to the reproduction of the testimony, but that the testimony was inadmissible because defendant was not warned and under arrest. So it will be seen that the bill of exception leaves it in doubt whether this was simply a statement of the defendant in the examining trial, or whether it was sworn testimony of defendant on said trial. The law of this state is that, if the defendant took the stand on the examining trial as a witness and was sworn, then his testimony could be reproduced against him in any subsequent trial, and it would be immaterial whether he was warned or under arrest or not. If, however, appellant made a statement as required by the statute in the examining trial, then the state, before introducing said testimony, would have to show a warning. We have uniformly held that bills of exception must be certain, and must show clearly the exact question complained of. This bill does not do so. In the case of Dill v. State, 35 Tex. Cr. R. 240, 33 S. W. 126, 60 Am. St. Rep. 37, the rule as suggested above was clearly laid down. Being unable to ascertain from the bill whether it was testimony taken of the defendant in the examining trial, or whether it was a statement, after due warning, made by defendant, we would presume that the court ruled correctly, and that it was the sworn testimony of the defendant that was offered in evidence. Furthermore, we think the record shows, not quite conclusively, however, that it was the testimony of the defendant that was introduced. In the condition of the bill of exception, there is nothing requiring a reversal of the case.

The charge of the court was correct, and there is no serious objection made to it. To whatever extent appellant's special charges were applicable, they were covered in the main charge. The facts show that appellant was a stout, vigorous young man, and deceased was a feeble old man, weighing between 95 and 100 pounds. Appellant stabbed him to death. From no standpoint is there any real valid excuse or justification offered for this killing. It is true appellant claimed self-defense; but the facts are conclusive against this suggestion, showing clearly that deceased, an old man, was unable to do any harm to appellant. He had no gun or pistol, and appellant with a knife, as suggested, stabbed him to death. The occasion of the difficulty was that deceased had failed to feed some hogs belonging to an aunt of appellant. He demanded the keys of deceased, in order that he (appellant) might feed them. Being refused the keys, he became angered, and out of this trivial reason the difficulty occurred, in which appellant stabbed deceased to death. This clearly makes out a case of murder in the second degree, and the evidence amply supports the verdict.

The judgment is in all things affirmed.

RASOR v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Motion for Rehearing Withdrawn Oct. 6, 1909.)

1. GAMING (§ 91*)—INDICTMENT—STATUTES.

An indictment charged that accused, on September 5, 1907, in T. county, did unlawfully keep, and was then and there interested in keeping, a building, room, or place to be used as a place to bet, wager, and gamble with cards, and was then and there interested in the keeping of such building, etc., where people resorted for that purpose. Another count charged that defendant, in the same place, on the same day, did unlawfully and knowingly permit the building, room, and place which was then and there under his control to be used as a place to bet, wager, and gamble with cards, and as a place where people resorted for that purpose. *Held*, that such counts stated an offense under Acts 30th Leg. 1907, p. 107, c. 49, prohibiting the keeping of any building, room, or place for gambling purposes, etc.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 256–262; Dec. Dig. § 91.*]

2. JURY (§ 58*)—METHOD OF DRAWING—JURY WHEEL LAW.

Acts 30th Leg. 1907, p. 269, c. 139, providing for the drawing of jurors in counties having a city or cities containing a population aggregating 30,000 or more according to a certain census, is constitutional.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 266; Dec. Dig. § 58.*]

3. JURY (§ 72*)—ABSENT JURORS—DILIGENCE.

Accused having requested the court to issue process for absent jurors, the clerk was directed to issue an attachment, which was placed in the hands of the sheriff, who within two hours reported back to the court that the absent jurors could not be found in the city, and that they lived in the country at a distance ranging from 8 to 20 miles. The sheriff had previously returned that eight of the jurors could not be found in the county. *Held*, that the sheriff's diligence was insufficient to justify the court in ordering talesmen.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 333–335; Dec. Dig. § 72.*]

4. CRIMINAL LAW (§ 1166½*)—APPEAL—PREJUDICE.

Where there was nothing to show that any prejudice existed against defendant in the minds of talesmen improperly summoned, and it also appeared that he received the minimum punishment for an offense clearly proved, a conviction would not be reversed because of the court's error in ordering talesmen on an insufficient showing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3114; Dec. Dig. § 1166½.*]

5. CRIMINAL LAW (§ 369*)—EVIDENCE—PRIOR TRANSACTIONS.

In a prosecution for keeping a gambling room, evidence that witnesses had seen gambling carried on at the place many times within six weeks immediately before the offense relied on for conviction was claimed to have occurred was admissible, under the rule that evidence of acts of control, ownership, and direction by accused of the place where the gambling was done,

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both before and immediately after the time charged in the indictment, is admissible to prove the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

6. GAMING (§ 97*)—EVIDENCE.

In a prosecution for maintaining a gambling room, evidence that a deputy sheriff, in raiding the room, found several persons there playing poker while sitting at a table with chips in front of them, and that K., who was co-operating with accused, was there cashing chips, but that defendant was not there, together with a description of the table and a washstand in which chips and cards were found, was admissible.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 286; Dec. Dig. § 97.*]

7. INDICTMENT AND INFORMATION (§ 86*) — VENUE.

An indictment charging the maintaining of a gambling room in a building in T. county sufficiently alleged the venue.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 231; Dec. Dig. § 86;* Gaming, Cent. Dig. § 221.]

8. CRIMINAL LAW (§ 829*) — REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

The refusal of a request to charge, substantially given in the court's main charge, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

9. CRIMINAL LAW (§ 780*)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

Under the statute providing that the players testifying in a gambling case shall not be regarded as accomplices, the court did not err in refusing to charge that the witnesses who had been engaged in playing poker at the place run and controlled by defendant were accomplices.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859–1863; Dec. Dig. § 780.*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Walter Rasor was convicted of keeping a building, room, or place where people resorted for gaming, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged with keeping a building, room, and place where people resorted for the purpose of betting, wagering, and gambling with cards in the first count of the indictment, and in the second count with knowingly permitting a building, room, and place under his control to be used for said purpose. Both counts of the indictment were presented by the court to the jury, and the jury found appellant guilty, and assessed his punishment at two years' confinement in the penitentiary.

The charging part of the indictment is as follows: "* * * That one Walter Rasor, alias Shorty Rasor, alias Shorty, alias A. J. Ward, alias J. A. Ward, in the county of Tarrant and state aforesaid, on the 5th day of September in the year of our Lord one thousand nine hundred and seven, did unlawfully keep, and was then and there interested in keeping, a building, room, and place for the purpose of being used as a place to bet, wager, and gamble with cards, and did then and there keep, and was then and there interested in keeping, said building, room, and place as a place where people resorted for the purpose of betting, wagering, and gambling with cards, against the peace and dignity of the state. And the grand jurors aforesaid, upon their oaths as aforesaid, do further present in and to said court that one Walter Rasor, alias Shorty Rasor, alias Shorty, alias A. J. Ward, alias J. A. Ward, in the county and state, on the date aforesaid, did unlawfully and knowingly permit a building, room, and place, which was then and there under the control of the said Walter Rasor, alias Shorty Rasor, alias Shorty, alias A. J. Ward, alias J. A. Ward, to be used as a place to bet, wager, and gamble with cards and as a place where people resorted for the purpose of betting, wagering, and gambling with cards, contrary to the form of the statutes," etc. Appellant filed a long motion to quash this indictment; but, without taking up appellant's criticism seriatim, we will say that the indictment is in strict consonance and accord with the statute passed by the Thirtieth Legislature. Laws 1907, p. 107, c. 49. We furthermore hold that the statute is not unconstitutional on the ground that it inflicts a cruel and unusual punishment.

Bill of exceptions No. 2 complains the court erred in organizing the jury in this case, insisting that the act of the Thirtieth Legislature known as the "jury wheel law" (Laws 1907, p. 269, c. 139) is unconstitutional. This has heretofore been decided against appellant in the case of Smith v. State (Tex. Cr. App.) 113 S. W. 289. The other matter complained of in said bill is embodied in the judge's qualification of the bill, which is as follows: "Instead of only 10 jurors appearing in response to the summons mentioned on the first part of the preceding page, 17 jurors appeared and 7 were excused by the court, and the sheriff's return showed that about 8 of said jurors could not be found in the county. The court, in response to motion of counsel for defendant to issue process for all of those jurors upon the regular jury for the week who had failed to appear for jury service, etc., caused process to be issued for the absent jurors, and directed the clerk to issue an attachment for said absent jurors, which was done, and said attachment placed in the hands of the sheriff. Whereupon the sheriff took said process and after about a couple of hours' time reported back to the court that said absent jurors could not be found in the city, and that they lived in the country at a distance ranging from 8 to 20 miles, and thereupon the court ordered the sheriff to go out and pick up talesmen, which was

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done." This showing, as evidenced by the explanation of the court, of the sheriff's diligence to secure the absent jurors, is not such as the law requires. It appears that in the first instance the sheriff reported the jurors were not to be found in the county. In the second instance it appears that after a casual inquiry of two hours he found they lived in the country, some 8 or 20 miles from the county seat. This clearly shows laches on the part of the sheriff in his effort to summon the jurors that had been drawn from the jury wheel; but we do not think it is such laches or such prejudice shown to appellant as will authorize a reversal of this case. The court excused 7 of the jurors, leaving 10 of the regular jury. There is nothing to show there was any prejudice existing in the minds of the talesmen against appellant. The facts in this case show that he received the minimum punishment. In a case where the facts are palpable, clear, and undisputed, showing that he did run a gambling hall or room, and was interested in running one, as in this case, we do not believe it is such error and laches on the part of the sheriff to summon the jury that will authorize a reversal of the judgment.

Bill of exceptions No. 3 complains that the court erred in permitting witnesses Smith, Hollingsworth, and Davidson, over appellant's objection, to testify that they had been at the place testified about from twice to as many as a half dozen times, covering a period of about six weeks immediately before September 5, 1907, that several persons were there each time playing poker, and that sometimes defendant was there, and during the absence of George Kilgore would attend to the game; that when Kilgore was there he attended to the game, and sold and redeemed chips, to all of which appellant objected on the grounds that these were prior occasions to the one mentioned in the indictment, and separate and distinct offenses, were not binding on appellant, and no allegations in the indictment to support such testimony, no allegations that said place was habitually kept or used for the purpose mentioned therein, and same was not binding on appellant, which objections were overruled by the court. There was no error in the admission of this testimony. Appellant was charged with keeping and being concerned in keeping a place where people resorted for the purpose of gambling and did gamble. Evidence going to show acts, control, ownership, and direction on the part of appellant of the place where the gambling was done, both before and immediately after the day alleged in the indictment, is admissible testimony to prove the facts in the case.

Bill of exceptions No. 4 complains the state was permitted to prove by deputy sheriffs that on the 5th day of September, 1907, which was the time relied on by the state, they raided the place on Second street over the Labor Temple saloon and found several persons there playing poker; that they were sitting at a table and had chips in front of them; that George Kilgore was there, but was not playing; that they saw him cash the chips, but that defendant was not there. They also testified about the table, describing it, and said table was, over appellant's objection, introduced in evidence, with a lot of chips, and a washstand drawer found in the room with chips and cards in it. Appellant objected to this testimony on the ground that same was immaterial, irrelevant, and was not binding on defendant; nor had it been shown that he owned or claimed same. An allegation that it had not been shown that he owned or claimed same is not a statement of a fact. Were we authorized to look to the statement of facts to complete a bill of exception, we would find that the statement of facts shows that Kilgore and appellant were co-operating together as partners or agents in running a gambling hall. There was no error in the ruling of the court.

Bill of exceptions No. 5 complains that the indictment failed to describe the place where the offense charged therein was committed, further than to state that it was a building and room in Tarrant county, and that while the witnesses Snow, Roark, Smith, Hollingsworth, Davidson, Robinson, and Evatt were on the stand as witnesses for the state during the trial of this case they were each permitted, over appellant's objection, to testify to the effect that said place was located on Second street, between Houston and Throckmorton, over the Labor Temple saloon. There was no error in the court permitting this testimony. The indictment does not have to be more explicit than the one above quoted.

Bill of exceptions No. 6 complains that the state was permitted to prove that during the absence of Kilgore appellant sold chips to the players and redeemed them at the end of the game, but that when Kilgore was present Kilgore attended to the game, and that appellant paid the rent on the place, taking receipt therefor in the name of one Ward, whereupon the defendant requested the court to give the jury the following charge, as follows: "Gentlemen of the jury, you are charged that the defendant cannot be convicted in this case unless he owned some interest in the business being run at the place testified about, and if you do not believe beyond a reasonable doubt, from the testimony introduced, that he had or owned such interest, then you will acquit the defendant." Appellant also asked the court to charge the jury as follows: "You are charged that, before you can convict in this case, you must believe from the evidence that defendant was the owner, lessee, or tenant of the building, room, or place mentioned in the indictment, or had some interest therein, and if you do not so believe, from the evidence introduced, beyond a reasonable doubt, you will acquit the defendant." These

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charges were substantially given in the court's main charge, and it was not necessary to repeat same.

Bill of exceptions No. 7 complains that the court erred in not charging that the witnesses who had been engaged in playing poker at the place run and controlled by appellant were accomplices. The statute does not make the witnesses accomplices, but explicitly says they are not where they testify in a gambling case.

We have carefully reviewed all of appellant's bills of exception, and other questions raised in this record; and, finding no error in the record, the judgment is affirmed.

SPELL v. WM. CAMERON & CO., Inc.

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Withdrawn Oct. 4, 1909.)

APPEAL AND ERROR (§ 389*)—PROCEEDING IN FORMA PAUPERIS—PROOF—SUFFICIENCY.

The proof by appellant, attempting to appeal under Rev. St. 1895, art. 1401, authorizing an appellant to appeal, though unable to pay costs or give security therefor, on making proof of his inability, must be made either before the county judge of the county where appellant resides or before the court trying the case, and an affidavit subscribed and sworn to before a notary public is insufficient to confer jurisdiction on the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2075; Dec. Dig. § 389.*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by Lucy Spell, guardian and next friend, of Oscar Spell, against William Cameron & Co., Incorporated. From a judgment for defendant, plaintiff appeals. Dismissed.

John J. O'Fiel and A. M. Hill, for appellant. Taliaferro & Nall and Sleeper, Boynton & Kendall, for appellee.

McMEANS, J. Lucy Spell, as guardian and next friend of Oscar Spell, a minor, brought this suit against Wm. Cameron & Co., Incorporated, to recover damages for personal injuries alleged to have been sustained by the minor while in the employment of the defendant. From a judgment in favor of the defendant, the plaintiff attempted to appeal to this court under the provisions of article 1401 of the Revised Statutes of 1895, which reads as follows:

"Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence, and to determine the right of the party, under this article to his appeal."

The affidavit provided for in the foregoing article was subscribed and sworn to by Lucy Spell before A. M. Hill, a notary public of Hardin county, and contained substantially all the essential statements prescribed by the statute. But the statute clearly requires that proof of appellant's or plaintiff in error's inability to pay the costs of appeal or give security therefor shall be made either before the county judge of the county where such party resides or before the court trying the case. We think that, in order to confer jurisdiction on this court on appeal by an affidavit of inability to pay costs of appeal or give security therefor, it is requisite that proof should be made before one or the other of the tribunals named in the statute, and that, appellant having in that regard failed to comply with its requirements, the appeal should be dismissed; and it is so ordered. Kalkosh v. Bunting, 40 Tex. Civ. App. 233, 88 S. W. 389; Wood v. Railway, 43 Tex. Civ. App. 590, 97 S. W. 323; Graves v. Horn, 89 Tex. 77, 33 S. W. 322.

Appeal dismissed.

PARTIN, FONDREN & FOWLER et al. v. WALLACE.

(Court of Civil Appeals of Texas. June 30, 1909. Rehearing Denied Oct. 7, 1909.)

1. MASTER AND SERVANT (§ 82*)—WAGES—LIENS—AFFIDAVIT.

An affidavit for a lien under Sayles' Ann. Civ. St. 1897, art. 3339b, for labor, which states the amount of the debt, and that it was for labor performed, and which avers that the affidavit was made to fix a lien on the product, is sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 134; Dec. Dig. § 82.*]

2. MASTER AND SERVANT (§ 82*)—WAGES—STATUTORY LIENS—PROCEEDINGS TO PERFECT.

An indebtedness for labor accrues on the date fixed by agreement for the payment therefor, and a lien for the labor filed within 30 days after such date is filed within 30 days after the accrual of the indebtedness as required by Sayles' Ann. Civ. St. 1897, art. 3339b.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 133, 134; Dec. Dig. § 82.*]

3. MASTER AND SERVANT (§ 82*)—WAGES—STATUTORY LIENS—BONA FIDE PURCHASERS.

A laborer's lien given by Sayles' Ann. Civ. St. 1897, art. 3339a, is not such a lien as is given by Const. art. 16, § 37, to a mechanic or artisan, and a laborer's lien depends on the statute and is subject to its terms, one of which

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protects a purchaser without actual or constructive notice of the lien.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 131; Dec. Dig. § 82.*]

Appeal from Tyler County Court; A. G. Reid, Judge.

Action by E. P. Wallace against Partin, Fondren & Fowler, in which T. H. Neyland and another, partners, intervened. From a judgment for plaintiff, defendants and interveners appeal. Affirmed in part. Reversed and remanded in part.

Mooney & Mann, for appellants. Joe W. Thomas, for appellee.

REESE, J. In this case E. P. Wallace sued Partin, Fondren & Fowler in the county court to recover $268 alleged to be due for services as sawyer at their sawmill. Plaintiff also set up a laborer's statutory lien on 1,000 railroad ties, the product in whole or in part of his labors, which lien he sought to foreclose. F. C. Holland, trustee under a deed of assignment, was also made a party defendant, and answered, disclaiming any interest in the ties, which had not come into his possession. The lien was filed under the statute on July 22, 1908. Suit filed August 27, 1908. T. H. Neyland, a firm composed of T. H. Neyland and J. P. Mann, intervened, claiming to be purchasers of the ties without notice of the lien. To this plaintiff replied, alleging notice to interveners, and that they had converted the ties to their own use, and praying judgment for their value. It developed upon the trial that $86.75 of plaintiff's account was for boarding the hands, and the court rendered judgment against defendant Partin, Fondren & Fowler for the amount sued for and foreclosing the lien as against them and Holland to the extent of $181.25 and against intervener T. H. Neyland for $181.25, the amount of the account secured by the lien. Defendants and interveners both have perfected appeal, but there are on file no briefs for defendants. The affidavit of appellee as to the lien is sufficient under the statute. It was not necessary to state in the affidavit that the ties were manufactured by his labor. The amount of the debt was stated, and that it was for labor and services performed. It was further stated that the affidavit was made for the purpose of fixing a lien on the 1,000 ties. Article 3339b, Sayles' Ann. Civ. St. 1897.

The first, second, and fourth assignments of error are overruled. There was no error in finding as a fact that the lien was filed within 30 days of the accrual of the indebtedness. The evidence was sufficient to show that there was an agreement to pay on July 1, 1908, and the indebtedness accrued then. Sparks v. Crescent Lumber Company, 40 Tex. Civ. App. 222, 89 S. W. 423.

The third assignment of error presenting the question is without merit. The trial court found that the interveners purchased and paid for the ties prior to July 22, 1908, when the lien was fixed under the statute. According to this finding, the interveners had no constructive notice of the lien at the time they bought and paid for the ties, and by the express terms of the statute they are protected unless they had at the time of the purchase actual notice "of the claim of the lienholder" upon the ties. Article 3339b, Sayles' Ann. Civ. St. 1897. The court makes no finding upon the issue of actual notice. The burden of proof upon this issue would be upon appellee, as the evidence shows that interveners are purchasers of the ties, and this fact protects them "unless" they had actual or constructive notice before their purchase. The evidence does not show such actual notice of the "claim of the lienholder" on the ties prior to the purchase, and payment therefor, by interveners. The findings of the trial court tend to the conclusion that this issue was not considered material. As we view it, appellee's right to recover of interveners depends upon proof of this fact of notice. Sayles' Ann. Civ. St. 1897, art. 3339b. The lien of appellee is not such a lien as is given to a mechanic or artisan on any article made by him by section 37, art. 16, Const. It was not so treated by appellee himself, who speaks of it as a laborer's lien, and the ties as the product of his labor, in the language of article 3339a, which deals with a different class of liens from those given by the Constitution. Appellee's lien depends alone on the statute referred to, and is subject to its terms and provisions, one of which protects the purchaser without notice actual or constructive of the property upon which the lien is claimed. The case of Keating Imp. Co. v. Marshall Elec. Co., 74 Tex. 605, 12 S. W. 489, and other authorities to the same effect, cited by appellee, have no application. The evidence does not appear to have been fully developed on this point of notice. For this reason, the judgment is reversed as to the interveners and the cause as to them remanded. The judgment as to the defendants Partin, Fondren & Fowler, for debt and foreclosure, and against the trustee Holland for foreclosure, is affirmed; no error being showr as to them. Except as indicated, the assignments present no error, and are overruled. One-half of the costs of appeal will be taxed against appellee and one-half against appellants Partin, Fondren & Fowler.

Affirmed in part. Reversed and remanded in part.

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GROSS v. COLONIAL ASSUR. CO.

(Court of Civil Appeals of Texas. June 30, 1909. Rehearing Withdrawn Oct. 6, 1909.)

1. INSURANCE (§ 336*)—WARRANTIES—PROMISSORY WARRANTIES—WARRANTY AGAINST ANOTHER INSURANCE.

A clause in a fire insurance policy forbidding other concurrent insurance unless permitted is a promissory warranty, so that strict compliance therewith is essential to a recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856–873; Dec. Dig. § 336.*]

2. INSURANCE (§ 336*)—WARRANTIES—STATUTORY PROVISIONS—CONSTRUCTION.

Rev. St. 1895, art. 3096aa, added by Acts 28th Leg. 1903, p. 94, c. 69, § 1, provides that any provision of an insurance contract, which provides that any answers or statements made therein or in the application, if untrue or false, shall render the policy void, shall be of no effect unless the matter misrepresented is material to the risk. A fire insurance policy provided that it should be void if assured then had, or thereafter procured other insurance. *Held*, construing the statute under the assumption that it was enacted with knowledge of the judicial doctrine of promissory warranties and representations, and requiring strict compliance with the former, that it did not abolish such doctrine, and the policy was avoided by carrying policies in other companies, $750 in excess of the $37,000 concurrent insurance permitted, and the small amount of the excess, compared with the total insurance permitted, did not excuse the violation of the provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856–873; Dec. Dig. § 336.*]

3. STATUTES (§ 214*)—CONSTRUCTION—LEGISLATIVE INTENT.

If a statute is not ambiguous, its meaning and legislative intent must be determined from the language used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 290; Dec. Dig. § 214.*]

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by Boone Gross, trustee, against the Colonial Assurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Louis & Masterson, for plaintiff in error. Wm. Thompson and G. S. Wright, for defendant in error.

McMEANS, J. Boone Gross, trustee of the estate of S. L. Sam Dry Goods Company, bankrupt, sued the Colonial Assurance Company upon a policy of fire insurance. It was alleged, and shown by the evidence, that the defendant has issued its policy of insurance in the sum of $2,000 to L. R. McFarlane, receiver of the S. L. Sam Dry Goods Company, on the 29th day of November, 1907, insuring against direct loss or damage by fire to the stock of goods formerly the property of the S. L. Sam Dry Goods Company, which had been adjudged a bankrupt; that afterwards the plaintiff, Gross, was elected trustee of the bankrupt estate, and was acting as such trustee in bringing this suit; that two days after the issuance of the policy a fire, originating in adjoining buildings, was communicated to the property insured, which was partly destroyed, and greatly damaged, causing a loss in excess of all insurance in force upon the same. The defendant pleaded a failure to comply with the iron-safe clause, and also a violation of the concurrent insurance clause. The case was submitted to the court, and upon conclusion of the evidence judgment was rendered for the defendant. Plaintiff has appealed.

The court filed its findings of fact, from which we make the following statement: At the time of the appointment of McFarlane as receiver the S. L. Sam Dry Goods Company held policies of fire insurance on its stock of merchandise in the amount of $35,750, which insurance was carried in various companies, but none of which was carried by the defendant. In each of said policies there was granted permission for carrying of only $35,000 insurance. These policies were turned over to McFarlane at the time of his appointment as receiver, but certain of the insurers declined to consent to the policies issued by them being transferred to McFarlane as such receiver, and by consent of McFarlane these policies were canceled, and in lieu thereof McFarlane obtained other insurance, including the policy sued on. This policy contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The defendant gave to McFarlane permission to carry insurance in the amount of $35,000 upon the property by the following words inserted in the face of its policy: "Thirty-five thousand dollars total concurrent insurance permitted, including this policy." At the time of the fire the total amount of insurance upon the stock of goods, etc., was $35,750, being $750 in excess of the amount permitted by the defendant in the policy sued on. Neither the plaintiff nor the defendant knew of this excess at the time of the issuance of the policy or at the time of the fire. The trial court expressly found that "the excess insurance in the sum of $750, in view of the total line carried, * * * was in an immaterial amount, and not material to the risk, and that said overinsurance did not in any way actually contribute to the loss or damage by fire. * * *"

The court's conclusion of law is as follows: "The provision of the policy which provided that the same should be void if the insured have or take insurance unless agreed to by the company having been violated by the excess insurance of $750, and this provision of the policy being a warranty, the policy was void by reason of such violation. Acts 1903, 28th Leg. p. 94, c. 69, known as Rev. St.

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art. 3096aa et seq., does not apply to fire insurance, and was not so intended by the Legislature. The materiality of the violation of said provision in the policy cannot therefore be inquired into. I, therefore, conclude that, the said warranty in the policy having been violated, the policy was rendered void, and the plaintiff cannot recover herein; but if the court is mistaken in this construction of the statute above, nevertheless, it would not apply in this particular case." These conclusions are attacked by appellant in his various assignments of error. In the view we take of the case it is unimportant, and not necessary for us to determine, whether the act of 1903 applies to both fire and life insurance or life insurance only. The first section, which is there called "article 3096aa," provides: "That any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit upon such contract unless it be shown upon the trial thereof that the matter or thing represented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was so material and so contributed in any case, shall be a question of fact to be determined by the court or jury trying such case." Plaintiff in error contends that the act applies to that provision of the policy relating to other insurance in amount beyond the sum consented to by the defendant, and that the act of the insured in procuring insurance in excess of the amount permitted would not avoid or forfeit the policy, unless it was shown that the breach was material to the risk, or actually contributed to the contingency on which the policy became due and payable. To this contention we cannot agree. At the time of the passage of the act the doctrine of promissory warranties was recognized and accepted by our courts, and for a long time prior thereto the decisions had made a distinction between representations and such warranties. In Kelly, Goodfellow Co. v. Liberty Insurance Co., 8 Tex. Civ. App. 227, 28 S. W. 1027, it was held that the iron-safe clause in a policy of fire insurance was a promissory warranty, and that strict compliance therewith was a condition precedent to a recovery. The iron-safe clause and "the other insurance" clause are of the same character, both being promissory warranties; and in Insurance Co. v. Storm, 6 Tex. Civ. App. 390, 25 S. W. 318, it was held that the violation of the "other insurance" provision avoided the policy. Thus stood the law as construed by our courts at the time of the adoption of the act.

We can assume that when the Legislature passed the act it did so with the knowledge of the decisions of our courts in reference to promissory warranties, and the distinction between such warranties and statements or representations, and if it had intended or desired to abolish those distinctions or overthrow the doctrine of promissory warranties, it could have easily done so by language expressing such intention. It is a well-settled rule of construction that where there is no ambiguity in the statute, its meaning and the legislative intent must be determined from the language used. It seems to us that the language of the act cannot be so construed to make it the "other insurance" clause. It simply applies to "Any provision of an insurance contract which provides that any answers or statements made in application or contract of insurance, if untrue or false, shall render the contract or policy void * * * shall be of no effect, unless it be shown * * * that the matter or thing misrepresented was material to the risk," etc. The provision of the policy to which plaintiff in error seeks to have this language apply is as follows: "This entire policy shall be void if the assured now has or shall hereafter make or procure any other contract of insurance whether valid or not," etc. This provision does not provide that any statement or answer, if untrue or false, shall render the policy void. We are of the opinion that the language of the act in question is not ambiguous, and under the rule of construction above stated the language clearly implies that it was not the intention of the Legislature to disturb or abolish the doctrine of promissory warranties by including them in the act. This construction is borne out by the recent case of Scottish Union & National Insurance Company v. Weeks Drug Company, decided by the Court of Civil Appeals of the Fourth District, in which a writ of error was denied by the Supreme Court (118 S. W. 1086). The policy sued on in that case contained a provision to the effect that "The assured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and for credit," etc. A violation of this provision was pleaded by defendant, and on the trial it was shown that the books kept by the insured failed to show any entry of the cash sales from November 23, 1907, to the date of the fire, which occurred on January 3, 1908. Plaintiff contended that the provision of the act of 1903 (article 3096aa) made the keeping of such items of the cash account not material to the risk in view of an inventory taken subsequently to the issuance of the policy. In overruling this contention Chief Justice James, who delivered the opinion of the court, says: "The peculiar wording of the statute makes it apply only to the truth or falsity of answers or statements in the application or contract, and not what was agreed in the contract to be performed. The case of Insurance Company

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v. Whitaker, 112 Tenn. 151, 79 S. W. 121, 64 L. R. A. 451, 105 Am. St. Rep. 916, did not involve a statute worded as this one. The contract was clearly violated by the failure to record the cash sales in the books for the period named, and the consequence of this breach is written in the contract itself, * * * which plaintiff must abide by, having agreed to it. * * *" Applying the reasoning in that case to the instant case, we hold that the contract of insurance sued on was violated by the insured in effecting insurance upon the property in excess of the amount permitted by the contract, and that this violation rendered the contract void. Nor do we agree to the contention of plaintiff in error that the amount of excess, viz., $750, was so infinitesimal and insignificant, as compared to the total insurance permitted, as not to warrant consideration as a violation of the clause prohibiting the carrying of insurance in excess of the amount permitted.

We are of opinion that the assignments of error presented by plaintiff in error, all of which have been considered by us, point out no reversible errors, and that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

TEXAS MEXICAN RY. CO. et al. v. REED.†

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 7, 1909.)

1. CARRIERS (§ 13*)—RATES—DISCRIMINATION.
Under the statute prohibiting discrimination by charging one shipper a different rate from that charged another, a lower rate charged in a particular case, unless shown to be open to all shippers, is prohibited as a discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 22; Dec. Dig. § 13.*]

2. CARRIERS (§ 13*)—RATES—CONTRACT RATE—MISTAKE—DISCRIMINATION.
Where the freight rate specified in a cattle transportation contract was a mistake, it being the intention of both parties that the regular rate should be charged, there was no discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 22; Dec. Dig. § 13.*]

3. CARRIERS (§ 192*)—LIVE STOCK CONTRACT—KNOWLEDGE OF PROVISIONS.
Where plaintiff did not ask for a special rate for the transportation of his cattle, and knew that the contract, which, in fact, specified an erroneous rate, was made with the understanding that the rate to be charged was the regular rate, such understanding formed a part of the contract, and it was therefore immaterial that he did not know of a provision therein that the rate named was subject to correction so as to conform to that prescribed by the railroad commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 192.*]

4. CARRIERS (§§ 193, 219*)—TRANSPORTATION OF CATTLE—MISTAKE IN RATE.
Plaintiff contracted for the transportation of certain cattle at $29 a car, both he and the initial carrier's agent believing that such was the regular rate. On the cattle arriving at destination, plaintiff was notified that the rate was $30 a car, which the agent of the last connecting carrier demanded as a condition to delivery of the cattle. Plaintiff refused for several hours to pay the additional charge until the agent obtained authority to deliver the cattle without payment, when plaintiff, because of the lateness of the hour, refused to receive the cattle until the next day. *Held*, that plaintiff was liable for the additional charge, and, the carrier having a statutory right to hold the cattle until all the freight was paid, plaintiff could not complain of injury to the cattle by their detention unless the carrier was negligent in caring for them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 950; Dec. Dig. §§ 193, 219.*]

5. CARRIERS (§ 193*)—CATTLE TRANSPORTATION—CONNECTING CARRIER.
A connecting carrier being bound to accept and forward cattle delivered to it by the initial carrier was not bound by a freight rate less than the legal rate specified by the agent of the connecting carrier by mistake.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 193.*]

6. CARRIERS (§ 219*) — TRANSPORTATION OF CATTLE—NEGLIGENCE—PROXIMATE CAUSE.
Where the detention of plaintiff's cattle by the last connecting carrier which resulted in damage to them could have been prevented by plaintiff's conceding to the carrier's demand for $21 additional freight, which plaintiff was then able to pay, the initial carrier's negligence in quoting plaintiff an incorrect rate was not the proximate cause of the damage to the cattle by the delay so as to render such initial carrier liable therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 950; Dec. Dig. § 219.*]

Appeal from District Court, Goliad County; James C. Wilson, Judge.

Action by J. P. Reed against the Texas Mexican Railway Company and others. From a judgment in favor of plaintiff against the Texas Mexican Railway Company alone, it appeals, and plaintiff files cross-errors. Reversed and rendered in part, and affirmed in part.

A. E. Atlee, Proctor, Vandenberge & Crain, and Fowler & Fowler, for appellant. G. E. Pope and H. J. Passmore, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellant and the Galveston, Harrisburg & San Antonio Railway Company and the San Antonio & Aransas Pass Railway Company to recover damages for the alleged wrongful detention by the defendants of 699 head of cattle shipped by appellee over the railroad lines of said defendant companies from Pierce Station, in Wharton county, to Hebbronville, in Duval county.

The petition alleges, in substance, that the Galveston, Harrisburg & San Antonio Railway Company owns and operates a line of railway extending from the town of Pierce, Tex., to Beeville, in Bee county, Tex., and there connects with the line of railway owned and operated by the defendant the San Antonio & Aransas Pass Railway Company;

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† Application for writ of error denied by Supreme Court.

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that said last-named defendant owns and operates a line of road which extends from said town of Beeville to the town of Alice, and there connects with a line of railway owned and operated by defendant the Texas Mexican Railway Company, which said defendant owns and operates a line of railway extending from the town of Alice to the town of Hebbronville, and that said several railway companies owned and operated said respective lines of road between said points named on the 22d day of June, 1905; that said several respective lines of road did then constitute a through line of transportation from said town of Pierce to said town of Hebbronville; that said railway companies were at said time engaged in the business of common carriers for hire between said points aforesaid; that on June 22, 1906, plaintiff owned 699 head of beef cattle, which he desired to ship from said town of Pierce to said town of Hebbronville, and on said date he delivered said cattle to defendant the Galveston, Harrisburg & San Antonio Railway Company, and paid said railway company all the charges due and demanded by said railway company for the transportation of said cattle from Pierce to Hebbronville, as aforesaid, and said Galveston, Harrisburg & San Antonio Railway Company then and there received said cattle to be transported by it and its connecting carriers on a through contract of shipment from said town of Pierce to said town of Hebbronville, and there to be promptly delivered to plaintiff; that said defendants the San Antonio & Aransas Pass Railway Company and the Texas Mexican Railway Company recognized, acquiesced in, and acted on said contract so made by the plaintiff for the transportation of said cattle, and plaintiff says that defendants had full knowledge of the fact that plaintiff had prepaid the freight charges on said cattle at Pierce as aforesaid, and, with full knowledge of said fact, recognized said contract and received and transported said cattle, as hereinafter set out; that said cattle were delivered to defendant the Galveston, Harrisburg & San Antonio Railway Company on the 22d day of June, 1906, at 6 o'clock p. m., and were transported by said defendants on their several lines of railway aforesaid to Hebbronville, reaching said place at about 1:30 p. m., on the 23d day of June, 1906, and, immediately upon the arrival of said cattle at Hebbronville, plaintiff demanded possession of his said cattle of said Texas Mexican Railway Company, and said defendant, acting by and with the advice and consent of said other defendants, and being instigated thereto by said other defendants, willfully and without authority of law demanded of plaintiff $21 freight in addition to and in excess of the freight agreed upon between plaintiff and the said Galveston, Harrisburg & San Antonio Railway Company, and which said freight agreed upon and paid by plaintiff to said railway company, as aforesaid, amounted to the sum of $609, and which said sum of freight charges were clearly shown by and specified in said contract of shipment, and said defendants, acting together, with the intention of extorting from this plaintiff said additional sum of $21 willfully and without authority of law refused to deliver plaintiff's said cattle to him, although plaintiff made repeated demands upon the agent of said Texas Mexican Railway Company, Hebbronville, for said cattle, but said railway companies, acting together, as aforesaid, refused to permit plaintiff to take possession of said cattle from 1:30 p. m. until 7 p. m. on said 23d day of June, 1906, when said agent at Hebbronville offered to deliver said cattle to plaintiff without the payment of said additional freight charges; that it was impossible for plaintiff, on account of its being late in the day, and on account of the near approach of night, to take charge of and properly care for said cattle when they were offered to him, as aforesaid, and by reason of the detention of said cattle by the Texas Mexican Railway Company, acting together with said other defendants, as aforesaid, he was compelled to leave his said cattle confined in the pens at Hebbronville until the morning of the 24th of June, 1906; that said agent knew, or should have known, that it was impossible for plaintiff to take his said cattle at said late hour in the day; that said cattle had already been confined in the pens and in said cars when they reached the town of Hebbronville for a period of 24 hours without food, and, by reason of the unlawful, willful, and outrageous conduct of defendants acting together, as aforesaid, plaintiff's said cattle were held in confinement without food for a further period of 17 hours beyond and in excess of the time necessary in the proper and speedy transportation and delivery of said cattle to him at Hebbronville, and that, by reason thereof, the said cattle became sick from want of food and sufficient supply of water, and were damaged thereby in the sum of $1,647.50; that, in addition thereto, defendants are liable to plaintiff for a penalty in the sum of $609 on account of their unlawful and willful conduct in attempting to force plaintiff to pay said sum of $21 in excess of the freight agreed upon and specified in said contract of shipment, and failing and refusing to deliver said cattle to plaintiff, upon his demand for same, as aforesaid. Then follow allegations of additional damages by reason of hand hire, horse hire, and other expenses incurred.

It is further alleged, in substance, that if plaintiff is mistaken in his allegations that the contract made by him with the Galveston, Harrisburg & San Antonio Railway Company, as before set out, was recognized and acquiesced in by the other defendants, and that said defendants, knowing that the freight on said cattle had been paid, acted together in wrongfully withholding said cat-

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tle from plaintiff, as before alleged, then plaintiff alleges and shows to the court that he made said contract with said defendant Galveston, Harrisburg & San Antonio Railway Company, and said defendant, by the terms of said contract, agreed to protect plaintiff in the through rate of freight specified in said contract and paid to it by plaintiff; that, if said defendant the Galveston, Harrisburg & San Antonio Railway Company contracted with plaintiff for a lower rate of freight on said cattle than the regular rate from Pierce to Hebbronville, such fact was entirely unknown to plaintiff, and, if such was not intended by said defendant, then plaintiff says the erroneous freight charge so given to him was the result of the negligence and carelessness of said defendant's agent at Pierce; that, relying upon the representations of said defendant's agent at Pierce and the stipulations contained in said contract, plaintiff believed he had paid all the freight charges due and collectible for the transportation of said cattle, and plaintiff relied upon the defendant the Galveston, Harrisburg & San Antonio Railway Company to notify said other defendants the San Antonio & Aransas Pass Railway and the Texas Mexican Railway Company of the fact that the freight charges on said cattle had been paid, and, in the event it should be found by court that said defendant the Galveston, Harrisburg & San Antonio Railway Company did not so notify said other defendants, then plaintiff would show to the court that same was due to the carelessness and negligence of said defendant, and resulted in the defendant the Texas Mexican Railway Company demanding of plaintiff said sum of $21 additional freight charges, supposed to be due on said cattle, and the holding of said cattle, because of plaintiff's refusal to pay said $21; that plaintiff would show to the court that said negligence and carelessness of the defendant the Galveston, Harrisburg & San Antonio Railway Company, in the first place, in fixing and charging an erroneous freight rate, as aforesaid, and, in the second place, in not notifying said other defendants that the freight charges on said cattle had been paid, as aforesaid, either one or both were the immediate and proximate cause of all the damages sustained by the plaintiff.

Appellant answered by general and special demurrers, by general denial, and four special pleas, substantially as follows:

(1) Appellant denied that it was guilty of the negligence alleged by plaintiff, but alleged that it was ready and willing to make delivery of the shipment on arrival at destination, and would have made prompt delivery of the same, and did tender to plaintiff the delivery of said shipment on the payment of the freight charges legally due, and which had not heretofore been paid by the plaintiff; that the sum of $609 alleged to have been paid by plaintiff as the agreed charges agreed upon by plaintiff and the Galveston, Harrisburg & San Antonio Railway Company was short of the legal charges, according to the published rate and the rate promulgated by the Railroad Commission of Texas for the shipment alleged; and that the amount appellant demanded in addition to said sum of $609, viz., $21, was the shortage which appellant was required by law to demand and collect, and that, if any delay was occasioned in the delivery of said cattle, such delay resulted from the delay and refusal of plaintiff to pay the said legal freight charges according to the published rate and the rate fixed by the Railroad Commission of Texas, and, in so refusing to pay said additional charges, was guilty of negligence contributing to his damages.

(2) That, if it were true that the Galveston, Harrisburg & San Antonio Railway Company fixed a rate of $609 for the shipment of appellee's cattle, nevertheless appellant was not bound thereby, and never ratified same; that, on the contrary, appellant and appellee entered into contracts in writing for the transportation of said cattle from Alice to Hebbronville at tariff rates, being the rate fixed by said Railroad Commission of Texas, which, from Pierce to Hebbronville, would be 15 cents per hundred, or an aggregate of $630 for the entire shipment.

(3) That, if appellee was injured at all, said injuries were due to the refusal of appellee to pay the freight rate fixed by the Railroad Commission after he had been fully informed of the true rate as fixed by said commission for the shipment of said cattle, and, after he had been informed that the rate as originally fixed by the Galveston, Harrisburg & San Antonio Railway Company was erroneous, the appellee well knowing that the rate as originally given him by the agent of the Galveston, Harrisburg & San Antonio Railway Company was subject to correction, so as to conform to the rates prescribed by said Railroad Commission; that in failing and refusing under the circumstances to pay said additional sum appellee was guilty of negligence, which contributed to causing his injuries.

(4) That, by the terms of the various contracts or bills of lading made by appellee with the various defendants to this suit for the transportation of his cattle, it was provided that said cattle were shipped thereunder subject to correction as to rate, weight, and classification, so as to conform to the rates, rules, and regulations prescribed by the Railroad Commission of Texas; that, according to such rates, rules, and regulations, the amount of the freight charges on said shipment was the sum of $630 in place of the sum of $609 paid by appellee, and therefore, according to the terms of said contracts, appellee was not entitled to delivery of said cattle until he had paid the balance of the freight charges due as fixed by said Railroad Commission.

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The defendant the Galveston, Harrisburg & San Antonio Railway Company answered by general and special demurrers, and general denial and various special pleas. By said special pleas said defendant pleaded:

(1) The terms of a written contract for the transportation of said cattle by said defendant, whereby it was agreed that said defendant should only be liable for the transportation of said cattle from Pierce to Beeville, and not liable for any injuries to said cattle beyond said point. That it had fully complied with its contract by transporting said cattle to Beeville with due care and dispatch, and delivering same to the San Antonio & Aransas Pass Railway Company for further transportation.

(2) That said written contracts specially provided that same were subject to correction as to rate, weight, and classification, so as to conform to the rates, rules, and regulations of the Railroad Commission of Texas, and that the sum of $609, claimed by appellee as the rate named in said contract, was erroneous, and was made by mistake of the agent of said defendant, who had no authority to make such rate, and same was not in accordance with the rate for such shipments as fixed by the Railroad Commission, but that said rate should have been fixed at $630, and sought recovery for the sum of $21, the difference between said sum and the sum paid by appellee, $609.

(3) That, if appellee was damaged, same was due to his refusal to pay the rate of freight as fixed by the Railroad Commission of Texas for such shipment after he had been fully informed what the true rate was, and after he had been informed that the original rate fixed was erroneous. That in refusing to pay said rate, under the circumstances, appellee was guilty of negligence contributing to his injuries.

The San Antonio & Aransas Pass Railroad Company answered by general and special demurrers, and general denial and various special pleas, whereby it was alleged: That said defendant was not bound by any rate fixed by the Galveston, Harrisburg & San Antonio Railway Company, which was not ratified by said defendant. That said defendant transported appellee's cattle from Beeville to Alice under written contracts at tariff rates fixed by the Railroad Commission from Pierce to Hebbronville, which was 15 cents per 100 pounds, or an aggregate of $630. That said defendant accepted said shipment and transported same under and by virtue of written contracts whereby it only undertook to transport and become responsible for the transportation of same over the line of its road from Beeville to Alice. That the injury and damage to appellee, if any, was due to his refusal to pay the true rate of freight fixed by the Railroad Commission of Texas after he had been fully advised that the rate originally fixed by the Galveston, Harrisburg & San Antonio Railway Company was erroneous, said appellee well knowing that the rate as originally given him by the agent of the Galveston, Harrisburg & San Antonio Railway Company was subject to correction, so as to conform to the rates prescribed by the Railroad Commission. That the refusal of appellee to pay said freight rate, as prescribed by said Railroad Commission, constituted negligence on his part, which contributed to causing said injuries and damages.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff against the appellant the Texas & Mexican Railway Company for the sum of $1,647.50 claimed by plaintiff as damages for depreciation in value of said cattle caused by their detention by said defendant, and in favor of the other defendants that plaintiff take nothing as against them. From this judgment the Texas & Mexican Railway Company has appealed, and plaintiff has also perfected a cross-appeal against the Galveston, Harrisburg & San Antonio Railway Company, and seeks a reversal of the judgment in favor of said defendant in event his judgment against appellant is not affirmed.

The facts found by the trial court are as follows:

"(1) I find: That on or about the 22d day of June, 1906, plaintiff was the owner of 699 head of beef cattle at or near the town of Pierce in Wharton county, Tex., which he desired to ship from the said town of Pierce to the town of Hebbronville, in Duval county, Tex.

"(2) That, before plaintiff purchased all of said cattle, he made inquiry of some person whom he did not know, not the superintendent, in the office of the Galveston, Harrisburg & San Antonio Railway Company in the building in which is situated the division headquarters of said company at Victoria, Tex., as to the rate on said cattle from El Campo, Tex., to Hebbronville, Tex., from which point the plaintiff first intended to ship his cattle, and was in said office of said Galveston, Harrisburg & San Antonio Railway Company, informed that said rate was $29 per car. That plaintiff then purchased a part of said cattle at or near El Campo after having been also informed by the agent of the Galveston, Harrisburg & San Antonio Railway Company at El Campo, that the rate on said class of cattle from El Campo to Hebbronville was $29 per car. That said cattle were situated, when bought by plaintiff, at a point about equal in distance from El Campo and Pierce. That on account of local conditions at the two places, El Campo and Pierce, it was decided by plaintiff to ship his said cattle from Pierce instead of El Campo. Before deciding to ship his cattle from Pierce instead of El Campo, plaintiff was informed by said agent of the Galveston, Harrisburg & San Antonio Railway Company at El Campo that the

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rate on said cattle from Pierce to Hebbronville would be and was the same as said rate on said cattle would be and was from El Campo to Hebbronville, and was also informed by the agent of the Galveston, Harrisburg & San Antonio Railway Company at Pierce, after discussion of the rate with said agent at Pierce, who at first charged $30 per car, that, before plaintiff would consent to ship his said cattle from Pierce instead of El Campo, he was assured by the said agent of the Galveston, Harrisburg & San Antonio Railway Company both at El Campo and Pierce, as aforesaid, that said rate was the same, to wit, $29 per car from Pierce to Hebbronville.

(3) That plaintiff relied on said representations of said agent at El Campo and of said agent at Pierce as to said rate, and that plaintiff entered into a binding contract with defendant the Galveston, Harrisburg & San Antonio Railway Company through its agent at Pierce for the transportation of said cattle from Pierce to Hebbronville for the remuneration of $29 per car, aggregating on the 21 cars of stock the sum of $609, which said sum of $609 plaintiff paid to said agent of the Galveston, Harrisburg & San Antonio Railway Company at Pierce when said contract was made, desiring, intending, and believing that he was paying the regular and full amount of freight charges on said cattle from Pierce to Hebbronville.

"(4) I find that said rate was an erroneous one, and was quoted through error on the part of the agents of the Galveston, Harrisburg & San Antonio Railway Company; that the rate as fixed by the Railroad Commission of Texas on such shipment from Pierce to Hebbronville is $30 per car or an aggregate of $630 on such shipment. The $21 demanded by the agent at Hebbronville was the difference between $609 collected as the freight between Pierce and Hebbronville and the amount of freight as fixed by the Railroad Commission of Texas.

"(5) I find that plaintiff had no knowledge of said rate so fixed by the Railroad Commission of Texas, and had no knowledge of said error on the part of the agents of the Galveston, Harrisburg & San Antonio Railway Company, and did not in any manner contribute thereto; that plaintiff paid said amount of $609 believing that same was correct, and relying on the said agent of the Galveston, Harrisburg & San Antonio Railway Company at Pierce to quote him the correct rate on said shipment.

"(6) I find: That bills of lading were issued by the Galveston, Harrisburg & San Antonio Railway Company to plaintiff for the shipment of said cattle from Pierce, showing the destination of said cattle to be Hebbronville. That a rate of $29 per car was stated as the rate in said bills of lading.

"(7) That said cattle were transported by said Galveston, Harrisburg & San Antonio Railway Company from Pierce on the 22d day of June, 1906, to Beeville, Tex., and there delivered to the San Antonio & Aransas Pass Railway Company, and by said San Antonio & Aransas Pass Railway Company were transported from Beeville, Tex., to Alice, Tex., and there delivered to the Texas Mexican Railway Company to be by it transported from Alice to Hebbronville. That, upon arrival of said cattle at Alice, plaintiff informed the Texas Mexican Railway Company's agent there that freight on said cattle was prepaid, and that said agent knew that the freight was all prepaid, and that same was $609 when he accepted same for transportation.

"(8) That said cattle arrived at Hebbronville at about 1 o'clock p. m., and were unloaded at about 1:30 o'clock p. m., on the 23d day of June, 1906. That the Texas Mexican Railway Company's agent at Hebbronville then demanded of plaintiff, J. P. Reed, $21 additional freight, and refused to deliver said cattle without payment of same. That plaintiff informed said agent that the entire freight charges had been prepaid by him at Pierce, and requested delivery of the cattle, informing said agent that he must have said cattle early in the evening so as he could handle them and carry said cattle to water and grass. That said agent of the Texas Mexican Railway Company refused to deliver said cattle to plaintiff, without the payment of said $21 additional freight charges until about 7 o'clock p. m. on said date, when said agent sought to deliver said cattle to plaintiff without the payment of said charges. That, owing to the lateness of the hour, and the fact that plaintiff could not find water and grass for his said cattle, he could not receive the cattle and safely handle them at the late hour the cattle were tendered him. That plaintiff received said cattle about 7:15 o'clock next morning, June 24, 1906.

"(9) I find that said cattle were confined in the pens of the Texas Mexican Railway Company at Hebbronville after their arrival for a period of about 17 hours longer than would have been the case had they been delivered to plaintiff when he demanded same; that said cattle had no food and an insufficient supply of water, and were damaged by reason of such excessive confinement and improper supply of food and water, according to the evidence, in the sum of $1,647.50.

"(10) There is no discrimination against other shippers shown by the evidence in this case.

"(11) The evidence does not show that there was any complicity or agreement between the Galveston, Harrisburg & San Antonio Railway Company or the San Antonio & Aransas Pass Railway Company and said Texas Mexican Railway Company to so hold said cattle for the payment of any additional

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freight charges, but that the same were so held by said Texas Mexican Railway Company without the knowledge or consent of the Galveston, Harrisburg & San Antonio Railway Company.

"(12) I find that there was a sufficient sum of the amount of prepaid freight to have more than satisfied the tariff rates of the Texas Mexican Railway Company and of the San Antonio & Aransas Pass Railway Company on said shipment."

The undisputed evidence shows that it was the intention of both appellee and the agent of the Galveston, Harrisburg & San Antonio Railway Company that the cattle should be shipped at the regular rate. Appellee does not intimate in his testimony that he requested or desired any special rate, and, when the controversy arose between him and the agent of appellant at Hebbronville, he only insisted that the rate named in the bill of lading was the correct rate, and told said agent that, if he would permit him to take the cattle without paying the additional charge of $21, if he found upon investigation that the rate claimed by said agent was the regular or commission rate, he would pay it. The contract of shipment made by the initial carrier was for the transportation and delivery of the cattle to the connecting line at Beeville, and contained the usual clause limiting the liability of the carrier as to said shipment to its own line, except as to the protection of the through rate of freight. Upon the face of the contract and immediately above the caption "Live Stock Contract," "Limiting the Liability of the Carriers," which is printed in capital letters across the center of the page and is immediately followed by the date of the execution of the contract and its various provisions and recitals, is printed in plain black type the following notice: "This bill of lading is given subject to correction as to rate, weight, and classification, so as to conform to the rates, rules, and regulations prescribed by the Railroad Commission of Texas, and to the rates, rules, and regulations adopted, according to law, for interstate shipments." Plaintiff testified that he did not read the contract before signing it, and did not know that the clause above quoted was contained therein or appeared thereon as above shown. When the cattle were received by the Aransas Pass Railway Company at Beeville, new contracts of shipment were made by which said company undertook to transport said cattle to Alice, and there deliver them to the connecting carrier. These contracts do not name or specify the freight rate further than by the use of the word "Tariff"; the clause as to charge for said shipment being as follows: "And the party of the first part covenants and agrees that the freight charges from point of shipment to final destination shall only be the sum of tariff ——— dollars per car." Each of said contracts have the notification above quoted as to rate named, being subject to correction so as to conform to that prescribed by the Railroad Commission printed upon a slip of paper which was pasted upon the face of the contract. When the cattle reached Alice, new contracts of shipments were made with the appellant road, but appellee testified that contracts were not issued by appellant for all the car loads. These contracts are not in the record, and there is no evidence as to their terms. When the agent of appellant at Hebbronville informed appellee that the rate named in the waybill and the contract with the initial carrier was erroneous, and that there was an additional charge of $21, appellee refused to pay it, and the agent held the cattle until he obtained authority to release them. When he offered to deliver them to appellee, he refused, for the reason stated in the findings of the court before set out, to receive them until the next morning. Appellee had the money in his pocket, and could have paid the additional charge and released the cattle. Upon cross-examination, he testified that he told McGovern (the agent of appellant at Hebbronville) that if, upon investigation, he found there was an honest mistake, he would pay the $21, if McGovern would release the cattle at once. He says: "I would have been willing to pay the difference in any event if it was an honest mistake, if he had turned my cattle loose, because $1 per car, $21, did not pay me to hold there. It did not pay me to hold my cattle there for $21. That was a small amount, comparatively speaking. I was able to pay the dollar per car. I told McGovern that I could get the money. I had the money in my pocket. I had the money in my pocket to pay it. I had the money in my pocket. I was able to pay it. I had the money in my pocket enough to pay it. I did not have the money in my pocket for that, but I had it. I could have paid it if I had wanted to do so. I had the money to pay it. As a matter of fact, I did not pay it. I told McGovern that I had the money in my pocket and could pay it. I let the cattle be held under the circumstances I have stated."

Under appropriate assignments of error, the appellant contends that the facts found by the trial court and established by the undisputed evidence show no liability on the part of appellant, and judgment should have been rendered in its favor. We think this contention should be sustained.

We shall not attempt to reconcile the apparent conflict in the opinions in the cases of Thompson v. Railway Company, 11 Tex. Civ. App. 145, 32 S. W. 427, and Railway Company v. Kerns (Tex. Civ. App.) 108 S. W. 187. It may be that these opinions are not necessarily conflicting. While there is no affirmative provision of the statute forbidding a railroad from fixing a lower rate for the transportation of freight than that prescribed by the Railroad Commission, the statute does prohibit discrimination of charg-

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ing of one shipper a different rate from that charged another, and it would seem that, unless the lower rate charged in the particular case is shown to have been open to all shippers, a special contract for carriage at such rate would be void because prohibited by the statute against discrimination. The trial court found, however, that there was no discrimination in this case, and this finding is clearly sustained by the undisputed evidence, which shows that the rate specified in the contract was fixed by mistake; it being the intention of both parties to the contract that the regular or commission rate should be charged.

Appellee contends that the notation at the head of the contract that the rate therein named was subject to correction, so as to conform to the rate prescribed by the Railroad Commission, not being in the body of the contract or referred to therein, is not a part thereof, and appellant, not knowing that this notice was written on the face of the contract, is not bound thereby. This contention might be correct if the notation in any way changed the contract actually made by the parties, but the undisputed evidence shows that the parties to the contract intended to ship the cattle at the regular rate. No special rate was asked by appellee, and, when the additional charge was made, he expressed a willingness to pay it if upon investigation he found the rate specified in the contract was not correct. Such being the facts, it is immaterial whether or not he read the notation on the contract. He knew the fact, as stated in said notation, that the contract was made with the understanding that the rate to be charged him was the regular or commission rate, and such understanding entered into and formed a part of the contract. It seems to us that under these circumstances, even if appellant was shown to have been a party to the contract, appellee would be liable for the additional charge; and, appellant having the right under the statute (Railway Co. v. Rucker, 38 Tex. Civ. App. 591, 88 S. W. 816) to hold all of said cattle until all of the freight was paid, appellee cannot complain of injury to his cattle caused by their detention unless appellant was negligent in caring for said cattle while they were in its possession, and no such negligence is alleged in the petition or shown by the evidence. But the evidence in this case fails to show that appellant was bound by the contract made with the initial carrier. It was bound under the law to accept and forward the cattle, and its acceptance of the shipment would not necessarily bind it to carry out the contract made with the Galveston, Harrisburg & San Antonio Railway Company. The evidence shows that, when appellant received the cattle for transportation, new contracts were made with the shipper, at least for the transportation of part of the cattle; but what the terms of these contracts were is not shown, and it cannot be presumed that they bound appellant to ship the cattle at a rate less than that allowed by law, nor will a contract of this kind be implied merely from the fact that the agent of appellant who received and forwarded the shipment to its destination was informed that the freight had been paid and knew the amount which had been so paid. It was not such agent's duty to investigate and determine whether the amount so claimed to have been paid by the shipper was the correct amount; that duty being one which rested upon the agent at the point of destination when the cattle were delivered to the shipper or his consignee. We think, under the undisputed evidence, the appellee was liable for the additional charge, and, the detention of the cattle by the appellant being caused solely by his refusal to pay said charge, appellant is not liable for damages to the cattle caused by such detention, and the judgment of the court below against appellant should be reversed and judgment here rendered that appellee take nothing by his suit against it.

The trial court, as before shown, found that the Galveston, Harrisburg & San Antonio Railway Company did not agree to or acquiesce in the detention of the cattle by the appellant, and therefore was not responsible for the damages caused thereby. By his cross-appeal, appellee attacks this conclusion, and under proper assignments of error contends, first, that the road above named having contracted to transport appellee's cattle from Pierce Station to Hebbronville for $29 per car or a total sum of $609 and expressly agreed to protect the rate named in said contract is liable for any damages caused appellee by its failure to protect said rate; and, second, that, if the rate quoted appellee by said railroad company was not the correct rate, said company was negligent in so informing appellee, and the injury to appellee's cattle having been proximately caused by such negligence said railroad is liable therefor. The first of these contentions has been disposed of by our conclusion that said railroad company did not, in fact, contract to transport said cattle at a less rate than that fixed by the Railroad Commission, but that it was fully understood by both parties to said contract of shipment that the regular rate should be paid and the rate of $29 per car specified in said contract was fixed under the mistaken belief that such was the commission rate. The second contention above mentioned cannot be sustained because, if it be conceded that said railway company was guilty of negligence in quoting an incorrect rate, the undisputed evidence shows that such negligence was not the proximate cause of the damage to appellee's cattle, but such damage was due to appellee's refusal to pay the correct charge when demand was made upon him therefor.

The case might be different if appellee

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had not had the money with which to pay such charge. If said railway company could be held bound to protect the rate of $29 per car specified in the contract, it may be that notwithstanding appellee had the $21 with which to pay the additional charge he would not have been required to prevent the damages caused by the detention of his cattle by paying said sum, and could have refused to pay and held said railroad company liable for such damage, but this is not the case presented by this record. Appellee was liable for the additional charge as we interpret the contract, and, having the money in his pocket with which to pay it, he could not refuse to do so, and then claim that the negligence of the railroad company in quoting him an incorrect rate was the proximate cause of the damage resulting from the detention of his cattle. Damages which could not be reasonably anticipated as the probable result of an act or omission cannot be held to have been proximately caused by such act or omission, and we do not think it could have been reasonably anticipated by the railroad company that its mistake in naming an incorrect rate in said contract would result in the refusal of appellee to pay the proper rate when demand was made therefor and the consequent damage to his cattle caused by such refusal. It follows that the judgment below in favor of the Galveston, Harrisburg & San Antonio Railway Company should be affirmed.

Reversed and rendered in part.

Affirmed in part.

REAGAN ROUND BALE CO. et al. v. DICKSON CAR WHEEL CO.

(Court of Civil Appeals of Texas. May 1, 1909. Rehearing Denied Oct. 7, 1909.)

1. SALES (§ 81*)—CONTRACTS—TIME AS OF THE ESSENCE.

A contract for the manufacture of automatic bale systems, called for delivery in installments, beginning June 1st and ending August 1st following. The preliminary agreement, stipulating for delivery before August 1st, had been made after the manufacturer had assured the buyer that he was in a position to undertake the contract, with knowledge that the buyer expected to use the systems during the cotton season of that year. The manufacturer also knew that a failure to deliver the systems on the date named would probably cause the buyer damages through the loss of profits from such use of the systems, etc. *Held*, that time was of the essence of the contract, so that the manufacturer, on failing to make deliveries on the designated dates, was liable for the damages within the contemplation of the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217; Dec. Dig. § 81.*]

2. SALES (§ 180*) — CONTRACTS — BREACH — WAIVER.

A contract for the manufacture of automatic bale systems, called for delivery in installments, beginning June 1st and ending August 1st following. After a failure of the manufacturer to make deliveries on the dates specified, the buyer wrote a letter reciting that he accepted a system in accordance with the contract, subject to adjustment of liability for enumerated parts of the system, and that the balance of the systems contracted for should be finished in accordance with the system accepted, and that the buyer would receive the systems as rapidly as completed, and waive his right of testing each system at the seller's factory, provided the latter would be responsible for breaks and defective workmanship during the first day's run at the several gin houses. *Held*, that the buyer did not waive his right to recover the damages within the contemplation of the parties for the failure of the seller to make deliveries on the contract dates, especially where the circumstances, which were known to the seller, showed that the buyer did not intend to waive any claim for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 471; Dec. Dig. § 180.*]

3. SALES (§ 418*) — CONTRACTS — BREACH — MEASURE OF DAMAGES.

A manufacturer contracted to manufacture automatic bale systems and make deliveries on designated dates between June 1st and August 1st following. At the time the contract was made he knew that the buyer expected to make a profit by using the systems during the cotton season of that year, and that a failure to deliver on the specified dates would probably cause the buyer a loss of such profits, and also damages for increased cost in the hire of mechanics for installing the systems. The manufacturer failed to make deliveries in time. *Held*, that the buyer was as a matter of law entitled to recover the loss of profits resulting from his inability to use the systems during the cotton season of that year, together with the damages caused by the increased cost of installing the systems.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

4. SALES (§ 179*) — CONTRACTS — BREACH — WAIVER—EFFECT.

A buyer of machinery for delivery on designated dates may waive his right to refuse to accept the same after the dates designated in the contract, and he may receive the same and hold the seller liable for damages for the delay in delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456–468; Dec. Dig. § 179.*]

5. TRIAL (§ 253*) — INSTRUCTIONS — IGNORING ISSUES.

An instruction ignoring issues pleaded and sustained by evidence sufficient to raise a jury question is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

6. SALES (§ 418*) — BREACH OF CONTRACT — DAMAGES—PROSPECTIVE PROFITS—EVIDENCE—SUFFICIENCY.

A buyer of automatic bale systems may, on failure of the seller to deliver the systems on the date contracted for, recover as damages the loss of profits resulting from his inability to use the systems during the cotton season, where the evidence shows such profits with reasonable certainty, and that their loss was in contemplation of the parties at the time of the execution of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

7. SALES (§ 279*)—CONTRACTS—WARRANTY.

A contract for the manufacture and sale of automatic bale systems required the manufacturer to manufacture them in accordance with specifications, and he warranted to demonstrate before the systems were sent out that the material and workmanship were according to the contract, and that all the fittings assembled prop-

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erly. Subsequently the buyer accepted a system as a complete one, according to the contract, with specified exceptions, and wrote to the manufacturer that the balance of the systems should be finished in accordance with the system so accepted, and that the manufacturer should become responsible for breaks and damages caused by breaks on the first day's run at the several gin houses. The manufacturer accepted the conditions. *Held*, that the only warranty as to the undelivered systems was that they should be finished in accordance with the system delivered, and that the manufacturer should be responsible for all breaks and damages caused thereby during the first day's run at the several gin houses.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783–792; Dec. Dig. § 279.*]

8. SALES (§ 187*)—CONTRACTS—CONSTRUCTION—INTEREST.

A contract for the manufacture and delivery of automatic bale systems, which stipulates for deliveries on designated dates between June 1st and August 1st following, and which requires the buyer to pay in installments, and to pay the final amount due thereon on or before September 1st following, does not contemplate that the systems shall be paid for before delivery, and the seller is not entitled to interest on the unpaid price from September 1st, unless he shows that the systems were ready for delivery before that date.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 499; Dec. Dig. § 187.*]

9. EVIDENCE (§ 144*)—EVIDENCE—CERTAINTY.

The testimony of a witness that, if there had been no delay in installing an automatic bale system in his gin, he would probably have ginned 1,000 or 2,000 more bales, is inadmissible because too uncertain on which to form any basis for a reasonable estimate upon the number of bales lost by the delay, but his testimony that the loss in bales was not less than 1,000 is admissible as against the objection that it is uncertain.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 430–433; Dec. Dig. § 144.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Dickson Car Wheel Company against the Reagan Round Bale Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Bryan & McRae, Swearingen & Tayloe, and Ogden, Brooks & Napier, for appellants. Baker, Botts, Parker & Garwood, C. L. Carter, and Jesse Andrews, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellant and the Reagan Bale Company to recover the sum of $28,781.25 alleged to be due upon a contract for the manufacture by appellee of 30 Reagan automatic round bale systems, and the further sum of $2,234.81 for supplies and extras furnished appellants by appellee for use in the operation of said "system." The contract sued on, which is attached to plaintiff's petition, is as follows:

"State of Texas, County of Bexar.

"This agreement, made the twenty-ninth (29) day of May, A. D. 1906, by and between the Reagan Round Bale Company of San Antonio, Texas, party of the first part, hereinafter designated the 'Owner'; and Dickson Car Wheel Company, of Houston, Texas, party of the second part, hereinafter designated the 'Manufacturer':

"Witnesseth: That the Owner, in consideration of the fulfillment of the agreement herein made by the Manufacturer, agrees with the said Manufacturer, as follows:

"Art. 1. The Manufacturer shall and will provide all the material and perform all the work mentioned in the specifications and shown on the drawings, which drawings and specifications are identified by the signatures of the parties hereto, and are marked Exhibits 'A' to '———' inclusive, and attached to this contract: The said drawings and specifications describe the Reagan Complete Automatic Round Bale System, consisting of the condenser, auxiliary press, main press and the fittings. The fittings are a sheet iron conveyor from the condenser to the auxiliary press, described fully in the drawings and specifications above referred to, a conveyor from the auxiliary press to the main press, pump, tank, accumulator, lubricator, compression grease cups, valves, pipes, levers, pulleys and I-beam, fully described in the said drawings and specifications. The drawings herein mentioned are those made by the Manufacturer and accepted by the Owner.

"Art. 2. The Owner shall furnish to the manufacturer such further drawings and explanations as may be necessary to detail and illustrate the work to be done, and the manufacturer shall conform to the same as part of this contract, so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Art. 1, and may not impose an additional cost or expense upon the Manufacturer. It is mutually understood and agreed that all drawings and specifications are to remain the property of the Owner.

"Art. 3. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Owner, accepted in writing by the Manufacturer, and when so made and accepted, the value of the work added or omitted shall be computed and the amount agreed upon shall be added to or deducted from the contract price.

"Art. 4. The Manufacturer shall build thirty (30) Reagan Complete Automatic Round Bale Systems, with all fittings, as specified in article 1. The Manufacturer shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, viz.: On or before the first day of June, 1906, the Manufacturer shall deliver f. o. b. cars, Houston, Texas, five (5) complete systems, with all the fittings, f. o. b. cars on or before the fifteenth day of June 1906 five (5) complete systems with all the fittings f. o. b. cars Hous-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ton Texas; on or before the first day of July, 1906, five (5) complete systems, with all the fittings, f. o. b. cars, Houston Texas; on or before the fifteenth day of July, 1906, ten (10) complete systems, with all fittings, f. o. b. cars Houston, Texas; on or before the first of August, 1906, five (5) complete systems, with all fittings, f. o. b. cars; Houston, Texas. It is expressly agreed and understood that each and every system shall be assembled and tested in the shops of the Manufacturer at Houston, Texas, and delivered f. o. b. cars there. The said tests shall demonstrate that the material and workmanship is according to this contract, and that all the fittings assemble properly, all pinions, gears and meshes work properly, and that the entire machine will run smoothly, and that all fittings, bearings and packings are true and tight.

"Art. 5. Should the Manufacturer be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner, or any other manufacturer employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by any abandonment of the work by the employés, or by failure to procure the necessary tools or materials, through no default of the Manufacturer, then the time fixed herein for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is written and mailed to the Owner within forty-eight (48) hours of the occurrence of the delay.

"Art. 6. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Manufacturer for said work and material shall be forty-six thousand and fifty dollars ($46.050.00), subject to additions and deductions as hereinabove provided, and that such sums shall be paid in current funds by the Owner to the Manufacturer in installments, as follows: Five thousand seven hundred fifty-six and $^{25}/_{100}$ dollars ($5,756.25) to be paid on the signing of this contract, five thousand seven hundred fifty-six dollars and $^{25}/_{100}$ ($5,756.25) to be paid on the fifteenth day of June, 1906; five thousand seven hundred fifty-six and $^{25}/_{100}$ dollars ($5,756.25) to be paid on the first day of July, 1906; Eleven thousand five hundred twelve dollars and $^{50}/_{100}$ ($11,512.50) to be paid on the first day of August, 1906; the above payments shall be made contemporaneously with the delivery of the last system due on the dates when the payments are due. The final payment of five thousand seven hundred fifty-six and $^{25}/_{100}$ ($5,756.25) shall be made on or before September 1, 1906.

"Art. 7. The Owner agrees to hold the Manufacturer harmless from any and all suits or claims, including judgments, court costs or expenses connected therewith, based on the alleged infringements or infringement of the patent rights or patents of the third parties.

"Art. 8. The said parties, for themselves, their heirs, executors, administrators, assigns and successors, do hereby agree to the full performance of the covenants herein contained.

"In witness whereof, the parties have hereunto set their hands and seals in duplicate, this the 29th of May, 1906.

"[Signed] Reagan Round Bale Company,
"By P. H. Swearingen, Pres.
"[Signed] Dickson Car Wheel Company,
"By John F. Dickson, Pres."

The petition alleges a compliance with said contract on the part of plaintiff, and the failure and refusal on the part of the defendants to receive nine of said systems and pay a balance of $28,781.25 due upon said contract, and the further sum for extras and supplies before mentioned. It is also alleged that the Reagan Bale Company has by purchase acquired all of the assets of the Reagan Round Bale Company, and has assumed all of its debts and liabilities. The defendant Reagan Round Bale Company answered by general and special exceptions and general denial, and specially answered, in substance, that plaintiff had failed to comply with its contract for the construction and delivery of said systems on the dates named in the contract, and the defendant had been damaged by the loss of the use of said systems during the cotton ginning season of 1906 in the sum of $75,000; that the 21 systems which were received by defendant under said contract were not constructed in accordance with the contract, and were not worth the price agreed to be paid therefor, and which had been paid by defendant, the reasonable value of said systems being $4,265.75 less than the sum defendant had paid plaintiff therefor; that by reason of the delay in the delivery of said systems, and the failure of the plaintiff to construct same of the material and in accordance with the requirements of the contract, defendant had been further damaged in the loss of time of its engineering force and in additional labor and mechanical power necessary in installing and operating said systems in the sum of $3,000; that plaintiff had failed to furnish certain pulleys, shaftings, belting, valves, and other fittings required under said contract to make the systems complete, which defendant had to supply at a cost of $8,290, and that plaintiff failed to furnish the drawings as required by said contract which drawings were reasonably worth the sum of $1,000, and had also failed to return to defendant certain patterns of said systems which belong to defendant and are worth the sum of $2,100. It is averred that plaintiff at the time of entering into the contract was fully informed of the use to which the systems were to be put by the defendant and of the necessity for a strict compliance with the contract

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provisions as to the time of the completion and delivery of said systems, and knew that defendant would likely suffer the damage claimed by it if said systems were not completed by the time specified in the contract. All of the above items of damage, aggregating a total of $93,655.75, are pleaded as a counterclaim against plaintiff's demand, and in reconvention, and judgment is asked against plaintiff for said amount.

The defendant Reagan Bale Company filed answer, admitting that it had purchased all of the assets of its codefendant and had assumed its liabilities, and adopted as its answer the answer of the Reagan Round Bale Company.

The plaintiff filed supplemental petition in reply to defendant's answer, in which it admits the delay charged by defendant in the completion and delivery of said systems, but alleges facts which excuse such delay under the provisions of section 5 of the contract before set out. It specially denied the averments of the defendant's answer as to the defective material and construction of said systems, and each and all of the several claims of damage set up in said answer. It further alleged that defendant had expressly waived any claim it might have for damage for delay in the construction of said systems or for defective workmanship and material used in such construction. Attached to this supplemental petition as an exhibit is the following letter:

"Houston, Texas, July 7, 1906. Dickson Car Wheel Co., Houston, Texas—Gentlemen: After careful examination and inspection of the main press, auxiliary, condenser, pump, tank, accumulator and other fittings attached immediately thereto, all of which go to make up one complete system, with the exception of the counter-shaft, main line shafting, pulleys, belting and boxes attached thereto, which parts are under discussion as to which of the two parties signing the existing contract is to furnish the material in question, we beg to advise that we hereby accept said system as being in accordance with the contract drawn up between your company and ourselves. It is understood that the matter of liability for the parts above referred to, is to be adjusted at some other time, as it is not intended to hold the presses here on account of this difference. The system which we are to-day accepting is a finished sample, numbered 130, and is a complete outfit according to the contract, with the above exceptions as to additional parts. The balance of 29 complete systems is to be finished in exact accordance with the system above referred to, with the exceptions heretofore stated. It is further understood that as you have tested these machines by belting them up and putting a low pressure on the cylinder and similar parts, we are further willing to receive the systems and ship them out as rapidly as they can be completed, and waive our right of thoroughly testing each system at your factory, provided that you will be responsible for all breaks, defective castings and defective workmanship and damage caused by said breaks to the system in the first day's run at the several gin houses, and it is further understood that only competent men shall make these tests, we reporting to you said tests of the first day's run as rapidly as each is made. It is further understood and agreed that no further changes are to be made on the systems now furnished and under construction. We, as representatives of the Reagan Round Bale Company, hereby accept the complete automatic system No. 130 as a sample system, the difference above mentioned to be decided later, which shipment is now finished and ready for shipment. It is understood that this does not alter or change the original contract except as herein stated. Respectfully submitted, Reagan Round Bale Co., per Wm. C. Lott.

"Accepted by Dickson Car Wheel Co., John F. Dickson, President."

The trial in the court below was by a jury and resulted in a verdict and judgment in favor of plaintiff for the sum of $28,781.25, balance due on the contract, with interest at 6 per cent. from September 1, 1906, and the further sum of $1,234.81 for extras and supplies furnished defendants, with interest from January 1, 1907, at 6 per cent., and in favor of defendants for $700, value of drawings, and for recovery of the nine systems in possession of plaintiff. In view of the conclusion we have reached as to the proper disposition of this appeal, it will be unnecessary to make a full finding of facts disclosed by the record, and we shall only set out in discussing the questions considered in this opinion the facts necessary to elucidate the several points decided.

Under appropriate assignments the appellant complains of the charge of the court, in that it submits as issues to be determined by the jury the questions of whether time was of the essence of the contract sued on, and whether plaintiff knew at the time the contract was entered into that, unless it made delivery of the presses on the several dates named in the contract, defendant would likely suffer loss by such failure of delivery; and in this connection complaint is also made of the refusal of the court to give a special charge requested by defendant which instructed the jury, in effect, that time was of the essence of the contract, and that, unless the plaintiff was excused from making said deliveries on the dates named in the contract under article 5 of said contract before set out, defendant would be entitled to recover such damages as the jury might find under the charge given by the court. The paragraphs of the court's charge of which this complaint is made and the special charge requested by the defendant above referred to are as follows:

"(18) As to the claim for damages for loss

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of profits in not being able to handle more round bales of cotton, you are instructed as follows: Defendant says that plaintiff knew, when it made the contract to deliver at the times named therein, that defendant intended to install and use the systems within a certain limit of time, and knew that, unless it was able to install and use the machines within the time named for delivery, defendant would suffer loss, and that plaintiff was advised that said dates of delivery were fixed with a view to such use, and that thereby defendant would make profits which it could not make if delivery was not made until a later date, and defendant alleges that 'time was of the essence of the contract,' which means that plaintiff was so advised when it contracted as to time of delivery that in reasonable probability loss would be suffered by defendant by delay in delivery in the way of profits, which it alleges plaintiff knew was in contemplation of both parties when the contract was made.

"(19) Whether the plaintiff knew when the contract was made that unless delivery was made at the time named defendant would likely suffer loss, and whether the plaintiff made the contract in contemplation of such loss of profits by defendant, if it (plaintiff) failed to deliver the systems according to contract, is for you to say from all the evidence.

"(20) If you find it did so contract with the knowledge that unless delivery was made as contracted to be made, defendant would probably suffer loss of profits by reason of inability to handle as many bales of round cotton as it would handle if delivery was made according to contract, and, if you find that the failure, if any, of the defendant to handle more cotton, was due to a breach of contract on the part of the plaintiff, then you will inquire what loss, if any, defendant sustained in that regard."

Special charge No. 9, the refusal of which is complained of, is as follows: "You are instructed that under the terms of the contract of May 29, 1906, the plaintiff obligated itself to deliver to the defendant Reagan Round Bale Company five complete systems, with all fittings, on or before the 1st day of June, 1906; five complete systems, with all fittings, on or before the 15th day of June, 1906; five complete systems, with all fittings, on or before the 1st day of July, 1906; ten complete systems, with all fittings, on or before the 15th day of July, 1906; and that said terms of said contract obligated the plaintiff to deliver said systems in the order, and in the times mentioned in said contract, and, if you believe from the evidence that the defendant Reagan Round Bale Company was damaged by reason of the failure of the plaintiff to deliver said systems on or before the days mentioned, then you will find for the defendants for such damage as you find under the charge of the court, if any, were sustained by reason of such delay, unless you further find that it was agreed between plaintiff and defendant Reagan Round Bale Company that steel drawn tubing should be substituted for XX pipe, for the guides for the main press, and that the plaintiff was unable to secure such tubing in time to comply with such contract, and that said delay was caused by reason of its inability, if any, to secure such tubing."

The original and preliminary contract between the parties for the construction of these presses was entered into on April 27, 1906, and contained no clause limiting appellee's liability for failure to complete and deliver the presses on the dates named in the contract. This contract is as follows: This is only a memorandum of an agreement to be executed by and between the Reagan Round Bale Company, of San Antonio, Tex., and the Dickson Car Wheel Company, of Houston, Tex. The contract is to embrace, among other things, the following: "The Dickson Car Wheel Company agrees to build thirty (30) of the Reagan complete automatic round bale systems, which include a press, like the one now in Lange's gin, built by the Dickson Car Wheel Company during the year of 1906, with certain changes already discussed and agreed upon; one auxiliary press similar to the one at Lange's gin built by the Alamo Iron Works during the year of 1906, with certain changes already discussed and one condenser similar to the one built by the Alamo Iron Works, and now in Lange's gin, with certain changes already discussed. These are to be delivered complete, including all the fittings and attachments, similar to the one now on system at Lange's gin, f. o. b. Houston, Tex., beginning on the 1st day of June, and all are to be delivered before the 1st day of August, 1906. The Reagan Round Bale Company agrees to pay for the same the sum of $1,535.00 for each system, which includes one of each of the above mentioned machines, to be paid as follows: $5,000.00 are to be paid on the 15th day of May, 1906, and seventy-five (75) per cent. of the purchase price to be paid on receipt of each system f. o. b. cars, Houston, Texas, the remaining twenty-five (25) per cent. to be paid Sept. 1st, 1906. It is further agreed that drawings and blue prints are to be made of the machines, including all the changes already discussed, which will be O. K.'d by both parties and attached to the contract, and to be made a part thereof. This is a memorandum only, and is to be replaced by a contract to be agreed upon embracing the elements herein mentioned. The usual 'strike clause' is to be inserted in the contract."

John F. Dickson, Jr., plaintiff, assistant general manager, and a witness for plaintiff, testified:

"We represented to the Reagan Round Bale people that we were prepared to undertake a contract for the prompt delivery of these machines, and that our shop was equipped for that purpose, to make prompt deliveries. All that was mentioned in the agreement of

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April 27th, relative to the obligation to deliver the 30 presses, was the usual strike clause. We believed when we signed the contract of May 29th that we would be able to comply with that contract. We knew the purposes for which these machines were being built. We constructed in our shop the only two machines that were ever built. We knew it was the purpose and desire of the Reagan Round Bale people to install them and use them on the cotton crop of 1906, and for that reason the date of delivery was fixed to begin on the 1st of June. They did not say, in effect, that the bid of the Union Iron Works was $7,000 less than my bid, but that they would give it to me only on the ground that I could get it out in June and July, and that the Union Iron Works could not. They said that, while they wanted to favor the Texas manufacturers, the southern manufacturers, that it would go to Chicago or St. Louis if we did not take it. They said that we were the only shop in Texas that could handle it. I suppose it was the intention to make a profit out of these presses, and it would be a natural conclusion that they expected to realize a profit and use them in the cotton season of 1906. I didn't know the detailed figures. They had not told me of the detailed figures of how they were going to make the profit. That was none of our business. We told the Reagan Round Bale Company that we were able to do this work. We entered into the contract on the 27th day of April. We thought with the tools we had, and the ones that we were putting in, that we could get it out in 60 days that we had. We said that we were equipped to do that. They knew that. They had sent a man to make an inspection of all the shops in the different cities in the state, I believe. We said that we could make the deliveries in that time. It is not a fact that that is one of the reasons that I gave why they should pay us a better price than they had offered them from the Union Iron Works. We represented that we had a good shop. We naturally would do that. We represented to them by letter, also, that we were able to handle the job. Q. Of course, you were figuring entirely upon a proposition to deliver at the times stated in the contract. You were not figuring on any earlier or later delivery? A. No, sir; we made them a price and agreed to make the delivery as the contract called for. We figured on delivering the 60 presses from the 1st of June up to the 1st of August. That was what the discussion was there at San Antonio, and that discussion there was more in the nature that we could do the whole job in that time. Mr. Swearingen said he wanted to run it through in batches of five, so as to keep his men around in one neighborhood. I testified about their saying that the contract, unless it was given to us, would have to be given to some outside manufacturer, because they considered that we were the only shop in the state that could handle the contract and makes the deliveries under contract."

P. H. Swearingen, president of the defendant Reagan Round Bale Company, testified for the defendant:

"The result (of the conferences with Messrs. Carr and Dickson, of the Dickson Car Wheel Company, in February, 1906) was it was agreed that the Dicksons should make a press according to the drawings we were to have made by Mr. Long in February, and he was to make that press for the purpose of ascertaining the cost on which he could base his bid, and for us to decide the number of presses we could make, because he could not tell the time it would take to make these presses. With relation to the Dickson Car Wheel Company being equipped and prepared to turn out our presses promptly at that time, they persuaded me completely that they were capable of delivering the presses at the time and in the numbers finally agreed upon, and I was guided by their own ideas in making those deliveries and in making that number of presses. Mr. Carr and Mr. John Dickson both made the statement that with the gigs and templets already made, and their shop prepared for it, that they would have no difficulty in getting the presses out much more rapidly than they had gotten out the experimental or the first press. We talked to Mr. John Dickson, Mr. Carr, and John Dickson, Sr., and we told them that the presses were for the purpose of being put up in the ginhouses, and for the purpose of baling the cotton that could come in during that season of 1906. We told them that the cotton generally came in about the middle of July, or earlier in the southern part of the state, where we expected to put some of the presses. The question as to the date of the delivery of the presses before the 1st of July was fully discussed in our conferences with those gentlemen. We did not want to receive any presses after the 1st of July, because we thought we could not get into any ginhouses after the 1st of July. At that time we expected to have all of the presses prior to that time. It was not advanced to the 1st of July. We subsequently, in making the contract with these gentlemen, extended it 30 days to the 1st of August, when the last presses were to be delivered, because we felt that we could put some of the presses in the northern part of the state where the cotton probably would not open so early. I made those statements to both Mr. Carr and Mr. Dickson. I knew those ginners would not permit us to do the installation work in their gins after the cotton season began, and I explained to them that in the southern portion of the state cotton came in about the middle of July, and they certainly agreed with me.

"As we had finally agreed on 30 machines, we had to have a set of mechanics for installing these presses, and we, anticipating, employed six or seven mechanics, believing

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these six or seven mechanics could get some experience at the shops assembling the presses, then they could take out the first six presses that came out and install those, which we estimated would approximate ten days, and, after getting out the first, then they would take out the next installment, and the next and so on. We allowed a margin approximately five days for safety. So the time intervening between the delivery of the presses and the opening of the cotton season or the first installment of presses was to be devoted to the installation of them. We explained in minute detail to Mr. Carr and Mr. John Dickson, Sr., and I expect we did to Mr. John Dickson, Jr., but I don't recall just now, as to the revenue and income on the use of these presses we expected to realize, and the source and manner in which we expected to realize it. I explained that the Reagan system was a gin compress. Its purpose was to bale the cotton at the gin to a density satisfactory to the transportation companies. We explained to him that this press would not take greater power to operate it than the original square box which was in the gins, and that the ginner himself would furnish the power and the labor for operating this press, instead of operating his square box press; the power being the same practically and the labor less. We explained to him that the package of cotton made by the Reagan system by reason of its superior density, and the ease with which it could be handled, would be preferred as a transportation package. I figured to those gentlemen that we would receive 10 cents per 100 pounds of lint for all of the cotton put into the Reagan bale from the railroad companies themselves. Boat rebate was about 25 cents. Ten cents amounts to about 25 cents a round bale. The round bale weighs about 250 pounds, and the difference in the tare between the square and the round package, which amounts to about $3 a square bale, $1.50 a round bale. There is also a difference of about 5 cents a bale in marine insurance. Then there is a little rebate in the burlap, of about 10 cents a bale. Counting everything, there was about $4.50 for every 500 pounds of lint, but we would be compelled to give away a large part of that to the ginners and farmers, to overcome the prejudice and induce them to use our press, and we boiled it all down to a profit, we believe, of about a dollar a round bale. We also told them that we expected to get about 3,000 bales, and in our talk with him we had amassed quite a little fortune.

"In that contract (memorandum contract of April 27th) the date of delivery is from June 1st to August 1st. Nothing was said with relation to that being conditioned upon his ability to get the material. That day we agreed upon five press installments, and the following day, or the day after, I prepared the contract exactly in accordance with the agreement, and made those stipulations. Mr. Dickson certainly expressed no doubt about his ability to deliver the presses exactly as the contract was written, and I had absolutely no doubt about it. I remember we agreed with Mr. Carr and Mr. Dickson that, if we would take five presses on the 1st of June, we should have at least five, or perhaps one or two extra men that knew something about the assembling of these Reagan systems and installing them, to receive those five and begin the installation, after which they would take the next five as they came out, and by the time the fourth installment came, which was on July 15th, we would have trained enough more men to have enough mechanics to take them after they arrived at the plant and install them. In our preliminary agreement we were to have ten presses in June, five on the 1st of June, five on the 15th June, five on the 1st of July, and ten on the 15th July. That was absolutely agreed on at the time the memorandum contract was made. The reason we didn't put it in was because it took quite a little time to arrange these payments and dates of shipment, and we reserved that to finish up the next day, which I did. I have lived in Texas all my life, and know when the cotton season opens up. I have made a study of that the last two years especially. Cotton don't always come in on the same day in the same community. Sometimes it is a month earlier, in the same section, than other times. At Cuero we have nearly always sold cotton before the middle of July. This year August 1st was about the time it came in, although it was an early season in other parts around there; but in a general way we know that the cotton would come in earlier around Kingsville, Goliad, and Yorktown than it would at other stations. We anticipated cotton around there about July 1st, around Floresville about the middle, about San Antonio and San Marcos about August 1st, and around Hillsboro we thought cotton would come in probably about August 1st. The manufacturers understood perfectly that we wanted to get in ahead of the cotton.

"Our first idea was to have the last installment of presses delivered on July 1st, but they could not make them in time, and we extended it to August 1st. We had a discussion between ourselves, Messrs. Carr and John Dickson and Mr. Lott and myself, as to the number of presses that they could make and deliver for us in time for the season then coming on—1906. We were willing to take as few as 10 and as many as 50, dependent on what they thought was their ability to deliver them at the times as agreed upon. We finally settled that the proper number would be 30, as Mr. Carr and Mr. Dickson felt certain they could deliver those 30 at those times and get them out. Our men were ready to receive the presses on the 1st of June. We had employed Mr. Reagan long before Mr. Elmo Lawson had been employed—for two months before. Mr. Lawson

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was to go around and draw the transmission plans and the installation plans, and measure the gins. Mr. Weatherford was employed to go to work the last of May. Mr. Griffin was ready for work prior to the 1st of June. He was sent down to Dicksons May 31st. We had also employed Mr. Hunt for the 1st of June. We figured that we needed one skilled mechanic at each plant, and he would employ helpers, blacksmiths, carpenters, tinners, and others as he needed. All the presses that were delivered were delivered between the 9th of July and the 14th of August, and, inasmuch as those 21 presses were all delivered between those dates, the six men we had already engaged could not receive the presses. Those six men were busy with six presses, and the other presses were going out to be received, and it was absolutely necessary to employ men to receive the presses as they were delivered. That required us to employ as many as 20 men. Of course, that late in the season it was a difficult matter to get the men. Yes; I can give you a tabulated statement showing the expenses of all these men, including their salaries and their expenses, which we paid."

There was other evidence from which the jury might have found that the defendant had sustained damages as alleged by it because of the failure of plaintiff to deliver the presses on the dates named in the contract.

We do not think the evidence before set out presents any issue upon the question of whether time was of the essence of the contract, in so far as that question concerns defendant's right under the contract sued on to recover such damage as was reasonably within contemplation of the parties as the probable result of the failure of plaintiff to complete and make delivery of the presses on the dates specified in the contract. The plaintiffs, having agreed to deliver the presses on the dates named in the contract, would certainly be liable for any damage sustained by the defendant by reason of its failure to make such deliveries which reasonably and naturally resulted from such failure or which the evidence shows was reasonably within the contemplation of the parties at the time the contract was made as a probable result of such breach, unless such failure was excused by the other provisions of the contract, or was waived by defendant, or by its acts defendant is estopped from claiming such damage.

The first paragraph of the above quoted charge may not be open to the objection that it submits to the jury the issue of whether time was of the essence of the contract, but, when taken in connection with the succeeding paragraph, we think it clearly submits such issue. After telling the jury that defendant claims that "time was of the essence of the contract," the charge then proceeds to instruct them that this claim means that plaintiff was advised when it made the contract that a failure on its part to make delivery of the presses on the dates named in the contract would probably cause defendant to suffer the damage claimed by it, and then instruct them, that "whether plaintiff knew when the contract was made that unless delivery was made at the times named defendant would likely suffer loss, and whether the plaintiff made the contract in contemplation of such loss of profits by the defendant if it (plaintiff) failed to deliver the systems according to contract, is for you to say from all the evidence." The definition given by the court of what was meant by the defendant's claim "that time was of the essence of the contract" was inaccurate, but, when the jury were told it was for them to determine from the evidence whether the conditions existed which the court instructed them were necessary to make time the essence of the contract, there was a submission of the issue as to whether time was of the essence of the contract. As before said, we do not think any issue of this kind was raised by the evidence. The contract is unambiguous, and plaintiff expressly and explicitly agreed to deliver the presses on the dates named therein, and we think no case can be found in which it is held that in a contract of this kind time would not be considered as of the essence of the contract. The letter of July 7th, before set out, cannot be construed as a waiver of defendant's claim for damages for failure of plaintiff to deliver the presses on the dates named in the contract. It contains no such waiver in terms, but only waives the right of defendant, which had then accrued, to refuse to accept any of the presses not then delivered, and defendant thereby agreed to accept such of said presses as should be constructed in accordance with the contract and completed and delivered to it as soon as possible after the date of said letter.

We think this is clear from the language used in the letter, but, if the language should be held ambiguous, the undisputed evidence as to the circumstances under which the letter was written and the purpose and intention of the writer, which was known to plaintiff, sustains the conclusion that it was not the intention of defendant in writing said letter to waive any claim for damages it might have against plaintiff on account of the failure to deliver the presses on the dates named in the contract. While there is other evidence in the record raising the issue of waiver and estoppel against defendant, it cannot be said that the evidence upon these issues is so conclusive as to render harmless any error in the charge of the court in submitting the issue of plaintiff's liability to defendant for damages. Under the evidence before set out, plaintiff's manager was advised at the time the contract was entered into that defendant expected to make a profit by using the presses during the cotton season of 1906, and such manager knew that a fail-

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ure to deliver the presses on the dates named in the contract would probably cause defendant to suffer damage through the loss of such profits and also by reason by increased cost to it in the hire of mechanics for installing said presses. This evidence was undisputed, and it was therefore error for the court to submit to the jury, as an issue, the question of whether the damage claimed by defendant was within the contemplation of the parties at the time the contract was made as a probable result of its breach by plaintiff in failing to make delivery of the presses on the specified dates. We think both of appellant's objections to the charge before stated are valid, and it cannot be said, under the facts of this case, that the error in submitting to the jury issues not raised by the evidence was not prejudicial to appellant.

The memorandum contract of April 29th provides for the delivery of all of the presses before the 1st day of August, 1906. The final contract contains a similar requirement, and expressly names the conditions under which failure to deliver by the time stipulated in the contract shall excuse the plaintiff. Under the terms of this contract we think it clear that unless the conditions existed which excused the plaintiff from making the deliveries on the dates specified in the contract, or unless a compliance with the contract as to the dates of delivery had been waived, the defendant would not have been required to accept and pay for presses delivered after the time named in the contract. Garrison v. Cooke, 96 Tex. 228, 72 S. W. 54, 61 L. R. A. 342, 97 Am. St. Rep. 906. In such case the defendant could waive the right to refuse to accept the presses and receive same holding the plaintiff responsible for any recoverable damage which the defendant may have sustained by plaintiff's breach of its contract as to the time of delivery of the presses. The waiver of the right to refuse to accept the presses would not defeat the right to recover damages for the delay in delivery.

There was no error in the refusal of the trial court to give the special charge requested by the defendant before set out, because said charge limited plaintiff's defense to defendant's claim for damages to proof of the alleged agreement to substitute steel tubing for XX pipe, and of the inability of plaintiff to procure said tubing in time to comply with its contract, thus ignoring the other defenses pleaded by plaintiff, as to which, as before stated, the evidence was sufficient to raise an issue.

Appellee very earnestly insists that the loss of profits for which defendant sued was too uncertain and speculative to constitute a basis for recoverable damage, and therefore any error in the charge in submitting to the jury defendant's claim for such damages cannot be complained of by defendant. While the testimony offered by defendant upon this claim for damages may have been subject to the objection that the statement of the witness of the number of additional bales of cotton that defendant would have pressed had the presses been delivered on the dates named in the contract was purely conjectural, no facts being stated from which the estimate of the witness could be made with reasonable certainty, there was other evidence bearing upon this issue which was not subject to this objection. We do not think it can be held that profits of this kind, when the probable amount of such profits can be shown with reasonable certainty, and their loss was in contemplation of the parties at the time the contract was made, cannot be recovered as damages. The right to recover damages of this kind is sustained by the following authorities: 13 Cyc. 37; Dilley v. Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237; Aultman & Taylor Co. v. Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243; Western Union Tel. Co. v. Jack Auslet (Tex. Civ. App.) 115 S. W. 624.

The eleventh assignment of error complains of the rulings of the trial court in sustaining objections of plaintiff to the testimony of the witness Taft offered by the defendant. The matter complained of under this assignment is shown in the following bill of exception: "Be it remembered that on the trial of the above numbered and entitled cause J. Taft was called as a witness for the defendant, and testified that he was in the employ of the Dickson Car Wheel Company in the year 1906, during the time the machines were being constructed for the defendant. Witness stated that he knew there were some undelivered machines now at the plaintiff's shops, and that at the request of Mr. Carr, plaintiff's superintendent, he made certain measurements of several parts of said machine, after having first made a full set of drawings for the auxiliary, and that he made a written report of the result of his measurements to said superintendent, B. M. Carr, about April, 1907, which report was offered and received in evidence, and appears in the statement of facts. The witness then stated that he had had 15 years' experience in the manufacturing of machinery and as a mechanical engineer, and as a draughtsman and pattern maker. Whereupon, he was asked the following question by the defendants' counsel: 'Now, then, you made an examination of several parts of the machine, concerning which this is a report. Don't answer this question until these gentlemen have a chance to object. I will ask you to state whether or not in your opinion as a mechanical engineer those machines as constructed were constructed in a workman-like manner, and whether or not the gears would mesh properly, and whether or not the machines would run smoothly, and whether or not the gears were all true and tight in your opinion.' (To which question the plaintiff's counsel ob-

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jected, because the witness had not shown that he ever saw the sample press of July 7th, which objection was by the court sustained, and said witness was not permitted to answer same, although defendant expected to prove, and would have proved by said witness, that said machines were not constructed in a workman-like manner, and that the gears on the same would not mesh properly, and that said machines would not and could not run smoothly, and that said gears were not true and tight. Before said witness was called to the stand, plaintiff's witness had already testified that the 29 machines, including the undelivered machines above referred to by this witness, were all like the sample press of July 7th in every respect. To which ruling of the court the defendant then and there excepted, and here now tenders this its bill of exception, and prays that the same may be allowed to become a part of the record in this cause.)"

We think the trial court correctly held that the letter of July 7th, before set out, substituted a different warranty for that contained in the contract of May 29th. The only warranty contained in the contract was that the test made at the shops of the plaintiff before the machines were sent out should demonstrate "that the material and workmanship is according to this contract, and that all the fittings assemble properly, all pinions gears and meshes work properly, and that the entire machine will run smoothly and that all of the fittings, bearings and packing are true and tight." By the letter of July 7th defendant waived this test in consideration of the agreement by plaintiff to become "responsible for all breaks, defective castings, and defective workmanship, and damage caused by said breaks to the system on the first day's run at the several ginhouses." It was further agreed in said letter that the "system" then delivered was completed in accordance with the contract, and that the remaining systems should be finished in "exact accordance" with said system. By the terms of this letter the only warranty in regard to the undelivered systems was that they should be finished in exact accordance with the system then delivered, and that plaintiff would be responsible for all breaks and damages caused by defective material or workmanship which occurred during the first day's run at the several ginhouses, and, it not being shown that the witness Carr had seen the machine delivered on July 7th, he could not know whether or not the nine undelivered presses were finished in "exact accordance" with that system, and his expert opinion as to character of the material and workmanship in said systems was immaterial and inadmissible. If the presses were constructed just as the one delivered on July 7th, defendant could not refuse to accept them because of defective workmanship or material, and its measure of damage for defects of this kind would be limited to such as occurred during the first day's run at the several gins in which they were installed. While the contract provides that the defendant should pay the final amount due thereon on or before September 1, 1906, this requirement must be held to have been made with reference to the other provisions of the contract which required delivery of all of the presses by August 1, 1906. It was not contemplated that the presses should be paid for before delivery, and therefore, if plaintiff was entitled to recover the contract price of the nine undelivered presses, it would only be entitled to recover interest on said amount from the time said presses were ready for delivery, and, unless the evidence showed that the nine presses were ready for delivery before September 1, 1906, interest should not have been allowed from that date.

There was no error in refusing to admit the testimony of the witness J. L. Norris, to the effect that, if there had been no delay in installing defendant's press in his gin, he would "possibly" have ginned "a thousand or two" more bales. This testimony was too indefinite and uncertain to form any basis for a reasonable estimate of the number of bales that was lost by the delay, and was therefore properly excluded. On the other hand, we think his statement that the loss in bales was not less than 1,000 was not subject to this objection. The evidence shows that defendant had delivered to plaintiff for use in the construction of these presses certain patterns which belong to defendant, and which plaintiff still held in its possession. The court instructed the jury that, if they found that the amount due plaintiff under the contract exceeded the amount of damages to which defendant was entitled, they should make no finding as to the patterns, but, if they found that the defendant had sustained damage in excess of the amount due plaintiff, that they should add to such damage the reasonable value of the patterns delivered by defendant to plaintiff. It is difficult to understand upon what theory this charge was based. Appellee's contention is that the charge is correct, because plaintiff, having expended labor on the patterns, was entitled to hold them if defendant was indebted to it until the amount of such indebtedness was paid. If the pleadings support this claim and appellee's contention is sound, the judgment should have protected defendant either by decreeing it the patterns or their value, or allowing same to be offset against the amount of plaintiff's judgment, and, in order to have done this, the jury should have been instructed to find the value of said patterns regardless of whether the judgment in favor of plaintiff exceeded the amount of damages found for the defendant.

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We have not thought it necessary to discuss all of the many assignments of error. What we have said is sufficient to indicate our conclusion upon the main questions presented by the record. If any error is shown in the record which we have not pointed out in this opinion, it is not such as we regard material or as likely to occur upon another trial.

For the reasons indicated, the judgment of the court below is reversed, and the cause remanded.

SHERMAN et al. v. PICKERING et al.

(Court of Civil Appeals of Texas. June 30, 1909. Rehearing Denied Oct. 7, 1909.)

1. PUBLIC LANDS (§ 172*) — LEGISLATIVE GRANT NOT IN DISCHARGE OF OBLIGATION.

When a legislative grant is not made in discharge of some obligation of the government that the law would recognize, the grant would not, in a legal sense, be anything more than an act of sovereign grace and a pure donation.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 172.*]

2. PUBLIC LANDS (§ 174*)—DUPLICATE WARRANT—OPERATION—LIMITATIONS.

S., a soldier in the Texas army entitled to a bounty warrant certificate for land, conveyed one-half his interest therein to L., and gave him authority to prove up the claim. Nothing was done by either of them to prove up the claim until it was barred by limitations. Subsequently the Legislature passed an act to relieve S., authorizing the issuance of a duplicate land warrant for the land, and certificate was issued in his name. *Held*, that the legislative act did nothing more than lift the bar of the statute, and authorized the discharge of a legal obligation of the state in favor of S., and did not make a donation of the land, and the title acquired by S. under the act inured to the benefit of his purchaser L.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 174.*]

3. LIMITATION OF ACTIONS (§ 19*) — LIMITATION APPLICABLE.

The act under which the certificate was issued to S., inuring to the benefit of L. the title acquired by L., whether legal or equitable, was such as would support an action of trespass to try title, and as such would only be barred under limitations affecting suits of trespass to try title.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 19.*]

Appeal from District Court, Shelby County; S. W. Blount, Special Judge.

Trespass to try title by Mrs. C. M. Sherman and others against W. A. Pickering and others, in which Joe S. Rice and another, receivers of the Kirby Lumber Company, intervened. Judgment for plaintiffs and the interveners for one-half of the land, and for defendants for the other half. Plaintiffs appeal. Affirmed.

Andrews, Ball & Streetman, John B. Warren, and Jno. Hamman, for appellants. Bryarly, Carter & Walker, D. W. Doom, D. H. Doom, and J. M. Sanders, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title, brought by the appellant Mrs. C. M. Sherman against the appellees, W. A. Pickering, the W. R. Pickering Lumber Company, and J. T. Harris, to recover the title and possession of a tract of 1,280 acres of land in Shelby county granted by the state to F. A. Sherman. The defendant J. T. Harris disclaimed all right, title, and interest in and to an undivided one-half of said lands; but, as to the other one-half, he filed a general denial and plea of not guilty. The defendants W. A. Pickering and the W. R. Pickering Lumber Company disclaimed as to the title to the land in controversy, except as to the undivided one-half interest in and to the standing and growing pine timber thereon 10 inches and upwards in diameter, as to which the said defendants filed a general denial and plea of not guilty. By way of cross-action the said defendants W. A. Pickering and the W. R. Pickering Lumber Company set up that the said undivided one-half interest in and to the standing and growing pine timber 10 inches and upwards in diameter upon the said land had been purchased by them of the defendant J. T. Harris, and that the said defendant J. T. Harris had warranted the title thereto; and, in the event plaintiff should recover of said W. A. Pickering and the W. R. Pickering Lumber Company the title and possession of and to the lands described in the pleadings of the plaintiff, then in that event, the said defendants prayed judgment over and against their warrantor, J. T. Harris, for the sum of $4,800; same being the amount paid to the said Harris for the said timber. On August 6, 1908, Joe S. Rice and Cecil A. Lyons, receivers of the Kirby Lumber Company, filed their petition in intervention in the form of an action of trespass to try title, seeking to recover the title and possession of and to the land in controversy from the plaintiff Mrs. C. M. Sherman and the defendants, W. A. Pickering, J. T. Harris, and the W. R. Pickering Lumber Company. Upon the trial of this cause it was admitted by the plaintiff and the defendants that the plaintiff Mrs. C. M. Sherman by a deed to the land in controversy, duly executed and acknowledged and delivered since the institution of this suit, had conveyed the land in controversy to Joe S. Rice and Cecil A. Lyons, receivers of the Kirby Lumber Company, and interveners herein, and that whatever interest plaintiff had in the land had been vested by said deed in the interveners, Joe S. Rice and Cecil A. Lyons, receivers of the Kirby Lumber Company. The case was tried before the court upon evidence introduced by the plaintiff, interveners, and defendants, and judgment rendered for the plaintiff and interveners for an undivided one-half interest in and to the land sued for and described

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in plaintiff's petition, and against the plaintiff and interveners, and in favor of the defendants, as to the other undivided one-half interest in and to said land.

The evidence shows that F. A. Sherman was a soldier in the Texas army in 1835 and 1836, and by reason of his services as such soldier was entitled to a bounty warrant certificate for 1,280 acres of land. On the 6th of August, 1857, he executed a deed to Edward Linn conveying to him the following described property: "One-half of my right, title and interest in and to certain land certificate No. 329, issued by the board of land commissioners for the county of Harris, to the said F. A. Sherman, for one-third of a league of land; also one-half of the title and interest in and to a bounty claim of twelve hundred and eighty (1280) acres of land for service in the army of the Republic of Texas, in the year 1836." On the same day that this deed was executed Sherman also executed a power of attorney to Linn, authorizing him "For and in my name, place and stead, to prosecute and obtain for me my right and title to a certain headright certificate No. 329, issued by the board of land commissioners for Harris county, to me, the aforesaid F. A. Sherman, for one-third of a league of land and to prosecute my right, title and claim in and to my bounty warrant for twelve hundred and eighty acres of land for services in the army of the Republic of Texas, for the year 1836, —also to have the same located, surveyed and patented; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof." It is not shown that Linn did anything in the matter of proving up the bounty warrant claim mentioned in the above deed and power of attorney. Linn died in November, 1868, and in a suit for the partition of his estate, in the district court of Travis county, among other property directed to be sold by order of the court for purpose of partition was an undivided one-half interest in a land certificate issued to F. A. Sherman for 1,280 acres of land; said certificate having been issued by virtue of an act for the relief of F. A. Sherman, passed by the Legislature of Texas and approved January 11, 1862. At a sale by the commissioners of partition on January 1, 1874, Linn's interest in this certificate was purchased by J. C. Minter. The deed to Minter was recorded in May, 1882. Appellee Harris holds the title of Minter. The land in controversy was located under this certificate in 1873 in the name of F. A. Sherman, after the death of Linn. In 1879 corrected field notes were made and returned to the Land Office in the name of F. A. Sherman, and patent was issued in his name. Sherman died in October, 1884.

The act under which the certificate by virtue of which the land was located is as follows:

"An act for the relief of F. A. Sherman.

"Section 1. Be it enacted by the Legislature of the state of Texas, that the Commissioner of the General Land Office be and he is hereby authorized and required to issue to F. A. Sherman a duplicate land warrant for 1280 acres of land in lieu of the original warrant for said quantity of land, provided it shall appear that said original warrant has not been returned to the General Land Office or duplicate issued for same.

"Sec. 2. That this act take effect from and after its passage. Approved January 11, 1862." Sp. Laws 1861–64, p. 44, c. 92.

It was shown that no bounty warrant issued to F. A. Sherman was ever registered and approved by the commissioner of claims, as required by the act of August 1, 1856 (Laws 1856, p. 14, c. 93), or was ever presented to such commissioner, and no bounty warrant for 1,280 acres of land was issued by said commissioner to Sherman, or to any one for him. There has been a continued assertion of claim under the Minter title ever since his purchase at the partition sale above mentioned. Appellants hold all the title of F. A. Sherman in the land in controversy. The appellants assail the judgment of the court below upon the ground that, the state having been under no legal obligation to F. A. Sherman at the time the relief act before set out was passed, such act was one of sovereign grace and bounty, and the land granted thereby became a gift from the state to said Sherman, and Linn acquired no interest therein under the prior conveyance to him by Sherman of one-half of the latter's interest in his bounty warrant claim. The cases of Causici v. La Coste, 20 Tex. 286, McKinney v. Brown, 51 Tex. 94, Grant v. Wallis, 60 Tex. 350, and others cited and relied on by appellants to support their contention, seem to establish the general rule that when a legislative grant is not made in discharge of some obligation of the government that the law would recognize, such grant would not in a legal sense be anything more than an act of sovereign grace and bounty. And in such case it matters not how meritorious the consideration that constitutes the moving cause for making the grant; if it is not such as the law would recognize, the grant is a pure donation. We do not think that the recognition of this rule necessarily requires a reversal of the judgment of the court below. It is true that, at the time the relief act was passed authorizing the issuance of a duplicate land warrant to Sherman, his original claim had become barred under the statute, and therefore

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the consideration for the grant was not in discharge of an enforceable legal obligation, but we think it clear that, if the Legislature, instead of authorizing the issuance of a duplicate certificate to Sherman, had merely authorized him to go into court and prove up his original claim and receive a certificate thereon, it could not be said that the certificate thus issued would not have been issued in discharge of a legal obligation, and that the land granted thereby was a donation. It seems to us that the act of the Legislature above set out did nothing more than lift the bar of the statute, and thus authorize the discharge of a legal obligation of the state in favor of Sherman. In the case of McKinney v. Brown, supra, this construction could not be given to the relief act in question in that case, for the reason that the Legislature at the time that act was passed could not, under the then Constitution of this state, waive the bar of limitation, and permit the reinstatement of the original claim.

In the case of Causici v. La Coste, supra, the claim which formed the consideration of the special grant had never become a legal demand, and in the Grant-Wallis Case the status and character of the claim which formed the consideration for the grant was not shown. The facts of all of the other cases cited by appellants distinguish them from the instant case. We do not think it can be doubted from the terms of the act itself that the certificate granted under the act in question in this case was given in consideration of the services of Sherman in the war for Texas independence, and in lieu of his barred claim arising from the legal obligation of the state to grant him 1,280 acres of land in consideration of his said services. Under this construction of the special act, under which the certificate was issued, it follows that the title thus acquired by Sherman inured to the benefit of his vendee, Linn, and the trial court did not err in so holding. We think the present case is more analogous to the case of Houston Oil Co. v. Gallup (Tex. Civ. App.) 109 S. W. 957, and the holding in that case should be followed.

It is further contended by appellants that the claim of appellee, being merely an equitable right in the land, is a stale demand, and is barred by the statute of limitation of 10 years. There is no merit in this contention. If the act under which the certificate was granted to Sherman inured to the benefit of his assignee, the title thus acquired by Linn, whether legal or equitable, was such title as would support an action of trespass to try title, and would only be barred under the statutes of limitation affecting suits of trespass to try title.

These conclusions dispose of all the questions presented in appellants' brief, and none of the assignments of error therein presented can be sustained.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

GALVESTON ELECTRIC CO. v. WILKINS.†

(Court of Civil Appeals of Texas. June 21, 1909. Rehearing Denied Oct. 7, 1909.)

1. STREET RAILROADS (§ 110*)—OPERATION—INJURIES TO TRAVELERS.

Where, in an action for injuries by a collision with a street car, the petition charged that the motorman could have discovered plaintiff's danger by ordinary care, and that the car was being operated at a higher rate of speed than could be done with safety to plaintiff, and that the motorman made no effort to stop the car until within about 10 feet of plaintiff, wherefore said car crashed into plaintiff's vehicle and horse, causing plaintiff's injury, and it further alleged that the motorman's failure to stop the car in time to avoid the collision was negligence, the petition sufficiently charged that plaintiff's injury was caused by the motorman's failure to use ordinary care to discover plaintiff's peril, and by running the car at an unsafe rate of speed and failing to use ordinary care to stop in time to prevent the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

2. TRIAL (§ 253*)—COLLISION—INSTRUCTIONS—NEGLIGENCE OF MOTORMAN.

Where there was no evidence that consideration for the safety of passengers on a street car prevented the motorman from sooner stopping the car when plaintiff was injured in a collision therewith, and there was no evidence that the safety of the passengers would have been endangered if the car had been stopped in time to have avoided a collision, an instruction with reference to the motorman's negligence in failing to do so was not objectionable as ignoring the question whether the car could have been stopped in time to have avoided the collision with safety to its passengers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 612–623; Dec. Dig. § 253.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—REPETITION.

The court did not err in refusing a request to charge to the same effect as an instruction already given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

4. TRIAL (§ 252*) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

A request to charge, submitting an issue not raised by the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Action by L. M. Wilkins against the Galveston Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Terry, Cavin & Mills, for appellant. Marsene Johnson and O. S. York, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover damages for injury to his person and to a vehi-

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† Writ of error denied by Supreme Court.

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cle owned by him, which injuries and damages it is alleged were caused by the negligence of one of appellant's employés operating one of its cars, whereby a collision occurred between said car and vehicle. The trial in the court below was by a jury and resulted in a verdict and judgment in favor of plaintiff for the sum of $100.

The petition states the cause of action as follows: "And plaintiff further alleges that on said July 7, 1906, he was going westwardly on said Market street between Twenty-Seventh and Twenty-Eighth streets in his buggy; that at said time said Market street was crowded with other vehicles and persons, and that a certain street car, belonging to and operated by defendant, was approaching him, going eastwardly along one of the tracks on Market street; that plaintiff's horse became frightened at some cause, and became hard to control, and that when said car had approached within about 90 feet of plaintiff, the employé of defendant operating said car discovered plaintiff and his vehicle and his horse on the track, and that plaintiff halloaed to said employé of defendant to stop until plaintiff could get his horse and vehicle off said track and across the street, and that plaintiff also waved his hand and screamed to said motorman to stop his car, and that said employé of defendant discovered the peril in which the plaintiff was at the time, or by the use of ordinary care could have discovered plaintiff's peril at said time, in ample time to have stopped said car and to have prevented a collision with plaintiff, but that said employé was operating said car at a higher rate of speed than could be done with safety to plaintiff; and that said employé of defendant made no attempt to stop said car, and made no attempt to prevent collision with plaintiff until when within about 10 feet of plaintiff, and that wherefore said car at said time crashed into plaintiff's said vehicle and horse, overturning said vehicle, and throwing the plaintiff under the body of said vehicle, and catching the plaintiff's foot and shoe under one of the wheels of said car, and causing plaintiff to sustain the damage and injury hereinafter set out and pleaded. And plaintiff further alleges that the said failure of the motorman to stop said car, and to thereby avoid collision with plaintiff, was negligence, and that the negligence of defendant was the proximate cause of the damages and injuries sustained by plaintiff, and that plaintiff in no way contributed to said negligence of defendant." The defendant answered by general denial and by the following special plea: "And for further and special answer herein, if required, defendant shows to the court that if plaintiff and his property, or either of them, was injured by one of defendant's cars, such injuries resulted from an unavoidable accident caused by the shying, balking, backing, or swerving of the horse driven by plaintiff at the time in question, by which sudden shying, balking, backing, or swerving of said horse and the vehicle to which said horse was attached, said vehicle and the plaintiff, who was therein, was suddenly, and without warning or notice to defendant's employés in charge of said car, placed upon the track in front of said moving car, and so close to said car that it could not be stopped in time to avoid injuring plaintiff and his property, but for which unavoidable shying, balking, backing, or swerving of the animal neither said plaintiff nor his property would have received the injuries complained of in plaintiff's petition."

The court charged the jury as follows: "You are further instructed that, if you believe from the evidence that on or about the 7th day of July, 1906, the plaintiff, L. M. Wilkins, while in the exercise of ordinary care on his part, and while riding west in his buggy on Market street, in the city of Galveston, his horse becoming frightened and hard to control, and that, while plaintiff was attempting to manage and control said horse, the said horse backed upon the tracks of the defendant company in such a way that plaintiff was run into, injured, and damaged, as alleged in his petition, by one of the cars operated by the defendant, the Galveston Electric Company, and if you further believe from the evidence that at the time of the collision between plaintiff's buggy and the defendant's car the motorman in charge of said car was not exercising ordinary care as to the rate of speed at which said car was being operated, or if you further believe from the evidence that the motorman on said car saw the plaintiff attempting to control his horse on or near the tracks of the defendant in front of said car, and that by the exercise of ordinary care on his part—the motorman's part—said car could have been stopped in time to prevent a collision with plaintiff's buggy, or, if you believe from the evidence that the motorman did not see plaintiff at or near the tracks of the defendant in front of said car, but you further believe that by the exercise of ordinary care on the part of him, the said motorman, the plaintiff could have been seen by said motorman in time to prevent the collision between the said car and plaintiff's buggy, and if you further believe from the evidence that the failure of the motorman to exercise ordinary care in the respects mentioned, if you have found that he did fail to use and exercise ordinary care, was negligence on the part of the defendant company, and that such negligence, if any, was the proximate cause—that is, the direct and immediate cause of the injuries and damages to plaintiff, if any—then you will find a verdict for plaintiff in accordance with the measure of damages hereinafter given you, unless you should further believe that the plaintiff was guilty of contributory negligence, that is to say,

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failed to use ordinary care for his own safety, in which event your verdict shall be for defendant."

By its first assignment of error appellant assails this charge upon several grounds. The first objection urged to said charge is that the issues of negligence on the part of the motorman in failing to use ordinary care to discover plaintiff on or near the track, and in running said car at a higher rate of speed than could be done with safety, were not raised by the pleadings, and therefore should not have been submitted to the jury. We do not think this objection is valid. The petition, as above shown, expressly charges that the motorman could have discovered plaintiff's danger by the use of ordinary care, and that at the time of the collision the car was being operated at "a higher rate of speed than could be done with safety to plaintiff," and that said motorman made no effort to stop the car until within about 10 feet of plaintiff, "and that wherefore said car at said time crashed into plaintiff's said vehicle and horse, overturning said vehicle, and throwing the plaintiff under the body of said vehicle and catching plaintiff's foot and shoe under one of the wheels of said car and causing plaintiff to sustain the damage and injury hereinafter set out and pleaded." It is further alleged that the failure of the motorman to stop the car in time to avoid the collision was negligence. These allegations, in effect, charge that plaintiff's injury was caused by the failure of the motorman to use ordinary care to discover plaintiff's perilous position, and by his running the car at an unsafe rate of speed and failing to use any care to stop same in time to prevent the injury.

The next objection to this charge is that it ignores the issue of whether the car could have been stopped in time to have avoided the collision with safety to the passengers therein. This objection is without merit, for the reason that there is no evidence which tends to show that consideration for the safety of the passengers prevented the motorman from sooner stopping the car, nor any evidence tending to show that the safety of the passengers on said car would have been endangered in the least if the car had been stopped in time to have avoided the collision.

The second assignment, which complains of the refusal of the court to give a special instruction submitting the issue of whether the car could have been stopped, with safety to the passengers, in time to have avoided the collision, was properly refused for the reason above stated.

The third assignment is disposed of by what we have said in answer to the contentions made under the first assignment, and is overruled.

The fourth assignment complains of the refusal of the court to give the following instruction requested by the defendant: "If you believe from the evidence that the injury to plaintiff and his vehicle, if any, was caused by the sudden backing, shying, or swerving of the horse attached to said vehicle, whereby said vehicle and plaintiff were backed, or placed in front of the car of defendant, and that, after the fact became apparent to the motorman in charge of said car that there might be a collision between said car and the vehicle in which plaintiff was driving, said motorman used all reasonable means, consistent with the safety of the passengers in said car, to stop said car and prevent injury to plaintiff and his property, then your verdict will be for the defendant." The court did not err in refusing this charge. The issue of whether the motorman could, by the exercise of ordinary care, have discovered plaintiff's peril in time to have avoided the injury was fairly submitted in the charge given by the court, and the jury were told to find for the defendant if they believed from the evidence that the motorman, in the exercise of ordinary care, failed to discover plaintiff's peril in time to prevent injuring him, and that when he did discover such peril, he used all the means in his power to prevent the collision. Having given this charge, it was unnecessary to repeat such instruction.

The requested charge was also objectionable in that it submits the issue of safety of the passengers on the car when no such issue was raised by the evidence.

The issue of contributory negligence was sufficiently submitted by the charge given by the court, and there was no error in refusing the special instruction on that issue requested by the defendant, the refusal to give which is complained of by the fifth assignment of error.

We think the issue of mental pain as a necessary result of the physical injury received by plaintiff was fairly raised both by the pleadings and the evidence, and the court did not err in submitting that issue to the jury.

None of the assignments present any reversible error, and the judgment of the court below is therefore affirmed.

Affirmed.

DAVIDSON v. WILLS.

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Denied Oct. 7, 1909.)

1. APPEAL AND ERROR (§ 1151*)—CORRECTION OF JUDGMENT.

A judgment allowing interest from an earlier date than claimed in the petition is erroneous, and the court on appeal will reform it so as to allow interest only from the date claimed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4504; Dec. Dig. § 1151.*]

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2. Costs (§ 238*)—Costs on Appeal—Liability.

Where the error, in a verdict and judgment arising from the allowance of interest from an earlier date than claimed in the petition was not in any way called to the attention of the lower court, the appellate court correcting the judgment will tax the costs of the appeal against appellant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 912; Dec. Dig. § 238.*]

Appeal from Nacogdoches County Court; C. D. Mims, Judge.

Action by J. E. Wills against John P. Davidson. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

See, also, 96 S. W. 634.

Ingraham, Middlebrook & Hodges, for appellant. Blount & Garrison, for appellee.

McMEANS, J. Plaintiff, J. E. Wills, sued the defendant, John P. Davidson, for certain commissions alleged to have been earned by him in the sale of a stock of goods belonging to defendant, alleging that, acting under a contract with defendant, he had, on February 1, 1903, effected an exchange of the goods for lands and other property, and that in addition to the commission due him for his services in that regard he was entitled to interest on the amount thereof at the rate of 6 per cent. per annum from the 1st day of March, 1903, and he prayed for judgment for his commissions and for interest from that date. The court directed the jury that, in case they found for plaintiff, they should allow interest at 6 per cent. per annum from the time they should find that the exchange of the goods for lands was consummated. The jury returned a verdict in favor of plaintiff for $710 as the amount of commissions due him, and for 6 per cent. per annum interest thereon from January 13, 1903, upon which verdict judgment was accordingly rendered. Defendant has appealed, and assigns as error the allowance by the verdict and judgment of interest for a time anterior to that for which interest is claimed in the petition.

It appears to be well settled that a judgment allowing a recovery for a larger amount of interest than that claimed in the petition is erroneous. Chapman v. Bolton (Tex. Civ. App.) 25 S. W. 1001; Walker v. Lewis, 49 Tex. 123; Ferguson v. Reed, 45 Tex. 582. The assignment must be sustained. The judgment of the court below will by this court be reformed so that interest will be recovered from March 1, 1903. Appellant in his motion for a new trial did not call the attention of the trial court to this error, nor otherwise seek to correct the error in the court below, and for this reason he will be taxed with the costs of this appeal. Haley v. Gatewood, 74 Tex. 281, 12 S. W. 25; Chapman v. Bolton (Tex. Civ. App.) 25 S. W. 1001.

We have examined all the assignments of error urged by appellant in his brief, and are of the opinion that no reversible error is presented in any of them.

The judgment of the court below, as reformed, is affirmed.

Affirmed.

KIMBELL v. POWELL et al.

(Court of Civil Appeals of Texas. June 21, 1909. On Motion for Rehearing, Oct. 7, 1909.)

1. Trial (§ 390*)—Conclusions of Law and Fact—Filing—Time—Statutes.

Acts 1st Sess. 30th Leg. 1907, p. 446, c. 7, § 1, authorizes a district judge to prepare and file conclusions of law and fact, when a demand is made therefor, at any time within 10 days after adjournment of the term, without a previous order to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 913; Dec. Dig. § 390.*]

2. Exceptions, Bill of (§ 38*) — Filing — Time—Order.

In order to authorize a district judge to sign and file statements of fact and bills of exceptions within 10 days after adjournment of the court, a previous order must be made.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 49; Dec. Dig. § 38.*]

3. Appeal and Error (§§ 669, 670*)—Record—Contradiction.

The record showing the date of filing of the court's findings of fact and conclusions of law cannot be impeached on appeal by affidavit, or by the statement of the judge appended to a motion to strike such conclusions from the record because not filed in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2864–2866; Dec. Dig. §§ 669, 670.*]

4. Appeal and Error (§ 649*)—Correction of Record—Mode.

Where the record of the filing of the trial court's conclusions of law and fact was claimed by plaintiffs not to speak the truth, their remedy to correct it was by proceeding in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2807; Dec. Dig. § 649.*]

5. Judgment (§ 951*) — Evidence — Admissibility.

Where defendant did not claim title to land under an unrecorded judgment, Rev. St. 1895, art. 4649, providing for record of judgments, and declaring that until so recorded a judgment should not be received in evidence to support any right claimed by virtue thereof, had no application to the question whether the judgment was available to identify and describe the land claimed under certain deeds referring thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1808; Dec. Dig. § 951.*]

6. Deeds (§ 41*)—Description—Reference to Other Documents.

Land may be described in a deed by reference to another registered deed or to a recorded judgment or decree, under the general rule that that is certain which can be made certain.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 84; Dec. Dig. § 41.*]

7. Deeds (§ 41*)—Description—Reference to Nonrecorded Judgment.

To identify and render definite the description of land in a registered deed to support title by limitation, resort may be had to an

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unrecorded district court judgment, distinctly referred to in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 84; Dec. Dig. § 41.*]

8. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—DEEDS.

Where defendant took no title under certain deeds, they could only serve as a basis for his claim of title by limitation of five years as to the land or interest described.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 417; Dec. Dig. § 71.*]

On Rehearing.

9. APPEAL AND ERROR (§ 801*)—NOTICE OF APPEAL—MOTION TO DISMISS.

Where the record showed that notice of appeal was properly given in open court, a motion to dismiss, supported by appellee's affidavit that no such notice was given, and contradicted by an affidavit of appellant's counsel that the notice was given as recited in the record, will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3163; Dec. Dig. § 801.*]

10. APPEAL AND ERROR (§ 649*)—RECORD—CORRECTION—STAY.

Where appellee claimed that the record showing the filing of conclusions of law and fact within the required time was untrue, the appellate court could delay the decision of the case until the record could be corrected in the trial court, either before or after judgment of the appellate court, provided counsel's attention had not previously been called to the omission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2809; Dec. Dig. § 649.*]

11. APPEAL AND ERROR (§ 649*)—CORRECTION OF RECORD—DELAY.

Where on October 9, 1908, appellee moved to strike additional conclusions of law and fact, on the ground that they were not filed in time, and supported the motion by his own affidavit and certificate of the district judge, and, the motion being overruled, no request was then made for delay until the record could be corrected in the trial court, and no steps were taken to do so until August, 1909, and the proposed proceedings were not brought to the appellate court's attention until October 5, 1909, a stay will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2809; Dec. Dig. § 649.*]

Appeal from District Court, Leon County; Gordon Boone, Judge.

Action by Cecilia B. Powell and others against B. B. Kimbell. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

B. D. Dashiell and Thos. B. Greenwood, for appellant. D. T. Garth, for appellees.

REESE, J. We are met, in limine, in this case by a motion presented by appellee to strike from the record the court's conclusions of law and fact. There is no statement of facts. The record shows original and additional conclusions of law and fact in two separate papers, each duly signed by the trial judge, and both, as appears from the record, filed on March 28, 1908. The court adjourned on March 21, 1908. With regard to both of these documents it is charged in the motion that no order was made allowing the district judge 10 days after adjournment to prepare and file such conclusions, and this is true; but we are of the opinion that such order was not necessary, but that under the provisions of section 1, c. 7, p. 446, Acts 1st Called Sess. 30th Leg. 1907, the judge of the court may prepare and file such conclusions of law and fact, when demand is made therefor, at any time within 10 days without a previous order to that effect, which is, however, required in case of statements of facts and bills of exceptions filed after adjournment. As to the additional conclusions of law and facts, appellees state in their motion, as an additional ground for excluding the same, that although they appear to have been filed by the clerk on March 28th, they were not in fact filed until April 6th, more than 10 days after adjournment, and this is made to appear by the affidavit of appellees' counsel and by the statement of the district judge, appended to the motion. We are of the opinion that we are without authority to consider the affidavit and statement referred to in impeachment of the record as presented to us. Appellees should have proceeded in the district court if they desired to so correct the record. Willis v. Smith, 90 Tex. 636, 40 S. W. 401; Boggess v. Harris, 90 Tex. 477, 39 S. W. 565; Ennis Merc. Co. v. Wathen, 93 Tex. 622, 57 S. W. 946. The motion to strike out the conclusions of law and fact is overruled.

This is a suit in trespass to try title by appellees against appellant to recover a tract of land out of the Wm. Little league and labor in Leon county. This tract is a part of the northern one-third of said survey. As to appellee's title, it is sufficient to say that the court found that appellees were the owners of the land and entitled to recover, unless their title was defeated by appellant's claim of title under the statute of limitations of five years. This finding is not controverted, and as a conclusion of law is fully supported by the facts found. The assignments of error present only alleged errors of the trial court in passing upon appellant's claim of title under the statute of limitations of five years. The deed from Wm. Little to the land claimed by appellees had been lost or destroyed, and was not of record, and was established by circumstances. Appellant claimed title under duly registered deeds from persons claiming to be the heirs of Wm. Little, or vendees of such heirs. The court found that such deeds had been duly registered, that under them appellant had been in continuous, actual, adverse possession of parts of the land conveyed, cultivating, using, and enjoying the same, and paying all taxes thereon, for more than five years before the suit was filed, and was entitled to recover the undivided interest conveyed, except for the insufficiency of some of the deeds to describe and identify the land thereby conveyed. As to some of these

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deeds the court found that such description was sufficient, and gave appellant judgment for the undivided interest therein conveyed. The description of the land conveyed by the other deeds was not sufficient to enable appellant to prescribe thereunder, unless reference can be had to a certain judgment of the district court of Leon county, particularly referred to for identification and description of the land conveyed. This reference gave the names of the parties to said judgment, and otherwise sufficiently identified it. This judgment had not been recorded, nor filed for record, in the office of the county clerk, as provided by article 4649, Rev. St. 1895, providing for the record of such judgment, and providing also that until so recorded such judgment "shall not be received in evidence in support of any right claimed by virtue thereof." For this reason the trial court held that it could not be looked to for description and identification of the land described in certain of the deeds, and, the description without this being insufficient, as to such portions of the land sued for gave judgment for appellees. The correctness of this ruling is presented by appropriate assignments of error.

The statute referred to has no application to the question involved. Appellant is not claiming title under this judgment, and whether such judgment, unrecorded in the county clerk's office, can be looked to for the identification and description of the land is entirely foreign to the purpose of the statute. The conclusion of the trial court on this point is not very clearly expressed, but we assume, from the way the question is treated by both appellant and appellees, that if reference could be made to the judgment referred to in the deeds, for description of the land, such deeds would be sufficient to afford a basis for the statute of limitations, as duly registered deeds, for undivided portions of the land in controversy therein conveyed. It is not controverted that in a deed the land may be sufficiently described by reference to another registered deed, or that reference to the judgment or decree, if it had been duly recorded in the office of the county clerk, as provided in article 4649, might be used for this purpose. This rule does not rest upon any statute, but upon the general principle that that is certain which can be rendered certain. It has been held in McDonough v. Jefferson Co., 79 Tex. 539, 15 S. W. 490, that a duly registered deed, containing no description of the land, but referring for such description to an unrecorded deed, was not sufficient to afford a basis for presumption under the statute of limitation of five years. As such a deed contained nothing on its face to indicate to the owner that it involved his land, it would clearly not be notice to him, which is the purpose of the requirement that the deed under which the title is claimed under the five-year statute should be registered, and this would seem to be true even if the deed referred to was registered. We think, however, that if the deed upon which the claim of title by limitation rests is duly registered, and if it is sufficient, from what appears on its face, together with what appears from a judgment of the district court, distinctly and clearly referred to, to serve as notice to the owner that his land is claimed under the deed, it would be sufficient. In other words, we think that, to identify and render definite the description of land in a registered deed, to support limitation, resort may be had to a judgment of the district court not recorded in the county clerk's office, to help out a description of land conveyed, in the same way and to the same extent as a recorded deed. Snow v. Starr, 75 Tex. 416, 12 S. W. 673; Catlett v. Starr, 70 Tex. 485, 7 S. W. 844; Watson v. McLane, 18 Tex. Civ. App. 212, 45 S. W. 177; Hermann v. Likens, 90 Tex. 455, 39 S. W. 282; 1 Cyc. 1090, 1091. See, also, dissenting opinion of Chief Justice Stayton in Schleicher v. Gatlin, 85 Tex. 276, 20 S. W. 120, upon this question of the sufficiency of description of the land in such deeds. A description in a deed can be just as effectually and readily made certain by reference to a judgment recorded in one book as a deed recorded in another, both being public records, kept in the same building, and quite frequently in the same room. The deeds rejected by the court, on the ground that the description of the land was insufficient without reference to the judgment, on their face conveyed undivided interest of the grantors as heirs of Wm. Little in the Wm. Little league of land in Leon county, referring to the judgment to show the amount of such interest owned by them, and for description of the portion of the Little league out of which such interest is to be taken. The reference to the judgment should be given the same consideration as a reference to a recorded deed for description. We are of the opinion that the trial court erred in holding that the judgment, not having been recorded in the office of the county clerk, could not be consulted in order to ascertain with definiteness and certainty the land or interest therein conveyed.

We cannot say from this record that the court erred as to the amount of the interest conveyed by the Bragger and Stroud and Wm. Watson deeds, and the assignments of error with regard to these deeds are overruled.

Appellees by their second cross-assignment of error complain that the court erred in adjudging to appellant the 132½ acres under the Bragger deed, and the 82½ acres under the Stroud deed (both undivided), to be taken entirely out of the tract of 935 acres in controversy. The 935 acres, as to which the court found that appellees had title, unless defeated by appellant's limitation claim, is a part of the tract of 1,475 acres described in the Stroud deed, and the 1,325 acres describ-

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ed in the Bragger deed, of which undivided interest of 82½ acres and 132½ acres, respectively, as found by the court, are conveyed. Appellant took no title by either of these deeds. They can only serve as a basis for his claim of title under the statute of limitation of five years, and this claim must be confined to the land or interest embraced in the terms of the deed; that is, if the court's findings are correct, to an undivided interest of 132½ acres out of the 1,325 acres, and 82½ acres out of the 1,475 acres. Only such proportion of these interests as the amount of the land in the tract claimed by appellees bears to the said tracts of 1,325 acres and 1,475 acres, respectively, should be taken out of the land in controversy, as only such proportion of the 935 acres was, in fact, conveyed by the deeds referred to.

Other assignments and cross-assignments of error, not herein otherwise disposed of, are overruled.

We are unable from the findings of fact of the trial court to determine satisfactorily what judgment should have been rendered by the trial court, and are therefore compelled to remand the cause. The judgment is reversed, and the cause remanded for another trial in accordance with this opinion.

Reversed and remanded.

On Motion for Rehearing.

The record in this cause was filed in this court July 3, 1908. On October 9th appellee filed a motion to strike out "additional findings of fact and conclusions of law" of the trial court, on the ground that, although they appear from the record to have been filed within 10 days after the adjournment, they were not in fact so filed until after the expiration of such time, supporting such motion by affidavits. This motion was submitted, and consideration thereof taken with the case, and on June 21, 1909, the cause was decided; the motion to strike out being refused for reasons stated in the opinion. On July 4, 1909, appellee filed in this court his motion for a rehearing, and on October 5, 1909, filed a motion praying that proceeding be stayed until he could, by proceeding in the district court, have the record corrected so as to show that no notice of appeal was in fact given, and that the additional conclusions of fact were in fact filed more than 10 days after adjournment of the trial court. In so far as concerns the motion to dismiss the appeal on the ground that no notice of appeal was given the record showed that such notice was properly given in open court. Appellees' affidavit that this was not true was met by the counter affidavit of appellant's counsel that such notice was properly given and entered, and that the record in this particular speaks the truth. Upon this showing we overruled the motion to dismiss at the last term. As to the motion filed October 5th to stay proceedings until appellee could have the record corrected so as to show that the additional conclusions of law and fact were not filed in time, it is stated by appellee in the motion that suit to correct this part of the record was filed in the district court on August 8, 1909, but citation was quashed as defective. Unquestionably in a case of this kind it would be proper to delay the decision of the case until the record could be corrected in the trial court, which is the only way in which it can be done (Willis v. Smith, 90 Tex. 636, 40 S. W. 401; Boggess v. Harris, 90 Tex. 477, 39 S. W. 565; Ennis Merc. Co. v. Wathen, 93 Tex. 624, 57 S. W. 946), and this may be done as well after the judgment (of the appellate court) is rendered as before; but, as said in Railway Company v. Cannon, 88 Tex. 314, 31 S. W. 498, "provided the attention of the counsel has not previously been called to the omission by motion or otherwise."

As early as October 9, 1908, appellee filed in this court his motion to strike out the additional conclusions of law and fact on the ground here set up, supporting such motion by his own affidavit and that of the district judge. This motion was overruled on the authority of the cases first above cited. No request was then made to have this court delay proceedings until the record could be corrected in the district court, nor were any steps taken to have this done until August, 1909, nor was it brought to the attention of this court that appellee proposed to institute proceedings to have it done until October 5, 1909. It is not contended that the paper copied in the record is not what it purports to be, but only that it was filed in fact a few days too late. Upon the record thus presented we do not feel disposed to further delay the case until final hearing of the proceeding instituted by appellee on August 8, 1909, and for that reason his motion is overruled, as is also his motion for rehearing.

Appellee cites the case of Sykes v. Speer (Tex. Civ. App.) 112 S. W. 422, with which, it is contended, our ruling that in this matter affidavits will not be heard to contradict the record is in conflict. We do not so understand the decision, but our interpretation of the opinion is that the certificate of the trial judge to the conclusions of law and fact as found in the record contradicted the file mark of the clerk, and showed that the conclusions were not filed in time. Otherwise the opinion on this point is in direct conflict with the several opinions of the Supreme Court in the cases herein cited.

Motion overruled.

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GILMER et al. v. VEATCH et al.

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Denied June 30, 1909.)

1. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

Two persons who had inherited an undivided interest in land which was the community property of their grandparents executed a power of attorney to an agent, authorizing him to "sell and transfer our interest in the estate of" the grandfather. The agent sold their entire interest in the land by deed conveying all the interest they had as heirs at law in the land. *Held*, that the purchaser who took in good faith, for value, and with no notice that the land had been community land, other than the deed, took the heirs' interest in the land inherited from their grandmother as well as their grandfather; the deed not giving notice that the land may have been community property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502–512; Dec. Dig. § 230.*]

2. PRINCIPAL AND AGENT (§ 34*)—"POWER COUPLED WITH AN INTEREST"—POWER OF ATTORNEY.

A power of attorney given by joint owners of land to another joint owner of the same land to sell and convey it, which conveys to the attorney no interest in the land to be sold, is not a "power coupled with an interest"—(citing Words and Phrases, vol. 6, pp. 5478—5480; vol. 8, p. 7758).

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.*]

3. PRINCIPAL AND AGENT (§ 2*)—EXECUTION OF POWER—LAW GOVERNING.

Where a power of attorney not coupled with an interest was given in California with nothing in its terms to indicate where it was to be executed, and in an attempt to carry out the powers conferred land in Texas is sought to be sold, the law of Texas will control.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. PRINCIPAL AND AGENT (§ 43*)—TERMINATION OF AGENCY—DEATH OF PRINCIPAL.

In Texas lands cannot be sold under a naked power of attorney after the death of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 67; Dec. Dig. § 43.*]

5. PRINCIPAL AND AGENT (§ 42*)—TERMINATION OF AGENCY—MARRIAGE OF FEMALE PRINCIPAL.

Where a woman, after executing a power of attorney to sell her interest in land and before a sale was made by the agent, married, the marriage revoked the power.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 66; Dec. Dig. § 42.*]

6. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERROR—STATEMENTS TO PROPOSITIONS.

Where an assignment of error is not followed by a statement sufficient to explain it as expressly required by Court of Civil Appeals rule 31 (31 S. W. vii), it will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Error from District Court, Orange County; W. B. Powell, Judge.

Action by May Veatch and others against A. Gilmer and others. Judgment in part for plaintiffs, and defendants bring error. Reformed and affirmed.

See, also, 117 S. W. 430.

The sale of land under the power of attorney referred to was by deed conveying all the interest that J. Allen Veatch and May Veatch had as heirs at law in the land in question. The purchaser took in good faith for value, and without notice other than the deed that the property had been the community property of the heirs' grandparents.

Geo. E. Holland, for plaintiffs in error. W. D. Gordon, for defendants in error.

McMEANS, J. Suit by John Alfred Veatch and others, heirs of John A. Veatch, deceased, against A. Gilmer and others, of trespass to try title to a part of the Kennard league of land, in Sabine and Newton counties. A trial in the court below resulted in a judgment against defendants for the title and possession of an undivided interest amounting to 762 acres of the land in controversy. From this judgment John Alfred Veatch alone appealed, and the judgment of the lower court was affirmed by the Court of Civil Appeals of the Fourth District (111 S. W. 740). A petition for a writ of error was granted by the Supreme Court, and that court on a cross-assignment of error reformed the judgment of the trial court and Court of Civil Appeals, and the judgment, as reformed, was affirmed (117 S. W. 430). A sufficiently full statement of the issues will be found in the opinions referred to, and need not be repeated here.

The appellees on that appeal filed and presented cross-assignments of error, only two of which were passed upon by the Court of Civil Appeals, that court holding that, defendants nor any of appellant's coplaintiffs having perfected an appeal, the cross-assignments of error, which had no reference to appellant, or that portion of the judgment appealed from, were not entitled to consideration. This appeal is by writ of error sued out by defendants in the court below against all the plaintiffs except John Alfred Veatch, and the assignments of error here presented are identical with the assignments presented on cross-appeal.

Plaintiff in error's fifth assignment assails the trial court's eighth conclusion of law, which is as follows: "I find that the power of attorney from J. Allen Veatch and May Veatch is valid, but only authorizes the conveyance of their interest in their grandfather's, John A. Veatch's, estate, and did not authorize the conveyance of the mother's interest or the part inherited by them from their grandmother, and that they are entitled to recover an undivided 111 acres of the land in suit." John A. Veatch during his lifetime became the owner of the south half and of an undivided one-eighth of the north half of the Kennard league. He sold 1,427 acres, and died possessed of 1,349 acres. This was the community property of John A. Veatch and his wife, who died in 1845. John A. Veatch died in 1870. J. Allen Veatch and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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May Veatch are their grandchildren, and are entitled to an undivided 222 acres of the 1,349 acres, unless their title was divested by a sale made by S. H. Veatch under a written power of attorney executed by them to him authorizing him to "sell and transfer our interest in the estate of John A. Veatch, deceased." Acting under this power, S. H. Veatch sold the entire interest of J. Allen Veatch and May Veatch in the Kennard league. The trial court held that this power of attorney only authorized S. H. Veatch to sell the interest of the land that was inherited by his principals from John A. Veatch, deceased, and not the interest inherited by them from their deceased grandmother, who was the wife of John A. Veatch, and awarded to May and John Allen Veatch 111 acres, which was one-half of the amount shown to have passed to them by descent from their grandparents. Following the opinion of the Supreme Court on the appeal of John Alfred Veatch, before referred to, and adopting the reasons therein given, we hold that the assignment is well taken, and that under the agreed facts the defendants in the court below, plaintiffs in error here, are entitled to the share of J. Allen Veatch and May Veatch of 222 acres, instead of the one-half thereof as awarded by the judgment of the lower court.

Plaintiff in error's first assignment of error is: "The trial court erred in his fourth conclusion of law in holding that the powers of attorney were naked powers, and not coupled with an interest." Under this assignment, the proposition is advanced that, "when an interest in the property to be dealt with under the agency is at the same time in the same person with a power to dispose of it, this constitutes a power coupled with an interest." The question here presented is whether a power of attorney, given by one joint owner of land to another joint owner to sell and convey it, is a power "coupled with an interest" within the legal meaning of that term. Plaintiffs in error contend that the instrument does not carry with it an interest in the land to be sold in order to couple an interest with the power; that the power is one thing, and the interest is another; and that when the power to sell is in the same person who has an interest in the thing to be sold, however that interest is acquired, the power becomes one coupled with an interest, and irrevocable. The powers of attorney in question were given by persons who owned an undivided interest in land to a person who also owned an undivided interest in the same land. No interest or estate in the land to be sold was conferred by the instruments upon the agent, but merely authorized him to sell and convey their land. We do not think the contention is sound. See Words and Phrases, tit. "Power Coupled with an Interest." The assignment is overruled.

The second assignment complains that the trial court erred in its fourth and fifth conclusions of law in holding that the power of attorney from Gitchell and wife was governed by the laws of Texas, and was revoked at the death of the makers. This instrument was a general power of attorney, and was executed in the state of California. There was nothing in its terms to indicate where or in what state it was to be executed. It was, in fact, attempted to be executed by the sale of lands in Texas afer the death of the makers. The statute of California provides that "agency is terminated by notice to the agent of the death of the employer." The power of attorney conferred upon the agent no interest or estate in the property to be sold; in other words, the power was not "coupled with an interest." We think that, when in an attempt to carry out the powers conferred land in this state was attempted to be sold, the law as recognized and applied by the courts of this state must control, and the mere fact that the instruments were signed and delivered in California would not alter this rule. That the sale of lands in this state under a naked power of attorney after the death of the principal cannot be upheld seems to be well settled. Cleveland v. Williams, 29 Tex. 219, 94 Am. Dec. 274; Renfro v. Waco (Tex. Civ. App.) 33 S. W. 767; Kent v. Cecil (Tex. Civ. App.) 25 S. W. 715; Connor v. Parsons (Tex. Civ. App.) 30 S. W. 85; Cox v. Bray, 28 Tex. 263. The assignment is overruled.

Fannie Veatch, after the execution of her power of attorney, and before a sale of her interest in the land was made by her agent, married; and the court concluded as a matter of law that her marriage revoked the power. This conclusion is assailed by the third assignment of error. We find no error in the court's conclusion. Judson v. Sierra, 22 Tex. 371; Henderson v. Ford, 46 Tex. 627.

The fourth assignment is not followed by a statement sufficient to explain it, as required by rule 31 (31 S. W. vii), and will not, therefore, be considered.

The sixth assignment was disposed of by the Supreme Court, and the seventh by the Court of Civil Appeals in the opinions above referred to, and for that reason will not be here discussed.

We are of the opinion that, instead of recovering of J. Allen Veatch and May Veatch 111 acres of the land, the plaintiffs in error should have recovered 222 acres; and accordingly the judgment will in that respect be reformed, and in all other respects affirmed.

Reformed and affirmed.

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TILLMAN v. ERP et al.

(Court of Civil Appeals of Texas. May 8, 1909. On Motion for Rehearing, June 24, 1909. Further Rehearing Denied Oct. 7, 1909.)

1. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—SALE TO ACTUAL SETTLER—ABANDONMENT—EFFECT.

Under Acts 1895, p. 67, c. 47, § 11 (Rev. St. 1895, art. 4218l), regulating the sale of public free school lands, land sold to an actual settler, subject to forfeiture for failure to comply with the condition of three years' occupancy, is not forfeited to the state, with the effect of being again upon the market for sale, by the mere fact of abandonment of the purchaser, but to have that effect the Land Commissioner must make formal declaration of such forfeiture by the indorsement "Land forfeited" on the purchaser's obligation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 549; Dec. Dig. § 173.*]

2. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—SALE TO ACTUAL SETTLER—ABANDONMENT—EFFECT.

Under Acts 1901, p. 294, c. 125, § 3, regulating the sale of public school lands, and providing that, if a purchaser shall fail to reside upon the land as required by law, he shall forfeit the land, etc., and it shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for nonoccupancy shall have the effect of placing the land upon the market without any action on the part of the Commissioner of the General Land Office, abandonment by an actual settler purchaser will not ipso facto place the land at once upon the market, but it can only be done by the declaration of forfeiture by the Commissioner as prescribed by statute.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 549; Dec. Dig. § 173.*]

3. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—SALE.

It is the acceptance of the offer of the state, and the compliance by the applicant to purchase therewith, that constitutes him a purchaser of school lands, and not the acceptance of his application by the Land Commissioner, and likewise, if an applicant has not brought himself within the law, the acceptance of his application by the Commissioner confers no right upon him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.*]

4. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—APPLICATION FOR LAND NOT ON MARKET.

If public school land is not on the market when application therefor is filed, the application confers no rights upon the applicant, and cannot be made effective by the acceptance of the Land Commissioner.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.*]

5. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—APPLICATION FOR LAND NOT ON MARKET—SUBSEQUENT AWARD UPON PREMATURE APPLICATION.

If public school land is not on the market, and subject to sale when application therefor is filed, a subsequent award by the Commissioner, after the land comes on the market, upon the premature application, is void.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

6. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—APPLICATION FOR LAND NOT ON MARKET—SUBSEQUENT AWARD UPON PREMATURE APPLICATION.

Defendant made application to purchase school lands, at the price of $3, then fixed, which had been sold to another, but did not designate the exact part of the tract he desired. The Commissioner informed him that his application had been suspended because of the prior sale, but stated that it could be further considered if the prior sale should be canceled, provided defendant stated the exact land desired. The Commissioner subsequently revalued the land at $5 per acre, and afterwards canceled the prior sale for abandonment. Defendant then amended his application, stating the land desired. Subsequently the Commissioner accepted defendant's application, awarding him the land at $3 per acre, notifying him that the award was made as of the date of the application. *Held*, that the award on the premature application, amended after the land had come on the market, and after the price had been raised, was void.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

7. PUBLIC LANDS (§ 173*)—STATUTES OF LIMITATION—ACTIONS TO ENFORCE RIGHT TO PURCHASE.

Acts 1905, p. 35, c. 29, limiting the time within which a person claiming the right to purchase or lease public school land previously sold or leased to others shall sue to one year after the act takes effect or after the award, if made after the act takes effect, was intended to bar after one year an action to set aside an award of school land by the Commissioner because of insufficient application.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

8. LIMITATION OF ACTIONS (§ 182*)—STATUTE OF LIMITATIONS—NECESSITY FOR PLEADING.

The act is a statute of limitations, and cannot be availed of as a defense, unless specially pleaded under the express provisions of Rev. St. 1895, art. 3371.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 678; Dec. Dig. § 182.*]

On Motion for Rehearing.

9. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—REVERSAL—REMANDMENT FOR AMENDMENT OF PLEADINGS.

The general rule is that when a judgment is reversed appellate courts may properly remand to allow appellee to amend his pleadings, when it seems to be required in the interest of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4616–4617; Dec. Dig. § 1178.*]

10. APPEAL AND ERROR (§ 1178*)—DETERMINATION OF CAUSE—REVERSAL—RIGHT TO REMAND.

Rev. St. 1895, art. 1027, provides that when a judgment of the lower court shall be reversed, the court shall render such judgment as the court below should have rendered, except when it is necessary that some fact be ascertained, or the damage to be assessed, or the matter to be decreed, is uncertain, in which cases the cause shall be remanded. *Held*, that a case, upon reversal, could not be remanded to allow appellee to plead the statute of limitations against appellant's claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604–4620; Dec. Dig. § 1178.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by Sadie F. Erp and others against Y. E. Tillman. Judgment for plaintiffs, and defendant appeals. Reversed, and judgment rendered for defendant on rehearing.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Stevens & Pickett, for appellant. A. W. Marshall, for appellees.

REESE, J. This suit was instituted on June 1, 1906, by W. F. Erp and wife against Y. E. Tillman, in the district court of Liberty county. The petition states an ordinary case of trespass to try title for the recovery of the west 240 acres of the C. A. Carson survey of 529½ acres of land. Defendant filed his original answer, which is not in the record, on August 13, 1906, and his first-amended answer, on which he went to trial, on March 8, 1907, wherein he pleaded general demurrer, general denial, and not guilty, and, by way of cross-action, set up his ownership and possession of the land and entry and ouster by plaintiffs on June 1, 1906, and prayed judgment for the land, rents, and damages. By supplemental petition filed February 17, 1907, plaintiffs demurred generally to defendant's cross-action, and pleaded not guilty. The case was tried without a jury, and judgment rendered for the plaintiffs, from which defendant appeals.

The case involved the validity of the sale of the land, a part of the public free school land of the state. The following is a correct history of the title as shown by the record evidence which is undisputed: Under the terms of the act of February 23, 1900, Chas. A. Carson made application for the survey of a tract of unsurveyed school land in Liberty county. Under the application field notes were made and returned to the General Land Office. The survey contained 529½ acres, and was designated by the Land Commissioner as survey No. 14 in the name of C. A. Carson. On June 11, 1902, the field notes were approved, and the land classified as agricultural, and valued at $3 per acre, and notice given to Carson allowing him 60 days to file his application to purchase. Carson died on June 11, 1900, having made no application, and on August 9, 1902, the Commissioner placed the land on the market as agricultural land, at a valuation of $3 per acre, having canceled Carson's claim. On August 15, 1902, W. F. Erp applied to purchase the east 240 acres of the tract as an actual settler, and on same day W. E. Chambers, as an actual settler, applied for 240 acres, and the land applied for was awarded by the Commissioner to the parties, respectively. August 15, 1903, Chambers sold the west 240 acres to Jno. S. Schmitz, taking his notes for $2,000, and Schmitz substituted himself to Chambers as an actual settler purchaser. The notes for $2,000 were assigned by Chambers, and under judgment and foreclosure thereon the land was sold and conveyed to the defendant, Tillman, on June 6, 1905. On February 8, 1905, Erp made application to the Land Commissioner to purchase 240 acres of survey No. 14, C. A. Carson, at $3 per acre, the price then fixed, as additional land to his home tract, being the east 240 acres of the survey. The application did not further describe the land applied for. On February 16, 1905, the Land Commissioner wrote to Erp as follows: "This is to advise you that your application * * * has been suspended for the reason that this land was sold to W. E. Chambers, and is now held by Jno. S. Schmitz as assignee. If this sale is canceled out in the near future, then your application can be further considered, provided that you designate what part of this survey you desire to purchase, as the entire survey contains 529½ acres, and you simply applied for 240 acres of same, without stating what part you desire." On February 14, 1905, the Commissioner revalued the land, placing the value at $5 per acre, and forwarded notice thereof to the county clerk of Liberty county, by whom it was entered upon the records of his office. On March 25, 1905, the Land Commissioner declared the sale to Chambers, Schmitz, assignee, forfeited for abandonment, making formal entry of such forfeiture as required by law, and by letter of the same date advised the county clerk of such forfeiture, and that the land was on the market. On the same day the Commissioner wrote to Erp as follows: "Referring to the matter of the attack upon the sale of W. E. Chambers, J. S. Schmitz, assignee, * * * I have to advise you that, the 30 days given Mr. Schmitz for filing rebuttal evidence having expired, and having heard nothing from him relative thereto, said sale is accordingly forfeited on this date. Referring to your application filed with the county clerk on the 8th day of February, 1905, and our letter to you regarding same on February 15, 1905, I have to advise you that unless you furnish this department with the information requested in said letter on the 15th ult., your application will be taken up and rejected, and you will be given 10 days from this date within which to furnish such information." On April 5, 1905, the Commissioner accepted the application of Erp filed February 8, 1905, and awarded him the land in controversy at $3 per acre, in accordance with his application, notifying him that the award was made as of February 8, 1905. The evidence does not show, so far as has been pointed out to us, or we have been able to find, whether Erp had amended or corrected his application so as to designate particularly the land he desired to purchase, as required by the Commissioner, prior to the award to him. Erp made the necessary payments, etc. On February 5, 1907, pending the suit, Tillman made application to purchase the land in controversy at $5 per acre, and tendered the necessary cash and notes required by law. This application was rejected, on account of the previous award to Erp. After the sale to W. F. Erp he conveyed the land to his wife, Sadie F. Erp.

By his assignments of error appellant assails the judgment on the ground that appellees, who were plaintiffs below, showed no

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title upon which they were entitled to recover, and that, under the evidence he was entitled to judgment on his cross-action. Appellant's claim as to the want of title in appellees rests upon the following grounds: First. Appellee's application, made on February 8, 1905, conferred no right upon him, and the subsequent award to him by the Land Commissioner likewise conferred no right, for the reason that at the time said application was filed the land was not on the market, as the previous sale to Chambers, Schmitz, assignee, had not been declared forfeited as required by law. Second. That appellee's application was defective in failing to designate the land, and so continued until after March 25, 1905, when the land came on the market by the forfeiture of the previous sale to Chambers, and that when this defect was corrected by amendment of his application, the land had been revalued, and was on the market at $5 per acre, and the Commissioner had no authority to accept Erp's application to purchase at $3 per acre.

It has become the settled construction of the act of 1895, regulating the sale of public free school lands, that land sold to an actual settler, subject to forfeiture for failure to comply with the condition of three years' occupancy, is not forfeited to the state, with the effect of being again upon the market for sale, by the mere fact of abandonment of the purchaser, but that to have that effect, it is necessary that the Land Commissioner make formal declaration of such forfeiture by the indorsement "Land forfeited" on the purchaser's obligation. Article 4218*l*, Rev. St. 1895. Such is the uniform construction of the language of that act with regard to forfeitures, as well for nonpayment of interest as for noncompliance with the condition of settlement and occupancy. Bates v. Bratton, 96 Tex. 279, 72 S. W. 157; O'Keefe v. McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534. The language of section 3 of the act of 1901, which was the law in force at the time of the sale to appellee, Erp (page 294, c. 125, § 3, Acts 1901), is slightly different, especially as containing the additional words "and all forfeitures for nonoccupancy shall have the effect of placing the land upon the market without any action whatever upon the part of the Land Commissioner." Comparing the language of the act of 1895 (article 4218l, Rev. St. 1895) with that of the act of 1901, in the case of Adams v. Terrell, 107 S. W. 537, it was held by our Supreme Court that the same construction must be given to the language of the latter act; that is, that abandonment by an actual settler purchaser did not have the effect, ipso facto, to place the land at once upon the market, but such could only be done by the declaration of forfeiture by the Commissioner in the manner prescribed by the statute. It must be said for the learned judge that this decision was not rendered until after the trial of the case at bar in the district court.

It has also been the uniform construction of our laws regulating the sale of school lands that it is the acceptance of the offer made by the state, and the compliance by the applicant to purchase therewith, that constitute him a purchaser, and not the acceptance of his application by the Land Commissioner. Neither the acceptance nor rejection of his application by the Commissioner affects his right to the land, but if the purchaser has brought himself within the terms of the law, he is entitled to have his application accepted, so that he may be entered as a purchaser on the records of the Land Office and the Treasury Department, and these are valuable rights for the enforcement of which he may resort to the writ of mandamus, but such award is not in any sense essential to his right to the land. Hazelwood v. Rogan, 95 Tex. 303, 67 S. W. 80. And for the same reason, if the purchaser has not brought himself within the terms of the law, the acceptance of his application confers no right upon him. Pohle v. Robertson (Tex.) 115 S. W. 1167; Briggs v. Key, 30 Tex. Civ. App. 565, 71 S. W. 73; Eastin v. Ferguson, 4 Tex. Civ. App. 643, 23 S. W. 918. One of the essential elements of such sale is that the land be upon the market; that is, that it be at the time offered for sale by the state. The application to buy is but the acceptance of the state's offer to sell. If there is no such offer, there can be no acceptance to bind the state; and accordingly we understand it to be settled by the decisions of this state that, if the land is not on the market at the time the application is filed, such application confers no rights upon the applicant, creates in him no title to the land, is, in fact, void and of no effect, nor can it be galvanized into effective life by the acceptance of the Land Commissioner. This has been so often decided by our courts that it is not necessary to cite authority in support thereof. And we deduce from the authorities the further proposition that if the land is not on the market, and subject to sale at the time the application is filed, a subsequent award by the Commissioner, after the land comes on the market, upon such premature application is void. Willoughby v. Townsend, 93 Tex. 80, 53 S. W. 581; Gracey v. Hendrix, 93 Tex. 26, 51 S. W. 846; Ford v. Brown, 96 Tex. 537, 74 S. W. 535; Adams v. Terrell (Tex.) 107 S. W. 537.

It is, however, insisted by appellee that, under the decision of the Supreme Court in Hazelwood v. Rogan, 95 Tex. 295, 67 S. W. 80, followed by the Court of Civil Appeals in Steward v. Wagley, 29 Tex. Civ. App. 105, 68 S. W. 299 (error refused), and Williams v. Barnes, 44 Tex. Civ. App. 298, 99 S. W. 127, the award of the land to Erp on April 5, 1905, after it had come on the market by the forfeiture of the sale to Chambers on the 25th March, no rights having

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intervened, vested him with title. We are somewhat embarrassed by what appears to us to be a conflict between the decision in the Hazelwood Case and Willoughby v. Townsend and Gracey v. Hendrix, and other cases heretofore cited, and especially in view of the emphatic statements in the opinion of the Supreme Court in those cases that the applicant must show that he was entitled to purchase in accordance with the terms of his application at the date it is filed. As said by Judge Brown in Gracey v. Hendrix: "The payment and obligation of Hendrix were not a compliance with the law at the time they were filed and presented to the officials of the state, and did not secure to him the right to purchase the land. The honorable Court of Civil Appeals rests its judgment upon the proposition that the application, being on file, became effective when the classification and valuation were changed so as to make it a compliance with the conditions as thus changed. In this we think that the honorable court committed error. The statute had prescribed the terms upon which the settlers might acquire a right, without the concurrence of any official, and had prescribed the standard of compliance to be the requirements of the law on the day that the papers were filed in the General Land Office. * * * Hendrix, the plaintiff in the court below, acquired no right to the section of land, and was therefore not entitled to recover, although the defendant, Gracey, may not have acquired any legal right himself, upon which it is not necessary for us to pass." To understand this language it must be borne in mind that in that case there was no intervening right to prevent the award to Hendrix, which was refused, and held by the Supreme Court to have been properly refused, on the sole ground that the price offered by Hendrix was $1.50 per acre, while the valuation at the date of this application was $2 which, however, had been reduced to $1.50 at the time his application was passed upon. That there was no intervening right to prevent the award to Hendrix is shown by the opinion of the Court of Civil Appeals, which gave him judgment on that ground, which judgment was reversed by the Supreme Court. Hendrix v. Gracey (Tex. Civ. App.) 50 S. W. 137.

We are of the opinion, however, that appellees can get no comfort from Hazelwood v. Rogan, for the reason that Erp's application to purchase was at $3 per acre, while at the instant of time that the land again came on the market, after the forfeiture of the sale to Chambers, the valuation of $5 per acre, placed upon it by the Commissioner on February 14th, became fixed upon it. It was said in the Hazelwood Case that, the Land Commissioner having in his hands the application of Hazlewood to purchase, in all respects in compliance with the law, when the land came on the market upon the termination of the lease, it would have been useless formality to require him to make another application, there being no intervening rights, thus treating the application, in purpose and effect, as having been made after the land came on the market. In the present case it would have been far from a useless formality to have required Erp to make a new application, as this would have required him to pay $5 per acre instead of $3. When notice was given to everybody that the sale to Chambers had been forfeited, and the land was again for sale, it is clear that other intending purchasers would have had to pay $5 per acre for the land. It cannot be that Erp, by having his application, filed before the land came on the market, in the hands of the Commissioner at the time of the forfeiture, would be allowed to thus forestall others who were entitled to an equal opportunity with him in the race of diligence to accept the offer of the state to sell, after such offer was properly made. On this point it may further be said that at the time Erp's application was filed, and up to the time the land was again on the market, Erp's application was defective, and could not have been accepted if the land had been properly on the market. His amendment thereof must be considered as a new application as of the date of such correction. But at this time the valuation of $5 per acre had attached, and as he could have gotten no right by an application to purchase at $3 per acre, then filed, neither could he under such amended application or correction of his original application. Applying these principles to the facts of the present case, we conclude that the award of the land to Erp on April 5, 1905, upon his application, filed February 8, 1905, and corrected after March 25, 1905, at which day the land came on the market, conferred upon him no right. The land being still unsold when appellant made his application to purchase, which was in all respects in compliance with law, the land should have been awarded to him. Appellees were not entitled to recover, and appellant should have judgment on his cross-action.

Ordinarily this would require that the judgment of the trial court be reversed, and judgment be rendered here for appellant, which would be done but for the defense urged by appellees that the right of appellant to question the validity of the award to Erp is barred by the provisions of chapter 29, p. 35, Acts 29th Leg. 1905. That act took effect on July 12, 1905, at which date the statute began to run. Plaintiffs' suit was commenced June 1, 1906, being an ordinary action of trespass to try title. Defendant answered August 13, 1906. There is no question that the statute was intended to bar, after one year, actions to set aside an award of land by the Land Commissioner upon the grounds here urged against the award to Erp. Weyert v. Terrell, 100 Tex. 409, 100 S. W. 133;

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Murphy v. Terrell, 100 Tex. 397, 100 S. W. 130. Appellant under his purchase of the Schmitz notes acquired no right to the land except upon condition that Chambers and Schmitz, his assignee, completed the three-year occupancy. Harwell v. Harbison, 43 Tex. Civ. App. 343, 95 S. W. 30; Bumpass v. McLendon, 45 Tex. Civ. App. 519, 101 S. W. 491. When this sale was forfeited, this carried with it whatever right appellant had acquired under such foreclosure and sale. Hence appellant, under the act of 1905, did not acquire any right to attack the award to Erp until he made his own application more than a year thereafter. We do not think that the institution of this suit by appellees interrupted the running of this statute. Section 2 of the act provides: "If no suit has been instituted by any person claiming the right to purchase or lease any of said lands within the period of time limited in the first section of this act, it shall be conclusive evidence that all the requirements of the law with reference to the sale or lease of such land have been complied with" saving the rights of the state. The institution of the suit by appellees cannot be considered such a proceeding as would interrupt the running of the statute. Indeed appellant, until the filing of his application to purchase, was not in a condition to attack the award to Erp. So that, if this defense had been properly interposed by appellees, it would have been a complete bar, under the facts presented, to appellant's claim.

But we are of the opinion that this is a statute of limitations, and cannot be made available without being specially pleaded. Article 3371, Rev. St. 1895; Williams v. Keith (Tex. Civ. App.) 111 S. W. 1056. There was no reference in appellees' pleadings to such defense on their part to appellant's claim of title as set up in his amended answer. It may be said, however, that this amended answer makes no reference specifically to the vice in appellees' title, but consists simply of a general denial of appellees' title, and an assertion of title in appellant, and on account of the peculiar provisions of the statute, and especially section 2, it may have been thought not necessary specially to plead it.

The facts are undisputed. Except for the act of 1905, and the limitation therein prescribed, we would reverse the judgment of the trial court, and render judgment for appellant for the land sued for. On the contrary, upon the undisputed facts, if appellees had interposed by proper pleading the bar of the statute referred to, we would affirm the judgment on that ground. In these circumstances we have concluded that it would be proper to reverse the judgment, and remand the cause for a trial alone of the issue raised by the statute referred to—that is, the limitation act of 1905—provided appellees interpose such defense by proper plea. Bridge Co. v. McLane, 8 Tex. Civ. App. 665, 28 S. W. 455; Hopkins v. Wright, 17 Tex. 31. If such plea is not interposed, judgment will be rendered for appellant for the land sued for. If such plea is interposed, and the facts on that issue are as shown in the present record, judgment will be rendered for appellees.

We think there is no merit in appellant's contention that Erp had no title to his home section, and the assignment presenting that question is overruled.

The judgment will be reversed, with instructions as herein indicated.

Reversed, with instructions.

On Motion for Rehearing.

Upon motion for rehearing by appellant it is very strenuously insisted that this court was in error in reversing the judgment, and remanding the cause in order to allow appellee to plead the statute of limitation against appellant's claim. In a very lengthy argument, in which it is claimed that the proposition stated is shown to be supported by the universal current of authority, counsel for appellant has failed to see that this court has not done what is charged against it. What this court did was not to reverse a judgment, which would have been otherwise affirmed, in order that the appellant might amend his pleadings, but to remand for another trial, when the judgment has been reversed, in order that the appellee might so amend, instead of rendering judgment. The distinction appears very clear to us, but is entirely overlooked in appellant's motion. That appellate courts may properly, when a judgment is reversed, remand for the purpose of allowing appellee to amend his pleadings, when such a course seems to be required in the interest of justice, is well recognized, and the doctrine supported by abundance of authority. See 3 Cyc. 458, and authorities cited in note 39; Wiggins Ferry Co. v. O. & M. Ry., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

The equities in the present case are all in favor of appellee Erp. In procuring his title he acted in accordance with the provisions of the statute as construed by the state's representative, the Commissioner of the General Land Office. His title fails upon a bare technicality. If he had been advised by the Land Commissioner that he would have to make a new application, after the forfeiture of the previous sale, at the increased price, doubtless he would have done so. By accepting his application and awarding him the land, the Land Commissioner advised him that such was not necessary. Appellant's title, in our view, is the better in law, but appellee's claim is bottomed upon abstract justice and the principles of equity. This is recognized by the act of 1905, and is the reason for prescribing the limited time within which such a title, good in equity, but not in law, may be attacked, and validating it; that is, making it good in law, as it was before in equity, against every one but the state, unless such

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attack upon it is made within the prescribed time.

Inasmuch as the record does not indicate upon what grounds the trial court based its judgment, there being no conclusions of fact or law in the record, we might have assumed it at least doubtful whether the judgment was not based upon this limitation act of 1905, under the view, which might with reason be taken, that it was not necessary for appellee to plead it, in which case our judgment remanding the cause would come within the case of Bridge Co. v. McLane (cited in the opinion) and Eaton v. Tod (Tex. Civ. App.) 68 S. W. 546, and the practice of appellate courts to remand instead of rendering judgment when the judgment is reversed for error in overruling exceptions to pleadings. But it is positively stated in the brief of appellant, and again in this motion for rehearing, that this statute was not relied upon nor referred to in the court below, and this is not denied by appellee. Article 1027, Rev. St. 1895 (Acts 1892, p. 31, c. 15, § 36) is as follows: "When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below." Upon a careful consideration of the apparently mandatory provisions of this act, which is not referred to, however, by appellant, we are inclined to the view that we are without authority to remand the cause, and that we were in error in doing so. But for this we would adhere to our opinion that in the interest of justice the cause should be remanded. But as we now think this statute is of controlling force in the present case, we have concluded that the motion for rehearing should be sustained, and that so much of our judgment as remands the cause for a new trial should be set aside, and judgment here rendered for appellant for the land sued for, and it is so ordered.

We adhere to our ruling that appellee could not avail himself of the act of 1905, without pleading it, against the claim set up by appellant in his cross-action. If it were true that a plaintiff in trespass to try title suit, who relied upon a title by limitation, would not be required to specially plead the same, as was held by the Court of Civil Appeals in Benavides v. Molino, 60 S. W. 260, but which does not appear to be the holding of the Supreme Court (Mayers v. Paxton, 78 Tex. 199, 14 S. W. 568), appellee's title had not been perfected under the act of 1905 when the petition was filed, so whether the statute be relied upon as an after-acquired right, or as a defense to appellant's cross-action, it was necessary to plead it.

MERRIMAN et al. v. BLALACK et al.

(Court of Civil Appeals of Texas. June 28, 1909. Rehearing Denied Oct. 7, 1909.)

1. DEEDS (§ 45*)—NAMES OF GRANTORS—VARIANCE.

The body of a deed described the grantors as "Francisco Balli" and "Toniasita Garzas," his wife. The names signed to the deed, however, were "Franco Balli y Cabasos," and "Tomasita Garza," both signing by mark. The deed was properly acknowledged by the wife as "Tomasita Garza," whom the officer certified to be the wife of "Franco Balli y Cabasos," parties to the deed, but was not acknowledged by the husband. It was shown that "Franco" was an ordinary abbreviation for "Francisco," and that "y Cabasos" was used to denote that the mother of the person was named "Cabasos." *Held*, that the variance in the names was not fatal to the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 91; Dec. Dig. § 45.*

2. ACKNOWLEDGMENT (§ 47*)—UNACKNOWLEDGED DEED—CURATIVE ACTS.

Where a deed had been on record since 1853, and no hostile claim had been made against it, failure of one of the grantors to acknowledge it was cured by Act April 23, 1907 (Laws 1907, p. 308, c. 165), providing that every instrument actually recorded for 10 years, whether proved or acknowledged as required, or not, should be admitted in evidence without proof of execution.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235–240; Dec. Dig. § 47.*]

3. HUSBAND AND WIFE (§ 119*)—PURCHASE OF LAND—PAYMENT OF CONSIDERATION—OWNERSHIP.

Where a deed to a married woman recited that she was the owner of $500 of separate property in her own right, and that the grantor had agreed to sell the land in controversy for said $500, followed by a granting of the land to her, in consideration of payment by her of such sum, though in language not conveying it to her as her separate estate, she nevertheless acquired the land in her separate right.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 424; Dec. Dig. § 119.*]

4. HUSBAND AND WIFE (§§ 193, 199*)—WIFE'S SEPARATE PROPERTY—CONVEYANCE—JOINTURE.

A deed by a married woman of her separate property without jointure of her husband was void, and was not cured by a statement in the husband's subsequent deed of other lands to the grantee, reciting that the lands then conveyed adjoined the land conveyed by his wife under such void deed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 716, 734; Dec. Dig. §§ 193, 199.*]

5. HUSBAND AND WIFE (§ 199*)—SEPARATE DEED—VALIDATION.

Where a wife's separate deed to her separate property was void for want of jointure, it was not cured by her recital, in a subsequent deed by her and others after she had become sole, that the land had been conveyed by her to the grantee, under the rule that confirmation, while available to make a voidable or defeasible estate absolute, cannot operate on an estate void at law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734; Dec. Dig. § 199.*]

6. DEEDS (§ 114*)—CONSTRUCTION—ESTATE CONVEYED.

A deed stating the names of the grantors, all of whom were recited to be heirs of M., de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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clared that they had sold and quitclaimed unto the grantee all their interest in the land described, followed by a recital that, whereas one of the grantors was still a minor, the others bound themselves, their heirs, etc., to forever warrant and defend the premises against any claim that such minor, or any one for him, might set up to the described premises; it being expressly understood that the warranty only extends to any claim by or for the minor grantor. *Held*, that the recital in the deed that the grantors were all heirs of M. was mere descriptio personæ, and that the deed should be construed as conveying all the title of the grantors to the land described from any source acquired, and was not limited to such rights as they may have received as heirs of M.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 326; Dec. Dig. § 114.*]

7. DEEDS (§ 25*)—CONSTRUCTION—QUITCLAIM.
The deed was not a mere quitclaim conveying a mere chance of title, but conveyed the land described.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 49; Dec. Dig. § 25.*]

8. DEEDS (§ 111*)—CONSTRUCTION.
The language of a deed must be construed against the grantors, in favor of the grantee, to convey the largest estate which the language can be construed to pass.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 313; Dec. Dig. § 111.*]

9. HUSBAND AND WIFE (§ 198*)—CONVEYANCE—NONJOINTURE—ESTOPPEL.
Where a married woman's deed to her husband was void, and she thereafter conveyed the land to G. by deed reciting the former conveyance to the husband, neither she nor those claiming under G.'s deed were estopped to deny the validity of the conveyance to the husband, except as against those claiming under it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 733; Dec. Dig. § 198.*]

10. DEEDS (§ 96*)—RECITALS—PRIMA FACIE EVIDENCE.
Recitals in a deed concerning former conveyances are evidence of the facts stated, and sufficient prima facie to establish them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

11. EVIDENCE (§ 208*)—ADMISSIONS—PLEADINGS.
A pleading filed by plaintiffs, in which a void deed was set up as the source of title to certain land in controversy, was admissible as an admission in connection with testimony of counsel who prepared the pleading that he did so without consulting his clients.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 714; Dec. Dig. § 208.*]

12. ADVERSE POSSESSION (§ 100*)—COLOR OF TITLE—EXTENT OF CLAIM.
Under the 5-year statute of limitations, a grantee who under a deed has color of title can only claim adverse possession to the interest conveyed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 564; Dec. Dig. § 100.*]

13. ADVERSE POSSESSION (§ 100*)—COLOR OF TITLE—UNDIVIDED INTERESTS.
Where the actual possession of the grantee under a deed was no greater in extent than the undivided interest conveyed by the deed, he did not have constructive possession beyond the limits of the conveyance, so as to acquire additional land under the 10-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 564; Dec. Dig. § 100.*]

14. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE.
Where a deed purported to convey an entire tract of land described, and not an undivided interest, and the grantee took open and notorious, possession of the whole tract, claiming it as his own inclosed and improved it, and paid taxes thereon from 1883 to 1907, he and his heirs had a valid title to the whole tract by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 415; Dec. Dig. § 71.*]

15. DEEDS (§ 86*)—RECORD.
A deed is not duly registered unless the record shows that the certificate of proof or acknowledgment is sufficient.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. § 86.*]

16. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—QUITCLAIM DEED.
A quitclaim deed is sufficient color of title to support a claim under the 5-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 427; Dec. Dig. § 71.*]

17. EVIDENCE (§ 317*)—OPINION.
Evidence that a witness had investigated defendants' claim of title, and had communicated his opinion that they could not recover the land in controversy, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1178; Dec. Dig. § 317.*]

18. APPEAL AND ERROR (§ 1054*)—TRIAL BY COURT—EVIDENCE—PREJUDICE.
Where an action in trespass to try title was tried by the court without a jury, the judgment could not be reversed because of the court's erroneous admission of evidence which could not have influenced his decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4185; Dec. Dig. § 1054.*]

19. WITNESSES (§ 230)—EXAMINATION—INTERPRETER.
Where witnesses testify through an interpreter, a greater latitude may be properly allowed in their examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 811, 812; Dec. Dig. § 230.*]

20. DEEDS (§ 114*)—DESCRIPTION—CORRECTION OF ERROR.
Additional provisions in certain deeds that it was the intention of grantors to convey all the land inherited by them from G. and wife corrected a misdescription by which a part of the tract was omitted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 320; Dec. Dig. § 114.*]

21. TRESPASS TO TRY TITLE (§ 38*)—BURDEN OF PROOF—COMMON SOURCE.
Where, in trespass to try title, plaintiffs are deprived of a common source of title, the burden is on them to deraign title from the sovereign.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 53; Dec. Dig. § 38.*]

Appeal from District Court, Hidalgo County; W. B. Hopkins, Judge.

Action by Titus E. Merriman and others against P. E. Blalack and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. B. Chapin, R. J. Swearingen, and Don A. Bliss, for appellants. Dougherty & Dougherty and Beasley & Beasley, for appellees.

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REESE, J. In this suit Titus E. Merriman and others sue, in trespass to try title, to recover of P. E. Blalack and G. T. Hawkins the title possession of an undivided thirteen-eighteenths of a tract of land described as the upper one-half of the upper league of a five-league grant called Agostadero del Gato, situated on the Rio Grande river in Hidalgo county, originally granted to Juan Jose Trevino. It is to be gathered from the recitals of the original answer of defendants, filed October 1, 1907, that the original petition was filed May 1, 1907. The date of the institution of the suit does not otherwise appear, as only the second amended petition of plaintiffs is in the record, which refers to the date of the first amended petition as October 2, 1907, but not to the date of the filing of the original petition. The plaintiffs claim title as heirs of Henry Merriman, the basis of such claim being that the land was the property of said Henry Merriman at his death, and that they as part of his heirs inherited from him the thirteen-eighteenths thereof sued for. Title of defendants in fee simple to three-eighteenths, and their ownership of two-eighteenths additional during the life of Elizabeth Merriman under the deed to Julio Guzman, Sr., seem to be conceded. Defendants pleaded general denial, not guilty, and under appropriate allegations pleaded title under the statute of limitations of 3, 5, and 10 years. Plaintiffs specially pleaded common source of title in Henry Merriman, and title in themselves under such common source to the undivided interest sued for. The case was tried by the court without the assistance of a jury, and a judgment rendered for defendants, from which plaintiffs prosecute this appeal.

The trial court prepared and filed conclusions of fact, which in the main, and as to the material facts involved, are supported by the evidence. It is not necessary here to set out these conclusions in full. The following brief summary embraces the material facts established by the evidence.

(1) The land in controversy is a tract of 762 varas, base line river front, running back between parallel lines to the back line of El Gato survey of five leagues. The tract is the upper or western half of the upper or western league of said five-league survey, which was originally granted to Juan Jose Trevino, and was by him conveyed to Francisco Balli in 1834, and by Balli and wife, on January 1, 1853, conveyed by deed to Mrs. Elizabeth Merriman, wife of E. T. Merriman.

(2) The deed to Mrs. Merriman contains the following recitals: "Whereas Elizabeth Merriman of said county of Hidalgo is the owner of five hundred dollars of her separate property and in her right, and whereas the said Francisco Balli has agreed to sell the said portion of said tract or grant so by him purchased of said Trevino as aforesaid for said sum of five hundred dollars, now therefore," following by words of conveyance of the land to Mrs. Merriman, her heirs and assigns, in consideration of the payment by her of the said sum of $500, not, however, in language conveying it to her in her separate right or as her separate estate. The trial court found that these recitals established that the land was paid for wholly by money belonging to Mrs. Merriman in her separate right and was her separate estate, and in this conclusion we agree.

(3) On June 20, 1854, being then married to Dr. E. T. Merriman, and living with him as her husband, Mrs. Merriman, by a deed executed and properly acknowledged by her as a married woman, conveyed the land referred to, to Henry Merriman, but her husband did not join in the conveyance, nor did he ever afterwards, by any subsequent instrument, join with his wife in the conveyance of this land. After the execution of this deed Eli T. Merriman conveyed to Henry Merriman another tract of land, adjoining the tract in controversy, in which deed he referred to the land he was then conveying as adjoining the tract sold by Elizabeth Merriman to Henry Merriman. No other title was shown in Henry Merriman than this deed, and the evidence authorizes the conclusion, as found by the trial court, that he had no other title.

(4) The deed from Balli and wife to Mrs. Merriman contained the further recital that the land had been conveyed to him by Juan Jose Trevino in the year 1834.

(5) The deed from Mrs. Merriman to Henry Merriman contained the recital that the land had been granted by the Mexican government to Juan Jose Trevino, and by Trevino to Francisco Balli, and by Balli to Mrs. Elizabeth F. Merriman.

(6) It appears also that on March 5, 1878, the tax collector of Hidalgo county sold and conveyed to one Handy all the right, title, interest, and estate of Henry Merriman in and to this land, and that on November 26, 1878, Handy quitclaimed it to Henry Merriman, both deeds duly recorded.

(7) Henry Merriman died in 1861, leaving as his heirs at law two brothers and one sister. Eli T. Merriman was one of the brothers, and he died in 1867, leaving surviving him his widow, Elizabeth Merriman, and certain children.

(8) On July 9, 1883, Elizabeth Merriman, then a feme sole, and the following children of herself and Eli T. Merriman, to wit, Henrietta C. Fusselman (joined by her husband S. P. Fusselman), John C. Merriman, James E. Merriman, George Merriman, and E. T. Merriman, by their deed of that date, conveyed to Julio Guzman, in consideration of $487.08, "all our and each of our right, title, interest, estate, claim and demand in and to a certain tract of land situated in the county of Hidalgo, state of Texas," describing the land in controversy. The deed contains a recital that the land had been conveyed by the original grantee, Juan Jose Trevino,

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to Francisco Balli, by Balli to Elizabeth Merriman, and by her to Henry Merriman, "all of which appears of record in record books of Hidalgo county." The land is conveyed "with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining; to have and to hold the above-described premises to the said Julio Guzman, his heirs and assigns forever," but has no warranty. After the names of the grantors in the body of the deed appears the following: "And being all heirs of Henry E. Merriman."

(9) The grantors in the aforesaid deed are some of the heirs of Henry Merriman. The plaintiffs constitute all of the heirs except said grantors, and are entitled to thirteen-eighteenths of his estate.

(10) Immediately after the sale by Elizabeth Merriman and others to Julio Guzman, in July, 1883, said Guzman went upon the land in controversy, and built a pasture inclosing a part of the land in controversy, inclosing about 200 acres thereof on the south side of the tract adjoining and fronting on the Rio Grande. He claimed all the land in controversy in this cause from the time he went into possession thereof until his death, and had a field within said pasture. In 1883 he built a house on the western boundary of the tract in suit, and also put in a field in the northern part of said tract, and he cultivated the same continuously until his death in 1901. The house erected on the northern part of the land he occupied continuously through his tenants, and grazed large herds of cattle and horse stock on same, and also had herds of sheep and goats thereon. The acreage in the tract varied considerably after the purchase thereof by Guzman, by reason of the erosion and caving-in of the Rio Grande river banks forming the southernmost boundary thereof, such caving and erosion shortening and cutting off the lower portion of the tract to the extent of about one-half mile to one mile. The acreage of the land in controversy is about 3,800 acres. Julio Guzman claimed to own the Santa Anna league, which adjoined the Gato league on the west, and in 1882 moved on the Santa Anna grant, erecting houses thereon, and continued, with his tenants, to live thereon until his death in 1901, and continued to use the land in controversy in connection with the Santa Anna land.

(11) The wife of Julio Guzman died intestate prior to the death of her husband, who died intestate in 1901, leaving as his heirs his eight children, the survivors of whom, with the children of those since deceased, are his and her sole heirs at law.

(12) After the death of Guzman his children and grandchildren remained in possession of the land, claiming the whole of it as their own, cultivated, used, and enjoyed the same, and had exclusive, adverse possession thereof until they conveyed to P. E. Blalack, the defendant.

(13) Blalack succeeded by regular deeds to the title of all of the heirs of Guzman. These deeds were executed and recorded at different dates, as follows: Deed of Amado, a son, dated February 8, 1902, recorded February 12, 1902; Dolores Guzman, a daughter, married to Longorio, and joined by her husband, dated March 4, 1902, and recorded March 14, 1902; Esterfana Guzman Garceres, a daughter, widow, deed dated February 3, 1902, recorded November 3, 1902; Librada Cantu, grandchild, deed dated February 10, 1902, recorded March 10, 1902; Prudencio Cantu, grandchild, deed dated February 8, 1902, recorded February 14, 1902; Adelaida Cantu, grandchild, deed to John Closner, dated July 13, 1907, recorded same day; deed from John Closner to Blalack August 24, 1907, recorded same day; Pedro Guzman, a grandson, deed dated June 25, 1902, recorded same day; Manuel Garza, a grandson, deed dated February 8, and recorded February 14, 1902; Julia, Esterfana, Francisca, Jose, Rufino, and Juan Garza, grandchildren, minors, by their guardian, duly authorized deed dated May 12, and recorded May 15, 1902; Ladislada Anaya, a granddaughter, deed dated February 10, and recorded February 19, 1902; Mariano, Nicholas, and Jose Caceres, grandchildren, by their guardian, duly authorized deed dated August 11, recorded August 12, 1902; Rufino, Guadalupe, and Concepcion Guzman, grandchildren by their guardian, duly authorized deed dated August 11, recorded August 12, 1902.

(14) The grantors in the foregoing deeds were all the heirs of the said Julio Guzman and wife. The deeds referred to were all duly acknowledged and registered, except the deed from Dolores Longorio, as to which reference will hereafter be made. The land is described in these deeds as 466 varas in width, base line river front, and extending north between parallel lines to the back line, with the addition that the grantor intended to sell, and did thereby sell, grant, and convey to the grantee all of the land in the Gato grant inherited by the grantors from Julio Guzman and wife, either directly or through the deceased parent of grantor.

(15) By deed dated February 3, and recorded March 13, 1903, Blalack conveyed to defendant Hawkins an undivided one-half interest in the land.

(16) After the death of Julio Guzman his children and grandchildren remained in possession of the land, claiming the whole of it as their own, and cultivated, used, and enjoyed the same, and had exclusive and adverse possession thereof until they conveyed the same to the defendant P. E. Blalack. When the defendant Blalack purchased the land from the Guzman heirs, he went into the actual possession thereof, and the heirs who had not conveyed to him admitted him into possession with them, and recognized his rights to the extent of the interests conveyed to him, and said Blalack recognized

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the right of the heirs who had not conveyed to him to the extent of the interest owned by them, and Blalack and the heirs who had not conveyed to him, so recognizing each others' rights and interests in the lands, remained in the actual possession thereof, using, cultivating, and enjoying the same, and claiming the same as their own adverse to the world continuously up to the filing of this suit.

(17) From and after the time Julio Guzman went into possession in 1883 taxes were regularly paid on the land year by year as follows: In 1884 and 1885, 6,321 acres; 1886, 2,062 acres; 1887, 2,056 acres; 1888, 2,336 acres; 1889 to 1898, both inclusive, each year 2,058 acres; 1899 and 1900, 611 acres; 1901, 500 acres; 1902, 1,751 acres; 1903 to 1907, both inclusive, each year 4,404 acres. These taxes were paid by Julio Guzman during his lifetime, and by his successors in the title after his death.

The court's conclusions of fact were all properly excepted to by appellants. Substantially all of the conclusions of fact and of law are attacked by the assignments of error, of which there are 48 in the record, followed by 84 propositions. These present, however, comparatively few questions material to a disposition of the appeal, and it will be more conducive to a clear understanding of the case, as presented, if we dispose separately of these questions, instead of undertaking to dispose of the separate assignments of error and the propositions thereunder.

Appellees, to show outstanding title in Elizabeth Merriman, and that the land was her separate property, in case Henry Merriman is held to be common source of title, which is appellants' contention, offered in evidence the deed from Francisco Balli and his wife, Tomasita Garza, to Elizabeth Merriman, dated January 1, 1853, also the original record of such deed. This was objected to by appellants on the ground that the deed was not properly acknowledged, and that the names of the persons signing the instrument are different from the names of the grantors named in the body of the deed. This question is presented by the forty-fifth assignment of error. The persons named in the body of the deed as grantors are Francisco Balli and Toniasita Garzas, his wife. The names signed to the deed are Franco Balli y Cabasos and Tomasita Garza, both signing by their mark. The deed was properly acknowledged by the wife as Tomasita Garza, whom the officer certified to be the wife of Franco Balli Cabasos, parties to the deed, but was not acknowledged by the husband. The only objection presented by the proposition under the assignment is addressed to the difference in the names of the persons as set out in the body of the deed and as signed thereto. The objection is without merit. It was shown that Franco was an ordinary abbreviation of Francisco, and the term "y Cabasos" was ordinarily used to denote that the mother of the person was named Cabasos. The difference between the name of Toniasita and Tomasita, and Garzas and Garza, are immaterial in view of the certificate of the notary that the person named was the wife of Franco Balli Cabasos. It is clear that a mistake was made, either in writing the deed or making the copy in the record, in the name of the wife as Toniasita Garzas, instead of Tomasita Garza. That Balli has executed this deed is recited in the deed from Elizabeth Merriman to Henry Merriman, under whom appellants claim, executed in 1854, and in the deed to Guzman. The failure of Balli to acknowledge the deed, if the question was presented, was cured by the act of April 23, 1907 (Acts 30th Leg. p. 308, c. 165), the deed having been on record since 1853, and no claim hostile thereto having ever been made. The recitals in this deed, which are set out in our conclusions of fact, show that the land was paid for by $500, the sole consideration, and that this money was the separate estate of Elizabeth Merriman, and this constituted it her separate estate. As showing that the parties so regarded it, it is shown that Mrs. Merriman afterwards undertook to convey the land to Henry Merriman by her own deed alone, in which her husband did not join. We agree with the conclusion of the trial court that the land was the separate estate of Mrs. Merriman.

The deed from Elizabeth Merriman to Henry Merriman, executed in 1854, in which her husband did not join, was void. It is shown by the record that it was agreed that Mrs. Merriman was married to her husband, Eli T. Merriman, prior to 1854, and that they remained so married, and lived together as husband and wife, until his death in 1867. Rev. St. 1895, art. 635; Cannon v. Boutwell, 53 Tex. 626; Ford v. Ballard, 1 Tex. Civ. App. 376, 21 S. W. 147. That the deed was void, without the joinder of the husband, if the property was Mrs. Merriman's separate estate is not controverted by appellants, but it is insisted that the statement in the subsequent deed from E. T. Merriman to Henry Merriman, conveying other lands, that the lands so conveyed adjoined the land conveyed by Mrs. Merriman to Henry Merriman, referring to the land embraced in the deed referred to, was such a joinder in the former deed from Mrs. Merriman to Henry Merriman as to satisfy the provisions of the statute. To this we cannot agree. This statement cannot even be taken as evidence that E. T. Merriman agreed or consented to the separate conveyance by the wife. The statement is made only for the purpose of showing the location of the land. The statute requires that "the husband and wife shall join in the conveyance." It was held in Cannon v. Boutwell, supra, that a power of attorney to convey a wife's separate estate, "although clearly assented to

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by the husband, will be ineffectual if made by the wife alone." It has been held that it is not essential that the husband join in the conveyance by the execution of the identical instrument executed by the wife (Harbert v. Bennett [Tex. Civ. App.] 26 S. W. 913; Nolan v. Moore, 96 Tex. 343, 72 S. W. 583, 97 Am. St. Rep. 911), but there must at least be the execution by him of some instrument for the purpose of evidencing his joinder in the transfer of the title by his wife.

It is further insisted that this deed was validated by the subsequent ratification thereof by Mrs. Merriman after she became a feme sole. This contention is based upon the recital in the deed from Elizabeth Merriman, Fusselman, and others to Julio Guzman that the land had been conveyed by Elizabeth Merriman to Henry Merriman. The deed from Mrs. Merriman to Henry Merriman being clearly void, we do not think that this recital can be given effect as a confirmation, validation, or re-execution of it, so as to make it operative as a conveyance of Mrs. Merriman's title. This recital cannot operate as a conveyance or a re-execution of the former void deed. Breitling v. Chester, 88 Tex. 586, 52 S. W. 527. "Confirmation may make good a voidable or defeasible estate, but cannot operate upon an estate void in law, but only confirms its infirmity." 1 Dev. Deeds, § 17; Branham v. San Jose, 24 Cal. 585; Chess v. Chess, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350. There are no "apt words of conveyance" from Mrs. Merriman, in the bare recital in the deed to Guzman, that the land had been conveyed by Elizabeth Merriman to Henry Merriman, along with the other recitals as to the chain of title, so as to make it operate as a new grant, without which such recitals could not operate to impart to the void deed an efficacy it did not before possess. Montgomery v. Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628. This deed to Julio Guzman, executed in 1883, purports, in the body of it, to be executed by Elizabeth Merriman (the widow) and Henrietta Fusselman (joined by her husband), John C., E. T., James E., George, Walter and J. D. Merriman, who, as we understand, were all of the children of Eli T. Merriman. The court, however, finds, and this appears to be true, that only Mrs. Merriman, Mrs. Fusselman (joined by her husband), John C., James E., George, and E. T. Merriman executed the conveyance.

The terms and recitals of this deed are set out in the fact findings. This deed, after making the parties, all of whom are stated to be heirs of Henry Merriman, and the consideration, proceeds: "Have bargained. sold and quitclaimed and by these presents do bargain, sell and quitclaim unto the said Julio Guzman all our and each of our right, title, interest, estate, claim and demand in and to a certain tract of land situated in said county of Hidalgo and state of Texas bounded and described as follows," followed by a full description of the land in controversy. The habendum clause is, "to have and to hold the above-described premises to the said Julio Guzman, his heirs and assigns forever." The concluding paragraph of the deed which we think is of some significance in determining whether the conveyance was intended by the parties to be limited to their interest as heirs of Henry Merriman, is as follows: "And whereas the said J. D. Merriman is still a minor, now therefore we, the said S. P. Fusselman, his wife, Henrietta C. Fusselman, Jno. C. Merriman, Geo. Merriman, Jas. E. Merriman, Mrs. E. T. Merriman and E. T. Merriman, do hereby bind ourselves, our heirs, executors and administrators to forever warrant and defend unto the said Julio Guzman, his heirs or assigns, the above-described premises against any claim or claims that the said J. D. Merriman, or any one for him, may set up to said above-described premises. And it is expressly understood that the above and foregoing only extends to any claim by or for the said J. D. Merriman and none other." The parties are not stated to be all of the heirs of Henry Merriman, but only that all of them are his heirs. Looking to the entire deed, we take it to be intended to convey, and to convey, all the right, title, and interest of the parties, and each of them, to the land described from any source, and not to be limited to such right as they may have had as heirs of Henry Merriman. The terms of the warranty against claims that might be made by J. D. Merriman lend color to this view. The warranty is against any claims that he might make to any interest in the land, and not against such claims as heir of Henry Merriman, and clearly the warrantors would have been liable for such claims of title from any source, made by or in behalf of J. D. Merriman. Our conclusion is that the recital that the parties are all heirs of Henry Merriman cannot be taken to limit the interest or title conveyed, but that as to this the deed must be construed as though such recital was not in the deed, and the language to have been used merely descriptio personæ. It seems clear that if any of these parties had any title or interest which did not accrue to them as heirs of Henry Merriman, it would have passed by this deed, and they would not have been allowed to set it up against the grantee in the deed, or any one holding under him.

We are further of the opinion that, notwithstanding the use of the word "quitclaim," the deed conveyed the land, and not a mere chance of a title. The language of the deed is in all material respects identical with that of the deed held in Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850, to convey the land itself, and not be a mere quitclaim deed. Guzman cer-

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tainly construed the deed as not conveying the undivided interests of the grantors as heirs of Henry Merriman, which was, at most, not quite five-eighteenths of the land, for he at once went into possession, claiming the whole tract, and in this claim persisted during the 18 years of his occupancy, his claim being public, open and notorious, as shown by the practically undisputed evidence. He also paid the taxes on what he evidently supposed was the entire tract. The language of the deed must be construed against the grantors and in favor of the grantee, and the deed must be held to convey the largest estate which the language can be construed to convey.

It appears, however, that the grantors in this deed were some of the heirs of Henry Merriman, and it is contended by appellants that Henry Merriman was common source of title of themselves and those claiming under the deed to Guzman, and that the recitals in the deed that the land had been conveyed by Elizabeth Merriman are binding upon Guzman and those claiming under him, and they are estopped to deny them. If Elizabeth Merriman is estopped, as against plaintiffs, to deny the truth of the recital that she had conveyed the land to Henry Merriman, it might, with some reason, be said that Guzman and those claiming under him would be estopped. 2 Dev. Deeds, § 1284; Kinsman v. Loomis, 11 Ohio, 475. But we do not know upon what principle she would be estopped except as to those claiming under the deed. 2 Dev. Deeds, §§ 995, 996, 1279; Sunderlin v. Struthers, 47 Pa. 423; Schuhman v. Garratt, 16 Cal. 100; Deery v. Cray, 5 Wall, 795, 18 L. Ed. 653; Robbins v. McMillan, 26 Miss. 434. The recital in the deed to Guzman as to the conveyance by Elizabeth Merriman to Henry Merriman, as well as the recitals in that and other deeds that Trevino had conveyed to Balli, and Balli to Elizabeth Merriman, was evidence of the facts recited, and sufficient prima facie to establish them, but we do not think that they go farther than this. Burk v. Turner, 79 Tex. 276, 15 S. W. 256; Bartell v. Kelsey (Tex. Civ. App.) 59 S. W. 632; Wallace v. Pruitt, 1 Tex. Civ. App. 236, 20 S. W. 728. As to the conveyances from Trevino and Balli the recitals were not disputed, and those deeds are a part of appellants' title, but to rebut this recital as to the deed from Elizabeth Merriman to Henry Merriman, whether such recital has the effect of prima facie establishing the fact recited, or upon the issue of common source of title in Henry Merriman, and showing outstanding title still in Elizabeth Merriman, which neither she nor Guzman and those holding under him were estopped to set up, it was shown that the deed from her to Henry Merriman was void, and left the title still outstanding in her. It was incumbent upon appellees further to show that this title had not in some other way gotten from Elizabeth Merriman into Henry Merriman. For this purpose appellees introduced in evidence certain allegations of a pleading filed by appellants, in which this void deed was set up as the source of Henry Merriman's title. There was no attempt made to show that by any other conveyance Elizabeth Merriman had parted with her title. It is not denied that the pleadings were admissible, and they were for the consideration of the court, sitting as a jury, to determine their weight, in connection with the testimony of counsel who had prepared the same, that it has been done without consultation with their clients. Railway v. De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877; Galloway v. Railway (Tex. Civ. App.) 78 S. W. 34. The introduction of the pleading in evidence was not objected to, and it was clearly admissible for the purpose of showing an admission of appellants that this void deed was Henry Merriman's only source of title. Barrett v. Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245. We think the evidence fairly supports the conclusion of the trial court that the title was still oustanding in Mrs. Merriman, and had not been acquired by Henry Merriman, unless it passed by her deed to Guzman. Rice v. Railway, 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72; House v. Reavis, 89 Tex. 626, 35 S. W. 1063; Ferguson v. Ricketts, 93 Tex. 565, 57 S. W. 19. Title from the sovereignty to Mrs. Merriman was shown by evidence of grant to Trevino, deed from him to Balli, and from Balli to her, of which the recitals in the various deeds, being uncontradicted, was sufficient evidence. In this state of the evidence we think that the court did not err in holding that appellants, plaintiffs in the suit, had failed to show title. Either there was outstanding title in Mrs. Merriman, or her title passed to Guzman by the deed to him.

But if the court erred in this, we think it clear that the title of appellees under the statute of limitations of both 5 and 10 years must be sustained. If the deed to Guzman conveyed only the undivided interest of the grantors inherited by them as heirs of Henry Merriman, the limitation title cannot stand. As to the five-year limitation Guzman could only claim adverse possession to the interest conveyed. Acklin v. Paschal, 48 Tex. 147. As to the 10 years, the actual possession of Guzman, which was not greater in extent than the undivided interests so conveyed entitled him to, would not give him constructive possession beyond the limits of his conveyance. But we have held that the deed to Guzman conveyed the entire tract, and not an undivided interest therein. Under this deed, duly recorded in 1883, he took possession of the entire tract, openly and notoriously, claiming it as his own. His inclosures and improvements were more than sufficient to support the claim of adverse possession under the statute of either 5 or 10 years, and he paid the taxes regularly, year by year, and this adverse possession in Guzman con-

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tinued from 1883 until 1901, when he died, and in those holding his title up to the filing of this suit in 1907. It might be argued that Guzman only paid taxes on the whole of the land for 1884 and 1885; the number of acres upon which he paid after that year being less than the number of acres in the tract as found by the trial court. But conceding this to be true, it would not affect his claim under the 10-year statute. All of the elements of claim of adverse possession under the 10-year statute existed without a break from 1883 to the date of filing of the suit in 1907. This is the irresistible conclusion from the evidence, if our construction of the deed to Guzman be correct.

Appellants contend that some of the deeds to Blalack from the heirs of Guzman were not recorded 5 years before the filing of the suit, and the court's findings of fact show this to be true, the date of such record of each deed being given, but this would only be material if appellee's whole defense under the 5-year statute rested upon adverse possession by them under those deeds. But this is not true; and, even if Guzman, by reason of his failure to pay taxes on the entire acreage, had not, at the time of his death, perfected his title under the 5-year statute to the entire tract, he had so perfected his title under the 10-year statute, and such adverse possession (under the 10-year statute), with all the elements necessary to ripen his title, beginning in 1883, continued in him and those succeeding to his title, without a break, until the filing of the suit, a period of 25 years. The court finds that each of the heirs of Guzman continued in possession, claiming his or her particular interest, until conveyance to Blalack, and that Blalack at once, upon receiving a deed from such heirs, took and held possession under such deed, the joint owners each recognizing the title and possession of each other up to the time that appellees, by the successive deeds, acquired the entire Guzman title.

Mrs. Longorio, one of the married daughters of Guzman, conveyed to Blalack. The original deed was introduced in evidence, and from the certificate of acknowledgment it appeared that the deed was properly acknowledged by Mrs. Longorio and her husband. It appeared, however, that in recording this deed and the certificate of acknowledgment certain essential words of the certificate were omitted. No objection was made to the introduction of the original deed as conveying Mrs. Longorio's title, but it is objected that the court erred in considering it as a duly registered deed as a support to the claim of title under the 5-year statute of limitations. We agree with appellant that the deed cannot be said to have been duly registered. Such registration, as we understand it, requires that the record shall also show that the certificate of proof or acknowledgment is sufficient. But this does not at all affect the claim of title under the 5-year limitation resting upon Guzman's possession alone under the deed to him, nor does it at all affect the claim under the 10-year statute. So the error complained of is immaterial. If the deed to Guzman be held to be a mere quitclaim, it has been held that such a deed will support a claim of title under the 5-year statute. Parker v. Newberry, 83 Tex. 430, 18 S. W. 815; McDonough v. Jefferson County, 79 Tex. 535, 15 S. W. 490; Wofford v. McKinna, 23 Tex. 43, 76 Am. Dec. 53.

By several assignments of error appellants complain of the admission of testimony of certain witnesses bearing upon the defense of adverse possession of Guzman. As the case was tried by the court, the same strictness in this regard is not required as upon a trial with a jury. Still some of the testimony objected to should have been excluded, notably that of J. B. Wells, as to his investigation of appellee's claim and his opinion, made known to them, that they could not recover the land. This testimony was clearly improper.

Other testimony objected to seems to us to be conclusions of the witness and objectionable on that ground. But without discussing these several assignments separately, which we do not think necessary, the answer may be made to all of them, except that relating to the testimony of Judge Wells, that the facts testified about were abundantly supported by other unobjectionable evidence. It appears clear to us that the trial court could not have been influenced in his conclusions by any of the objectionable testimony, and this appears equally true as to the testimony of Judge Wells. Upon the issue of Guzman's possession, the following admission was made by appellees: "It is admitted by the plaintiffs that Julio Guzman, the grantee in the deed from Sam P. Fusselman and others, which will be offered in evidence, in the year 1882–83 entered into the actual possession of a part of the land sued for, and fenced a portion thereof on the river in connection with a portion of a league of the Santa Anna grant claimed by him. That this inclosure was kept up, and the lands therein continuously used and enjoyed during his lifetime, and by his children after his death until they sold the land to Blalack, and by said Blalack until he sold to Hawkins, and by Blalack and Hawkins as tenants in common ever since, and that continuously during said period of time from 1882 up to this time, the defendants and their said predecessors in title claimed said land as their own, and exercised ownership thereover. It is agreed that this instrument shall not be construed as an admission by the plaintiff that the defendants or their predecessors in title, or either or any of them, at any time in the past claimed or held the land in dispute, or any part of it, adversely to them, nor that the defendants, or their predecessors

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in title, claimed any part of the Santa Anna grant adversely to them."

The witness Julio Guzman, a Mexican, who testified through an interpreter, stated, in one part of his examination, that his father, Julio Guzman, Sr., did not claim any more land that was fenced, which he afterwards corrected. It appears to us that the above statement was not made understandingly. With this exception there is not, in the entire testimony, a whisper of recognition by Julio Guzman, Sr., of any other title to any part of the land, or that would tend to impeach the adverse claim on his part of the entire tract, and the open, notorious, and public character of such claim. Appellants' contention that Guzman's claim to all of the land was not adverse to them finds no support in any part of the evidence. In this state of the record we cannot reverse the judgment for the errors in the admission of testimony referred to. Some of the witnesses, whose testimony is thus objected to, in some instances on account of the form of the questions, were Mexicans who testified and were interrogated through an interpreter, which required a greater latitude in their examination. In view of what we have said there is no merit in the objection urged by appellants that the deeds from the heirs of Guzman to Blalack did not include the 296 varas in width, river front base line on the eastward side of the tract. But we think that the additional provisions in each of these deeds that it was the intention to convey all of the land inherited by the grantor from Julio Guzman and his wife corrects what is evidently a misdescription of the land conveyed as to its width.

If it should be held that the deed to Guzman conveyed only the undivided interests of the grantors as heirs of Henry Merriman, which is not sued for, but the title of appellees to which is conceded, what would be the result? In such case it could not be said that Henry Merriman was common source of title of appellants and appellees to the thirteen-eighteenths of the land here sued for. As to that appellants do not, and certainly could not, claim title under Henry Merriman, and there would be nothing in the way of their defense, as to the land sued for, or the interests therein, that the title was outstanding in Elizabeth Merriman. Appellants, deprived of the claim of common source of title in Henry Merriman, would be compelled to deraign title from the sovereignty, and this they failed to do; the deed to Henry Merriman, under whom they claim as heirs, being void. They could only bridge this gap by giving to the recitals in the deed from Elizabeth Merriman and others to Guzman that she had conveyed the land to Henry Merriman the force of an estoppel against Guzman, in favor of appellants, not parties to that deed, nor claiming any rights thereunder. This deed, under the construction referred to, did not purport to convey the land sued for, and we think it utterly untenable that Elizabeth Merriman or appellees could be estopped, by the recitals referred to, to deny that she had conveyed the interests in the land here sued for. Appellants cannot get the benefits of such construction of this deed to Guzman as would limit its effect to a conveyance by the grantors of their undivided interests as heirs of Henry Merriman, without taking the corresponding burden of such construction in the destruction of their claim that Henry Merriman was common source of title of themselves and appellees of the interest in the land sued for, which under such construction appellees do not, and cannot, claim under such deed, nor under Henry Merriman as source of title.

The objection that the findings of the trial court do not state where, on the land in controversy, the improvements were located, is without merit.

If these conclusions are not sound, and Henry Merriman could be considered common source of title of the land sued for, this did not bar appellees from showing that such common source did not have title, which, we think, was shown by the evidence of title in Elizabeth Merriman from the sovereignty, and that she has never parted with such title, leaving it, as we have before said, outstanding in her.

We have endeavored to pass upon every question presented by the appeal, regardless of whether they are properly presented by the assignments of error. The record is not entirely free from error, but none of the errors are of such a character as to require a reversal of the judgment.

The various assignments and the propositions thereunder are overruled, and the judgment is affirmed.

Affirmed.

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WOLF v. SAHM et al.†

(Court of Civil Appeals of Texas. Oct. 13, 1909.)

1. JUDGMENT (§ 403*)—EQUITABLE RELIEF—NATURE OF REMEDY.

An independent suit based upon equitable grounds may be maintained to prevent the enforcement of an unjust judgment, irrespective of any statute authorizing such a suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. § 403.*]

2. JUDGMENT (§ 456*)—EQUITABLE RELIEF—LIMITATIONS.

An equitable suit to prevent the enforcement of an unjust judgment is not barred until the expiration of four years after the judgment was obtained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863–866; Dec. Dig. § 456.*]

On motion for rehearing. Motion overruled.

For former opinion, see 120 S. W. 1114.

KEY, J. Appellant's motion for rehearing and the strong argument presented in support of it have received careful consideration, but this court is still of the opinion that its judgment heretofore rendered is correct. We have re-examined the question, and are confirmed in the view that a proceeding instituted under article 1375 of the Revised Statutes of 1895 for the purpose of obtaining a new trial does not constitute an original suit but is merely a continuation of the former suit, as held in our former opinion in this case

It is evident that the article referred to was intended to enlarge the rights of and confer a benefit upon a certain class of litigants, viz., defendants who had been served by publication and had not appeared either in person or by attorneys of their own selection. It is an old and well-settled principle which authorizes an independent suit based upon equitable grounds for the purpose of preventing the enforcement of an unjust judgment, and it required no legislative enactment to confer that right upon the class of persons referred to in article 1375, or upon any other class of persons. Furthermore, such an action is not barred until the expiration of four years after the judgment was obtained. McLean v. Stith (Tex. Civ. App.) 112 S. W. 355. Article 1375 requires the proceedings therein authorized to be filed within two years after the rendition of the judgment. Hence it will be seen that, if the contention urged by appellant's counsel be adopted, and proceedings under article 1375 be held to constitute a new and separate suit based upon equitable grounds, then, instead of enlarging any right or conferring any benefit, the statute would have the opposite result, in that it would restrict an existing right by curtailing the time within which such right could be asserted. It is manifest that the Legislature intended to confer upon the class of persons referred to in the statute a benefit not enjoyed by other litigants, and the only means by which such legislative intent can be accomplished is to construe the statute as extending the time within which such class of litigants may file a motion for a new trial.

The ruling of this court in Brown v. Dutton, 38 Tex. Civ. App. 294, 85 S. W. 454, seems to be in conflict with our ruling in this case on the question under consideration, and, on that point, that case may be considered as overruled.

Motion overruled.

MERRILL et al. v. BRADLEY et al.

(Court of Civil Appeals of Texas. Dec. 7, 1908. Rehearing Denied Jan. 7, 1909.)

1. PRINCIPAL AND AGENT (§ 24*)—POWERS OF ATTORNEYS—EXECUTION—JURY QUESTION—MISREPRESENTATIONS.

In a suit to partition land, in which plaintiffs claimed an undivided one-half interest through a conveyance by an attorney in fact of defendants, evidence *held* to make it a jury question whether defendants were induced by misrepresentations to execute the power of attorney under which such attorney acted.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 24.*]

2. PRINCIPAL AND AGENT (§ 148*)—BONA FIDE PURCHASERS—NOTICE—FRAUD.

If the purchasers of land through an agent acting under a power of attorney were not shown to have notice that such power was obtained by the owner by misrepresentations, the fact that it was so obtained would not affect the validity of their title.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 534–552; Dec. Dig. § 148.*]

3. PRINCIPAL AND AGENT (§ 148*)—BONA FIDE PURCHASERS—FACTS PUTTING ON NOTICE—RECORD.

Defendants executed an instrument which recited the execution by them of an instrument called a power of attorney, authorizing another to recover for them and sell all their lands in Texas, and conveying to him one-half of any such lands, and stated that defendants had revoked, and did by these presents revoke, the power of attorney and all authority given thereby. The revoking instrument was filed in the county in which the land was situated, which was thereafter purchased by plaintiffs from such attorney under the power; plaintiffs having examined the revoking instrument before purchasing. *Held* that, while defendants could not revoke the executed conveyance to their attorney by the latter instrument, it showed an effort to do so so far as possible, and was sufficient to put plaintiffs upon notice that the attorney's title to the land purchased might be defective so as to require them to inquire of defendants upon the subject, and not merely of the attorney.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 534–552; Dec. Dig. § 148.*]

4. PRINCIPAL AND AGENT (§ 34*)—POWER COUPLED WITH INTEREST.

An instrument executed by defendants appointing another their attorney in fact, with authority to take possession of any lands they

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might own in Texas as heirs of a certain person, and to sell, with their consent, any land in which they might have an interest, and conveying to such attorney, in consideration of his services, an undivided half of all such lands, was in effect a power of attorney coupled with an interest in the subject-matter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.*]

5. PRINCIPAL AND AGENT (§ 193*)—BONA FIDE PURCHASERS—JURY QUESTION—NOTICE.

In a suit to partition lands, in which plaintiffs claim an undivided half interest through a conveyance by an attorney in fact of defendants, evidence *held* to make it a jury question whether plaintiffs had notice that the power of attorney was procured by such attorney by misrepresentations.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 193.*]

6. PRINCIPAL AND AGENT (§ 19*)—POWER OF ATTORNEY—VALIDITY—FRAUD—BURDEN OF PROOF.

In a suit to partition lands, in which plaintiffs claimed an undivided half interest through a conveyance by an attorney in fact of defendants, the burden was upon defendants to show that the power of attorney under which such attorney acted was obtained by misrepresentations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 36; Dec. Dig. § 19.*]

7. PRINCIPAL AND AGENT (§ 190*)—BONA FIDE PURCHASERS—BURDEN OF PROOF—NOTICE.

In a suit to partition lands, in which plaintiffs claimed a one-half interest through a conveyance by an attorney in fact of defendants, the burden was upon defendants to show that plaintiffs had notice of the fact that the power of attorney under which the attorney acted, was obtained by misrepresentations.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 190.*]

8. DEEDS (§ 114*)—PROPERTY CONVEYED.

An instrument authorizing one to take possession of any lands the signers might own in the state as heirs of another and sell any lands in which they might have an interest, and, in consideration of such services, conveying to such an attorney one-half of all lands in which they may have an interest in the state, conveyed to the attorney a one-half interest in all of the grantor's lands in the state, from whatever source they deraigned title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 317; Dec. Dig. § 114.*]

9. VENDOR AND PURCHASER (§ 231*)—NOTICE—RECORD.

Where the record title to property was in defendants' ancestor, plaintiffs were not required to look further in purchasing the property from defendants to discover whether it was community property unless they had notice of that fact; defendants being heirs.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513–539; Dec. Dig. § 231.*]

10. GUARDIAN AND WARD (§§ 42, 70*)—CONTRACTS—POWER OF ATTORNEY—EXECUTION BY GUARDIAN—NECESSITY OF AUTHORITY.

A power of attorney to sell land signed for an infant by his guardian is not binding upon the infant where the guardian was not authorized to bind him thereby, in absence of ratification on attaining his majority.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 175, 311–315; Dec. Dig. §§ 42, 70.*]

11. GUARDIAN AND WARD (§ 70*)—CONTRACTS—POWER OF ATTORNEY—RATIFICATION—SUFFICIENCY.

An instrument, signed by one who was an infant when his guardian executed, without authority, a power of attorney for him, authorizing another to sell land, which instrument, though reciting the execution of the power, expressly revoked and annulled it, was not a ratification of the unauthorized act of the guardian in executing the power.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 308–315; Dec. Dig. § 70.*]

12. EVIDENCE (§§ 159, 165*)—BEST EVIDENCE—DEEDS.

Where the testimony of a witness showed that a deed was in existence, and that inquiry of a certain person would show where it was, it was error to permit witness to testify as to its execution and contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471–474, 548–555; Dec. Dig. §§ 159, 165.*]

13. EVIDENCE (§ 370*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—NECESSITY.

In a suit to partition lands in which plaintiffs claimed an undivided one-half interest, the fact that the suit was a partition suit did not authorize the admission of a deed under which plaintiffs claimed title, without proof of its execution and without the three days' filing and notice to defendants, required by statute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1564; Dec. Dig. § 370.*]

Appeal from District Court, Harris County.

Suit by C. L. Bradley and others against A. F. Merrill and others. From a judgment for plaintiffs upon directed verdict, defendants appeal. Reversed and remanded.

For answers to certified questions by the Supreme Court, see 119 S. W. 297.

Wm. A. Anderson and G. H. Pendarvis, for appellants. Joe. M. Sam and C. L. Bradley, for appellees.

REESE, J. This suit was instituted by appellees against appellants for partition of a block of ground in the city of Houston; appellees claiming that they owned an undivided one half of the block, and that appellants owned the other half. In their answer appellants denied the title of appellees, and set up claim to the entire block. They alleged that the power of attorney and conveyance under which Yeagley, appellees' vendor, claimed, was procured by misrepresentation and fraud, and prayed that it be canceled. By supplemental petition appellees denied these allegations of the answer, and pleaded that they were innocent purchasers without notice. The case was tried with a jury, who were instructed to return a verdict for appellees for one-half of the property, which was done. From the judgment for appellees, the defendants appeal.

We think the trial court erred in refusing to submit the issues to the jury and in its peremptory instruction to find for appellees, and that the first assignment of error presenting this question should be sustained. Appellees claimed title under appellants by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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virtue of a certain instrument in the nature of a power of attorney, executed by them to one F. H. Yeagley, dated December 12, 1904, by terms of which they appointed Yeagley their agent and attorney in fact with authority to recover and take possession of, at his own expense, any lands they might own in Texas as heirs at law of James H. Merrill, and to sell and convey any and all lands they might have any interest in in Texas after having obtained the consent of appellants. By this instrument the makers in consideration of the services performed and to be performed by Yeagley and money paid out by him conveyed to him an undivided one-half of "said lands"; that is, "all of the lands that we may have an interest in in Texas." Under this instrument, Yeagley conveyed to appellees Bradley and Sam an undivided one-half of the block of the ground in controversy. Appellees paid full value.

If the evidence was sufficient to present the issue of misrepresentation on the part of Yeagley in procuring from appellants the instrument in question, and also the issue as to whether appellees were innocent purchasers without notice thereof, the court erred in directing a verdict for appellees. The alleged misrepresentations and fraud consisted in certain statements by Yeagley by which appellants were led to believe that their title to the land was disputed, and that litigation would be necessary to clear their title and establish them in possession, which were alleged to be untrue and known to Yeagley to be untrue, also certain representations that appellants owned other lands in Texas which Yeagley was to recover for them. Without discussing the evidence on this point, we think it was sufficient to raise the issue that appellants were induced to execute the instrument referred to by the representations alleged on the part of Yeagley, and that those representations were not true. The evidence at least tended to show that Yeagley represented that the title to the Houston property was in such shape that it would be necessary to bring suit to establish appellants' claim, that, in fact, their title was not disputed, there was no adverse claim, and no obstacle to their possession, and that this was known to Yeagley, but not known to them. Yeagley lived in Houston and appellants in Louisiana. This would not have required a submission of this issue if the undisputed evidence had shown that appellees purchased from Yeagley without notice of the facts above stated, or if there had been no evidence of such notice.

On February 24, 1906, appellants made and signed an instrument which was recorded in Harris county, February 26, 1906, prior to the date of the sale by Yeagley to appellees. This instrument recites the execution by them of the instrument of December 12, 1904, which is called a power of attorney. The recitation contained an exact copy of the material contents of the first instrument; that is, the authority to recover and take possession, to sell and convey with consent of the makers and the conveyance of the one-half interest to Yeagley, and then proceeds: "Therefore, know all men by these presents, that we have countermanded and revoked and by these do countermand and revoke, the said power of attorney and all power and authority thereby given to the said F. H. Yeagley." This instrument was examined by appellees before they bought. It was, in fact, introduced in evidence by them over the objection of appellants as evidence of their defense. This instrument seems to have been construed by the court as intended to be a ratification of the conveyance and a revocation only of the power of attorney. It is true that it was beyond the power of appellants arbitrarily to revoke the conveyance which was an executed conveyance and vested title in Yeagley subject only to be set aside and canceled for fraud, misrepresentation, or other sufficient cause. Still we think it clear that it manifested an intention, so far as this could be done, to revoke and cancel the entire instrument of December 12, 1904, which they denominated a power of attorney, and which is, in fact, but a power of attorney coupled with an interest. The making of this instrument and placing it of record was clearly intended to give notice, so far as this could thereby be accomplished, of appellants' desire and intention to cancel and revoke the entire instrument referred to. This was sufficient to put a prudent man upon inquiry that there was something wrong about Yeagley's title and to call for investigation. The proper source of inquiry would be, of course, the maker of the instrument and not its beneficiary, Yeagley, and there can be little, if any, doubt, that such inquiry would have brought to appellees information of the claim here made by appellants upon which they seek a cancellation of this instrument. The inquiries that were, in fact, made by Bradley show that he felt that this paper required some inquiry. He should have applied to some of the appellants for information. For these reasons, we think the court erred in directing a verdict for appellees, and that the issues of misrepresentation on the part of Yeagley as an inducement to the execution of the power of attorney and of the want of notice on the part of appellees should have been submitted to the jury. The burden of proof was, of course, upon appellants upon both issues.

Without discussing the other assignments of error, we will indicate our views of the principles which should control the questions presented upon another trial.

It may be that the authority given to "recover and take possession," etc., must be lim-

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ited to such portion of the land in controversy as appellants might own as heirs at law of J. H. Merrill, their deceased father, to the exclusion of that portion which descended to them from their deceased mother, the property being community and the mother surviving the father by many years, but when it comes to the clause giving power to sell and convey, and conveying the half interest to Yeagley, different language is used, to wit, "all of the lands that we may have any interest in in Texas." The conveyance to Yeagley, if valid, must be held to convey the interest of the grantors, whether inherited from their mother or father. If it were otherwise, unless appellees had notice that it was community property of the father and mother, the title being in J. H. Merrill and appellants being his heirs, they were not required to look farther. Mangum v. White, 16 Tex. Civ. App. 254, 41 S. W. 80.

The instrument of December 12, 1904, was signed for A. F. Ebenhoch by his guardian. He was at that time a minor, and no authority is shown in the guardian to bind him by this instrument. It is not binding upon him unless expressly or impliedly ratified after he attained his majority. This is not shown. The revocation of February 24, 1906, which was signed by him after he became of age, cannot, by any construction, be given the effect of such ratification. It recites the execution of the first instrument by him, but the whole purpose of the later instrument is to revoke and cancel, not to ratify or confirm. So far as the present record discloses, A. F. Ebenhoch is not bound, or his interest in any way affected, by the conveyance to appellees.

We think the court erred in admitting, over objection, the testimony of Yeagley as to the execution and contents of the separate deed from Mrs. George. His testimony showed that the deed was in existence, and that he knew that it was in the custody of Ponder, or that at least inquiry of Ponder would show where it was. No sufficient excuse was shown for the failure to make inquiry of Ponder. Taliaferro v. Rice (Tex. Civ. App.) 103 S. W. 464.

As to the action of the court in admitting in evidence the original deed last referred to (which was in fact found during the trial in Houston) without proof of its execution and without the three days' filing and notice to appellants required by statute, the fact that this was originally a partition suit did not authorize its admission. The issue was one of title in appellees. But we are inclined to think that the admission of Mrs. George and her husband contained in the instrument of February 24, 1906, that they had executed the former instrument, the later instrument having been duly executed and acknowledged by them, was sufficient proof of the execution of the former instrument to authorize the admission of the original deed. However, as appellees have this original deed and will be prepared to introduce it in evidence properly upon another trial, what we have said on this point becomes probably immaterial.

What we have said sufficiently disposes of the other assignments of error.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

GALLAGHER v. NEILON et al.†

(Court of Civil Appeals of Texas. July 1, 1909. Rehearing Denied Oct. 9, 1909.)

1. WILLS (§ 156*)—UNDUE INFLUENCE.

Where testator's mind was so impaired by disease, old age or mental anguish as to render him an easy dupe to the acts and intrigues of those by whom he was surrounded and that the will by which he made a different disposition of the property from what he otherwise would have done, was procured by taking advantage of his condition, the will will not be admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 382; Dec. Dig. § 156.*]

2. WILLS (§ 55*)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence *held* to support a finding that testator was mentally incompetent to make a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 138; Dec. Dig. § 55.*]

3. WILLS (§ 324*)—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—FRAUD—QUESTIONS FOR JURY.

In a will contest, the questions of testamentary capacity and of undue influence or fraud exerted over testator in procuring the will are questions of fact, to be determined by the jury from all the facts and circumstances of the case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 768, 769; Dec. Dig. § 324.*]

4. WILLS (§ 155*)—"UNDUE INFLUENCE."

"Undue influence" is a species of fraud.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 375; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172, 7823, 7824.]

5. WILLS (§ 332*)—CONTEST—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where in a will contest the repetition of the phrase "undue influence" in the several paragraphs of the court's charge was necessary to render such paragraphs complete and accurate in stating the principles of law embodied therein, the charge was not objectionable, as on the weight of evidence, for giving undue prominence to the phrase.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 785; Dec. Dig. § 332.*]

6. WILLS (§ 300*)—CONTEST—EVIDENCE.

Where in a will contest undue influence and lack of testamentary capacity are charged, any issue arising under any phase of the case may be established or disproved by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 697; Dec. Dig. § 300.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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7. TRIAL (§ 244*) — INSTRUCTIONS — SINGLING OUT FACTS.

It is improper for the court to single out any one fact, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 578; Dec. Dig. § 244.*]

8. TRIAL (§ 235*)—INSTRUCTIONS—INFERENCES —FACTS—WEIGHT OF EVIDENCE.

It is error to instruct that a certain inference may or may not be drawn from a particular fact or condition, when such inference must be drawn from all the facts and circumstances in the case relating thereto; such instruction being on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 539; Dec. Dig. § 235.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—CONTEST OF WILL — UNDUE INFLUENCE—TESTAMENTARY CAPACITY—REQUESTS.

Where, in a will contest on the ground of undue influence and lack of testamentary capacity, the court charged fairly and fully on all the issues submitted instructing in effect that testator had a legal right to devise his property to whomsoever he pleased, and that if he was of sound mind, and not under undue influence, he could make an unequal distribution of his property; that if he had mental capacity enough to know and appreciate the natural objects of his bounty and the character and disposition of his property, he had sufficient mind to make the will, and further fully defined the words "undue influence" as used with respect to the execution of a will—it was not error to refuse special charges relating to the same issues.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 260.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Will contest by Ed Neilon and others against V. B. Gallagher, executor. Judgment for contestants, and proponent appeals. Affirmed.

Smith & Wilcox and Garnett & Hughston, for appellant. Abernathy, Abernathy & Abernathy, for appellees.

TALBOT, J. This is an appeal from a judgment of the district court of Collin county, rendered on appeal from the county court in a proceeding instituted by the appellant to probate the alleged will and codicil thereto of James Neilon, Sr., deceased. The instrument offered for probate is dated April 8, 1903, was signed by James Neilon, Sr., deceased, and duly witnessed by A. J. Reinhardt, C. E. Dunn, and V. B. Gallagher. The codicil thereto bears date December 5, 1903, was likewise signed by the said James Neilon, deceased, and witnessed by the said V. B. Gallagher and C. E. Dunn. The will sought to be probated made an unequal distribution of James Neilon's property among his own children, and bequeathed to Willie Neilon, his grandson, and son of Patrick Neilon, deceased, a certain lot in the town of Wylie, Tex., but did not give anything to the brothers and sisters of the said Willie; there being four of them. The codicil provided that this lot should be given to all of the children of the said Patrick Neilon, share and share alike. It also made a correction in the will by giving the true and correct number of a lot therein devised to his son Eddie Neilon, and appointed V. B. Gallagher executor of the will. James Neilon, Sr., died in February, 1904, and appellant, Gallagher, as his executor, on June 15, 1904, filed an application in the county court of Collin county, Tex., to have said will and codicil probated. Appellees, Eddie Neilon, Mrs. Marian Keejan, Mrs. Theresa Rhodes, children of the said James Neilon, Sr., deceased, and L. E. Christenson, as next friend and guardian of Lillian and Will Neilon, his grandchildren, contested the probate of said will and codicil on the grounds: (1) That the said James Neilon, deceased, did not have mental capacity to execute a valid will; (2) that the execution of the will and codicil was procured through undue influence and by fraud. Upon a trial in the county court the will and codicil were admitted to probate, but, on appeal in the district court a jury trial resulted in a verdict and judgment in favor of contestants, declaring said will and codicil not to be the last will and testament of the said James Neilon, deceased, and denying probate of the same.

The propositions contended for by appellant under his first assignment of error are: "That the whole evidence shows that, at the time of the execution of the will and codicil in question, James Neilon, Sr., was of sound mind and disposing memory, and had testamentary capacity sufficient to make and execute each of said instruments; that the evidence is insufficient to show that any undue influence was exercised on the said James Neilon, deceased, which coerced him into making the will and codicil in question, or either; that there is not a scintilla of evidence showing, or even tending to show, that the execution of the will and codicil in question, or either, was procured by fraud." The evidence touching the questions presented in these propositions is conflicting, but after a careful consideration of it as a whole, we have reached the conclusion that it is sufficient to authorize and support the verdict of the jury in favor of appellees upon them. At the time of the execution of the will in question the testator, James Neilon, Sr., was a very old man, between 83 and 86 years of age, feeble and broken in health. His aged wife, with whom he had lived for 64 years, was desperately sick and expected to die any hour. The attending physician had informed him that she was in such a "condition that she could not last very long; that the time might be very soon, and she might linger along for some hours." Ed Neilon, one of the contestants, and who was better provided for in the will than the other devisees, testified that he did not believe his father was of sound mind at the time

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of the execution of the will, and that he did not think his father was in as good condition physically or mentally when the codicil was made as he was when his mother died; that his father was always considered a just and upright man by every one; that he knew of some transactions of his father—the last two or three he made—indicating a want of mental capacity; that he had repudiated those transactions, and said he did not make them; that he thought both of the transactions were with reference to written instruments prepared by the proponent, Gallagher. This witness on cross-examination said that he swore on the trial of this case in the county court that he thought his father was a man of sound mind, but that he meant by sound mind that he was not crazy or dangerous, but very childish; that since hearing the definition of "sound mind" he knows his father's mind was unsound.

F. M. Brooks testified that he knew James Neilon, deceased, for 37 or 38 years, and up to the date of his death; that during the latter years of his life he was very feeble, childish, and forgetful; that he would forget in a few minutes what he had said in regard to business transactions; that he would say a thing and then deny it in a few minutes afterwards, and assert that he did not say it.

Dr. E. S. Blythe testified that he had been James Neilon's physician for 8 or 10 years just prior to his death; that he attended his wife in her last sickness, and at that time, Neilon's health was ordinarily good; that he saw him every two or three weeks from the time of his wife's death up to the time of his own death; and that his mind and body were good until his last sickness. On cross-examination of this witness, however, he stated that he gave the said Neilon, Sr., medicine all the time to keep him alive, and that he had to stimulate him that way on account of his condition; that "his frame was feeble, and was pretty well played out, and there was not much to support a mind"; that he had stated that his (Neilon's) mind was good for a man of his age; that he expected him to die at any time; and that he had told Martin (Neilon's son) a short time before the death of his wife, Mrs. Neilon, "that the old man was liable to drop out any time"; that he told Martin "the old man would likely die when the announcement of his wife's death was made." The evidence further shows without contradiction, so far as we have been able to discover, that his daughters, Mrs. Keejan and Mrs. Rhodes, lived with their father for a number of years before their marriage, and during that time a greater portion of the property bequeathed by the will was acquired. Their relations were always pleasant and characterized by mutual kindness and love.

Mrs. Rhodes testified: "I remember the morning that this will was written. I saw my father that morning. He seemed to be very weak and very troubled, and seemed to be excited. We were expecting mother to die at that time, and I heard Dr. Blythe tell my father about it. He said that mother was just in a condition that she could not last very long; that the time might be very soon; she might linger along for some hours. I did not hear any conversation between Martin and my father with reference to making the will. Martin asked father to go out with him. I had not up to that time heard Martin say anything to my father about fixing up his will. After Mrs. Keejan left (Mrs. Keejan left the morning the will was drawn), I heard a conversation between Jim and his father about fixing up a will. Jim said he did not think that Eddie and Claude were the proper ones to fix the business, and he says, 'Father you know you have already given Eddie more than any of the rest,' and said, 'I don't think he is the proper one. I think you don't want Eddie at all.' And he says, 'I think Vince [V. B. Gallagher, the proponent] would be the proper one to do the writing, and you and Martin can go and talk this over and fix it. You know how you want it, and I will go home and send Vince here.' When Jim went home, my father and Martin went off and went out in the back yard and talked, and were out there quite a while, a long time. * * * After Vince came, Martin and him were out there in the pasture talking, and I saw them out there talking. After Vince and Martin went out in the pasture and talked they came into my mother's room, and Martin went and got a pen and ink to do this writing, to write the will, and they went into the east room. I was in the west room, waiting on my mother. * * * After awhile they brought out a paper, and Martin came to my mother's bed and asked her if she could hear it read. * * * I did not hear them ask my mother to sign it, the paper, but I thought they wanted her to sign it. Martin says, 'Mother do you think you can hear this read?' and she says 'No; I am too sick.' * * * That maybe was three or four days before my mother died. My father was perfectly friendly with me at that time. My father was just heartbroken and grieved so that he didn't seem to care much for anything, and acted like he didn't care for anything. He did not pay much attention to anything that was going on around him. Of course he was grief stricken on account of my mother."

Mrs. Keejan testified: "I was at my father's the morning the will was drawn, and my son came after me and I went home. I don't know that I could state what passed that morning. * * * When I went back the next day, they had the business drawn up, all of it drawn up in shape to suit them. * * * I know something about Jim Neilon keeping watch on me, but that was after my mother was dead and buried. One

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evening when I was there my father was sick, and I came down there, and there wasn't any person in the sickroom, and I stayed awhile there, and Martin and his son went for wood, and Jim he came in the room, and went and sat between father and me, and my father said something to him, and I didn't hear what father had said, and Jim he says, 'Yes,' he says, 'you had better,' and walked right out of the door, and went and got Martin Neilon's wife to help him carry a cot and put it right along the window, and he lay on that cot while I was there. Jim's hand was doubled up when he said that. When I left that morning [the morning the will was prepared] I left my sister, Mrs. Rhodes, there, and I don't know who came after I left. I was not there at any time that anything else was done with reference to that paper that I know of. They never told me they were going to have a will written, but they kept that secret. They did not do anything about it while I was there, but they waited until I went home. Long before my father died the doctor had been giving him medicine, and he could not take one dose of that medicine without some one to give it to him, because he was so tottery he could not hold the spoon nor take it, and I suppose when he shook hands his hand would shake. I was there the biggest part of five weeks, and I stayed there and helped nurse my mother, and while I was there my father never was allowed five minutes in my company by himself. Jim was with him, and whenever he got tired Martin took his place, and when they got tired in the room they took my father out. For some time before he died my understanding was that they always went with him to take care of him. I was sitting in a chair in the room, and Jim went and sat by my father's bed, and of course he was between me and my father. Jim wouldn't let me be alone with my father; neither he nor Martin would allow my father five minutes where I was—they just took him out and talked to him an hour at a time. I did not want to be alone with my father, but I was noticing that, because they had been with him all their lives, Jim and Martin and these boys, and I just drew an idea they were at something. Martin was living right there with him, and had been living there about 12 years. Jim shook his fist at him and says, 'Yes, you had better,' but I can't tell you what it was he was talking about."

There is also testimony to the effect that Martin Neilon was present while the will sought to be probated was being written, or at least a part of the time. He testified: "I believe the first part of the will is the part that was willed to me. I was in there and heard him tell Mr. Gallagher about my part of it, and then I went out, but I was back in there and heard him mention the other boys."

We think this and other testimony in the record authorized the submission of the question as to whether or not James Neilon, Sr., at the time of the execution of the will and codicil sought to be probated, had testamentary capacity sufficient to execute said instruments. And that Jim and Martin Neilon were very active in procuring the execution of said will and codicil, and probably unduly influenced the testator in making the disposition of his property as therein appears, may reasonably be inferred from his extreme old age, mental weakness, deep distress and anguish at the rapid approach of the death of his wife, the importunities and zeal with which the execution of said will was procured, and the unexplained virtual disinheritance of his daughters and grandchildren, for each of whom the testimony clearly indicates he entertained sincere affection. James Neilon, Sr., when the will was written and signed, was, as the testimony shows, between 83 and 87 years of age. His memory was so defective that he would forget statements made and acts done by him in a very few minutes afterwards. He was so grieved and heartbroken over the condition of his wife "that he didn't seem to care for anything." In this condition and amid these sad and distressing surroundings we find his son Jim Neilon engaging him in conversation relative to the preparation and execution of his will, admonishing him that he had already given Ed Neilon more than any of the rest of his children, and that Ed, his trusted son, was not the proper person to "fix the business," but that his (Jim Neilon's) stepson, V. B. Gallagher, the proponent herein, was. Immediately after this conversation, and while awaiting for V. B. Gallagher to come to prepare the will, it appears that Martin Neilon engages his father, when no one else was present, in a long talk, which is immediately followed by the preparation of the will in question. The daughters of the testator, who had theretofore been the recipients of his love and bounty, in the will were given "a mere pittance"—$400 apiece. So unequal was the distribution made by the will of the testator's property, and so out of keeping with the affection evinced for his daughters and his former kind and considerate treatment of them, that we feel justified in saying it was unnatural and inequitable.

In the case of Gay v. Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712, the following language of Mr. Redfield on the Law of Wills, is quoted with approval: "When the will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, this of itself will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will." In the case of Davis v. Calvert, 5 Gill & J. (Md.) 302,

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25 Am. Dec. 282, Chief Justice Buchanan said: "A testator should enjoy full liberty and freedom in the making of his will and possess the power to withstand all contradiction and control. That degree, therefore, of importunity, or undue influence, which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it." And so we think that where it appears to the satisfaction of the jury that the testator's mind was so far impaired by disease, old age, or mental anguish as to render him an easy dupe to the acts and intrigues of those by whom he was surrounded, and that the will, by which he made a different disposition of his property from what he otherwise would have done, was procured by taking advantage of his condition, such will should not be admitted to probate.

Considering all the facts and circumstances in evidence in this case, we are not prepared to say the verdict of the jury is without evidence to support it. The questions of James Neilon's testamentary capacity and of undue influence or fraud exerted over him in procuring the will and codicil were questions of fact, to be determined by the jury from all the facts and circumstances of the case. Goodloe v. Goodloe (Tex. Civ. App.) 105 S. W. 533. The testimony shows that after the death of his wife James Neilon, Sr., gradually grew weaker physically and mentally up to the time of his death; that the same parties who prepared and urged the execution of the will on the 8th day of April, 1903, were the same parties who prepared and were instrumental in procuring the codicil thereto, and that James Neilon, at the time the codicil was prepared and signed by him, was in as bad, if not a worse, condition physically and mentally than he was when the will was signed. The question of fraud having been practiced to procure the execution of the will does not seem to have been submitted to the jury, except as it was a part of, and involved in, the issue of undue influence. Undue influence is a species of fraud, and the word "fraud," wherever it appears in the court's charge, seems to have been used synonymously with the phrase "undue influence," and the jury doubtless so understood it. Disassociated from the question of undue influence, it is probable that the evidence was insufficient to show any positive act of fraud, but from the manner and connection in which the word is used in the charge, it is not at all likely that the jury was misled by it to the prejudice of appellant.

The foregoing remarks apply to and dispose of appellant's proposition under his second assignment, to the effect that the fifth paragraph of the court's charge was erroneous because there was no evidence showing restraint or fraud. The contention under this assignment that said charge is upon the weight of the evidence, in that, taken in connection with other paragraphs of the charge, it gave undue prominence to the term "undue influence" is not well taken. The repetition of the phrase "undue influence" in the several paragraphs of the court's charge was necessary to render complete and accurate said paragraphs in stating the principles of law embodied therein. In such cases repetitions are not subject to the criticism that they make too prominent a particular feature or phase of the case.

The third and fourth assignments of error complain that the seventh and eleventh paragraphs of the court's charge are erroneous, misleading, upon the weight of the evidence, and not supported by the evidence. What has been said in discussing the propositions urged under the first assignment of error disposes of these assignments adversely to appellant's contention.

The court did not err in charging the jury to the effect that any issue which arose under any phase of the case could be established or disproved by direct or circumstantial evidence. This charge is not subject to either of the criticisms urged by appellant. It states a correct proposition of law, and is not inappropriate under the facts.

Appellant presents several assignments of error, complaining of the court's refusal to give special charges asked, embodying, respectively, the following propositions: (1) That testamentary incapacity cannot be inferred from enfeebled condition of the mind or body, and that if, at the time of the execution of the will and codicil, James Neilon, deceased, had sufficient intelligence to comprehend the condition of his property, and the scope, meaning, and effect of the provision of said will and codicil, and that each was his free act, to return a verdict for proponents, even though they believed the mental and bodily powers of said Neilon were impaired when said instruments were executed; (2) that mere influence or persuasion alone is not sufficient in law to set aside a will upon the ground of undue influence, and, if the jury believed James Neilon, deceased, was influenced to make and execute the will and codicil in question, yet they would not be authorized, on this account, to find in favor of contestants unless they should further find that such influence amounted to moral coercion, etc.; (3) that if at the time of the execution of the will and codicil James Neilon, deceased, was of sound mind, and that said will and codicil were each the free and voluntary act of said Neilon, and not the result of undue influence, then he had the right to make an unequal distribution of his property among his children, and the fact that he did make such unequal distribution, if he did, would not invalidate the will and codicil, or either of them; (4) that if at the time of the ex-

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ecution of the codicil in question James Neilon, deceased, was of sound mind, and that said codicil was his free and voluntary act, etc., to return a verdict in favor of proponent, Gallagher, even though he was not of sound mind, or was acting under undue influence, when the will was executed, as said codicil readopts and reaffirms said will; (5) that if James Neilon, deceased, was of sound mind at the time of the execution of the will and codicil, and said will and codicil were each his free and voluntary act, and not the result of undue influence, then the fact that he attempted in said will to dispose of property in which his wife had an interest would not invalidate said instruments, or either of them.

We are of the opinion there was no error in refusing these charges. It may be conceded that each embraced a correct abstract proposition of law, but under the facts in this case we think the giving of them would most likely have misled the jury. It is improper for the court, as has been repeatedly held, to single out any one fact in a case, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance. Likewise it would be error to instruct the jury that a certain inference could or could not be drawn from a particular fact or condition, when such inference must be drawn from all the facts and circumstances in the case relative thereto. Such course has frequently been held to be upon the weight of the evidence, and it is believed the special charges under consideration, in view of the facts and circumstances developed in this case, are subject to that objection. The several facts or circumstances adduced upon the trial to support the issue of undue influence, taken and considered separately and alone without the supporting evidence, would not be sufficient to support the finding of the jury on that issue, but considered as a whole was sufficient, we think, to authorize the conclusion that such influence was brought to bear upon James Neilon, deceased, to procure the will and codicil in question. Besides the court's charge was very fair and full upon all the issues submitted, and sufficient to preclude the probability of injury to appellant's rights by the refusal of the special charges. The jury were instructed in effect that James Neilon, Sr., had the legal right by will to devise his property to whomsoever it pleased him, and that if he was of sound mind and not under undue influence, he would have the legal right to make an unequal distribution of his property among his children and grandchildren; that if he had mental capacity enough to know and appreciate the natural objects of his bounty, and the character and disposition of his property as described by the will and codicil sought to be probated, then he had sufficient mind to make them; that by the words "undue influence" as used with respect to the execution of a will and codicil is meant any means employed upon or with the testator which, under the circumstances and condition by which the testator was surrounded, he could not well resist, and which controlled his volition, and induced him to do what he otherwise would not have done. They were further instructed that if they believed, from the facts and circumstances in evidence, that, at the time James Neilon, Sr., signed the will and codicil, his mind and memory were sufficiently sound to enable him to know and understand what he was doing, and the effect of the act, to find a verdict in favor of the proponent, Gallagher, on this issue, or that if they believed the said James Neilon, at the time he executed the will on the 8th day of April, 1903, was of unsound mind, or was induced to execute same by reason of "undue influence," yet if they further believed from all the facts and circumstances in evidence that afterwards on the 5th day of December, 1903, when he executed the instrument offered as codicil to said will, he was of sound and disposing mind and memory, and was not laboring under any "undue influence," and referred to and published the instrument executed by him on the 8th day of April, 1903, as his last will and testament, to return a verdict in favor of proponent, Gallagher, establishing both instruments as valid and binding. With these instructions before the jury no harm was done appellant by the refusal of the special charges requested relating to the same issues.

There are some assignments complaining of the admission and rejection of certain testimony. These assignments have been carefully examined, with the conclusion reached that neither of them discloses reversible error.

Other assignments not discussed are either disposed of adversely to appellant's contention by what has been said, or present no reversible error.

The judgment of the court below is affirmed.

FT. WORTH & R. G. RY. CO. v. KINDER.

(Court of Civil Appeals of Texas. May 25, 1907.)

1. APPEAL AND ERROR (§ 776*)—DISMISSAL—VOLUNTARY DISMISSAL.

Where appellee had not appeared in any way before the appeal was dismissed upon appellant's motion, no rights of appellee were prejudiced by the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3115; Dec. Dig. § 776.*]

2. APPEAL AND ERROR (§ 807*)—DISMISSAL—REINSTATEMENT.

Where appellee had not appeared in any manner when appellant had the appeal dismiss-

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ed so that none of appellee's rights were prejudiced thereby, that appellee intended at some time to ask the statutory damages for delay in prosecution was not ground for reinstatement of the case to assess such damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3177; Dec. Dig. § 807.*]

Action between the Ft. Worth & Rio Grande Railway Company and R. C. Kinder. On motion to reinstate the appeal, after dismissal on appellant's request, for assessment of statutory damages for delay. Motion denied.

C. H. Yoakum and West, Chapman & West, for appellant. Ramsey & Odell, for appellee.

RAINEY, C. J. On a former day of this term, to wit, May 11, 1907, at the request of appellant, we dismissed the appeal in this case, assessing the appellant with costs. The appellee now presents a motion to reinstate the cause and be allowed to file a motion to assess 10 per cent. damages for delay.

Appellee's motion, we think, comes too late. Before the order of dismissal was made the appellee had not appeared in the case by brief, cross-assignment of error, nor suggestion of delay. This being the state of the record, it was the right of appellant to have it dismissed, as no rights of the appellee were prejudiced, as shown by the record. Elliott's Appellate Procedure, § 534. That appellee intended at some time to suggest delay and ask the assessment of the 10 per cent. damages allowed by statute in delay cases is not a sufficient reason to authorize the court to reinstate the case and hear the suggestion.

The motion is refused.

Motion refused.

EL PASO SOUTHWESTERN R. CO. v. BARRETT.

(Court of Civil Appeals of Texas.)

Additional opinion.

For former opinion, see 101 S. W. 1025.

JAMES, C. J. Having omitted in the opinion to dispose of the seventh assignment of error, we here do so by stating that the testimony was not such as demanded a verdict for defendant in response to the charge mentioned in the assignment.

Writ of error refused.

TEXAS MIDLAND R. R. v. H. L. EDWARDS & CO.

(Court of Civil Appeals of Texas. July 1, 1909. Rehearing Denied Oct. 9, 1909.)

1. CARRIERS (§ 134*)—FREIGHT—AGENTS.

In an action against a railroad company for the value of cotton destroyed by fire, while on the platform of a cotton compress company to be compressed and shipped over defendant's railroad, evidence *held* to sustain a finding that the compress company was defendant's agent for receiving the cotton.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 134.*]

2. CARRIERS (§ 41*)—FREIGHT—DELIVERY.

Plaintiff delivered cotton to a compress company, which was defendant's agent for shipment when compressed, and after the cotton had been checked by the compress company, plaintiff presented the bills of lading to defendant's agent, but he refused to sign them because the insurance carried by the compress company to cover cotton on its platform for shipment, pursuant to an agreement between it and the railroad company, was not sufficient to cover the cotton then on hand, and plaintiff's cotton was destroyed before the bills of lading were signed. *Held*, that there was a delivery of the cotton to defendant for transportation before the fire.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 102, 103; Dec. Dig. § 41.*]

3. CARRIERS (§ 153*)—LOSS OF GOODS—LIMITATION OF LIABILITY—FAILURE TO SIGN BILL OF LADING.

Where cotton had been delivered to a railroad company and accepted for shipment, that the bills of lading, which were prepared by the shipper and presented to the company's agent for signing, but not signed before the cotton was destroyed by fire, exempted the company from liability for loss by fire, would not prevent a recovery of the value of the cotton, as the company's liability did not depend upon the undelivered bill of lading, but upon acceptance of the cotton for transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 694–696; Dec. Dig. § 153.*]

Error from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by H. L. Edwards & Co. against the Texas Midland Railroad. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. H. Dashiell and Ogden, Brooks & Napier, for plaintiff in error. Young & Adams and Cockrell, Gray & Thomas, for defendants in error.

BOOKHOUT, J. This suit was brought by the defendant in error, H. L. Edwards & Co., in the district court of Kaufman county, Tex., against the plaintiff in error, the Texas Midland Railroad, to recover the value of 74 bales of cotton, which were, on the 19th day of December, 1901, destroyed by fire while situated on the compress platform of the Shippers' Warehouse & Compress Company, at Terrell, Tex. That plaintiff alleged that on the 18th and 19th days of December, 1901, the plaintiffs delivered to the defendant on its platform in the city of Terrell, Tex., 310 bales of cotton for immediate shipment by defendant to Liverpool and 100 bales of cotton for like immediate shipment to Havre. That said platform was the platform of the Shippers' Warehouse & Compress Company at Terrell, but the same adjoins the tracks of defendant, and said platforms were on said dates, and for a long time theretofore had been, the only platforms for the purpose of receiving and shipping cotton of all kinds owned or controlled by defendant in Terrell, and the same were the usual places for its receipt of cotton for shipment and the only place that defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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had for such purpose at such time, and it was defendant's universal custom to receive cotton for shipment on said platforms. That defendant received said cotton for immediate shipment, and caused the same to be segregated and put in a place to itself; same being properly marked and tagged for shipment as aforesaid. That thereupon the plaintiffs prepared bills of lading for said cotton, and said bills of lading were O. K.'d by defendant's servants and agents, who checked said cotton, and ascertained that it was there. That thereupon said bills of lading were handed to the station agent of defendant at 12 o'clock on the 19th, and he was requested to sign the same. The said agent promised to sign said bills by 2 o'clock in the afternoon, but for some reason unknown to plaintiffs he failed and refused to sign the same at 2 o'clock, and for some hours thereafter, although demand was made of him that he sign same. That from said 2 o'clock until 5 o'clock the said station agent kept promising to sign said bills, but had not done so at about 5 o'clock, when a fire broke out upon said platform and destroyed 74 bales of plaintiff's cotton, which had been, as above alleged, delivered by it to defendant for shipment as aforesaid, 69 out of the shipment for Liverpool, and 5 out of the shipment for Havre. That after the destruction by fire plaintiffs still demanded of defendant that it sign and deliver them said bills of lading, but the agent then refused to do so. That plaintiffs had completed their delivery of said cotton to defendant, and had done all that they could do towards the shipment of same, and that defendant had received the same for shipment as a common carrier prior to its destruction by fire. The defendant answered by general demurrer, general denial, and specially answered, alleging the facts why it claimed the plaintiffs ought not to recover. A trial resulted in a judgment for plaintiffs for $4,199.33, the value of the cotton burned, and defendant perfected a writ of error.

Conclusions of Fact.

The cause was tried by the court without a jury, and the court filed conclusions of fact, from which it appears: That in December, 1901, and for many years prior thereto, H. L. Edwards & Co. had been buyers and exporters of cotton, and were represented at Terrell by Lucias Rash, as their agent. That at the same time, and long prior thereto, the Texas Midland Railroad had been in the business of a common carrier of freight and passengers, and as such had been engaged in the transportation of cotton for foreign shipment. That the defendant company had no facilities at its depot for the reception of cotton for shipment, and all cotton intended for foreign shipment over its road, as well as over the Texas & Pacific Railroad, was delivered to the respective roads on the platform of the Shippers' Warehouse & Compress Company, the said railroads having spurs or side tracks contiguous to said compress platform and on opposite sides thereof. That by the general custom and usual course of business dealing between the cotton shippers, the railroad and said compress company, which had prevailed for many years, all cotton, when intended for foreign shipment, was delivered on the compress platform. If the same was local cotton—that is, cotton which had been marketed from the wagons in the city of Terrell—the same was hauled from the cotton yards to the compress company's platform, and the management of said compress issued what was known as dray receipts for this local cotton as it was delivered at the compress. If the cotton intended for shipment was "localed in" from the noncompress points, it was delivered by the railroad so transporting it to Terrell to the compress platform, where it was taken charge of by the compress management for the owner of the cotton, said compress management issuing receipts or tickets for this cotton, and tagging the same in order that it could be identified. Whenever any exporter of cotton desired to ship the same, they would, after having collected the same upon the compress platform, as aforesaid, and determining over which railroad they would ship, usually prepare their own bills of lading as a matter of convenience, and take them to the superintendent of the compress, who would check up the cotton, and see that it was all on the compress platform, and would take up the dray receipts and also the receipts for the "localed in" cotton, which was included in the bills of lading, and, after said cotton was ascertained to be on the platform, would O. K. this bill of lading. The approval at that time of the bills of lading consisted of "O. K.," signed by W. H. Flowers, who was superintendent of the compress. These bills of lading were left blank as to date, and after receiving the O. K. of the superintendent of the compress, the shippers of the cotton, or some one representing them, would then take the bills of lading to the agent of the railroad over which the cotton was desired to be shipped to be signed and dated by said agent.

There was an arrangement and agreement between the compress company and the Texas Midland Railroad that said company should protect it in the way of insurance against the cotton delivered on the compress platform for shipment over said railroad. The said compress company, in pursuance of this agreement, carried a blanket policy of $15,000 for the protection of the Texas Midland Railroad, and if at any one time there was more cotton for shipment over the Texas Midland Railroad than this blanket policy covered, then by said arrangement and agreement the compress company took out short-term policies to cover their excess, and the

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railroad company would decline to sign the bills of lading until it was protected for the amount of cotton then on the compress for compression and shipment, until it was protected either by the blanket policy or short-term policies in addition thereto. The plaintiffs in this case were not a party to this arrangement between the compress company and the railroad; had nothing to do with the payment of the insurance premiums, and the policies were not taken out for the benefit of the plaintiffs, or other shippers, but solely for the benefit of the railroad.

On the 19th day of December, 1901, and prior thereto, the defendant railroad had no receiving or checking clerk to receive and check the cotton received at the compress platform and intended for compression and shipment over its road, and by the custom and usage which had grown up at Terrell, W. H. Flowers, the manager or the superintendent of the compress company, performed this duty of receiving and checking clerk in the manner and under the course of dealing stated in these findings. The manager of the compress had requested the defendant company to place a checking clerk on the compress platform in order that the compress management might be relieved of this labor, but this the defendant railroad company declined to do, stating that they were willing to take the checking of said Flowers as to the cotton, and declined to place a receiving or checking clerk on the compress platform to do this work.

On the 19th day of December, 1901, H. L. Edwards & Co. had placed on the compress platform 410 bales of cotton, intended for shipment, after compression, to Liverpool, England, and Havre, France, over the defendant's railroad. Some of this cotton had been localed in from noncompress points, but most of it was local cotton, which had been hauled from the cotton yards at Terrell to the compress platform. The bills of lading were prepared for this cotton by H. L. Edwards & Co. at Dallas, and sent to Rash, their agent at Terrell, said bills of lading, identifying the same in the usual way, and there presented to W. H. Flowers, the superintendent of the compress, who checked up the cotton and took up the dray receipts and receipts for the localed-in cotton, and O. K.'d the bills of lading in the usual way. This was done about 12 o'clock on this day. These bills of lading were then taken by a representative of the plaintiffs to G. W. Pence, agent of the defendant railroad, and the only person expressly authorized to sign bills of lading for it; but Pence, at this time, was not in the office. Later on his attention was called to the bills of lading, and, after checking up the cotton as shown in the bills of lading with his insurance policies, found that he was some $3,000 short on insurance, and declined to sign the same until the compress had taken out a short-term policy in addition to the blanket policy to protect this excess. He telephoned to Flowers, and Flowers assured him that he would take out such short-term policies, after some controversy as to fixing the value of the cotton for insurance purposes, and said Pence commenced work on the bills of lading and duplicates thereof, preparing them for his signature when said insurance policies had been arranged. During the time the said Pence was working on said bills of lading he telephoned to Griffith, the insurance man, whom Flowers had informed Pence would cover the cotton by insurance, but Griffith was out of the office, but he was informed by some one in the office that the policies would be issued. That in O. K.'ing the said bills of lading said Flowers was acting for defendant. Pence continued to work on the bills of lading, preparatory to signing them when the insurance had been arranged to his satisfaction, but before this had been done a fire broke out on the compress platform, and 74 bales of this cotton was destroyed. Pence had failed and declined so far, before the fire, to sign these bills on account of insurance, and after the fire he refused to sign same, though asked to do so by plaintiff. The insurance policies were not issued, nor the bills signed, but were returned to plaintiffs, and were by them applied to a subsequent shipment of cotton. No complaint was made by the agent of the defendant company as to the checking of the cotton or O. K.'ing of the bills of lading by Flowers, and his only reason for not signing them was on account of the shortage of insurance.

By the general usage the owner of cotton would give shipping instructions in writing to the compress company, and no shipping instructions were given to the agent of the railroad after such instructions were given to the compress company, and the compress company marked and tagged the cotton which was already on the platform, which had been localed in, according to such shipping instructions; but the cotton which was hauled to the compress platform from the local cotton yards was marked for shipment when delivered to the compress. And this was the method pursued with reference to the 410 bales of cotton in question. After this cotton was delivered to the compress company with shipping instructions no further instructions were given, either to the compress management or to the railroad with reference to the cotton by the owners thereof, and they had nothing further to do with the cotton in furtherance of its transportation.

After the bills of lading had been O. K.'d by Flowers, and the cotton checked by him, and the owner of the cotton had presented these bills of lading to the agent of the defendant company with a request to sign them, there was nothing further the shipper could do in furtherance of the transportation of the cotton, and there was nothing further to be done to the cotton to prepare it for transportation, except to compress the same.

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Said Flowers was not employed by the railroad company directly to perform the duties either of receiving or checking clerk, but such duties as were performed by him in this regard grew out of, and were a part of, the usage and custom incident to the compression and shipment of cotton at Terrell. The usages and customs with reference to receiving, checking, compressing, and shipping all cotton as detailed in the foregoing findings was the universal custom at the town of Terrell, not only between plaintiffs and defendant railroad, but between all other shippers and such railroad, and between all other shippers and the Texas & Pacific Railroad, and such usages and customs were carried out with reference to the 410 bales of cotton in question, up to the time of the fire; but the bills of lading were not signed, nor the insurance to cover excess taken out, as heretofore shown in these findings.

The Shippers' Warehouse & Compress Company was a corporation duly incorporated under the general laws of the state of Texas, authorized to do business in Kaufman county, among other counties, and was on December 19, 1901, and for some time prior thereto, the owner of the cotton compress and its platform at Terrell, Tex., and was operating the same as a cotton compress. Section 13 of the rules and regulations of the Railroad Commission, which was in force and effect at the time of the fire in question, provides as follows: "Sec. 13. When cotton is tendered to a railroad company upon a compress platform which is situated on the track of such railroad company, it shall be the duty of such railroad company to take charge of and receipt for such cotton in the same manner and on the same terms as it would receive and receipt for the cotton if tendered at its depot, platform or other place assigned by it for such transactions; provided, however, that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of the railroad company." After the cotton was delivered to the compress for compression and shipment the owners of the cotton had nothing further to do with it with reference to loading the same into the cars of the defendant company. The agent of the railroad would ascertain from the management of the compress how many cars would be needed for cotton then on the platform ready for compression and shipment, and these cars would be placed upon the side track of the defendant company alongside of the platform, and loaded by the compress people. None of the cotton in question had been compressed at the time of the fire, which consumed the 74 bales, but it was understood that such cotton was delivered for immediate shipment as soon as same could be compressed, shipping instructions having been given by the plaintiffs to the compress company.

Conclusions of Law.

The controlling questions arising on the facts are: (1) Was the compress company the agent of the railroad company as to this cotton? (2) Was there a delivery of the cotton to the railroad? The facts show that the railroad company had no facilities at its depot for the reception of the cotton intended for foreign shipment, as this particular cotton was, that the cotton was delivered on the platform of the compress company, and that the railroad maintained a spur track out to the platform of the compress, and the usual custom and course of dealing between cotton shippers on the one hand, and the compress company and the railroad on the other, was that all cotton intended for foreign shipment was delivered at the compress platform. By the rules and regulations of the Railroad Commission of Texas, it is made the duty of the railroad company, when cotton is tendered to it upon a compress platform situated on its track, to take charge of and receipt for such cotton in the same manner and on the same terms it would receive and receipt for the cotton if tendered it at its depot platform or other place assigned by it for such transactions. It was shown that the plaintiffs had concentrated and delivered 410 bales of cotton on the platform of the compress for foreign shipment, and had prepared bills of lading in proper form for the transportation of said cotton over appellant's railroad, and that W. H. Flowers, the superintendent of the compress company, had examined said bills of lading, and ascertained that the cotton called for and included in said bills of lading was on the platform of the compress company, and approved the same by marking the same "O. K.," and signing his name thereto; that upon O. K.'ing the bills of lading he took up the receipt of the compress company issued to the draymen, or whoever delivered the cotton to the compress. These bills of lading, after having been O. K.'d by W. H. Flowers, were by plaintiffs' agent delivered to the agent of the railroad company, to be by him, as was his custom upon receiving such bills of lading, dated and signed. He began work on the bills of lading preparatory to signing them, and after checking up the cotton, as shown in the bills of lading, with his insurance policies, found he was some $3,000 short on insurance, and declined to sign the same until the compress company took out a short-term policy in addition to its blanket policy for $15,000 then on the cotton. This refusal was based on an agreement between the compress company and the railroad company that the compress company should protect the railroad company in the way of insurance against the cotton delivered on the compress platform for shipment over said railroad, and that the railroad would decline to sign the bills of lading until it was pro-

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tected for the amount of cotton then on the compress platform for compression and shipment, either by the blanket policy or short-term policies in addition thereto. The plaintiffs were not parties to this agreement, and had nothing to do with it. Pence, the agent of the railroad company, telephoned Flowers, and after some controversy Flowers assured Pence that he would take out the additional short-term policy. During the time Pence telephoned the insurance agent whom Flowers had informed him would issue the policy for additional insurance, but the agent was not in his office, but he was informed by some one in the office that the policy would be issued. Before the policy was issued, and while Pence was at work on the bills of lading, and before he had signed them, a fire occurred on the compress platform, which destroyed 74 bales of the cotton. The fact that the railroad company had no place to receive cotton intended for export shipment but the compress platform; that it had no employés for the handling of the cotton while on the platform, but accepted the O. K. of the superintendent of the compress as to the number of bales thereon, and relied on the compress company's employés to load the cotton in its cars—tends strongly to show, in our opinion, that in these respects the compress company and its superintendent were the agents of the railroad. In a case where the facts were quite similar to those here existing, it was held by the Supreme Court of the United States that the issue as to whether or not the compress company was the agent of the railroad company was raised by the evidence, and should have been submitted to the jury, and a judgment, rendered upon an instructed verdict, in favor of the railroad, was reversed, and a new trial awarded. Arthur v. T. & P. Ry. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590. On the authority of that case we hold that under the evidence the trial court did not err in his finding that the compress company and W. H. Flowers in the matter of the delivering and receiving the cotton were the agents of the railroad company.

Had there been a delivery of the cotton to the railroad company at the time of the fire? No bill of lading had been signed and delivered to plaintiffs at the time of the loss. But this fact is not the sole criterion as to liability on the part of the railroad. If the facts show a delivery of the cotton to the railroad for immediate transportation, then its liability as common carrier had attached. Railway v. Hall, 64 Tex. 615; Railway Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Railway Co. v. Martin, 12 Tex. Civ. App. 464, 35 S. W. 21; Martin v. Railway Co. (Tex. Civ. App.) 27 S. W. 267; Arthur v. T. & P. Ry. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590. It is true that the cotton had not been compressed at the time of the fire, and this was necessary in foreign shipments, but it was understood that the cotton was delivered for immediate shipment as soon as it could be compressed; shipping instructions to that effect having been given the compress company. The compressing of the cotton and the loading of the same in the cars were matters to be performed by the compress company. The cotton was, at the time of the fire which destroyed the 74 bales, in the control of the railroad, and plaintiffs had done everything in their power to procure the signing of the bills of lading and the transportation of the cotton. The agent's refusal to sign the bills of lading grew out of a matter between the compress company and the railroad, to which plaintiffs were not parties, and over which they had no control. The facts show a delivery of the cotton to the railroad for transportation prior to the fire.

It is contended by plaintiff in error that if the cotton had been delivered and accepted, then the shipper was bound by all the provisions of the bills of lading. The bills of lading which were O. K.'d by W. H. Flowers contained a clause as follows: "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots; strikes or stoppage of labor; or by leakage, breakage, chaffing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or usual to carry such property upon open cars." This contention is not sustained. The bills of lading were not signed, and had not become the contract of the parties. The liability of the railroad did not arise on the bills of lading, but upon a delivery of the cotton to the railroad for transportation.

Finding no reversible error in the record, the judgment is affirmed.

MELTON v. BEASLEY.†

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Denied Oct. 7, 1909.)

1. LIENS (§ 3*)—AGREEMENTS—REINSTATEMENT OF VENDOR'S LIEN.

A purchaser of land gave as part payment his note which contained a vendor's lien. The vendor transferred the note to a third person, and the purchaser paid it. Thereafter the third person advanced to him a specified sum under an agreement that the payment of the vendor's lien note should be withdrawn to the amount advanced, and that the land should stand as security therefor, and a new note for the amount advanced was executed. *Held*, that the transaction resulting in the execution and delivery of the second note created a contract lien good as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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between the parties and others not purchasers for value without notice.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 24; Dec. Dig. § 3.*]

2. VENDOR AND PURCHASER (§ 280*)—FORECLOSURE—PLEADING AND PROOF—VARIANCE.

The variance between the petition specifically pleading a vendor's lien and the proof establishing a contract lien was corrected by the answer alleging the execution of a vendor's lien note which had been fully satisfied, and that the note in suit was given for borrowed money, and that the lien was attempted to be fixed on the land as an original vendor's lien note, and by the reply alleging that the intention of the parties was that the note in suit should stand in place of the original note, and be a lien on the land, justifying a judgment foreclosing a contract lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 280.*]

3. HOMESTEAD (§ 115*)—INCUMBRANCE.

An unmarried man may mortgage his homestead, though the same is exempt from execution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 183–190; Dec. Dig. § 115.*]

4. HUSBAND AND WIFE (§ 273*)—PROPERTY INCUMBERED—COMMUNITY PROPERTY.

Where there was no evidence that an owner had any children entitled to share with him in the community property on the death of his wife, it could not be urged that he owned only a half interest, so that his mortgage only incumbered the property to that extent.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

5. LIMITATION OF ACTIONS (§ 151*)—NOTES—NEW PROMISE.

Where there was nothing in a will bequeathing a note to indicate that the executor, who was the guardian of a legatee, was to do more than pay the debts and make a distribution among the beneficiaries and control the portion bequeathed to the legatee until he became of age, a written acknowledgment by the maker of the note that the debt was just, due, and unpaid, made after the death of testator, was not a promise to the executor or guardian vesting in him the title to the debt, but was a revival of the old obligation and inured to the legatee, since under Rev. St. 1895, § 1869, property left by a testator vests immediately in the legatees, and an action by the legatee brought within two years after he attained full age was not barred by limitations, though more than four years had elapsed since the acknowledgment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 614–620; Dec. Dig. § 151.*]

Appeal from District Court, Fannin County; Ben. H. Denton, Judge.

Action by Bob C. Beasley against Charles M. Melton. From a judgment for plaintiff, defendant appeals. Affirmed.

H. G. Evans, for appellant. McGrady & McMahon, for appellee.

HODGES, J. In August, 1908, the appellee filed his amended original petition in the usual form of an action of trespass to try title to 73⅛ acres of land situated in Fannin county. He alleges that in November, 1890, W. T. Gray conveyed the aforesaid tract of land to T. H. Melton, and as a part of the consideration of said conveyance Melton executed a note payable to the order of Gray due November 1, 1891, for $558, with interest and attorney's fees; that a vendor's lien was retained in said note to secure its payment; that afterwards, and before the maturity of same, the note was transferred by Gray to I. D. Beasley. It is further alleged that on February 14, 1898, in renewal and extension of this note and debt said T. H. Melton executed another note, a substantial copy of which is attached to the petition as an exhibit, which was as a matter of form indorsed in blank by Gray, but which was in fact executed and delivered to I. D. Beasley as his property; that afterwards, on January 11, 1904, Melton executed a written acknowledgment of such debt by signing the following written entry on the back of said last-mentioned note: "Balance due on this note, just and unpaid January 11, 1904. T. H. Melton." It is also alleged that plaintiff is the legal holder and owner of said debt and note, and that it is past due and unpaid except certain credits mentioned. It is also alleged that in 1906 T. H. Melton conveyed the land, or such interest as he had in it, to the defendant in this suit, and the latter now owns that interest subject to the debt, note, and vendor's lien retained as thereinbefore described; that T. H. Melton is insolvent and has been adjudged a bankrupt; that I. D. Beasley died testate February 23, 1903, leaving a will by the provisions of which the plaintiff was made the residuary devisee and legatee of his estate, and thereby became the legal owner of said debt and note against the land; that the will was duly probated April 8, 1903, and by its provisions administration of the decedent's estate was withdrawn from the court, and his estate had been fully administered, and the debt and notes turned over by the executor to the plaintiff in September, 1905; that the plaintiff is only 23 years of age, having been born in July, 1885. The petition concludes with a prayer for judgment, for title, and possession of the land; but, if he is not entitled to recover the land, then he prays judgment against the defendant for the debt, interest, attorney's fees, costs of suit, and foreclosure of said vendor's lien on the land described, and that it be sold, to satisfy the debt and costs. The defendant, appellant here, filed special and general exceptions, pleads the five and ten years statute of limitation, also pleads limitation of four years against the note sued on, a general denial and plea of not guilty, and specially says that the note mentioned in the plaintiff's petition as given for the purchase money for the tract of land was paid off and fully discharged years ago, and the vendor's lien, if any, fully satisfied, and that the note involved in this suit was given for borrowed money and a lien attempted to be fixed upon this land as the original vendor's lien note. The appellee filed a sup-

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plemental petition, in which it was alleged that, when the second note mentioned in the petition was executed, it was the intention of the parties and the agreement between T. H. Melton and I. D. Beasley that the same should stand in place of the original note, and should be a lien on the land, was executed for a valuable consideration, and thereby did become a valid lien on said land; wherefore he prays as before. The case was tried before the court without a jury, and a judgment rendered in favor of the appellee foreclosing a lien upon the land for the amount of the note, interest, and attorney's fees, but specially providing that no execution should issue against the appellant personally for any part of the judgment except costs of suit.

It appears from the evidence that at or about the dates mentioned in the petition the land in controversy had been sold by Gray to T. H. Melton and a note for $558 taken as part payment of the consideration, in which a vendor's lien was retained; that this note was transferred to I. D. Beasley by Gray; that thereafter the note was paid off by T. H. Melton, but that on the following day S. D. McGee, acting as agent for Beasley, advanced to Melton $500, and that the second note mentioned in the petition was taken therefor. The testimony as to what occurred between McGee and T. H. Melton is somewhat conflicting. The court, however, finds as follows upon that issue: "That in a short time after February 14, 1898 (that being the date when the first note was paid off), said Melton desired to borrow from I. D. Beasley the amount he paid on said note, less the interest which had accrued, viz., the sum of $500. He made an agreement with I. D. Beasley through his agent, S. D. McGee, in substance, that Beasley loan him, T. H. Melton, $500, and that they consider said payment made on said note February 14, 1898, as canceled or withdrawn to the amount of $500, and that said land would stand as security for such $500 loan, and that Beasley should have a lien thereon, and it was agreed and intended by the parties that same should be a vendor's lien thereon, same as secured the note, which had been paid off, and thereupon T. H. Melton executed to I. D. Beasley a new note, a copy of which is attached to plaintiff's original petition, and at the time it was executed the credits were indorsed thereon which purport to have been made prior to February 14, 1893, and it was understood that W. T. Gray would indorse same in blank, which he did a few days thereafter, and Beasley loaned Melton $500 thereon and said original note also turned back to Beasley, who, with plaintiff, have thereafter held same all the time." The court further finds that on January 11, 1904, Melton made the indorsement before mentioned acknowledging the justness of the note and the fact that it was due and unpaid. I. D. Beasley died on the 23d of February, 1903, leaving a written will in which the plaintiff in this suit was made the residuary legatee and devisee, and in that way acquired the note in question. The will was probated April 8, 1903, on which day S. D. McGee qualified as executor. The court finds further that plaintiff was born in 1885, and soon after he became of age McGee turned over the property which had been willed to him. The court finds that T. H. Melton, joined by his then wife, on January, 2, 1906, deeded the land to the defendant in this suit. We do not think there was any error in the action of the court in overruling the general and special exceptions interposed by the appellant to the original petition.

The appellant contends that because the evidence shows that the original vendor's lien note executed by T. H. Melton to Gray and by the latter transferred to Beasley was paid off and the vendor's lien thereby extinguished the court erred in holding that there was any lien upon the land which appellee was entitled to have foreclosed. We think the transaction between T. H. Melton and McGee representing Beasley in the execution and delivery of the second note was sufficient to create a contract lien good as between the parties and others not purchasers for value without notice. Honaker v. Jones (Tex.) 113 S. W. 748; Wright v. Campbell, 82 Tex. 388, 18 S. W. 706; Busby v. Bush, 79 Tex. 658, 15 S. W. 638; Wilcox v. Bank, 93 Tex. 322, 55 S. W. 317; Lippincott v. York, 86 Tex. 276, 24 S. W. 275; Mustain v. Stokes, 90 Tex. 358, 38 S. W. 758; Armstrong v. Burkitt (Tex. Civ. App.) 34 S. W. 759; Ingersoll v. Corom, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. The appellant has neither pleaded nor undertaken to prove that he was a purchaser of the land upon which the lien existed for value and without notice; and that question is not involved.

It is also claimed that the appellee, having specifically pleaded a vendor's lien, was not entitled to recover upon a contract lien. It is true the appellee's petition does allege the existence of a vendor's lien, and the facts as stated show the existence of a contract lien. The note sued on is alleged to have been given in renewal of one which was in fact a vendor's lien note. However, this variance between the allegata and probata was corrected by the pleadings of the defendant and the facts set up in the supplemental petition filed by the appellee. The appellant in his answer alleges, among other things, that the note described in the plaintiff's petition as being given for the purchase money for the tract of land was paid off and fully discharged years ago, and the vendor's lien, if any, fully satisfied, and that the note involved in this suit was given for borrowed money and the lien attempted to be fixed upon the land as the original vendor's lien note. In reply to this the appellee alleges that it was the intention of the parties that this second note should stand in place of the original note and be a lien upon the land. We think the

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pleadings of the parties, taken as a whole, are sufficient to support the judgment rendered. Lyon v. Logan, 68 Tex. 522, 5 S. W. 72, 2 Am. St. Rep. 511; Willis v. Lockett (Tex. Civ. App.) 26 S. W. 419; Railway Co. v. Anderson, 76 Tex. 252, 13 S. W. 196; Grimes v. Haygood, 19 Tex. 246. There was no evidence to show that T. H. Melton was at the time of executing this renewal note the head of a family, or that he was entitled to a homestead exemption which could not be mortgaged. For aught that appears to the contrary, he may have been at the time an unmarried man, and could have mortgaged his homestead, even though he had one which was exempt from execution. Busby v. Bush, supra; Bateman v. Pool, 84 Tex. 405, 19 S. W. 552; Howard v. Windom, 86 Tex. 360, 26 S. W. 483. Neither is there any evidence that T. H. Melton had any children who were entitled to share with him in the community property upon the death of his wife. Hence there is no support for the contention that Melton only owned a one-half interest in the land, and that his mortgage only incumbered the property to that extent.

It is insisted that action on the note was barred by limitation, and that the lien was thereby lost. The note does show upon its face that in 1908, when the suit was filed, more than four years had elapsed since the written acknowledgment had been given by T. H. Melton, but it is also shown that the appellee was a minor, and did not attain his majority till 1906. This being true, his cause of action was not barred at the time this suit was filed, unless there existed facts such as would bring the case within the rule applied where a trustee has the legal title to the property in controversy, and not merely its management and control. Belt v. Cetti, 100 Tex. 92, 93 S. W. 1000. The appellant contends that the cause of action arose during the administration upon the estate of I. D. Beasley, and that limitation having commenced to run against McGee, the executor, continued uninterrupted against the appellee, notwithstanding the latter's minority. He seeks to apply the doctrine announced in the case of Rindge v. Oliphint, 62 Tex. 682. In the Belt Case above referred to the Supreme Court limited the ruling in this latter case to the facts involved, and justified it only upon the ground that the cause of action under consideration arose during the administration of an estate and accrued to the administratrix in her capacity as such. It is true that in the case at bar the new promise, which is the one relied on as the basis of this suit, was made after the death of I. D. Beasley; but we are unable to say from the record whether it was before or after McGee had discharged all of the duties that devolved upon him as the executor under the will. He was the guardian of the estate of the appellee at the time, and it may have been that he was merely holding the note in that capacity. We cannot say that the cause of action upon this note accrued to McGee in his capacity as executor, or as guardian, any more than a right to sue upon any other mature and unpaid obligation which he held in his possession. Under the provisions of article 1869 of the Revised Civil Statutes of 1895 property left by a testator or intestate vests immediately in the devisees or legatees and the heirs at law. Unless there is something shown to the contrary, we must assume that McGee, as the executor and guardian appointed by the will of I. D. Beasley, had only such authority as was essential to a proper performance of the duties enjoined upon him. There is nothing in that portion of the will embraced in the record that would indicate that McGee was to do more than pay the debts due from the estate if any existed, make a distribution of the property among the devisees, and to manage and control that portion bequeathed to the appellee till he became of age. The acknowledgment by Melton that the debt was just, due, and unpaid was not a promise made to McGee as guardian or executor investing him with the legal title to the obligation. It was but the revival of the old obligation and inured to the benefit of the devisee, the legal owner of the old note. The conclusions of the trial court involved a finding of fact that McGee did not hold the legal title to the note and that it was not a cause of action that accrued to him in his representative capacity. No complaint is made of the sufficiency of the evidence to support the findings of fact; but, if there had been, we could not, in view of the record, say that these were unsupported.

The remaining assignments are overruled; and the judgment affirmed.

TRINITY & B. V. RY. CO. v. ELGIN.†

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 9, 1909.)

1. MASTER AND SERVANT (§ 289*)—DEATH OF SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether a brakeman killed while between two defective cars in a train while attempting to stop the train to prevent a wreck was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1122; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE.

Where a car in a train had a defective brake beam, and the train passed through stations where an inspection could have been, but was not, made, there was sufficient evidence of the negligence of the railroad company in carrying the car with a defective brake beam to support an instruction submitting the issue of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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3. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for the death of a brakeman, the pleading charged, and the evidence showed, that it was the duty of decedent to stop the train if in his judgment it was necessary to prevent injury to it, and that he was killed while attempting to stop the train, an instruction that if decedent became aware of the fact that the train was in danger, and it was his duty as brakeman to stop the train, if in his judgment it was necessary, and that he believed it was necessary for him to stop the train to prevent injury to it, etc., was not erroneous because it made the judgment of decedent the criterion by which his conduct was to be measured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

4. MASTER AND SERVANT (§ 246*)—CONTRIBUTORY NEGLIGENCE OF SERVANT—ACTS DONE IN EMERGENCY.

The rule that acts done in an emergency on an impulse are not negligence as a matter of law applies to the protection of life as well as where the duty devolves on one to protect his employer's property.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789–794; Dec. Dig. § 246.*]

5. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for the death of a brakeman while attempting to stop a train, the evidence showed that the dragging of a brake beam was calculated to wreck the train, and created an emergency that called for the immediate stopping of the train, and that this duty devolved on the brakeman, and that from the moment he was made aware of the emergency until he met his death his efforts were unceasing to stop the train, and that he acted suddenly and hurriedly, an instruction that the realization of the danger to the train and necessity to stop it came on decedent so suddenly as to afford no time for reflection, and that he acted on the impulse of the moment, etc., was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

6. TRIAL (§ 219*)—INSTRUCTIONS—DEFINITION OF TERMS.

Where, in an action for the death of a brakeman while attempting to stop a train to prevent injury to it, the court charged that, if decedent acted after time for consideration of the danger of going between the cars that crushed him, then he could not recover, that, if the realization of the danger to the train and the necessity of stopping it came on him so suddenly as to afford no time for reflection on the danger, and he acted on the impulse of the moment in placing himself in peril, etc., the refusal to give a charge defining the term "sudden impulse" was not erroneous; that expression not being used and the equivalent terms employed being of common use and meaning and easily understood.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a charge substantially embodied in the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

8. TRIAL (§ 260*)—INJURY TO SERVANT—INSTRUCTIONS — REQUESTS — CONTRIBUTORY NEGLIGENCE.

Where the court in an action for the death of a brakeman while between cars in a train while attempting to stop it to prevent injury to it charged that decedent was guilty of contributory negligence unless suddenly confronted with an emergency which threatened immediate danger to the train, the refusal to give a further charge on contributory negligence was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

9. MASTER AND SERVANT (§ 213*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A railway employé does not assume the risk of the negligence of the railway company in the operation of a train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 561; Dec. Dig. § 213.*]

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Action by T. A. Elgin against the Trinity & Brazos Valley Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Ball & Streetman, W. E. Terrill, and Williams & Bradley, for appellant. J. Ross Bell and Collins & Cummings, for appellee.

RAINEY, C. J. This suit was brought by T. A. Elgin, appellee, against the Trinity & Brazos Valley Railway Company, appellant, to recover damages resulting to him from the killing of his son, T. A. Elgin, Jr., occasioned by the negligence of the railway company. Defendant answered by general demurrer, general denial, assumed risk, and contributory negligence. Upon a hearing a verdict and judgment was rendered for plaintiff for $1,600, and defendant appeals.

The appellant complains of the action of the court in overruling its general demurrer to plaintiff's petition. There was no error in this action of the court. The allegations state a cause of action, and are not subject to a general demurrer.

The second assignment of error complains of the refusal of the court to give a requested charge to the jury, to the effect that plaintiff had failed to show such facts as entitled him to recover and to return a verdict for defendant. The facts show that deceased at the time he was killed was in the employ of defendant and engaged as brakeman in the operation of a freight train running south from Ft. Worth. At Bird's Siding two defective cars were attached to said train, the defect being the drawheads of same were gone, and they were fastened together with a chain, and there was nothing to prevent them from running together if the train should for any reason be suddenly stopped. One of said cars had a defective brake beam. As the train was leaving Munger in Limestone county, and running about as fast as an ordinary man could walk, it was discovered that said brake beam had dropped down and was dragging on the track, and endangered the train. Under these conditions, it was the duty of the de-

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ceased to have the train stopped, and, to accomplish this, he signaled to the engineer and fireman to stop the train, but, getting no response, he ran forward on the top of the train a car's length, and got down on the ground, and again signaled for the train to stop. Still getting no response to his signal, he ran forward on the ground and in between the two defective cars, shut off the angle cock which applied the air, and set the brakes on the cars in front of said two defective cars. This had the effect to cause said two cars to run together, crushing him to death. The brake beam having fallen, it was the duty of the deceased to stop the train as quick as possible to prevent a wreck, and, having failed to attract the attention of the engineer, the only other way to stop it was to shut off the angle cock. As the train was increasing in speed, it was necessary for him to act suddenly and hurriedly, and he so acted. The defective cars were picked up at Bird's Siding, and were in bad order, which was known to defendant's trainmaster, by whose order they were attached to this train. Said cars were not inspected or repaired at Cleburne or Hillsboro, where defendant had repairing done. The train passed through these places just before the accident. The deceased knew when the two cars were picked up that the drawheads were gone, but the evidence is silent as to his knowledge of the brake beam being defective.

The contention is made that the plaintiff cannot recover, as the evidence conclusively shows that the appellee's deceased son was guilty of contributory negligence. It is conceded that a "father suing for damages on account of the death of his adult son can recover only upon the same evidence of negligence that, if death had not ensued, would have entitled the injured party to maintain an action for such injuries"; but the question arises: Do the facts show such negligence upon the part of deceased as to authorize the court to say as a matter of law that he was guilty of contributory negligence as will prevent a recovery in this case? We think not. The facts are not such, in our opinion, as conclusively show contributory negligence by deceased, such as but one conclusion can be reached by intelligent men, but are such that reasonable and sensible men might reach a different conclusion, and should have been submitted for the jury's determination.

Appellant complains of the fifth paragraph of the court's charge, which is as follows: "There is no question that plaintiff's son was killed by reason of going in between the cars, and that the deceased could not have stopped the train by applying the air from the caboose. Now, if you believe from the preponderance of the evidence that there was a defect in the brake beam of one of the cars, and that it was negligence on the part of the defendant's servants to carry the car in the train by reason of the defect, and that, on account of said defect, there arose a danger that the train or some of the cars would be damaged, and that plaintiff's son became aware of that fact, and that it was his duty as brakeman to stop the train, if in his judgment it was necessary to preserve the train from injury, and that deceased believed it was necessary for him to stop the train to prevent injury thereto, and that the realization of the danger to the train and necessity to stop the train came upon him so suddenly and unexpectedly as to afford no time for reflection upon or consideration of the danger involved in his act, and that he acted upon the impulse of the moment in so placing himself in peril of his life, and if you further believe that persons of ordinary prudence in deceased's situation and in similar circumstances would commonly have done as he did, you will not regard him as negligent, and in such event, and if you further believe from the evidence that had deceased lived he would have donated money to the plaintiff, then you will find for plaintiff the present value of such sum or sums of money as from the evidence you believe he would have contributed to plaintiff."

The first criticism of the charge is that it submitted the issue of negligence on the part of defendant in carrying a car with a defective brake beam, because there is no evidence tending to show there was any negligence in regard to the defective brake beam. The evidence shows that one of the cars had a defective brake beam, that it fell and was dragging on the track, and was liable to wreck the train. This was the moving cause that prompted the deceased to go between the cars, which resulted in his death. The train had passed through stations where an inspection could have been made by defendant, but such was not done. This evidence raised the question of negligence of defendant as to such defective brake beam, and there was no error in so charging. Railway Co. v. Hahl (Tex. Civ. App.) 83 S. W. 29.

Another objection to the charge is that the jury were told, if they believed the deceased became aware of the fact that the train was in danger of injury, and "that it was his duty as brakeman to stop the train, if, in his judgment, it was necessary to prevent the train from injury, and that deceased believed it was necessary for him to stop the train to prevent injury thereto," because the judgment of deceased was not the criterion by which his conduct was to be measured, but whether his conduct was that of an ordinarily prudent and cautious person so situated. The pleading charged, and the evidence shows, that it was the duty of deceased to stop the train if in his judgment it was necessary to prevent the train from injury. Such being the pleading and proof, there was no error in the court so instructing.

Another objection is made to that portion

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of the charge as states " 'that the realization of the danger to the train and necessity to stop the train came upon him so suddenly and unexpectedly as to afford no time for reflection upon or consideration of the danger involved in his act, and that he acted upon the impulse of the moment in so placing himself in peril of his life,' and should not have been given, because the facts do not show and are not sufficient to show, that the danger to the train came upon deceased so suddenly and unexpectedly as to afford no time for reflection or consideration of the danger involved in his act." By the foregoing criticism we do not understand that it is claimed the charge announces an incorrect principle of law, but that said charge is not applicable to the facts. "Acts done in an emergency on an impulse are not negligence as a matter of law." This applies to the protection of life, as well as where the duty devolves on the party to protect the employer's property. Smelting Co. v. Taylor, 107 S. W. 889, and cases there cited. The evidence shows that the dragging of the brake beam was calculated to wreck the train, and created an emergency that called for the immediate stopping of the train. This duty devolved upon the deceased, and from the moment he was made aware of it, until he met his death, his efforts were unceasing to stop the train. He acted suddenly and hurriedly, and seemed to be excited. It may be that in the hurry he may have thought he could run in between the cars and cut off the angle cock and escape before the cars would come together, and thereby save the property of his employer, and probably the life of his co-workers. His lips are closed, and his version of this cannot be known, and whether or not his acts were negligent was properly left for the decision of the jury.

The court refused a special charge as follows: "You are charged that the term 'sudden impulse,' as used in the charge, means a momentary and inconsiderate impulse by which a person is impelled, occurring unexpectedly to such person at the time, without previous notice." The refusal of this charge is assigned as error. The court did not err in refusing this charge. The term "sudden impulse" is not used in the court's charge. The words, "suddenly," "unexpectedly," and "impulse of the moment," are used by the court in connection with the acts of the deceased, but these are of common use, have no technical meaning, and their meaning easily understood. Besides, the court told the jury: "If the deceased acted deliberately or after time for consideration of the danger of the act of going in between the cars, then plaintiff cannot recover." The charge was sufficiently explicit in this respect, and the jury could not possibly have been misled to the defendant's injury.

The appellant requested a special charge on the measure of damages. The court's charge on the measure of damages was substantially that as requested. Therefore there was no error in refusing said special charge.

The court refused several special charges defining ordinary care, contributory negligence, and one applying the law to the facts as to the knowledge of deceased of the defective coupling, the use of ordinary care, etc. The court, at the request of appellant, gave a charge defining "negligence" and "ordinary care." The evidence shows conclusively that deceased knew of the defective coupling of the cars, but there is no evidence that he knew of the defective brake beam until he was warned at Munger that it was dragging on the track.

The following are excerpts from the court's main charge: "The evidence shows that there were two cars in the train that had no drawheads, and that plaintiff's son and the defendant's servants in charge of the train knew it; and that, unless he was justified by reason of matters hereinafter referred to in going between the cars plaintiff's son was guilty of contributory negligence which would preclude plaintiff's recovery. Now, if you believe from the preponderance of the evidence that there was a defect in the brake beam of one of the cars, and that it was negligence on the part of the defendant's servants to carry the car in the train by reason of the defect, and that, on account of said defect, there arose a danger that the train or some of the cars would be damaged, and that plaintiff's son became aware of that fact, and that it was his duty as brakeman to stop the train, if in his judgment it was necessary to preserve the train from injury, and the deceased believed it was necessary for him to stop the train to prevent injury thereto, and that the realization of the danger to the train and necessity to stop the train came upon him so suddenly and unexpectedly as to afford no time for reflection upon or consideration of the danger involved in his act, and that he acted upon the impulse of the moment in so placing himself in peril of his life, and if you further believe that persons of ordinary prudence in deceased's situation and in similar circumstances would commonly have done as he did, you will not regard him as negligent." "If the deceased acted deliberately or after time for consideration of the danger of the act of going in between the cars, then plaintiff cannot recover." "If there was no negligence on the part of defendant's servants in discovering and removing the defect, if any, in the brake beam, the plaintiff cannot recover." "In this connection you are informed that it is the duty of a railroad company to use ordinary care to keep its cars in reasonably safe condition for use, yet, if in this instance there was a defect in the brake beam that occasioned a danger to the train and thereby led up to a necessity for stopping the train, and if the defect in the brake beam was the proximate cause of deceased getting in between the cars and receiving injuries, and if because of such

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defect in the brake beam deceased was injured, yet, if there was no negligence on defendant's part in carrying the car with no brake beam in the train, the plaintiff cannot recover." "If you do not believe that the act of deceased in going between the cars was such as would be commonly done by persons of ordinary prudence in his situation and in similar circumstances you will find for defendant." The court having charged the jury that deceased, under the facts, was guilty of contributory negligence unless suddenly confronted with an emergency which threatened immediate danger to the train, etc., there was no need to further charge on contributory negligence. Besides, the said special charge, in effect, excluded the right to recover if deceased was justified in so acting from an emergency. The requested charges were properly refused.

There are several assignments of error as to the admission of evidence, but in each instance the witnesses showed themselves competent to speak, or the witnesses were stating matters of fact, and not opinion. These assignments are not sustained.

Several assignments relate to assumed risk. An employé does not assume the risk of the negligence of a railway company in the operation of a train, and by the charge of the court a recovery was made to depend upon the negligence of the company as regards the brake beam. Said special charges omitted any reference to a defective brake beam. We think the said charges were properly refused.

Believing the evidence is sufficient to sustain a recovery, and that no material error was committed by the trial court, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HOLT et al.†

(Court of Civil Appeals of Texas. July 1, 1909. Rehearing Denied Oct. 7, 1909.)

1. MASTER AND SERVANT (§ 112*)—MASTER'S DUTIES—CARE REQUIRED FOR EMPLOYÉS' PROTECTION.

It was the duty of a railroad company to use ordinary care to keep its track in a reasonably safe condition for the protection of a fireman while engaged in the discharge of his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213–223; Dec. Dig. § 112.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for a fireman's death by a collision of his engine with box cars which had been left so near the track on which intestate's engine was that it did not clear them, evidence *held* to sustain a finding of negligence by the switching crew in so placing the cars.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 112*)—INJURIES NEGLIGENCE.

It was the duty of a railroad engineer operating his engine on a switch which was connected with another switch to use ordinary care to discover that the track on which his engine was running was not obstructed by cars on the other track which were not within clearance distance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218–223; Dec. Dig. § 112.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for a fireman's death by the collision of his engine with box cars on a connecting switch which were not within clearance distance, evidence *held* to sustain a finding that the engineer was either negligent in not discovering the dangerous position of the cars, or, if he discovered their position, in not averting the collision.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

5. MASTER AND SERVANT (§ 217*)—INJURIES—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

While a railroad fireman assumed the ordinary risks of his employment and all extraordinary risks of which he knew or should have known, he did not assume risks of which he had no knowledge, due to the company's failure to exercise reasonable care for his safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

6. MASTER AND SERVANT (§ 281*)—INJURIES—ACTIONS — SUFFICIENCY OF EVIDENCE — KNOWLEDGE OF DANGER.

In an action for a fireman's death by a collision caused by his engine "sideswiping" box cars on a connecting switch which were not within clearance distance, evidence *held* not to show that decedent saw the box cars before the collision.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES—ACTIONS — JURY QUESTION — CONTRIBUTORY NEGLIGENCE.

In an action for a fireman's death by the collision of his engine with box cars on a connecting switch which were not within clearance distance of the track on which decedent's engine was, whether decedent was excusable for not seeing the cars before the collision *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

8. COURTS (§ 91*)—RULES OF DECISION—DECISIONS OF SUPREME COURT.

A ruling of law by the Supreme Court is binding upon the Court of Civil Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

9. MASTER AND SERVANT (§ 293*)—INJURIES—INSTRUCTIONS—APPLICABILITY OF CASE.

In an action for a fireman's death by collision of his engine with box cars on a connecting switch which were not within clearance distance, there was evidence that it was the fireman's duty, as much as the switchman's, to see whether cars on switches are in the clear, and the court instructed that, if some of defendant's employés left a car on a connecting switch so near the track on which decedent's engine was that it would not clear, and an ordinarily prudent person would not have so left the car, and if, as a direct result of its being left there,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Writ of error denied by Supreme Court.

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decedent's engine ran against it, inflicting the fatal injuries, the jury should find for plaintiff unless decedent was also negligent. *Held*, that the instruction did not authorize a finding for plaintiff merely because the jury might believe that the placing of the car was negligence as to employés other than decedent to whom the company owed a duty, without reference to whether they believed it was negligence as to decedent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1161; Dec. Dig. § 293.*]

10. APPEAL AND ERROR (§ 930*)—PRESUMPTIONS—CONDUCT OF JURY—FOLLOW INSTRUCTIONS.

It should be assumed on appeal that the jury considered the charge as a whole.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757; Dec. Dig. § 930.*]

11. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

It was not error to refuse a requested charge where the facts grouped therein were sufficiently grouped and submitted in the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

12. DEATH (§ 99*)—EXCESSIVE DAMAGES—EVIDENCE.

In an action for a fireman's death by a collision of his engine with box cars, evidence *held* to sustain a verdict for plaintiff of $10,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Della Holt and others against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

In appellant's switching yards in Tyler its main line track ran east and west. Running parallel with said main line track, and crossing Spring street, appellant maintained three other tracks—the first one known as the "house track," the second as "No. 4," and the other as "No. 5." By switches the house track connected directly with the main track, and by similar means No. 5 connected directly with the house track. No. 4 was a spur track. By a switch situated west of Spring street it connected with No. 5. February 4, 1908, appellant's switching crew left on track No. 5, west of Spring street and east of the switch connecting it with No. 4, it seems, box cars so placed as to obstruct the passage of a locomotive going over the switch east of No. 4. One of appellant's locomotives operated by one of its engineers, with Henry Holt as fireman, after backing west on the main line track returned east taking track No. 4, where it "sideswiped" or collided with the box cars so left on No. 5. As a result of the collision the side of the cab of the locomotive was so crushed inward and against Holt, then in the cab, as to inflict upon him injuries which caused his death. On the ground that appellant's switching crew was negligent in so placing and leaving the box cars, and on the further ground that its engineer operating the locomotive on which Holt was performing service as a fireman was negligent in failing to discover the position of the box cars and take such steps as were necessary to avoid the collision, appellees, the widow, children, and mother of Holt, recovered the judgment for $10,000, from which the appeal is prosecuted.

E. B. Perkins, Daniel Upthegrove, and Marsh & McIlwaine, for appellant. Johnson & Edwards, for appellees.

WILLSON, C. J. (after stating the facts as above). In refusing to instruct the jury to return a verdict in appellant's favor we think the trial court did not err. It was appellant's duty to use ordinary care to keep its track in a condition reasonably safe for Holt while engaged in the discharge of his duties. T. & P. Ry. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942; Henry v. Railway Co., 109 Mo. 488, 19 S. W. 240. Kirk, a member of appellant's switching crew charged with the duty of placing the box cars, testified: "Track No. 4 is connected with No. 5 on the west side of the road or street crossing, where Spring street crosses them. The cars * * * were between Spring street and the switch stand for that connection. At the time they were left there (about an hour before the accident occurred) I was standing at the street crossing, and I observed the situation in which they were left. I could see that they did not clear track No. 4. I mean by that that they were not far enough away from the switch stand that cars passing on the other track would have plenty of room to go by, but would strike these cars there. If a car is set far enough away from the switch stand, there is no danger of a car passing along the other track striking it. If it is not placed far enough away, cars passing along the other track will strike it, or 'sideswipe' it. * * * W. A. Graham was the foreman of that switch engine, and a man named Buckingham and myself were the switchmen. As well as I remember, Graham was standing on the old house track, south of me, on the Spring street crossing, about 50 or 60 feet from me. * * * Buckingham was up about the engine. He cut the cars off from the engine. I suppose it was the duty of one of us just about as much as the other to judge whether or not the cars were left where they would be in the clear. The foreman has charge of the work, but it is as much the duty of one switchman as of the other to see that the cars are left in the right place." The testimony quoted was not contradicted by any other testimony in the record of this appeal. It shows that the cars were knowingly left by appellant's employés charged with the duty to properly place them in a position where they would obstruct the passage of locomotives on track 4. That reasonable men might have conclud-

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ed that so placing and leaving the cars was negligence on the part of the switching crew we think is clear, notwithstanding the further testimony of Kirk that it was Holt's duty as fireman to keep a lookout and see that the cars were so placed as not to obstruct said track; for it was shown that, as fireman, Holt was charged with the performance of other duties as well, and that, while engaged in the performance of such other duties, he might be able to keep such a lookout as would enable him to know of the existence of the obstruction in time to prevent the collision. As reasonable men, the jury might have believed that an ordinarily prudent person charged with the duty of so placing the cars as not to obstruct the track would have foreseen that a fireman on a locomotive on track 4 might not, because engaged in the discharge of duties preventing him from keeping a lookout, have discovered the obstruction in time to have averted the collision. It was the duty of the engineer operating the locomotive to use ordinary care to discover that track 4 was not obstructed by the cars on track 5, and to so operate his engine as to avoid the collision which occurred. The witness Perry testified that he was going north on Spring street; that just before he reached the main line track the locomotive backed west thereon; that the engineer was then in his place in the cab; that the locomotive came back headed east and took track 4; and that the engineer was still in his proper place in the cab. Kirk testified: "Anybody going in on track No. 4 could see they would 'sideswipe' the cars on track No. 5. * * * If I had been intending to go into that track, I would have seen that I would hit the cars on track 5, and I would have avoided doing so. It is the duty of the engineer and fireman to keep a lookout. It is as much their business as it is the switchman's business to see whether cars will be sideswiped or are in the clear." The engineer did not testify, and the testimony of Perry and Kirk as specified was without contradiction. It seems to us to be sufficient to support a finding that the engineer either was negligent in failing to discover that the cars were in a position to obstruct his locomotive, or, if he discovered their position, was negligent in failing to so operate his locomotive as to avert the collision.

Holt assumed ordinary risks incidental to his employment. He also assumed extraordinary risks of which he knew, or of which he should have known. He did not assume risks of which he had no knowledge, due to a failure on the part of appellant to exercise reasonable care for his safety. As before stated, we think the evidence was sufficient to support a finding that it was due to appellant's negligence that the cars were left at a place on track 5 where they would obstruct the passage of the locomotive on track 4. The verdict of the jury involves such a finding, and therefore, in considering the contention made that the evidence showed that Holt assumed the risk of the collision, it is only necessary to determine whether the evidence was sufficient to support a finding that Holt did not know, and was excusable for not knowing, that the cars had been so placed as to obstruct the locomotive when moving on track 4. Kirk testified that it was as much the fireman's "business as it is the switchman's business to see whether cars will be sideswiped or are in the clear. * * * I guess the fireman could have seen that he would strike them (the cars) if he was looking out." If it appeared from the evidence that Holt saw the cars and appreciated the fact that they were so placed as to obstruct the passage of the locomotive in time to have taken steps to have averted the collision, and that he did not take such steps, or if it appeared that he did not see the cars and yet was not excusable for failing to see them, appellant's contention would have force. But it does not so appear. There is no evidence whatever in the record from which an inference fairly could be drawn that he saw the cars. On the contrary, the evidence tended to show that he did not see them. Perry did not see Holt as the locomotive moved west on the main line track, nor did he see him as it came back east, notwithstanding he was then on the fireman's side of the cab. Perry testified: "I did not see him [Holt]. He was not in the fireman's place or I would have seen him. If he had been in his place on the left-hand side of the engine, I would have seen him. I say that he was not in the fireman's side."

It appearing, as we think it does from the testimony, that Holt did not see the cars, the question is: Were the jury justified in finding that Holt was excusable for not discovering the position of same? Appellant argues that the testimony indicates that it was the custom of switchmen to leave cars on sidings in such positions as to obstruct other tracks, and that Holt knew of the custom. We have been unable to find any testimony in the record showing the existence of such a custom. It was shown, however, that, in addition to his duty to keep a lookout ahead, it was the fireman's duty to keep fire in the engine by shoveling coal from the tender, to keep the boiler supplied with water by means of an injector operated on some engines by means of a lever situated twelve or eighteen inches above the floor of the cab, and on others by means of a lever having a handle on the inside of the cab and even with a window thereof; and, when not prevented by his other duties from doing so, to ring the bell of the engine as it approached a road crossing. Perry testified that, if the bell of the engine was ringing as it approached from the west, he did not hear it. So it may be said the testimony in the record tends to show that Holt was not engaged in discharging either his duty to keep a lookout

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for obstructions on the track or his duty to ring the bell for the crossing, but, instead, was engaged in discharging another or other of the duties resting upon him, and for that reason did not discover the position of the cars. Whether he therefore was excusable or not for failing to see the cars we think was for the jury to say.

It follows from what we have said that we are of opinion it would have been error had the trial court, as it was requested by appellant to do, instructed the jury to return a verdict in its favor. The first, second, and third assignments of error therefore are overruled, as are the fourth and fifth, complaining of the action of the court in submitting to the jury as an issue to be determined by them a question as to whether the engineer was guilty of negligence or not in failing to use due care to discover the position of the cars and so operate his engine as to avert the collision.

The trial court instructed the jury as follows: "If you shall find that some of defendant's employés other than deceased left a car on the switch track designated by the witnesses as No. 5 so near to switch track No. 4 that it would not clear, and would collide with an engine which was going in upon said track No. 4, and if you find that an ordinarily prudent and cautious person would not under the same or similar circumstances have so left said car, if you find it was so left, and if you further find that an engine upon which the deceased was attempted to go in upon said track No. 4, and that, as the direct and proximate result of the car having been left 'not in the clear' on track No. 5, the engine ran against said car and mashed in the cab, thereby inflicting injuries upon deceased from which he died, then, unless you find that he was guilty of contributory negligent hereinafter explained, you will find for the plaintiffs." Kirk having testified that it was as much the fireman's duty as it was the switchman's "to see whether cars will be sideswiped, or are in the clear," it is insisted that the instruction was erroneous because it authorized the jury, if they believed that an ordinarily prudent person, having in mind the safety of Holt and others charged as he was with the duty to keep a lookout for such obstructions, would have left the cars in the position they occupied, nevertheless to find for appellees if they believed such a person, having in mind the safety of persons not charged as Holt was with a duty to keep such a lookout, would not have left the cars in such a position. In other words, the contention is that to leave the cars obstructing track 4 might be negligence as to other persons to whom appellant owed a duty, and yet not be negligence as to Holt, and that the charge authorized a verdict against appellant without reference to such a distinction. In support of the contention we are cited to Railway Co. v. Pope, 98 Tex. 540, 86 S. W. 5, as a case in point. There the railway company in violation of its rules had left unblocked and uncoupled on a siding not on a grade certain cars. While walking on top of the cars, in the act of stepping from one of them to another, while they were moving, Pope was injured as a result of the cars separating. The court charged the jury as follows: "If you find from a preponderance of the evidence that it was not reasonably safe to leave cars standing together uncoupled on the side track in Mt. Pleasant in question, then if you further find that the car from which plaintiff fell was uncoupled with, although standing together with, the car immediately south of the same, then, if you further find that an ordinarily prudent person would not have left the cars uncoupled under similar circumstances, then if you further find that plaintiff, while exercising ordinary care, was injured as the direct result of said cars being left uncoupled, then you will find for plaintiff unless you find plaintiff assumed the risk of same being uncoupled, as explained under the eighth division of this charge, or was guilty of contributory negligence as explained in subdivision 8a of this charge." "The issue presented by the charge," said the Supreme Court, "is that if the condition of the cars was not 'reasonably safe,' whether the danger was to the plaintiff or to some one else, and that the plaintiff was injured by reason of that condition of the cars, then he had a right to recover." The evidence showed that cars left uncoupled and unblocked on the side track were liable to move to and upon the main track, thereby rendering it "unsafe both for the cars and for persons engaged in operating trains upon the main line." "It is apparent from the charge taken in connection with the evidence," the Supreme Court further said, "that the jury might have concluded that the condition of the cars was unsafe as to others than the plaintiff, and yet, under the terms of the charge, they could have found their verdict against the defendant. * * * If all the facts grouped in the charge be true, they do not show that the railroad company owed to plaintiff the duty of coupling the cars on the side track; therefore would not support the verdict." Accepting, as we must, the ruling in the Pope Case as the law, we do not regard it as supporting the contention made in this case. As we understand the record, danger only to Holt and others engaged as he was in assisting in operating appellant's engines and cars on track 4 reasonably could be foreseen as likely to follow as a result of leaving the cars in the position they occupied on track 5. In the Pope Case the evidence suggested dangers to others than those engaged like Pope was, as reasonably to be apprehended from leaving the cars unblocked and uncoupled on the inclined side track, and the charge there complained of was so framed as to lead the jury to believe that

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they should find the company guilty of negligence if they thought a reasonably prudent person, having in mind the company's duty to such other persons, would not have left the cars uncoupled and unblocked, without respect to whether they believed the company was negligent in the discharge of the duty it owed to Pope or not. The charge here complained of considered with reference to the evidence fairly was not capable of a construction which could have led the jury to believe they were authorized to find for appellees without reference to whether they believed the act of leaving the cars in the position they occupied was negligence or not as to Holt and others similarly situated, if they believed such act was negligence as to persons otherwise situated, to whom appellant owed a duty. We do not think the jury could have understood the court to mean by the instruction, read in connection with the remainder of the charge, that they were authorized to find against appellant on the issue as to its negligence in so leaving the cars, unless they believed from the evidence that an ordinarily prudent person charged with the duty to Holt to use ordinary care to keep track 4 clear would not under the circumstances shown by the evidence have so left them on track 5 as to obstruct said track 4.

Notwithstanding the absence of any testimony tending to show that Holt saw the cars, the court instructed the jury: "In addition to the main charge read to you, you are further instructed that, should you find that deceased Holt saw the car upon track 5 in time to have prevented the engine from colliding with same, you will find for defendant." Appellant urges that the instruction was calculated to confuse the jury and mislead them to understand the court to mean that their verdict should be for appellees, without respect to other matters, if they believed the negative of the proposition stated in the instruction, to wit, that Holt did not see the cars. As reasonably intelligent men considering the charge as a whole, which we should assume they did, we think the jury could not have been so misled. The seventh assignment of error, therefore, is overruled.

The eighth assignment of error, complaining of the action of the court in refusing to give a special charge requested by appellant, is overruled because we think the facts grouped for submission by it were sufficiently grouped and submitted in the court's main charge and in appellant's special charge No. 10 given by the court.

The assignment remaining undisposed of attacks as excessive the verdict and judgment rendered. It appears from the record that Holt at the date of his death was 29 years of age, was in good condition physically, had a life expectancy of 36 years, an earning capacity of from about $50 to about $75 per month, and that his earnings were devoted to the support and maintenance of appellees. The evidence referred to is sufficient, we think, to support the finding of the jury as to the amount of damages suffered by appellees. There is nothing in the record indicating that in arriving at the amount of their verdict the jury may have been influenced by passion or prejudice, or by a consideration of any matter they should not have considered. Therefore we think the assignment should be overruled.

The judgment is affirmed.

LEWIS et al. v. MANSFIELD GRAIN & ELEVATOR CO.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 9, 1909.)

1. BROKERS (§ 58*) — COMMISSIONS — SUFFICIENCY OF SERVICES.

Where defendants, real estate brokers, agreed to procure a purchaser for plaintiffs' property, and, in fact, procured a person who executed a contract valid on its face with plaintiffs for the exchange of property, defendants were entitled to their commissions, irrespective of whether plaintiffs misrepresented their property to the purchaser so as to justify him in refusing to carry out the exchange.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 90; Dec. Dig. § 58.*]

2. BROKERS (§ 74*)—COMMISSIONS — PERSONS LIABLE.

Defendants agreed to procure a purchaser for plaintiffs' property, and procured one with whom plaintiffs executed a written contract, which provided that, to bind the contract, the purchaser had deposited with defendants warranty deeds to a certain tract, part of the property to be exchanged, and that plaintiffs had paid to them $500, and, if the titles should prove defective upon examination, the sum deposited and the deeds should be returned to the respective parties, but, if the title proved good and the purchaser failed to perform, his title to the tract mentioned should pass to plaintiffs according to the deed deposited with defendants, in settlement of commissions and liquidated damages, and, if plaintiffs failed to perform, the $500 should be forfeited in payment of commissions and liquidated damages, and, if both parties failed to perform, the purchaser authorized plaintiffs to convey to defendants the tract above mentioned to secure to them the payment of the $500 as commissions, and that such sum should be forfeited to defendants as commissions and liquidated damages. *Held* that, even if defendants were bound by the contract between plaintiffs and the purchaser, it did not make their commissions depend upon the consummation of the exchange, but upon the approval of the titles of the properties, nor did it require defendants to look to the purchaser for their commissions, if he breached his contract with plaintiffs, they being bound to pay the commissions in such case, as the purchaser's title to the tract mentioned passed to plaintiffs in accordance with the deed deposited with defendants.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 74.*]

3. EVIDENCE (§ 463*) — PAROL EVIDENCE — VARYING CONTRACT—AMBIGUITY.

The contract was not ambiguous, so that plaintiffs were precluded from showing by parol

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evidence that defendants' right to commissions depended upon the consummation of the contract of exchange.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2140–2143; Dec. Dig. § 463.*]

4. Brokers (§ 63*)—Commissions—Right.

A contract for the exchange of property made by plaintiffs and a purchaser whom defendants had procured provided that, to bind the contract, the purchaser had deposited with defendants a deed executed to plaintiffs, and that plaintiffs had paid to defendants $500, and, if the purchaser failed to perform, his title to the tract conveyed by the deed should pass in accordance therewith in settlement of commissions and liquidated damages. When defendants learned that the purchaser refused to perform, they asked plaintiffs if they should send such deed for record where the land was situated, but plaintiffs replied that they would think about it, and, after defendants had held the deed two days without receiving instructions, they sent it to plaintiffs, who did not have it recorded for three months. The purchaser in the meantime had sold the tract to one who recorded his deed prior to the recording of plaintiffs' deed. *Held*, that plaintiffs' failure to have the deed recorded in time was through their own fault, and would not prevent defendants from recovering their commissions from plaintiffs for procuring a purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. § 63.*]

5. Appeal and Error (§ 1175*)—Disposition—Reversal and Rendition.

Where, under the undisputed evidence, the trial court should have directed a verdict for defendants, the Court of Civil Appeals will, upon reversal of the judgment for plaintiffs, render judgment for defendants as the trial court should have done.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573–4587; Dec. Dig. § 1175.*]

Appeal from Dallas County Court; W. M. Holland, Judge.

Action by the Mansfield Grain & Elevator Company against E. T. Lewis and another. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

Gano, Gano & Gano, for appellants. A. B. Flanary and W. D. House, for appellee.

TALBOT, J. This suit was instituted in the county court at law of Dallas county, Tex., by the Mansfield Grain & Elevator Company, a private corporation, against E. T. Lewis and J. J. Collins, composing the firm of Lewis & Collins, to recover from them the sum of $500, which plaintiff alleges was deposited with said firm under a written contract entered into between plaintiff and one J. H. Mowrey; that said agreement was executed on or about the ——— day of March, 1906, by the terms of which said Mowrey was to convey to plaintiff certain lands located in Childress and Fannin counties, Tex., and also certain lands located in the state of California, in consideration of which the plaintiff was to convey to said J. H. Mowrey the lands upon which its milling plant was located, together with all improvements, etc., located in Tarrant county, Tex.; that the defendants, as brokers or real estate agents, agreed to bring about an exchange of said properties between the parties to said agreement, but failed to do so; that plaintiff had no power to enforce specific performance of said contract or agreement; that defendants held the said $500 in trust for plaintiff, and was legally bound to turn same over to it upon the failure of said J. H. Mowrey to comply with his part of the said contract; that the said J. H. Mowrey deposited with defendants a warranty deed to certain lands located in the state of California, as required by said contract (said deed was executed by J. H. Mowrey, and conveyed said lands to plaintiff), and that said deposit of $500 by plaintiff and the said deed by J. H. Mowrey were for the purpose of binding said parties to said contract or agreement. The defendants pleaded general and special demurrers, a general denial, and that for their services in bringing about an exchange between plaintiff and J. H. Mowrey of the properties described in plaintiff's petition plaintiff agreed to pay them a commission of $500; that under the very terms of the written contract they were entitled to said $500, which plaintiff had agreed to pay them, and had deposited with them as its agents in making the said trade; that they complied with all the terms of said contract; that possession of plaintiff's property was delivered to said J. H. Mowrey; that the said J. H. Mowrey, if he refused to carry out said contract, which defendants deny, did so because of false representations made by plaintiff in regard to its said properties. Defendants further pleaded that if the said deed to the California lands was held in trust by plaintiff for defendants, which defendants deny, then plaintiff held said deed in its possession and failed to record same until the defendants lost its security by reason of the fact that J. H. Mowrey sold said California lands to other parties prior to the filing of said deed for record by plaintiff. A jury trial resulted in a verdict and judgment in favor of plaintiff, for the sum of $500, together with interest thereon from April 15, 1908, at the rate of 6 per cent. per annum, and defendants appealed.

The practically undisputed evidence shows beyond controversy that appellee engaged the services of appellants as real estate agents to sell, or exchange for other property, the property owned by them and described in the pleadings, for which it agreed to pay them the sum of $500. To effect such exchange or sale, appellants advertised that the property had been placed with them for that purpose. J. H. Mowrey answered the advertisement, and, through appellants, he and an agent of the appellee, authorized to represent it, were brought together, and they entered into a written contract to exchange and convey, each to the other, the respective properties owned by him, which are particularly describ-

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ed in the petition. Among the provisions of this contract, which set out fully the terms and conditions upon which the exchange of the properties were to be made, are the following: "To bind the parties, hereto subscribed, to carry out the conditions and agreements above made, the first party has deposited with Lewis & Collins, agents, his general warranty deed to the property described as tracts Nos. one (1) in paragraph No. one; second party has paid to said Lewis & Collins, agents, the sum of five hundred dollars, in cash. * * * It is agreed and understood that, if an examination of the abstracts of title to the above described properties should disclose fatal defects in the title or defects which cannot be cured within a reasonable time, said deed deposited with Lewis & Collins, agents, and said sum of five hundred dollars in cash deposited with Lewis & Collins, agents, shall be returned to said parties, that is, said deed to first party and said five hundred dollars to said second party, but if the titles to above described property are approved by the attorneys examining same and first party fails or refuses to carry out the foregoing terms of this contract, then his title to above described tract one, paragraph No. 1, shall pass according to the deed deposited with Lewis & Collins, agents, in settlement of commissions and liquidated damages; and, if second party fails or refuses to carry out the foregoing terms of this contract, then the said sum of five hundred dollars deposited with Lewis & Collins shall be forfeited in payment of commissions and liquidated damages; and, if both parties fail or refuse to carry out the terms of this contract, first party authorizes second party to convey the first tract above described to Lewis & Collins to secure them in the payment of five hundred dollars commissions and liquidated damages, and said sum of five hundred dollars deposited by second party shall be forfeited to Lewis & Collins in payment of commissions and liquidated damages. Executed in quadruplicate."

The undisputed evidence further showed that J. H. Mowrey executed and deposited with appellants, as recited in the contract, a general warranty deed to the property described in paragraph No. 1 of the contract, which appears to be lots 6 in block 13, and 3 and 4 in block 18, situated in Corning, Tehema county, Cal.; that appellee paid over to appellants Lewis & Collins the sum of $500; that the title to the properties involved in the trade was favorably passed upon and approved by the attorneys selected for that purpose; and that neither party offered any objection to the title to the properties agreed to be exchanged. Appellants requested the court, upon the conclusion of the evidence, to charge the jury to return a verdict in their favor. This request was denied, and the jury, on the contrary, instructed in substance that Mowrey had refused to comply with the terms of the written contract entered into between himself and appellee, and they should find for appellee, unless they believed that Mowrey refused to perform on account of certain misrepresentations alleged to have been made by appellee to Mowrey with respect to the property to be conveyed by appellee to him. We are of the opinion that the court erred in refusing appellants' special charge directing a verdict in their favor, and in making their right to recover depend upon a finding by the jury that Mowrey had refused to carry out the contract entered into between him and appellee because of the alleged misrepresentations on the part of appellee. The record discloses beyond controversy that appellants, as brokers and real estate agents, represented appellee in the transaction; that they procured a purchaser of its properties with whom it entered into a contract for the consummation of the sale and exchange contemplated by the execution and delivery of the necessary deeds, a contract which it could have specifically enforced unless precluded therefrom by the misrepresentations charged against it. This was all they could or were required to do in order to earn the commissions agreed to be paid them for their services, and they were entitled to recover, whether appellee did or did not so misrepresent its properties to Mowrey as to cause him to refuse to comply with the terms of the contract, or whether by reason of such misrepresentations he was or was not justified in refusing to consummate the trade. A broker is entitled to his commissions when he procures a purchaser with whom his principal is satisfied, and with whom such principal contracts for the sale of the property at a price and upon terms satisfactory to him. Newton et al. v. Dickson, Moore & Smith et al. (Tex. Civ. App.) 116 S. W. 143. Appellants did not sign the written contract entered into, and upon which appellee's suit to recover the five hundred dollars deposited with appellants is based, and it does not otherwise appear that they were parties thereto and bound by its terms; but, if they were, the terms of said contract do not make their right to commissions depend upon the consummation of the exchange of the properties, as contracted for by the execution and delivery of the deeds, but upon the approval of the titles to said properties by the attorneys selected to pass upon them, and parol evidence was inadmissible to vary its said terms. But if it should be conceded, which is not done, that parol evidence was admissible to show that such right of appellants did so depend, then we are of opinion that such evidence of that character as may be found in the record is insufficient to sustain a finding to that effect. We think it appears from the evidence as a whole, and from a fair interpretation of the written contract referred to, that upon the execution of the written contract between appellee and Mowrey and the

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approval of the titles to the properties therein agreed to be exchanged by the attorneys engaged to examine and pass upon them appellants' right to the commissions agreed to be paid them by appellee and to the $500 deposited with them became absolute. If the written contract referred to by reason of any ambiguity in its language is open to construction, it is not subject to the interpretation placed upon it by appellee to the effect that if Mowrey wrongfully breached his contract to convey, appellants' claim for commissions, if any they had, was against Mowrey, who was in default, and not against appellee. We think it evident from the language of the contract that it was the intention of the parties thereto that appellee should pay appellants their commissions of $500, and to guard and protect themselves against loss, in the event Mowrey should fail to perform his part of the contract, the provision was inserted that, if he failed or refused to carry out the terms of the contract, his title to the California lands should pass to appellee according to the deed deposited with appellants in settlement of said commissions. This deed, as before stated, was executed and deposited with appellants and held by them until they understood Mowrey had refused to consummate the trade by the execution and delivery of a deed. Upon receipt of this information, A. F. Armstrong, representing appellants, called up Edwards, agent of appellee, and asked if they should send said deed to California for record before Mowrey could dispose of the lands therein conveyed. Edwards replied that they would think about it, and let him know. Appellants held the deed after this conversation for two days awaiting instructions from appellee, and, receiving none, they sent it to appellee. This was on the 12th day of April, 1906, and appellee failed to have the deed recorded in California, where the land therein conveyed was situated, until over three months thereafter. In the meantime, Mowrey sold the land to another party who placed his deed of record prior to the filing and recording of appellee's deed. It was not, under these circumstances, the duty of appellants to forward the deed deposited with them for record in California, to the end that the security thereby afforded appellee might not be lost by the conveyance of the land by Mowrey to some innocent purchaser; and, if such security was lost to appellee by reason of such a conveyance and the failure to sooner record appellee's deed, the fault lies at the door of appellee, and such loss can in no way militate against the right of appellants to recover their commissions. Upon the whole, we conclude that the undisputed evidence conclusively established that appellants were entitled to hold and apply the $500 deposited with them, and sued for in this action, to the payment of their commissions, and that the trial court erred in not so instructing the jury. This being true, it becomes our duty under the statute to render such judgment in this court as should have been rendered in the court below. It is therefore ordered that the judgment of the county court at law be reversed, and that judgment be here rendered that appellee take nothing by its suit, and that appellants recover all costs of both courts.

Reversed and rendered.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. WILCOX.†

(Court of Civil Appeals of Texas. July 1, 1909. Rehearing Denied Oct. 9, 1909.)

1. PLEADING (§ 8*) — COMPLAINT — CONCLUSIONS—NEGLIGENCE.

An allegation in an injury action against a railroad company that plaintiff was struck by a projection from a passing freight train while walking along the track at a place habitually used by pedestrians while he was at a safe distance from the train charged negligence, and was not objectionable as alleging a conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–31; Dec. Dig. § 8;* Negligence, Cent. Dig. § 182.]

2. RAILROADS (§ 396*)—INJURY FROM ARTICLES PROJECTING FROM TRAIN—BURDEN OF PROOF—FREEDOM FROM NEGLIGENCE.

If a pedestrian was struck by a projection from a train while walking along the track at a safe distance from the train, the burden was upon the company in an action for injuries received to show that it was without fault.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.*]

3. RAILROADS (§ 381*) — PROJECTIONS FROM TRAIN—CONTRIBUTORY NEGLIGENCE.

Plaintiff was walking along the track in the dark at a safe distance therefrom when he was struck by a projection from a passing freight train which he had no reason to anticipate. Plaintiff looked back before he was struck to see if his dog had been hit, but his looking back did not place him nearer the train, and he was struck while looking ahead. *Held*, that he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285–1287, 1291½; Dec. Dig. § 381.*]

4. RAILROADS (§ 396*)—INJURIES FROM PROJECTIONS FROM CARS — NEGLIGENCE — PRESUMPTIONS.

In absence of evidence to the contrary, negligence by the railroad company may be inferred from the projecting of a cross-tie on a passing train which struck a pedestrian walking along the track at a safe distance from the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1341; Dec. Dig. § 396.*]

5. RAILROADS (§ 398*)—INJURIES ON TRACK—CONTRIBUTORY NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action for injuries to a pedestrian from being struck by a cross-tie projecting from a passing freight train, evidence *held* not to show contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1360; Dec. Dig. § 398.*]

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† Writ of error denied by Supreme Court.

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6. RAILROADS (§ 398*)—INJURIES BY PROJECTION FROM TRAIN—SUFFICIENCY OF EVIDENCE.

In an action for injuries to one walking along a railroad track by being struck by a projection from a passing freight train, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1356; Dec. Dig. § 398.*]

7. TRIAL (§ 118*)—CONDUCT OF COUNSEL—ARGUING LAW.

Counsel may present to the jury their theory of the law applicable, so that, where plaintiff alleged in an action for injuries caused by being struck by a projection from a passing train that the train was running at a high speed, plaintiff's counsel could argue that such excessive speed was negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 290–293; Dec. Dig. § 118.*]

8. TRIAL (§ 133*)—ARGUMENT OF COUNSEL—ARGUING LAW TO JURY—ACTION OF COURT.

Where the court charged that in arriving at a verdict the jury were to be governed by the law given in the instructions and special charges, and the charges given were correct, any error in the views of counsel as to the law applicable stated to the jury in argument could not have misled the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

Requested charges which were substantially covered by charges given were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

10. RAILROADS (§ 356*)—INJURY TO LICENSEE—CUSTOMARY USE OF TRACK.

One walking along a railroad track at a safe distance in a space commonly used by pedestrians for a walk with the knowledge and consent of the company was a licensee, and the company was bound to use ordinary care not to injure him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1233; Dec. Dig. § 356.*]

Appeal from District Court, Henderson County; B. H. Gardner, Judge.

Action by G. C. Wilcox against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, Daniel Upthegrove, R. S. Neblett, and W. R. Bishop, for appellant. Watkins, Green & Richardson, for appellee.

RAINEY, C. J. Appellee brought this suit against appellant to recover damages for personal injuries to him, caused by being struck by a timber projecting from one of appellant's freight trains operated along its track near the depot at Malakoff, Tex., about 8 o'clock at night. Defendant answered by general and special demurrer, general denial, and contributory negligence. A trial resulted in a verdict and judgment for plaintiff for $800, and defendant appeals.

The first assignment is: "The court erred in overruling defendant's special demurrer, which is substantially as follows: 'The defendant specially demurs to that part of plaintiff's petition contained in the third paragraph thereof, which undertakes to charge this defendant with negligence, and says the same is insufficient, in that the allegations of negligence are mere conclusions and said allegations do not specify the character of the acts, nor the acts of negligence which plaintiff claims caused the injuries.'" The allegations of the plaintiff's petition are: "That on said date said minor plaintiff was walking near the depot in the town of Malakoff along a place commonly and habitually used by pedestrians, which use was well known to defendant and its servants, or could have been known by the exercise of ordinary care, when without any fault or negligence on the part of said plaintiff he was struck by timber or other hard substance which was projecting from a passing train; that at the time plaintiff was so struck he was walking at a safe and reasonable distance from said train, and no injury would have been done him but for the negligence of defendant and its servants in so running and operating its said train with said timber or other substance so dangerously and carelessly projecting therefrom. Plaintiff further charges that at the time of said injury he was on his way to the depot of said defendant, to which place he was going at the solicitation and request of one of the servants of said defendant, and that in so going he was traveling the most direct, practical, and public route." The contention is that the acts or facts constituting negligence for which appellant was sought to be liable are not specifically stated, but negligence is alleged as a conclusion. The allegation that he was struck by a projection from a passing train while he was walking at a safe and reasonable distance from said train and injured is a sufficient allegation to charge liability, and, if proven, it devolves upon the railway company to show that it was without fault. Railway Co. v. Smith, 74 Tex. 276, 11 S. W. 1104; McCray v. Railway Co., 89 Tex. 168, 34 S. W. 95; Railway Co. v. Easton, 2 Tex. Civ. App. 378, 21 S. W. 575. There was no error in overruling the demurrer.

The second assignment is: "The court erred in refusing defendant's special charge No. 6, which is substantially as follows: 'You are instructed that if you believe from the evidence that G. C. Wilcox when struck was negligently looking back to see whether his dog had crossed in front of the train, and that his act in looking back proximately contributed to his being struck, the defendant would not be liable, and should you so believe the form of your verdict will be, "we, the jury, find for the defendant."'" The proposition is: "The evidence is sufficient to show that the injuries received by the appellee were caused by his negligence in walking at a distance of but four or five

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feet from a moving train in the dark, knowing the train was in motion, and, instead of looking out for his own safety, he negligently looked back to see if his dog had been caught by the passing train, which act precluded his seeing and avoiding the projecting substance which caused his injury, and the court erred in refusing special instruction directing the jury's attention to these facts." The defendant pleaded contributory negligence of plaintiff in looking back, but we are unable to see wherein plaintiff was negligent in looking back. The evidence fails to show that by looking back he was placed any nearer the train, or that he would probably not have been struck had he not looked back. There is nothing in the evidence to show that plaintiff was called upon to suspect or anticipate that the train while running through a town would have a projection that endangered the persons who commonly frequented the cinder platform where plaintiff was struck. It was dark, and the plaintiff did not see the projection, and the evidence conclusively shows that he was struck full in the face, or nearly so, which clearly establishes that he was not struck when looking back. The charge was properly refused. McCray v. Railway Co., 89 Tex. 168, 34 S. W. 95.

Complaint is made that the evidence does not support the verdict. The evidence shows that appellant's railway track runs practically east and west through the business portion of the town of Malakoff, Henderson county; business houses being situated on both sides of the track. On the occasion in question plaintiff, his brother, and one West, who worked at the railway company's depot, at about 8 o'clock at night, were at a livery stable just south of the track. West proposed that they go to the depot, situated on the north side just across the track. The three started, and plaintiff decided he would go to church. They went across the track at a public crossing, and turned north, and were walking about five feet from the track along the platform of the depot, made of cinders, when plaintiff was struck by a cross-tie projecting from the side of a passing train, going west or in a southerly direction. They saw the train coming when they crossed the track, and just after and while walking along on the cinder platform plaintiff looked back to see if his dog had crossed the track, and, as he turned, was struck in the face and injured. Plaintiff's brother and West were walking ahead of him. They were not struck because as the train passed the depot a light shone through a window on the car, and they saw the projection as it passed and dodged it. The place where plaintiff was walking at the time he was struck was constantly and habitually used by pedestrians, which was well known to defendant. Two of the cars in the train were loaded with cross-ties. From the tie projecting negligence on the part of defendant can rightfully be inferred, in the absence of sufficient evidence to the contrary. The evidence fails to show contributory negligence on the part of plaintiff. The evidence is sufficient, we think, to justify the verdict, and said assignment is overruled.

The thirtieth assignment is: "The court erred in not suppressing and excluding from the jury the closing argument of A. B. Watkins to the jury in substance as follows: 'There is another question of negligence in this case, which has not been discussed by the attorneys for the defendant, and that is this: I claim that the law makes it negligence for the road to run its trains through Malakoff at the speed which our testimony shows this train was going when this plaintiff was injured'—as shown by defendant's bill of exceptions." We do not think this argument of counsel reversible error. Counsel have the right to present to the jury their theory of the law as applicable to the evidence adduced on the trial of the case. Plaintiff had alleged the train was running at a high rate of speed, and we see no objection to the counsel giving his conclusion drawn from the evidence presented. Besides, the court instructed the jury: "In arriving at your verdict, you will be guided by the law as it is given you in these instructions, and such special charges as the court may give you, and it is your duty to be governed thereby." The court correctly charged the law, so, if the claim of the counsel as to the law was incorrect, the jury were not misled by counsel.

Complaint is made of the refusal of the court to give special charge No. 5, requested by appellant, in effect, that if appellant used ordinary care in loading the ties, and in operating the train, and in inspecting the ties in the ordinary and usual way while in transit, to determine whether they were in a safe and ordinary condition, and that said projection was not discovered and the presence of the plaintiff was not known to the operatives, to find for the defendant. The court gave special charge No. 13, requested by counsel for appellant, which embraced substantially the matters contained in special charge No. 5, the giving of which leaves no ground for complaint for the refusal to give special charge No. 5.

Several charges were requested, which, in effect, told the jury that plaintiff had no business with defendant, and had no legal right to be in the place he was at the time he was injured; that, plaintiff being on the cinder platfrom at the invitation of West for pleasure and convenience and having no business to transact with the railroad, he was subject to all the dangers and perils of passing freight trains for which he could not hold the defendant liable, etc. We do not think the principles invoked by these special charges are applicable to the facts of this case. The plaintiff was at a place that was commonly and habitually used by the

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people for a passway with the consent and knowledge of the railway company, and he was therefore a licensee, and it was the duty of the railway company to use ordinary care not to injure persons at that point, and, where injury results from its negligence alone, it will be liable. Railway Co. v. Watkins, 88 Tex. 20, 29 S. W. 232.

We think the amount of recovery under the evidence is not excessive.

The judgment is affirmed.

BERGER v. DE LOACH, Mayor, et al.†

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Denied Oct. 7, 1909.)

1. INTOXICATING LIQUORS (§ 74*)—RULINGS ON APPLICATION FOR LICENSE—REVIEW—BURDEN OF PROOF.

A party seeking relief by mandamus for an abuse by a city council of discretion conferred on it in denying applications for a liquor license has the burden of clearly showing such abuse.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

2. INTOXICATING LIQUORS (§ 74*)—RULINGS ON APPLICATION FOR LICENSE—ABUSE OF DISCRETION—EVIDENCE.

That the council of Texarkana, authorized by its charter (Sp. Laws 1907, p. 823, c. 104) to issue liquor licenses provided that only two licenses shall be issued in any half block, and that, where there are more than two applications for licenses for any half block, the council shall determine which shall be accepted on the question of priority of applications, and for any other good and sufficient reason, granted two licenses for a half block by granting licenses to the first and third applicants in point of time and rejecting the second applicant, did not show an abuse of discretion so as to authorize the second applicant to proceed by mandamus to compel the granting to him of a liquor license, though the council in acting on the applications did not discuss the priority of filing, nor the qualifications of the applicants.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

3. INTOXICATING LIQUORS (§ 72*)—DENIAL OF APPLICATIONS FOR LIQUOR LICENSE—JUDICIAL REVIEW.

Under the Texarkana city charter (Sp. Laws 1907, p. 823, c. 104), authorizing the granting of liquor licenses, limiting the number in each half block to two, and requiring the council to determine which two applications shall be accepted, and that its action shall be final, confers judgment and discretion on the council in the granting of liquor licenses, and its action is not reviewable by the courts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 74; Dec. Dig. § 72.*]

4. INTOXICATING LIQUORS (§ 72*)—DENIAL OF APPLICATIONS FOR LIQUOR LICENSES—JUDICIAL REVIEW.

While ordinarily, where a discretion is conferred, it may be so abused as to entitle the party injuriously affected to relief, the Legislature may confer on the council of a city the power to conclusively determine what persons shall obtain a liquor license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 74; Dec. Dig. § 72.*]

Appeal from District Court, Bowie County; R. W. Simpson, Judge.

Mandamus by Sam Berger against A. B. De Loach, mayor of the city of Texarkana, and others, to compel the granting of plaintiff's application for a liquor license. From a judgment denying relief, plaintiff appeals. Affirmed.

See 113 S. W. 557.

By the act to incorporate the city of Texarkana, approved May 2, 1907 (Sp. Laws 1907, p. 823, c. 104), power was conferred upon its city council "to make and enforce all needful regulations for saloons, dramshops and other places where intoxicating liquors are sold or given away," and "to prescribe by ordinance that no intoxicating liquors shall be sold or given away within the corporate limits of the said city in any certain prescribed district in said corporation in which there are more residents (residence?) than business houses." "Provided, however," the act declares, "that at any one time not more than two saloons or retail liquor dealers shall ever be licensed or permitted to conduct a business in any one-half block, and by half block as herein used shall be held to mean that portion of a block between an alley and a street; and provided, further, that when two licenses shall have been issued to a saloon or retail liquor dealer in any one-half block, that no saloon license or retail liquor dealer's license for any such one-half block shall thereafter issue for the period of time or any part of the period of time thereby covered by such two licenses issued; and provided further, that in the event there should be at any time more than two applications to the city tax collector for the issuance of saloons or retail liquor dealer's license for any particular one-half block, as herein defined, it shall be the duty of the tax collector aforesaid to refer all such applications to the city council of the said city, which shall immediately determine which said two applications shall be accepted, which shall be determined upon the question or point of priority of the making of such application, and for any other good and sufficient reason, and the action of the said city council shall be final, and provided the city council may refuse to issue a license to a non-resident of the state." Section 130, p. 849. Applications for licenses to engage in the retail liquor business in the same one-half block were duly made to the city tax collector as follows: By Louis Mereto May 2, 1908; by appellant Berger June 2, 1908; and by Dan Gallagher July 27, 1908. The applications having been referred by said tax collector to the city council as directed by the charter, that body refused to grant a license to appellant, and granted licenses to Mereto and Gallagher. By his petition filed August 28, 1908, appellant sought to have issued a writ of mandamus "commanding and requiring the said defendants to grant plaintiff's said application and issue city license to him

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† Writ of error denied by Supreme Court.

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in accordance to law." The grounds relied upon for the relief sought were, as stated in appellant's petition, that his application in point of time was prior to that of Gallagher, and that "no good reason was, is, or could be alleged why his application should not be granted and city license issued to him; yet, nevertheless, the defendants, acting as the city council of said city, * * * illegally, arbitrarily and without good or sufficient reason, and in violation of * * * provisions of the city charter refused and rejected plaintiff's application for license and granted the application of the said Dan Gallagher." The relief sought was denied by the trial court, whereupon appellant prosecuted this appeal. From the record it appears that at the time he made the application for the license appellant was a resident of this state, had been engaged in the retail liquor business in Texarkana, Tex., for about six years, during which time he "had conducted a quiet, orderly, and peaceable place of business, had never violated or been charged with violating any of the laws relating to the sale of intoxicating liquors," was a law-abiding citizen of good character, and then had a license from the state and county authorizing him to engage in the business. It further appears from the record that at the time the case was tried Gallagher had pending against him three suits for penalties provided for a breach of his bond, and had had other suits for like penalties pending against him. It was shown by the testimony of appellees testifying as witnesses on the trial of the case that, when the several applications were before the city council and before they were acted upon, said city council "did not mention or discuss the priority of filing said applications for license, and did not mention or discuss the qualification of either of said applicants, or mention or discuss any cause or reason why either of said applications should be granted or refused"; that "a secret ballot was taken, each member of said city council writing two names from among the three applicants upon his ballot and casting his ballot in a hat"; and that, "after all five of said members (of the city council) had voted in this manner, the ballots were counted, Dan Gallagher receiving five votes, Louis Mereto three, and Sam Berger two votes, and it was declared by said council that licenses should be issued to Dan Gallagher and Louis Mereto, and should not be issued to Sam Berger, he having received the smallest number of votes." Neither before nor after the ballot was taken was a reason urged or in any way voiced before the council why appellant should not be granted the license he had applied for.

Todd & Hurley, for appellant. F. M. Ball and T. N. Graham, for appellees.

WILLSON, C. J. (after stating the facts as above). From his brief we understand appellant to have abandoned the contention presented by his first assignment, that the charter granted the city of Texarkana, Tex., is unconstitutional, and therefore void, in so far as it declared "that at any one time not more than two saloons or retail liquor dealers shall ever be licensed or permitted to conduct a business in any one-half block" in said city.

The question left for consideration in disposing of the appeal is the one made by appellant's second assignment, where he insists that "under the law and facts it was the mandatory duty of the city council" to issue to him the license he had applied for. The contention urged is based upon the fact that appellant's application for a license was made before Gallagher applied for the license issued to him, and upon an assumption that the city council arbitrarily and without a reason for doing so refused to grant him a license. We do not think the assumption referred to is warranted by the evidence as it appears in the record, and for that reason, if no other existed, would be of the opinion that the judgment of the lower court should be affirmed. If abuse by the city council of the discretion conferred upon it entitled appellant to the relief he sought, the burden was upon him clearly to show such abuse. Arberry v. Beavers, 6 Tex. 473, 55 Am. Dec. 791; 19 A. & E. Ency. Law (2d Ed.) p. 725. It does not appear from the record that he discharged such burden, in that it does not affirmatively appear that the city council in refusing to grant his application for a license acted arbitrarily and without a reason. The evidence was that in acting upon the applications made to it the city council did not "mention or discuss" the "priority of filing" of same, nor the qualifications of the applicants, nor any reason why either of the applications should be granted or refused. It ought not to be assumed that reasons justifying their conduct, but not at the time "mentioned or discussed," did not exist. Sherlock v. Stuart, 21 L. R. A. 582, note. The law did not require that the reasons influencing their conduct should be entered of record, or in any manner declared. If a reason or reasons existed justifying their action, it should not be said that in acting upon them they abused the discretion conferred upon them merely because they did not mention or discuss such reason or reasons in connection with their action. In re Knarr, 127 Pa. 554, 18 Atl. 640; Perry v. Salt Lake City, 7 Utah, 143, 25 Pac. 739, 998, 11 L. R. A. 447. In the case last mentioned the council of Salt Lake City had been authorized "to license, regulate, and tax the manufacturing, selling, giving away or disposing of in any manner any intoxicating liquor," and had refused to grant Perry a license to sell such liquors. He sought the writ of mandamus to compel the council to issue to him such a license. In refusing the relief prayed for, the Supreme Court of Utah said: "The char-

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ter confers the power to regulate the traffic upon the city without expressly requiring it to be exercised by ordinance. But it is said that the councilmen may act from mere whims, caprice, partiality, or prejudice unless the regulation is by ordinance. The court should assume that public officers will act from proper motives until the contrary appears. It is also claimed that the court must presume that the council acted arbitrarily or without sufficient reason in refusing the license, because no reason appears upon its record. The court will not assume that the council refused the license arbitrarily and without sufficient reason without some proof. Being public officers, and acting under the sanction of an oath, the court will assume that they acted lawfully until the contrary appears."

There is, we think, another satisfactory reason why the judgment complained of should be affirmed. Without reference to whether it abused the discretion conferred upon it or not, we think the action of the council in refusing to grant the license appellant applied for was final. In Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 624, the Supreme Court of the United States, after declaring that there is no inherent right in a citizen to sell intoxicating liquor by retail, and that engaging in so selling such liquor is a business which might be "entirely prohibited or permitted under such conditions as will limit to the utmost its evils," added: "The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on and to issue licenses for that purpose." In the case before us, applications having been made to the city tax collector for licenses to establish more than two saloons in a one-half block, the power and duty to determine which two of the three applicants should be granted licenses was conferred by the Legislature upon appellees as the city council of said city of Texarkana, Tex., without restriction further than the direction to determine between such applicants according to the priority of their respective applications and "for any other good and sufficient reason." There can be no question that the exercise of the power so conferred was not merely ministerial, but involved discretion and judgment on the part of the city council. And we think there can be no doubt that it was the intention of the Legislature to confer it absolutely and free from control on the part of any other tribunal; for in conferring the power the Legislature expressly declared that the "action of the city council shall be final." Having the power as it unquestionably did (Giozza v. Tiernan, 148 U. S. 659, 13 Sup. Ct. 721, 37 L. Ed. 601), to make a determination by the city council final, and having done so in so many words, we have been unable to appreciate the force, if any it has, of the contention made that the action of the council was not final, but, on the contrary, was subject to be controlled by another or other tribunals. We freely concede that ordinarily, when a discretion is conferred, it may be so abused as to entitle a party injuriously affected by its exercise to relief by mandamus. But we have been referred to and have found no case like this one, where it has been held that another person or tribunal can correct an abuse of a discretion conferred, in the face of an express declaration on the part of the Legislature, having power to confer and conferring it, that, when exercised by the person or tribunal upon whom it has been so conferred, his or its decision shall be final. Such power as that conferred upon the city council "needs to be discretionary," said the court in United States ex rel. Hover v. Ronan (C. C.) 33 Fed. 121, "but at the same time final and conclusive." The Legislature, it appears, took such a view of the matter when it conferred upon the city council the power exercised by it and here complained of. The lawmakers doubtless duly considered the fact that the discretion they were conferring might be abused, yet they not only did not provide a way in which to revise the action of the council and correct an abuse, but expressly declared the determination reached by that body should be final. In enforcing the legislative will, we think the court below did not err. Ramagnano v. Crook, 85 Ala. 226, 3 South. 845; Devin v. Beet, 70 Md. 352, 17 Atl. 376; Sherlock v. Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580, and note; Deehan v. Johnson, 141 Mass. 23, 6 N. E. 240; State v. Com'rs Cass Co., 12 Neb. 54, 10 N. W. 571; In re Knarr, 127 Pa. 554, 18 Atl. 639; Bryan v. De Moss, 34 Ind. App. 473, 73 N. E. 156; McCormick v. Pfeiffer, 19 S. D. 269, 103 N. W. 31.

The judgment is affirmed.

GUILL et al. v. O'BRYAN.

(Court of Civil Appeals of Texas. June 17, 1909. Rehearing Denied Oct. 14, 1909.)

1. PUBLIC LANDS (§ 175*)—SURVEY—RESURVEY—CONCLUSIVENESS OF PATENT.

Where a resurvey of land was had and the former field notes corrected so that the survey embraced less land, and a patent issued on the corrected field notes only, the owner, in the absence of a showing of mistake, is bound by the patent calls.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 565–568; Dec. Dig. § 175.*]

2. BOUNDARIES (§ 87*)—ASCERTAINMENT—EVIDENCE.

In an action to determine the boundary between two surveys, evidence *held* to show that the true line ran so as to include the disputed land in defendants' survey.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 191; Dec. Dig. § 87.*]

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3. BOUNDARIES (§ 3*) — CONFLICTING ELEMENTS—COURSES AND DISTANCES AS CONTROLLING.

In determining the true dividing line between surveys, if, from a definite beginning point, course and distance alone will with reasonable certainty locate and identify the line, course and distance will control.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 20–24; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 3*)—ABSENCE OF MONUMENTS—CONTROL OF COURSES AND DISTANCES.

Where no marked trees are on a patented survey identified as those of the grant, the true boundary must be ascertained by course and distance given in the patent.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 20; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 35*)—ASCERTAINMENT—ADMISSIBILITY OF EVIDENCE.

Where, in an action to establish the boundary between two surveys, the parties agreed that the only controversy was as to the true line between the surveys, evidence of an agreed or acquiesced line between the former owners was not admissible, by way of estoppel, to operate to acquire the land in dispute, but was admissible as a circumstance affording the presumption that the line so recognized was the true line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 163, 164; Dec. Dig. § 35.*]

6. BOUNDARIES (§ 3*) — ASCERTAINMENT — FORCE OF CALLS IN A PATENT.

The calls in a patent constitute a written description, and when not ambiguous or conflicting, the boundaries of the land granted are to be determined from some of the calls of the grant, and extraneous facts can only be used to remove or determine conflicting calls, and hence where patent of the H. survey by its calls ties a boundary line in dispute to the G. and A. surveys, and neither the H. survey nor the G. nor A. survey ties to any call for the B. survey, and the calls in the H., G. and A. surveys are not uncertain, a line traced from the B. survey could not be considered.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 20–24; Dec. Dig. § 3.*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Trespass to try title by C. B. O'Bryan against J. C. Gulli and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered.

Brooke & Woolworth, for appellants. W. R. Anderson, for appellee.

LEVY, J. The suit was brought by appellee in the ordinary form of trespass to try title to recover against appellants a strip of land 70 varas wide by 711 varas long, containing 8 acres more or less. After answer was made by appellants it was agreed in writing by the parties "that the plaintiff does not own or claim any of the W. A. Grady survey, and the defendants do not own or claim any part of the J. M. Holmark survey, and the only controversy is as to the true line between the J. M. Holmark survey and W. A. Grady survey." The case was tried to a jury under this agreement, and in accordance with their verdict a judgment was entered in favor of the appellee.

Appellants assign as error, among others, that the court erred in overruling their motion for a new trial. The contention made, in effect, is that the verdict of the jury is contrary to the weight of, and is unsupported by, the evidence, and the appellee was not entitled to have the boundary line located at the point where he insisted it should be. The agreement of the parties as made, it is true, affects the cause of action and the character of the defense, and made the case one of boundary strictly. The agreement by its terms, operating as an admission, admitted that the appellants had title to and did not own or claim any more than the land embraced in the field notes of the Grady to its "true line," and the appellee had title to and did not own or claim any more than the land included in the field notes of the Holmark survey to its "true line." In consequence the only issue became and was whether the land 70 varas wide by 711 varas long was included in appellants' field notes of the Grady survey or in the appellee's field notes of the Holmark survey. Under the admission the "true line between" the two surveys means the true dividing line on the ground as called for by the two patents granting the land, and not some supposed line. In the issue outlined by the agreement the burden of proof was on the plaintiff to show that the patent of the Holmark survey embraced within its field notes, as run out on the ground, the strip in suit; and, failing in this, as we think, it clearly appears he would not be entitled to a judgment.

It appears from the evidence that the two surveys in question adjoin and were surveyed in 1859 by the same surveyor, but about four months apart. The field notes of the Grady do not call for the Holmark survey, but the Grady does call for, and ties itself to, the Anderson survey, which is a senior survey adjoining it on the north and patented. In 1872, and before the patent issued, the field notes of the Holmark survey were by a resurvey of the original location corrected, and by these corrected field notes this grant was patented. The original field notes of the Holmark called for its south line to run "west at 1,788 varas a stake," and the north boundary line to run "east at 1,788 varas to place of beginning." In the resurvey the field notes, being corrected, reversed the course, and called for the north line to run from the beginning point "west at 1,700 varas, and the south line to run "east and at 1,700 varas the S. W. corner of W. A. Grady's survey," and its east line to run "north with said W. A. Grady's west line at 1,711 varas his N. W. corner." Thus the Holmark tied itself to the Grady, which was patented, by the specific calls mentioned. In the light of the field notes, thus corrected by the resurvey, the north and south lines of the Holmark were in length diminished

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88 varas east and west. This fact truly indicates, from all the evidence, that the controversy herein is over the strip that the original field notes of the Holmark formerly called to cover and embrace. A resurvey, however, of the Holmark having been made, as authorized by law to be made, and the length of its south and north lines having been diminished, and made to yield and conform to and end with the Grady survey, and the patent issued on and embracing the corrected field notes only, and there being no pleading attacking the same for mistake, it follows that the appellee, as owner of the Holmark, can only claim the true dividing line to be at the point the patent calls for, and that is bound by the patent calls. Thus eliminating, as a matter of law in the case, the 88 varas difference between the original survey and the corrected field notes, it leaves the question of the "true line between" the two surveys, as agreed to be fixed by this suit, to be determined from the field notes contained in the patent to the two grants as traced and located on the ground.

In applying the field notes of the Grady to the ground it affirmatively appears, by the testimony of one of the surveyors tracing the same, and not disputed in the evidence, that the southeast corner, marked "G" on the plat, was found and identified on the ground. He testified that it "was an old, established, and long-recognized corner, about which there was no dispute." It was likewise proved as to the southwest corner of the Holmark, marked "H" on the plat, that it "was a long-established and well-recognized corner, about which there is no dispute." It conclusively appears, therefore, from the evidence that the southeast corner of the Grady and the southwest corner of the Holmark were found and located on the ground. It further appears that the surveyor, by running from this established southeast corner of the Grady a course and distance described in the patent, there being, according to the evidence, no bearing trees remaining on the ground, reached the southwest corner of the Holmark. All the evidence agrees that by beginning at the southeast corner of the Grady survey and running west 1,100 varas as called for by the field notes of the Grady, and beginning at the southwest corner of the Holmark and running east 1,700 varas as called for by the field notes of the Holmark, each survey would have its exact quantity of land, and by the distances and calls in the grants would meet on the ground as adjoining corners. The evidence also agrees that if the courses called for in the grants be followed, and the lines are run otherwise than by the distances called for in the grants, there will be a discrepancy or difference between the corners of the two surveys of about the number of varas the corrected field notes of the Holmark diminished. It further appears that by running each survey from its said established corners, according to the courses and distances described in the grants, a common boundary of the two surveys north and south is reached, and at the beginning point of the north and south line that no space or loss of varas intervenes east and west. If such result is accomplished, as it is, it would seem to show the location of the "true line between" the surveys.

There appears evidence going to show two marked lines running north and south between the surveys, but neither of these marked lines appears by the evidence to be identified with the calls and objects of the field notes of either survey. One of the surveyors testified in respect to the marked line claimed by appellee, "I found an old corner—at the Fain survey, and at the Anderson—but I don't know that these corners corresponded with the field notes." All the evidence agrees that to follow course and distance, there being, according to the evidence, no bearing trees remaining on the ground of the disputed line, from either the established southeast corner of the Grady or the established southwest corner of the Holmark, would, in running north between the surveys, locate the west line of the Grady where appellants claim it to be. All the evidence agrees that the marked line east where the appellee claims the west boundary line of the Holmark to be could not be reached by following the distances called for from said established beginning point of either survey. Nor does it appear that the marked line claimed by appellee could be reached by the patent calls and distances from any other established corner of the surveys. It is further apparent from the evidence under all the facts that these two marked lines claimed by both appellants and appellee appear on the ground because of the corrected field notes of the Holmark. One of the lines evidently appears to have been made under the old field notes, and the other under the new field notes of the Holmark. The difference in the width at the base of the two lines is about the difference in the diminished lines by such correction. As the west marked line claimed by appellants in the evidence to be the true line was undoubtedly the line marked after the correction, and the east line claimed by the appellee was evidently marked under former field notes and abandoned under the patent, and the line claimed by appellants being perfectly consistent with the calls of each survey, it must be held that the "true line between" the two surveys is clearly shown to be where appellants claim it to be. In thus determining that the evidence shows the true location of the line between the two surveys to be where appellants claim it to run, we do not think the evidence is clear and definite enough, nor could it be made so, to warrant the line north and south be-

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tween the surveys to be run at such variation as to reach the objective point marked "D" on the map in evidence. The mark at the point indicated is not shown definitely to be the bearing tree of the Holmark. The Holmark calls for its west line to run from the southwest corner of the Grady, "thence N. with said Grady's west line at 1,711 varas his N. W. corner." As the Grady northwest corner can be definitely located by its established southeast corner, then its west line, as called by the Holmark, would be the east line of the Holmark to that call. As the Grady northwest corner is, so must that corner also be the Holmark corner. The same variation that located the Grady southeast corner and the Holmark southwest corner in evidence locates the Grady northwest corner; and by that same variation, and not the variation in evidence, or any other variation, must the line between the surveys north to the Grady northwest corner be run. It is only this line between the two surveys that is to be located in this case. It is a settled rule of law in determining the true dividing line between surveys, as in this case, that if from a definite beginning point course and distance alone will with reasonable certainty locate and identify the line, as in this case, that will be held sufficient. Course and distance will control, then, under the surrounding and connecting circumstances. They are the most certain and reliable evidences of the true locality of the grant. Robinson v. Doss, 53 Tex. 506. Where no marked trees are on the ground identified by the evidence as those of the grant, as in this case, the true boundary must be ascertained by course and distance given in the patent. Luckett v. Scruggs, 73 Tex. 519, 11 S. W. 529. Where a survey has been made calling for the southwest corner and northwest corner of a patented survey, as in this case, the west and north lines of the latter survey must be run according to the courses and distances laid down in the original field notes, and cannot be varied in order to reach trees which cannot be clearly identified as the original corner, as in this case. Williams v. Beckham, 6 Tex. Civ. App. 739, 26 S. W. 652.

Appellee offered evidence to show an agreed or acquiesced line between the former owners. Under the agreement in this case any evidence of estoppel by agreed or acquiesced line could not be used to operate to acquire the land. It is the "true line" that the agreement calls to locate. Such evidence, however, was admissible under the rules as circumstances affording the presumption that the line so recognized is the true line, and could have no stronger probative force by reason of the agreement. But it is quite certain from the record that if any line was marked, and the marks recognized by former owners, under a surveyed line, it was under the original field notes, and not the corrected field notes in the patent of the Holmark, and by reason thereof could not have force as a presumption in this case that such line is the "true line" as corrected by the field notes in the patent. This is convincing by the evidence of Surveyor Neal, who says as official surveyor he ran the line, and that he was surveyor "many years ago." If the "many years ago" was since 1872, it does not appear that he used the corrected field notes of the Holmark, because he says, "I don't know that there were two surveys of the Holmark." But even if the recognition of the line by former owners would legally create a presumption that it is the true line, such presumption is overcome by the direct evidence that it is not the "true line" under the patent as agreed to be determined. It could really be an answer to this testimony of appellee that the agreement he made had the effect to exclude and disclaim any former agreed line, and to rely only on the true line as it is. Porter v. Miller, 76 Tex. 593, 13 S. W. 555, 14 S. W. 334, was a controversy as to dividing lines between two leagues. The southwest corner of one league and the northwest corner of the other were established and identified on the ground. Following course and distance from these corners, the boundary line between the two surveys was located as claimed by the plaintiff in that suit. In that case it was further ruled that understanding about where the line was could not prevail against direct evidence.

Any line that could be traced from the Bradbury survey would not affect the location of the line in question, and could not legally be considered in the case. The Holmark by its calls ties this line in dispute to the Grady and Anderson. Neither the Grady, Anderson, nor Holmark ties to any call for the Bradbury, and neither are the calls in the last three surveys mentioned so uncertain and ambiguous or incapable of location on the ground as to authorize resort to extraneous evidence to aid their location. It is the recognized and established doctrine that the calls in a patent constitute a written description, and when not ambiguous or conflicting, the boundaries of the land granted are to be determined and ascertained from some of the calls of the grant. Extraneous facts, it is ruled, can only be used to remove or determine conflicting calls, which do not appear in the patent calls in the instant case. Hamilton v. Blackburn, 43 Tex. Civ. App. 153, 95 S. W. 1097, 1098.

The judgment was ordered reversed and here rendered in favor of the appellants, with all costs, locating the east boundary line of the Jas. M. Holmark and the west boundary line of the W. A. Grady between the two said surveys to be as follows: Beginning at the southwest corner of the Jas. M. Holmark survey; thence east with the

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south line of the said survey 1,700 varas to a point 1,100 varas west of the southeast corner of the W. A. Grady survey; thence north, at same variation, with said W. A. Grady's west line at 711 varas his northwest corner, which is also the southwest corner of a survey made for R. B. Anderson.

HOUSTON & T. C. RY. CO. et al. v. KEELING.

(Court of Civil Appeals of Texas. Oct. 14, 1909.)

1. CARRIERS (§ 303*) — TRANSPORTATION OF PASSENGERS — PREMATURE START — NEGLIGENCE.

Where plaintiff, a mail clerk, was injured while alighting from his car before the train had arrived at its final destination, and plaintiff claimed that he was induced to alight by the act of a transfer man employed by another railroad company in rolling mail trucks to the side of the car, but plaintiff testified that he knew the two stops were made by the train at that place, one for a crossing and the final one for passengers to alight, and that the stop made was not the final one, and it also appeared that none of the train operatives saw or knew that plaintiff was attempting to alight at the place where he was injured, there was no evidence of the carrier's negligence sufficient to sustain a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216–1243; Dec. Dig. § 303.*]

On rehearing. Denied.

For former opinion, see 112 S. W. 808. For answers to certified questions by the Supreme Court, see 120 S. W. 847.

LEVY, J. We are further of the opinion that the fourteenth assignment of error, complaining of the action of the court in overruling the motion for new trial because the verdict was contrary to the evidence, should be sustained. It does not appear in the record that the transfer man, who rolled the trucks beside the mail car, and whose act in so doing the appellee claims in this case reasonably induced him to believe that the train had halted at the depot, was in the employ or an agent of the Houston & Texas Central Railway Company, or that any operative of the train knew that this transfer man employed by the Missouri, Kansas & Texas Railway Company had rolled the trucks beside the mail car at this time and place, or that any employé in charge of the train saw or knew that appellee was attempting to alight at the place in question. In the absence of such proof by the appellee, negligence in the case on the part of said Houston & Texas Central Railway Company could not be rested.

Appellee testified that he knew that two stops were to be made by the train at this place—one for the road crossing and the other the final one for passengers to alight—and that the stop in question was not the final stop. But he says he was induced to believe by the trucks being put beside the mail car by the transfer man in question that the stop was at the final stop, and because of such belief he attempted to alight, and while thus alighting was injured by the train's suddenly moving. The only testimony as to the employment of the transfer man was: "My business is that of mail transfer man at Denison. I have been engaged in that business 18 months. My duties are to transfer mail from one train to another." On cross-examination this witness says: "I was working for the M., K. & T. Railway Company. I transferred mail from both M., K. & T. and H. & T. C." We would not be authorized to conclude that he was an employé or agent of the Houston & Texas Central Railway Company in this evidence. There does not appear any evidence that any employé in charge of the train saw the truck placed there, or saw or knew appellee was attempting to alight at this place. The engineer affirmatively testified: "No; I did not know at the time we moved the train about the truck being there."

The appellee's motion for rehearing as to both appellants was ordered overruled.

GRAHAM v. SPARKS, State Treasurer, et al.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 9, 1909.)

1. INSURANCE (§ 69*)—FORFEITURE OF CHARTERS—JURISDICTION OF COURT.

The district court of Travis county had jurisdiction to forfeit for cause the charter of a mutual fire insurance company whose domicile was at Houston, and appoint a receiver for the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 92; Dec. Dig. § 69.*]

2. INSURANCE (§ 70*)—MUTUAL COMPANIES—PROPERTY SUBJECT TO GARNISHMENT—DEPOSITS WITH STATE.

Whether or not the funds of a mutual fire insurance company deposited with the State Treasurer under Acts 1903, p. 168, c. 109, § 5, were in the custody of the law upon forfeiture of its charter and the appointment of a receiver, under section 9, providing that the securities in the hands of the State Treasurer over the amount necessary to pay losses incurred shall be divided among the policy holders at the date of forfeiture, such funds were held for the benefit of policy holders after forfeiture; and hence were not subject to garnishment.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 70.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Garnishment proceedings by A. C. Graham against Sam Sparks, State Treasurer, and others. From an order denying motions for a judgment against defendants, plaintiff appeals. Affirmed.

Meador & Davis, for appellant. R. V. Davidson, Atty. Gen., William E. Hawkins, Asst. Atty. Gen., and W. J. Moroney, for appellees.

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RAINEY, C. J. On December 13, 1906, A. C. Graham recovered in the district court of Dallas county a judgment for $673.62 against the Standard Mutual Fire Insurance Company of Houston, Tex., on an insurance policy, and said judgment is unsatisfied. On July 15, 1907, said insurance company was placed in the hands of a receiver by the district court of Travis county, and George E. Shelley was appointed receiver, who immediately qualified as such. Prior to the appointment of said receiver said insurance company had deposited with Sam Sparks, State Treasurer, the sum of $640.50, by virtue of section 5 of an act of the Legislature of 1903 (Acts 1903, p. 166). On February 19, 1908, Graham caused a writ of garnishment to be issued and served on Sam Sparks, who failing to answer, the district court of Dallas county issued a commission, and thereunder Sparks answered "that he as said Treasurer is now, and was at the time the said writ was served upon him, indebted to the Standard Mutual Fire Insurance Company of Houston Tex., in the sum of $640.50; that said $640.50 is now on deposit with the State Treasurer in the said Treasurer's office." Said answer being returned, said district court on March 21, 1908, rendered judgment against said Sparks, State Treasurer, for said sum, the judgment among other things reciting that said Treasurer "is ordered to deliver up to the sheriff of Travis county or any constable of said Travis county, presenting an execution herein," etc. On April 15, 1908, an execution issued reciting said judgment, and delivered to the sheriff of Travis county, Geo. S. Matthews, who on April 17, 1908, presented same at the Treasurer's office in Austin, and, said Sparks being absent, his chief clerk delivered to said sheriff said sum of money, to wit, $640.50, in accordance with the command of said writ, and therefor said sheriff executed the following instrument, to wit: "Received this day of Sam Sparks, Treasurer of the state of Texas, the sum of six hundred forty and 50/100 dollars ($640.50) under and by virtue of and in part satisfaction of a certain execution dated March 21, 1908, issued out of the district court of Dallas county, 14th judicial district of Texas, in cause No. 699, A. C. Graham v. Sam Sparks, Garnishee; said money having been heretofore deposited in the State Treasury by the Standard Mutual Fire Insurance Company, having its domicile at Houston, Texas, under the provisions of chapter 109 of the general laws of the 28th Legislature of Texas. Under written instruction and authority given to me by the attorneys for said plaintiff, A. C. Graham, said sum of six hundred forty and 50/100 dollars ($640.50), is accepted by me for the purposes and with the understanding and upon the terms and conditions set forth in said execution."

Shortly after the said George S. Matthews received this money from the chief clerk of State Treasurer, Sam Sparks, and on the same day, he was advised both by Geo. E. Shelley, receiver of the Standard Mutual Fire Insurance Company, and Judge V. L. Brooks, judge of the Twenty-Sixth judicial district of Texas, that said Standard Mutual Fire Insurance Company was in the hands of a receiver, and that the said funds which he, the said George S. Matthews, had in his possession belonged to the receiver, and Judge V. L. Brooks further stated to said George S. Matthews that he must not forward said $640.50 to A. C. Graham, his attorneys, or the district clerk, but that he must hold same, and that he, the said George S. Matthews, sheriff, would be ordered by decree of the district court to return said money to the said Sam Sparks, State Treasurer. Said money was by the said Matthews returned to State Treasurer in accordance with an order of the judge of the Twenty-Sixth district. He made the following return on said execution, to wit: "Came to hand on the 17th day of April, 1908, and executed on the 17th day of April, 1908, by collecting the within amount $640.50 as the property of the Standard Mutual Fire Insurance Company, and on the 18th day of April, 1908, having been notified by George S. Shelley that said company was in the hands of a receiver, and he was said receiver, and to hold said money until the court could instruct me what to do with said money. On the 2d day of May, 1908, said court ordered me to pay over said money to the State Treasurer, a copy of which order is hereto attached, and upon said order I paid said $640.50 back to the State Treasurer, as per copy of his receipt hereto attached. After paying over said sum to the State Treasurer, I again demanded said sum of money $640.50 of said Treasurer upon this writ, to which demand he refused to pay over same. And this writ is returned this May 6, 1908, not satisfied."

Graham filed two motions in the district court of Dallas county, one seeking judgment for $640.50 against Sheriff Matthews and his sureties for the failure to pay over said money to him, and the other for judgment against Sparks in the event judgment was not rendered against Sheriff Matthews. Said motions were consolidated, and upon hearing were denied, and Graham appeals.

A decision of this case depends upon whether the fund in the hands of the State Treasurer under the facts of this case was subject to garnishment. The fund was deposited with the treasurer of the state in trust by the Standard Mutual Fire Insurance Company of Houston for the benefit of its policy holders in accordance with section 5, c. 109, Acts Leg. 1903, and, as long as said company was solvent and a going concern, said fund was subject to garnishment, but said insurance company had ceased to do business, and its affairs had been placed in the hands of a receiver by a court of competent jurisdiction at the instance of the Attorney General

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in an action to forfeit its charter, and the receiver ordered "to take charge of and to close up the business affairs of said company under the further orders of this court." The district court of Travis county had jurisdiction to forfeit the charter of said insurance company and appoint a receiver to take charge of its property, and said fund was in custodia legis, unless the character of its holding was such that the court could not control it by reason of section 9 of said act of 1903, which provides that: "The securities in the hands of the State Treasurer over and above the amount necessary to pay losses already incurred shall be by the commissioner of insurance divided among the policy holders at the date of forfeiture in proportion to the amount of insurance then held by them." In either event the fund was held for the benefit of the policy holders of said company, and was therefore not subject to garnishment, under the conditions then existing. The fund was held subject to distribution among the policy holders of said insurance company, and Graham was entitled to his proportion thereof, but, in the absence of evidence that he was the only policy holder, he was not entitled to recover it all by the aid of the writ of garnishment. To enforce his rights to the fund or a portion thereof, he should have resorted to some other remedy.

The judgment is affirmed.

LIVERPOOL & LONDON & GLOBE INS. CO. v. DELTA COUNTY FARMERS' ASS'N.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 9, 1909.)

1. INSURANCE (§ 504*) — FIRE INSURANCE — DOUBLE INSURANCE—LIABILITY.

Where a fire policy, stipulating that insurer should not be liable for a greater proportion of any loss on the property covered than the amount insured by it bore to the whole insurance on the property, covered property in one location only, and another policy covered such property, and also property in other places, there was double insurance on the property covered by both policies, and insurer was liable for no greater proportion of the loss of such property than the amount of its policy bore to the whole insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1286, 1287; Dec. Dig. § 504.*]

2. INSURANCE (§ 504*) — FIRE INSURANCE — ACTIONS.

Where, in an action on a policy stipulating that insurer should not be liable for a greater proportion of any loss on the property than the amount insured bore to the whole insurance on the property, the insurer alleged in its answer the existence of other insurance and the amount thereof, and the evidence established the allegations, and the loss sustained was not as much as the amount of the combined insurance, the court must apply the rule of pro rata liability on the part of insurer, and it was not necessary to make the other insurer a party defendant, and ask for contribution.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1289; Dec. Dig. § 504.*]

3. INSURANCE (§ 504*) — FIRE INSURANCE — STIPULATIONS—CONSTRUCTION.

A provision in a fire policy that, if at the time of a fire the whole amount of insurance on the property shall be less than the actual cash market value thereof, insurer shall in case of loss be liable for such portion only of the loss or damage as the amount insured by the policy shall bear to the actual cash market value of the property at the time of the fire, does not nullify the stipulation in the policy limiting insurer's liability to no greater proportion of the loss sustained than the amount insured by its bears to the whole insurance on the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1285–1290; Dec. Dig. § 504.*]

Error from District Court, Delta County; R. L. Porter, Judge.

Action by the Delta County Farmers' Association against the Liverpool & London & Globe Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reformed, and affirmed.

Wm. Thompson, for plaintiff in error. J. L. Young, for defendant in error.

TALBOT, J. This suit was instituted by plaintiff, Delta County Farmers' Association, a corporation, against the defendant, Liverpool & London & Globe Insurance Company, a corporation, to recover the sum of $4,000 as loss by fire on cotton in bales, covered by two contracts or certificates of insurance of $2,000 each issued by defendant to plaintiff under an open policy. The petition alleged, in substance: That defendant issued to it two certificates of insurance of $2,000 each under its open policy A, for the term of three months from October 19 and October 22, 1907, respectively. That plaintiff owned and operated a cotton warehouse at Cooper, Tex., in which was stored bales of cotton held by plaintiff in trust as bailee for hire. That said certificates and policies constituted contracts in securing plaintiff against loss by fire to cotton situated in said warehouse. That on January 13, 1908, there were 167 bales of cotton stored in the warehouse, which were on said date totally destroyed by fire, which 167 bales of cotton were of that date and place of the reasonable cash market value of $10,359.07. That plaintiff complied with the requirements of its contract in giving notice of loss, and making proof of loss. That defendant admitted liability, but declined to pay $4,000 as its liability for the loss sustained. Defendant answered that plaintiff had in addition to the contracts sued on other insurance contracts or policies, which were set out, against loss by fire to the amount of $22,000, making a total insurance of $26,000 on the property described in the contracts sued on. That the contracts sued on contained a provision or stipulation as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby

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insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property." Defendant says that it can only be liable for its proportionate part of the loss considering the other $22,000 of insurance. Plaintiff by first supplemental petition alleged that the other $22,000 of insurance carried covered, not only the cotton in the warehouse, but also cotton situated and stored on plaintiff's shipping platform and on its weighing platform, which cotton were separate and distinct from the cotton in the warehouse; that defendant's contracts covered only the cotton in the warehouse, which was totally destroyed, and defendant is entitled to no contribution from the other insurance. The case was submitted to the trial court upon an agreed statement of facts, and resulted in a judgment in favor of the plaintiff for $3,823 and interest, from which judgment this writ of error is prosecuted.

The material facts, as shown by the agreed statement of facts sent to this court, are as follows: The plaintiff held the two certificates of insurance set out in its petition, which were valid and subsisting, and covered the cotton in the warehouse described in said certificate at the date of the fire alleged, subject to the terms of said certificates and of open policy A, mentioned in said certificates. The cotton covered by these certificates was burned January 13, 1908, and on February 24, 1908, proofs of loss were duly made and furnished defendant, in which claim was made against defendant for $3,823.45. There were 167 bales of cotton in the warehouse on date of fire, and all of same were consumed and destroyed by fire; and said cotton was of the total cash value on that date of $10,359.07. There were 215 bales of cotton on the platform adjoining the warehouse and outside thereof, which were of the total value of $13,455.95; and 48 bales of said cotton were burned on said date, and which 48 bales were of the total cash value of $2,977.39. There were 107 bales of cotton on the weighing platform on January 13, 1908, which were of the total cash market value of $6,434.60, and which platform is situated near the public square in Cooper, Tex., and nearly a half mile from the warehouse. The total number of bales of cotton in the warehouse, on the platform adjoining the warehouse, and on the weighing platform, was 489, and were of the total cash market value of $30,249.62, and all of said cotton was covered by insurance in various companies to the amount of $22,000, which $22,000 insurance was in addition to and distinct from the certificates sued on, to the extent that they also covered cotton on the weighing platform and cotton on the shipping platform, which the certificates sued on did not cover, which said other policies are set out in defendant's answer by number, name of company, and amount of each other policy, and each and all of said policies contain the following provision and clause: "And it is further understood and agreed that if at the time of fire the whole amount of insurance on the property covered by this policy shall be less than the actual cash market value thereof, this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash market value of such property at the time and place of fire." The open policy A, mentioned in the two certificates sued on, contained a provision as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property."

There is but one assignment of error presented, which is as follows: "The court erred in rendering judgment in favor of the plaintiff and against the defendant for the sum of $3,823, when defendant had no such liability to plaintiff under the contract sued upon." The proposition contended for by appellant under this assignment is that where a fire insurance policy stipulates, as in this instance, that the company shall not be liable for a greater proportion of any loss on the described property than the amount insured shall bear to the whole insurance, whether valid or not or by solvent or insolvent insurers, covering such property, is a reasonable and valid provision; and, where such policy covers property situated in one location only and other policies cover the property in the same location and property in other places also, on the happening of a fire each policy covers for its full amount in each location, and each is contributing insurance for any inexhausted balance, if not for its full face. Defendant in error contends that plaintiff in error's contract upon which it sues was specific and special, covered different interests, risks, and hazards to that of the general policies, and therefore a pro rata contribution could not be claimed from the other and general policies.

The precise question as here presented has not, so far as we are advised, been passed upon by any appellate court of this state. No such decision has been cited by counsel, and in our research we have found none. Where the policy sued on contained a provision similar to the one found in the policy declared in this case and the property therein insured was personal property, and was covered by other policies which did not also cover property located in another and different place, and the amount of the loss was not as much as the amount of the whole insurance, our courts have uniformly held that the provision as to the share of loss to be suffered by the insured as to contribution by all compa-

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nies that issued policies on the same property is to be given effect. Insurance Co. v. Coffee, 61 Tex. 287; Queen Ins. Co. v. Ice Co., 64 Tex. 573; Hibernia Ins. Co. v. Starr (Tex.) 13 S. W. 1017. The decisions of other states seem to be in conflict upon the proposition urged by appellant, but it is well supported by some of them, and by the decisions of the federal courts. The rule established by these decisions, and the one believed to be correct, is, in substance, that wherever there are two separate insurers liable for the same loss the fact that one policy covers more property or wider risks than the other does not prevent the insurance being double on the subjects covered by both. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Page et al. v. Sun Ins. Office, 74 Fed. 203, 20 C. C. A. 397, 33 L. R. A. 249; Blake v. Insurance Co., 12 Gray (Mass.) 265; Hough v. Insurance Co., 36 Md. 398; Meigs v. London Ass'n Co. (C. C.) 126 Fed. 781. In the first case cited it appeared that the warehouse company had taken out two policies amounting in the aggregate to $30,000. One of these was in the Home Insurance Company on "merchandise, hazardous or extra hazardous, their own or held by them in trust, or in which they have an interest, or liability." Some of the depositors of the merchandise who received advances thereon from the warehousemen had themselves taken out specific insurance upon their own property. The suit was upon one of the general policies, and the court held that the policies protected the merchandise itself, not merely the warehouse company's interest, in it or lien upon it, and therefore covered all the cotton and tobacco that belonged to the several owners in separate lots, and that all the policies, general as well as specific, should contribute and bear the loss proportionally. Mr. Justice Strong, who delivered the opinion of the court, in closing the discussion of the question, said: "Without pursuing this discussion further, we have said enough to vindicate our opinion that the policy upon which this suit was brought covered the merchandise held by the warehouse company on storage, and not merely the interest of the bailees in that property. It follows necessarily that there was double insurance. The policy issued to the warehouse company and those obtained by the depositors of the merchandise covered the same property, and they were for the benefit of the same owners. The insurers are liable therefore pro rata; each contributing proportionately." In Page v. Sun Ins. Office, supra, the property insured consisted of lumber piled upon two separate blocks in the city of Anoka, Minn. A fire occurred which damaged the lumber situated upon one block, but did no harm to the lumber upon the other block. The owner at the time of the fire held policies aggregating $50,000, of which $40,000 covered the property situated on both blocks, while $10,000 covered only the property that was injured. The policy issued by the Sun Insurance Office, and upon which the suit was brought, was one of the latter policies, and contained a provision that the company should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance. The court held, in substance, that the compound policies covered the property destroyed to their full amount, so that the proportion of the loss to be borne by the specific policy was the proportion which that policy bore to the total amount of both the compound and specific policies. In the case of Blake v. Insurance Co., 12 Gray (Mass.) 265, cited above, the defendant's policy and one other covered manufactured lumber only. Two other policies in the Harmony and La Farge Insurance Companies, respectively, covered the same property and also manufactured stock. The trial court instructed the jury that the policies issued by the Harmony and La Farge Companies did not prorate because they covered other property than that included in the defendant's policy. The Supreme Court of Massachusetts held the instruction erroneous, saying: "The court erred in instructing the jury that no abatement of the amount to be recovered of the defendant could be made on account of the Harmony and La Farge policies, because those policies covered other property besides that covered by the defendant's policy. We think these policies, though covering manufactured stock, sustain their proportion of the loss." We think these cases very clearly and correctly announce the principle applicable to that class of cases to which the one at bar belongs, and demonstrate that the trial court gave a much larger judgment against the defendant than warranted by the terms of the contract upon which the suit is founded. They make it plain that the provision in the policies, to the effect that the insurance company should not be liable for a greater proportion of any loss on the property described in them than the amount insured should bear to the whole insurance, should have been given effect, and judgment entered for such amount only.

The contention of defendant in error, that, "if the plaintiff in error desired contribution from the other insurance companies, it was its duty to have made them parties defendant and asked for such contribution," is not well taken. The contracts of insurance sued on stipulated that in the event of other insurance defendant should not be liable for a greater proportion of any loss on the property covered by said contracts than the amount thereby insured bore to the whole insurance covering said property. The defendant alleged in its answer, as was its right to do, the existence of such other insurance and the amount thereof. These allegations of the answer were conclusively established by the evidence, and, it further appearing that the

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loss sustained was not as much as the whole amount of insurance, it became the duty of the court to apply the rule of pro rata liability on the part of the defendant as stated in the policies and render judgment against defendant for no greater proportion of the loss than the amount of said policies bore to the whole insurance. Nor does the provision in the policies of insurance "that, if at the time of the fire the whole amount of insurance on the property covered by this policy shall be less than the actual cash market value thereof, this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash market value of such property at the time and place of fire," have the effect to impair or nullify the provision in said policies limiting defendant's liability to no greater proportion of the loss sustained than the amount insured bears to the whole insurance. Neither do we concur in the contention that the case of Insurance Company v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235, is in conflict with the cases cited in this opinion in support of the conclusion we have reached. We have examined that case, and fail to find anything in it that justifies the conclusion that it is at variance with the doctrine enunciated in the cases we have cited. We conclude that the clause in the policies sued on, to the effect that the insurance company should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance, must be given effect; that it results in so doing that the loss of $2,977.39, which occurred at the shipping platform of plaintiff, should be paid by the policies aggregating $22,000, which loss deducted from the amount of said policies leaves a balance of $19,022.61, as insurance existing on the cotton situated in plaintiff's warehouse to contribute, with the $4,000 sought to be recovered in this suit, to pay the loss of $10,359.07 sustained on cotton in the warehouse, and that the liability of defendant for such loss will be $^{4000}/_{23022.61}$ parts of $10,359.07, or $1,799.80.

It is therefore ordered that the judgment of the district court be reformed so as to reduce the same to the sum of $1,799.80, and as reformed that it be affirmed, and that the costs of this appeal be taxed against defendant in error.

Reformed and affirmed.

HOUSTON & T. C. R. CO. v. ALEXANDER et al.

(Court of Civil Appeals of Texas. July 1, 1909. Rehearing Denied Oct. 9, 1909.)

1. MASTER AND SERVANT (§ 110*)—INJURIES—NEGLIGENCE.

Defendant railroad company was negligent in permitting oil and grease to accumulate on the top of an oil box on an engine, which was slanting, and upon which an employé who was engaged in giving fuel oil to the engine stepped in descending from the tender, and slipped and was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 214; Dec. Dig. § 110.*]

2. MASTER AND SERVANT (§ 129*)—INJURIES—PROXIMATE CAUSE.

Where an employé who was engaged in putting fuel oil in defendant's engine stepped upon the top of an oil box which slanted and was covered with grease, and slipped and fell, defendant's negligence in permitting the box to be covered with grease was the proximate cause of his injuries, caused by the fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

3. MASTER AND SERVANT (§ 233*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

Where an employé was engaged at night in filling a tender with fuel oil, and in descending from the tender in the usual way stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell, he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684–686, 701–742; Dec. Dig. § 233.*]

4. MASTER AND SERVANT (§ 210*)—INJURIES—ASSUMPTION OF RISK.

An employé, whose duty it was to fill engine tenders with fuel oil, in descending from a tender in the usual way after filling it stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell. *Held*, that he did not assume the risk of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554–556; Dec. Dig. § 210.*]

5. DEATH (§ 101*) — DAMAGES — APPORTIONMENT.

Where the evidence in a death action made it an issue whether each plaintiff had suffered loss from decedent's death, and the verdict for plaintiffs as a whole was not complained of as excessive, defendant cannot complain that the amount apportioned to one of plaintiffs was excessive.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 101.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of one engaged in putting fuel oil in an engine tender, by slipping on a greasy fuel box lid and falling in descending from the tender, the admission of testimony by the fireman that decedent was slow and awkward in filling the tender, and the engineer would often tell him to hurry, was not reversible error, even if the testimony was immaterial, where witness was not positive that the engineer hurried decedent at the time of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

7. MASTER AND SERVANT (§ 274*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

The testimony that decedent was slow and awkward in filling the tender, and the engineer told him to hurry, was admissible on the question of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939–949; Dec. Dig. § 274.*]

8. EVIDENCE (§ 121*)—RES GESTÆ.

The testimony that decedent was slow and awkward in filling the tender, and that the

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engineer told him to hurry, and that he was delaying the engine, was admissible as res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 329–331; Dec. Dig. § 121.*]

9. APPEAL AND ERROR (§ 1050*) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of an employé engaged in filling a tender with fuel oil, by slipping on a greasy fuel box lid, only the engineer and fireman being present at the time of the accident, the engineer was asked, after testifying that he did not know whether the fireman was then attending the trial, whether the fireman had attended the trial, and answered "Yes"; also when witness last saw him there, to which witness answered that he could not tell; also whether the fireman was sworn that morning, to which witness answered that the fireman was not at the trial then; also whether the fireman was still in the company's employment, to which witness answered that he was so far as he knew. *Held*, that it was not reversible error to admit the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

10. APPEAL AND ERROR (§ 207*)—ARGUMENT OF COUNSEL.

The suit was for the death of an employé while engaged in filling a tender with fuel oil, by slipping on the fuel box and falling, and plaintiff had taken the deposition of the fireman, who, with the engineer, was the only person present at the accident, and who was afterward brought to the trial by the company in whose employment he still was, but disappeared before the trial was over. Plaintiff's counsel stated in argument that the jury did not know under what difficulties plaintiff had labored in the trial; that the fireman and engineer were the only eyewitnesses of the accident, and both were in the company's employment, and that plaintiff had been compelled to go into the enemy's camp and pull the testimony from their unwilling witnesses; that the jury could see that the engineer was adverse, because when asked whether the fireman was at trial, he squirmed and turned to defendant's attorneys, but was finally forced to admit that the fireman had been at trial, but had disappeared; and that the fireman had in fact disappeared during trial. *Held*, in view of the fact that the argument was not objected to at the time, and no request was made to charge the jury to disregard it, the remarks were not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by Eliza E. Alexander and others against the Houston & Texas Central Railroad Company. Upon appeal by defendant to the Court of Civil Appeals after judgment for plaintiffs, questions were certified to the Supreme Court. On remand after answer to questions (119 S. W. 1135). Judgment below affirmed.

Baker, Botts, Parker & Garwood and Head, Dillard, Smith & Head, for appellant. John H. Sharp and J. H. Wood, for appellees.

BOOKHOUT, J. On the night of November 8, 1906, Joe Alexander was an employé of the appellant, and was engaged in supplying one of its oil burning locomotives with oil at Sherman. In descending from the tender he stepped upon the top of the oil box, and, the top of the box being in a slanting position and covered with greasy dust, his foot slipped, causing him to fall. From injuries thus received his death resulted. This suit was brought by his wife and children to recover damages alleged to have been sustained as a result of his death. Defendant answered by general denial and plea of contributory negligence and assumed risk. A trial before a jury on February 6, 1908, resulted in a verdict and judgment in favor of plaintiffs for $6,000, apportioned: Eliza E. Alexander, $3,000; Mary Cherry, $500; George Alexander, $700; Viola Alexander, $800; Willie Alexander, $1,000. Defendant's motion for new trial having been overruled it perfected an appeal.

Conclusions of Fact.

Joe E. Alexander was in the employ of the appellant at Sherman, and a part of his duties was to put fuel oil in its locomotives. In the performance of this duty, on the night of November 8, 1906, he climbed upon the tender, pulled the spout down, and gave oil to the tender of the engine. After oiling the engine he stepped down from his position onto the top of an oil box, the top of which was sloping so as to shed water, and on which grease had been permitted to accumulate and the box top to become slippery, causing his feet to slip from under him, and causing Alexander to fall to the ground with great force and violence, resulting in his death. The defendant was guilty of negligence in permitting the top of said box to become greasy and slippery, and such negligence was the proximate cause of Alexander's injuries and death. Joe E. Alexander descended from the tender in the usual way, and was not guilty of contributory negligence, and did not assume the risk. By the death of said Alexander appellees sustained damage in the amount of the verdict and judgment.

Conclusions of Law.

On a former day of the present term we certified the controlling questions in the case to the Supreme Court, and that court, in an opinion delivered June 9, 1909, answered these questions in favor of appellees.

The first, second, third, fifth, sixth, and seventh assignments of error are disposed of adversely to appellant by the opinion of the Supreme Court in answering the certified questions.

The evidence fairly supports the finding of the jury, and the assignments of error challenging the verdict as being without evidence to support it are not sustained.

It is contended that the verdict of the jury in allowing the plaintiff Mary Cherry $500 is excessive, and is without evidence to support it. Mrs. Cherry was about 19 years

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old November 8, 1906, the date of her father's death. She was unmarried at that time, and a member of her father's family. The father turned all of his earnings over to Eliza Alexander, his wife, and the mother of Mary Cherry, to be used in support of the family. Mrs. Cherry was married May 19, 1907, after her father's death. The verdict was for $6,000, which the jury apportioned among the plaintiffs; Mrs. Cherry's portion being $500. The facts justified the submission of the issue as to whether each of the plaintiffs has suffered loss, and the verdict as a whole is not complained of as excessive. In such case the appellant cannot be heard to complain of the manner in which the verdict is apportioned among the plaintiffs. Railway Co. v. Johnson, 10 Tex. Civ. App. 254, 31 S. W. 259; Railway Co. v. Munn (Tex. Civ. App.) 102 S. W. 442; T. & P. Ry. Co. v. Johnson (Tex. Civ. App.) 106 S. W. 773.

The tenth and eleventh assignments are grouped, and complain of the admission of certain evidence of J. B. Martin. This witness testified by deposition, and to a certain interrogatory he answered as follows: "Alexander was so slow in giving us oil that the engineer would hurry him. He would say: 'Hurry up, old man; you are laying us out'—or something like that. Alexander would return no answer." Also the part of the answer reading, "As he always had to hurry him." Again parts of the answer of said witness to cross-interrogatories propounded by defendant were read by plaintiff as follows: To the first cross-interrogatory, viz.: "Engineer Manning, when Alexander would give us oil, would hurry him, but I am not really sure whether he hurried him that night or not." Also the following part of the same answer: "What the statement says about him being slow and awkward, I would rather say he seemed not like a practical man for that place, as he was so slow he very often delayed us at that point." Also the following part of same answer: "Mr. Alexander was a little slow and awkward, and I have heard Mr. Manning tell him to hurry up, or something like that. Nothing that I heard was said that night." The entire answer to the eighteenth interrogatory to the witness was read in evidence as follows: "Alexander was so slow in giving us oil that the engineer would hurry him. He would say, 'Hurry up, old man; you are laying us out'—or something like that. Alexander would return no answer. Now I do not remember that the engineer said anything to him that night, though he might have done so, as he always had to hurry him." The objection to the evidence was that it was irrelevant and immaterial. The objections were overruled, and the evidence admitted. In view of the fact that Martin, who testified that the engineer hurried deceased in the performance of his duties, was not positive whether or not the engineer hurried deceased on the occasion that deceased slipped and fell from the locomotive, no reversible error is shown by the admission of the evidence.

Again, the testimony, in our opinion, was admissible on the issue of contributory negligence, and as a part of the res gestæ.

While W. S. Manning was on the witness stand, and after having testified that he was the engineer in charge of the engine, and J. B. Martin was his fireman at the time Alexander was injured, and that he (Manning) did not know whether said Martin was at that time in attendance upon the trial or not, they then asked said witness the following question: "Has he (Martin) been here in attendance on the court?" The witness answered, "Yes, sir." Plaintiff then asked: "When did you last see him here?" The witness answered: "I could not tell that. We all came up here together." Plaintiffs then asked: "Is he (Martin) here now or not?" The witness answered, "I could not tell you." Plaintiffs then asked: "Was he sworn with the witnesses this morning?" The witness answered, "He was not here this morning." Plaintiffs then asked said Manning this question: "Is Mr. Martin still in the employment of the company?" and the witness answered, "Yes, sir; he is still in the employment of the Houston & Texas Central as far as I know." Defendant objected to each of these questions as immaterial and irrelevant, which objections were overruled, to which ruling defendant excepted. The court's action in overruling these objections and admitting this evidence does not constitute reversible error. Nor do the remarks of counsel for appellee, made in his closing argument to the jury, constitute reversible error, wherein he used language as follows: "Gentlemen of the jury, you do not know under what difficulties we have labored in this case. The only eyewitnesses to the death of Joe Alexander were J. B. Martin, fireman, and W. S. Manning, engineer. It is uncertain that Manning, the engineer, saw him fall. He says he saw a shadow through the window. Both Manning and Martin are still in the employ of the company. * * * We have been compelled to go into the camps of the enemy and to corkscrew and pull the testimony from the unwilling witnesses of the enemy. * * * You could see that Manning was adverse when he was on the stand; for, when I asked him whether or not the witness J. B. Martin was here, you saw how he squirmed and turned, and finally looked over at his attorneys, and said he didn't know, but I finally forced him to admit that Martin had been here, but on yesterday had disappeared. Martin, one of the two eyewitnesses to the accident, was brought here as one of defendant's witnesses, and remained a day or two, but when the case

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was tried, he had disappeared. That is the kind of thing the plaintiffs have had to contend with in this case." Appellee had taken the deposition of J. B. Martin. Afterwards he was brought to Sherman by appellant as a witness, and was in attendance upon the court, and disappeared before the trial was over. No objection was made by defendant at the time to the argument, and no request was made, in writing or otherwise, for an instruction to the jury to disregard the same.

Finding no reversible error in the record, the judgment is affirmed.

HARVEY v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. On Motion for Rehearing, Oct. 13, 1909.)

1. CRIMINAL LAW (§ 1063*)—RECORD—MOTION FOR NEW TRIAL—NECESSITY.

Errors in instructions must be reserved in a motion for new trial to be available on appeal, and in absence of a motion for a new trial in the record such errors will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683; Dec. Dig. § 1063.*]

On Motion for Rehearing.

2. CRIMINAL LAW (§ 1088*)—APPEAL—RECORD—MOTION FOR NEW TRIAL.

A motion for a new trial cannot be considered as a part of the record, unless it is filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2790; Dec. Dig. § 1088.*]

Appeal from Knox County Court; J. H. Milam, Judge.

F. B. Harvey was convicted of willfully exposing his person, and he appeals. Affirmed.

See, also, 121 S. W. 501.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of willfully exposing his person, and his punishment assessed at a fine of $10.

We find no motion for a new trial in the record. We find an assignment of errors, but an assignment of errors has no place in this court. All errors in the charge must be reserved in a motion for a new trial. The assignment of errors is not filed in the lower court. In the absence of motion for a new trial, there is nothing in this record authorizing a review.

The judgment is affirmed.

On Motion for Rehearing.

This case was affirmed at the last term of this court, and now comes before us on motion for rehearing.

Appellant contends there is a motion for a new trial in the record. There is an unsigned portion of what purports to be a motion for a new trial, though it does not appear to have been filed, and is indexed as an assignment of errors. Unless a motion for new trial is filed, it cannot be reviewed by us.

The motion for rehearing is accordingly overruled.

Ex parte KEELING.

(Court of Criminal Appeals of Texas. June 24, 1908.)

1. MUNICIPAL CORPORATIONS (§ 18*)—GROUNDS FOR RELIEF—VALIDITY OF MUNICIPAL CORPORATION—REMEDY.

The legality of the corporate existence of a city and the election and incumbency of its officers, including respondent, restraining relator under a capias, may only be attacked in quo warranto, under Rev. St. 1895, art. 4343, and may not be inquired into by habeas corpus for the release of one from arrest under an ordinance of the city and commitment thereunder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 41–44; Dec. Dig. § 18.*]

2. MUNICIPAL CORPORATIONS (§ 106*)—ORDINANCES—ENACTING CLAUSE.

The enacting clause of an ordinance of the city of Calvert, in the form prescribed by Rev. St. 1895, art. 559, providing that the style of ordinances shall be, "Be it ordained by the city council of the city of ———" (inserting the name of the city), is sufficient, though the corporate name of the city is the "Mayor, Aldermen, and Inhabitants of the City of Calvert," and the word "Calvert" alone is used.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 224; Dec. Dig. § 106.*]

3. MUNICIPAL CORPORATIONS (§ 21*)—HABEAS CORPUS (§ 32*)—NAMES—VALIDITY.

Where for more than 30 years a city continuously used a certain name as that of the city in all official acts, though occasionally with the added word "Texas," the name was that of the city in fact, and the arrest and detention of one for violating an ordinance adopted by the city under such name was under color of authority, and he could not obtain his discharge on habeas corpus.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 8; Dec. Dig. § 21;* Habeas Corpus, Dec. Dig. § 32.*]

Appeal from Robertson County Court; J. W. Woods, Judge.

Habeas corpus proceedings, on the relation of H. A. Keeling, for his release from an arrest under a city ordinance and commitment thereunder. From a judgment remanding relator to the custody of the city marshal, he appeals. Affirmed.

J. E. Bishop and Hudson & Wilson, for relator. Lane & Woods and R. W. Purdom, for respondent. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The relator was arrested by C. R. Lovett, city marshal of the city of Calvert, on the 13th day of July, 1907, by virtue of a capias which purported to be issued by the corporation court of the city of Calvert. Relator sued out a writ of habeas

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corpus before the county judge of Robertson county, which was granted, and the hearing thereof set for the 23d day of July, 1907. On a hearing, relator was remanded to the custody of the city marshal.

The relator's assignment of error, and the only one, is as follows: "The court erred in remanding the defendant, H. A. Keeling, to the custody of C. R. Lovett, city marshal of the pretended city of Calvert, in this: Because the complaint upon which the capias in this case is founded, and by virtue of which the defendant is held in custody, is illegal, null, and void, and of no force or effect in law, because said complaint charges the defendant, H. A. Keeling, with the offense of violating a stock law ordinance of the pretended city of Calvert, Tex., which purports to have been passed and approved by the pretended mayor and city council of the pretended city of Calvert, Tex., on the 3d of July, 1907, when there does not exist in the law of the state of Texas any such municipal corporation known by the name of the city of Calvert, Tex.; because said ordinance does not have prefixed thereto a proper legal enacting clause, and was not passed by any body of persons or officials, or any city council, or municipal corporation having power or authority to make complaints and issue warrants of arrest, or to pass ordinances governing any municipal corporation known to the law of the state of Texas; because said complaint purports to have been made by the city marshal of the city of Calvert, and said ordinance purports to have been passed and approved by the mayor and city council of Calvert, Tex., when there is not now and never was a municipal corporation known to the law of the state of Texas by the name of the city of Calvert, Tex."

It appears from the evidence that in 1871 the city of Calvert was incorporated by the Legislature of the state of Texas. The act of incorporation purports to be an act to incorporate the city of Calvert, in Robertson county, and by its terms ordains that the inhabitants of the city of Calvert, in Robertson county, shall be and they are declared a body politic and corporate under the name and style of the "Mayor, Aldermen and Inhabitants of the City of Calvert," and provides that they shall be known in law by this name and shall have the usual powers of corporations. On the 8th day of May, 1896, the city council of Calvert passed an ordinance accepting the provisions of the Revised Statutes of Texas relating to cities, in which, in substance, it was decided to surrender the special charter of the city and to operate under the general laws of the state. By this ordinance, however, it was provided that they were to retain the corporate name the "Mayor, Aldermen and Inhabitants of the City of Calvert." The particular ordinance under which relator was arrested contained an enacting clause as follows: "Be it ordained by the city council of the city of Calvert," etc., and was approved on the 3d day of July, 1907. The testimony showed, without dispute, that Calvert had been called and known by the name "city of Calvert," and all ordinances and resolutions passed and adopted had been in the name of the "city of Calvert," and that for many years all elections had been held, all the officers elected, all taxes levied and collected, all bonds issued, all trials had and fines imposed and collected, all ordinances promulgated by authority of the mayor and city council of the city of Calvert, and all mail addressed to Calvert, Tex.; that all freight and express shipped to persons in said municipal corporation is shipped to Calvert, Tex.; that the depot is known as Calvert, Tex., and the post office is known as Calvert, Tex. Its existence and status as a municipality is shown to have been recognized without dispute for quite 30 years.

The ordinance is claimed to be invalid, in the first place, because it is urged that its principal officers were not elected, and its laws have not been enacted, under the name of the "Mayor, Aldermen and Inhabitants of the City of Calvert," and for the reason that the addition of the word "Texas," after the name "city of Calvert," is in addition thereto, unknown to its creation, and in fact forms no part or parcel of its real name. We think that relator was properly remanded, and that in such proceeding as this the legality of the corporate existence of the city of Calvert, and the election and incumbency of its officers, cannot be inquired into; but the only way that such an attack could be made would be in the nature of quo warranto proceedings. Rev. St. 1895, art. 4343; Brennan v. Bradshaw, 53 Tex. 330, 37 Am. Rep. 758; White v. Quanah (Tex. Civ. App.) 27 S. W. 840; McCrary v. Comanche (Tex. Civ. App.) 34 S. W. 680; Higgins v. Bordages (Tex. Civ. App.) 28 S. W. 350; Eustis v. Henrietta (Tex. Civ. App.) 37 S. W. 636; Troutman v. McClesky, 7 Tex. Civ. App. 561, 27 S. W. 173; State v. Birch, 186 Mo. 205, 85 S. W. 361; State ex rel. Chandler v. Huff, 105 Mo. App. 354, 79 S. W. 1010; Town of Decorah v. Gillis, 10 Iowa, 234; Town of Fredericktown v. Fox, 84 Mo. 59; Judson v. Plattsburg, Fed. Cas. No. 7,570, 3 Dill. 181; Harris v. Nesbit, 24 Ala. 398; Hamilton v. City of Carthage, 24 Ill. 22; Tisdale v. Town of Minonk, 46 Ill. 9; Railway v. Shires, 108 Ill. 617; City of Billings v. Dunnaway, 54 Mo. App. 1; City of Clarence v. Patrick, 54 Mo. App. 462; State v. Whitney, 41 Neb. 613, 59 N. W. 884.

We think there is no valid objection to the enacting clause, and hold that same is not subject to attack. Article 559, Rev. St. 1895, provides that the style of all ordinances shall be: "Be it ordained by the city coun-

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cil of the city of ———" (inserting the name of the city). The enacting clause in this case follows the statute literally. According to relator's contention, to have made the enacting clause valid, it should have read: "Be it ordained by the city council of the city of the 'Mayor, Aldermen and Inhabitants of the City of Calvert.'" We think, in any event, such mere literalism is not to be seriously treated.

Again, we think the due arrest and detention of relator might be upheld on the proposition that the city of Calvert has for more than 30 years continuously used the name of the "city of Calvert" in all the official acts and proclamations, and has by custom, usage, and prescription acquired said corporate name in fact. 7 A. & E. Enc. of L. (2d Ed.) p. 685, b (2); Id. p. 685 (3); Brennan v. Bradshaw, 53 Tex. 330, 37 Am. Rep. 758; Town of Henderson v. Davis, 106 N. C. 88, 11 S. E. 573; West v. City of Columbus, 20 Kan. 633; State ex rel. Chandler v. Huff, 105 Mo. App. 354, 79 S. W. 1010; 20 A. & E. Enc. of L. (2d Ed.) "Municipal Corp." 11, p. 1143, and notes. Nor do we think that the addition of the word "Texas" occasionally, or even continuously, would make any difference. This word would be merely descriptive of the locus of said corporation, and would not alter its corporate name or affect its legality; and the use of the name "city of Calvert" continuously for all these years in all its official acts and proclamations substantially estops said corporation and all of its members from questioning the legality of said corporate name.

From what has been said, it follows that we think the arrest and detention of relator was under color of authority, in any event, and that he is without remedy by writ of habeas corpus, and he is therefore remanded to the custody of the city marshal.

Remanded to custody.

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BANK OF CERULEAN SPRINGS et al. v. GARDNER et al.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. PLEDGES (§ 57*)—FORECLOSURE—NOTICE—PUBLICATION—STATUTES.

St. § 14a (Russell's St. § 24), provides that, in addition to other notices, all judicial sales shall be advertised in some newspaper published in the county unless the appraised value of the property is less than $100. *Held*, that such section was applicable to the sale of a land note assigned as collateral security for a loan and ordered sold by a foreclosure decree.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 57.*]

2. JUDGMENT (§ 426*) — PLEDGES — FORECLOSURE — INSUFFICIENT PUBLICATION — VACATION.

That a judgment foreclosing a pledge of a certain land note authorized a sale thereof after advertisement by written handbills posted within the county, and did not require publication of notice in a newspaper as provided by St. § 14a (Russell's St. § 24), did not make the judgment void, but voidable only on exceptions regularly filed thereto, or in a suit to set the same aside for fraud or unavoidable casualty or misfortune, preventing the filing of exceptions as provided by Civ. Code Prac. § 518, subsecs. 4, 7.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 426.*]

3. JUDGMENT (§ 460*) — VACATION — FRAUD — UNAVOIDABLE CASUALTY OR MISFORTUNE.

A petition for the vacation of a judgment directing the sale of collaterals charging that the judgment was erroneous, in that it failed to direct the advertisement of the sale in a newspaper published in the county and that the collateral was of a value of more than $100, to wit, $600, but that by fraud or mistake it was ordered sold without being advertised or appraised as required by law and without plaintiff's knowledge, did not charge facts sufficient to entitle plaintiff to the vacation of the judgment for fraud, casualty, or unavoidable misfortune.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879–883; Dec. Dig. § 460.*]

4. APPEAL AND ERROR (§ 1178*)—REVERSAL—REMAND—PLEADING—AMENDMENT.

Where, on appeal from a decree setting aside a judgment for the sale of collaterals, the court held that the sale was void, and that plaintiff's petition was insufficient to justify a vacation of the decree for fraud, unavoidable casualty, or mistake, plaintiff, on remand, would be permitted to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4616–4618; Dec. Dig. § 1178.*]

Appeal from Circuit Court, Trigg County.

"To be officially reported."

Action by Jennie A. Gardner and others against the Bank of Cerulean Springs and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Crenshaw & Son, for appellants. John F. Kelley, for appellees.

CLAY, C. On February 20, 1906, R. F. Wade executed to appellant Bank of Cerulean Springs his promissory note for the sum of $100, with appellee Jennie A. Gardner as surety. To secure the payment of the note aforesaid, appellee deposited with appellant bank a $600 land note, which had formerly been executed by R. F. Wade to Mrs. J. G. Gardner, and transferred by her to appellee on February 14, 1906. On January 13, 1908, appellant Bank of Cerulean Springs instituted an action against R. F. Wade and Jennie A. Gardner, who was then Jennie A. Wade on said note of $100, and asked for a sale of the $600 land note which had been deposited as collateral security with the bank. Upon the failure of the defendants to answer and make defense, judgment was awarded against them by default on January 29, 1908. The judgment directed that the $600 land note be sold by the master commissioner of that court, after advertisement by written handbills posted in front of the courthouse door in Cadiz, Ky., and three other public places, at least 10 days before the date of the sale. Pursuant to the judgment of the court, the sale was advertised and the note sold on March 9, 1908, and the Bank of Cerulean Springs, plaintiff in this action, became the purchaser for the sum of $125.35, the amount of its debt, interest, and costs. The sale was duly reported by the master commissioner at following term of the court, and left open for exceptions. No exceptions being filed thereto, the court on May 24, 1908, confirmed the sale and ordered the note to be transferred by the commissioner to the purchaser, and further directed that the cause be stricken from the docket. The note was transferred to the bank, and thereafter sold and transferred to appellant R. M. Wooldridge. This action was instituted in the Trigg circuit court on the 3d day of June, 1908, by Jennie A. Gardner, formerly Jennie A. Wade, for the purpose of setting aside the judgment of the Trigg circuit court rendered on the 29th day of January, 1908, and the sale of the $600 land note, made in pursuance to said judgment.

The petition charges that said judgment was erroneous, in that it failed to direct the advertisement of the collateral securities held by the Bank of Cerulean Springs in the Cadiz Record, a weekly newspaper published in Trigg county and the paper having the largest circulation of any paper published therein, as required by law, that said note was of the value of more than $100, being of the value of $600, but that by fraud or mistake the same was ordered sold by the judgment without being advertised or appraised, as required by law, and without the knowledge of plaintiff Jennie A. Gardner. The petition also charges that the judgment referred to is erroneous and defective, and that the sale thereunder passed no title to the purchaser. The Bank of Cerulean Springs defended on the ground that Jennie A. Gardner was a party defendant to the original suit, and was bound by the orders therein entered; that she failed to file any excep-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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tions to the report of sale; that, if the judgment was erroneous, she should have moved to set the same aside, and, if said motion was not sustained, she should have appealed to this court. On June 6, 1908, R. M. Wooldridge, to whom the $600 land note in question had been assigned, instituted an action in the Trigg circuit court to recover thereon and enforce his lien upon the land securing the note. The defendant in that action, R. F. Wade, answered, setting up substantially the same facts as were set up by Jennie A. Gardner in her action against the Bank of Cerulean Springs, thus putting in issue the ownership of the note. The two cases above referred to were consolidated, and upon the hearing thereof the court entered a judgment directing that the order approving the sale of the $600 land note and the further order directing the master commissioner to transfer and assign said note to the Bank of Cerulean Springs be set aside and held for naught. From this judgment the Bank of Cerulean Springs and R. M. Wooldridge prosecute this appeal.

The statute with which it is claimed the order of sale did not comply is section 14a, Ky. St. (Russell's St. § 24), and is as follows: "That in addition to the notices now required by law to be posted all public sales of any kind of property, when sold under execution, judgment or decree, shall, unless otherwise agreed upon by the parties to such execution, judgment or decree, be advertised in some newspaper published in the county of such sale, if any newspaper be therein published, at least once a week for three consecutive weeks next preceding the day of sale: Provided, that in counties where there is a daily newspaper published or in general circulation, publication of such notice of sale for three consecutive days next preceding the day of sale shall be sufficient. The advertisement shall state the time, place and terms of sale and shall give a description of the property to be sold: Provided, that the newspaper advertisement herein provided for shall not be necessary where the appraised value of the property to be sold is less than one hundred dollars, to be ascertained by appraisement in each case as now provided by law." There can be no question that the above section applies to property of the kind sold under the judgment in question. By its express terms it applies to any kind of property when sold under execution, judgment, or decree. However, the trial court erred in holding that the judgment of sale was void because it did not direct that the property be advertised in conformity with the statute. We have carefully examined the decisions of this court, and, while it has been frequently held that a failure to follow in a material particular the statutes regulating the sale of property is ground for setting aside the sale, where exceptions are regularly filed thereto, it has never been held that such failure renders the judgment void. We therefore conclude that, inasmuch as the court had jurisdiction of the parties and of the subject-matter, the judgment was simply erroneous, and such as should have been set aside upon proper exceptions being filed. If such exceptions had been filed and the trial court had declined to set the judgment aside, such refusal would have been ground for reversal by this court. As the judgment is not void, and as appellee failed to file exceptions, her only mode of relief now is to proceed under section 518 of the Civil Code of Practice. She can do this by alleging and proving facts showing that fraud was practiced by the appellant in obtaining the judgment in question, as provided by subsection 4, or unavoidable casualty or misfortune that prevented her from appearing and defending by filing exceptions to the report of sale in the original action brought by appellant as provided by subsection 7. Her petition in the case before us is not sufficient to enable her to avail herself of the above grounds of relief. Upon the return of the case, the court will permit appellee to amend her petition if she so desires.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

STEWART et al. v. BLUE GRASS CANNING CO.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. APPEAL AND ERROR (§ 937*) — PRESUMPTIONS.

Where the record shows a supersedeas bond, it will be presumed that a supersedeas issued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3794; Dec. Dig. § 937.*]

2. APPEAL AND ERROR (§ 1185*)—JUDGMENT—CORRECTION.

Where, on affirmance of the judgment, appellee was entitled as a matter of right to 10 per cent. damages, the failure of the clerk to so enter the judgment was a clerical mistake, which might be corrected after the term on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4638, 4640; Dec. Dig. § 1185.*]

"To be officially reported."

Motion for damages. Granted.

For former opinions, see 117 S. W. 401; 120 S. W. 375.

HOBSON, J. The record shows a supersedeas bond. It will be presumed a supersedeas issued. When the judgment was affirmed, the appellee was entitled as a matter of right to 10 per cent. damages. This appeared from the record. The failure of the clerk to so enter the judgment was a clerical misprision, which may be corrected after the term on motion. This has been the uniform ruling of the court.

The motion is sustained.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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RICE et al. v. MUSIC et al.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT.

Where, notwithstanding a different conclusion might have been reached, the evidence is so nearly balanced that the appellate court does not feel justified in disturbing the chancellor's finding, it will be upheld.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Johnson County.

"Not to be officially reported."

Action between George B. Rice and others and Newton Music and others. From the judgment Rice and such others appeal. Affirmed.

Vaughn, Howes & Howes, for appellants. M. C. Kirk and Wells & Wells, for appellees.

O'REAR, J. Newton Music was indebted as principal on sale bonds to John C. Ward for $600. Music had bought in his own land at a foreclosure sale for that sum, and the money was payable to Ward, who had advanced it for Music in discharge of the bonds. To indemnify Ward, Music assigned his bid on the land and obligated himself that, if he did not pay the $600 and interest in six months, the land was to belong to Ward. Music then began to arrange for the redemption of his land. He contracted to sell to S. S. Cox the timber on it for $600. To this arrangement Ward assented. The following written contract was entered between them:

"Article of agreement made and entered into this March 27th, 1905, by and between Newton Music, Julia A. Music, and John C. Ward, parties of the first part, and S. S. Cox, party of the second part. The parties of the first part this day sell to the party of the second part all the timber on the Newton Music farm from eight inches and upward, except black oak and the black oak from twelve inches and upward and one locust tree and six board trees, which sale is made for and in consideration of $600.00 (six hundred dollars), with six per cent. interest from date, which amount is to be paid to the above named John C. Ward and go as a credit on sale bill on said land in favor of said John C. Ward and A. M. Glenn and against Newton Music, and said A. M. Glenn being a party of buying a note of G. P. Rice and the said S. S. Cox is to pay five cents on each cross tie before loaded on cars at Railroad, and $1.00 on each thousand feet of lumber before loaded on cars at railroad and one dollar on each cord of tan bark when loaded on cars at railroad till the above amount of $600.00 is paid, which amount is to be paid in six months from this date, and the said boundary of land is lying and being in the State of Kentucky and county of Johnson. * * * [Description of land.] And the said S. S. Cox is to have four years to remove said timber and is to have the privilege to build any building for himself or workhands and such building is to be left on said land and is to be delivered back to the parties of the first part at the end of four years and the said Newton Music, Julia Music and John C. Ward this day agree to let the said S. S. Cox enter on said land and cut, peal, log, saw and sell all above named timber, and attachments thereto and is to give all mill yard, log yard and lumber yard between the Newton Music residence and County road where or near where the saw mill once set and anywhere up the Bear Branch, except in James Music's garden to the head of the Bear Branch on said land, and the parties of the first part gives to the party of the second part all the timber and the privileges hereinbefore mentioned for and in consideration of $600.00 hereinbefore mentioned, and which is secured by note to John C. Ward for the purpose of redeeming the said Newton Music land and in case the $600.00 with interest to John C. Ward, or order is not paid within six months from date all of the within is to be null and void all of which is agreed to by both parties.

"Given under our hand this March 27th. 1905.

his
"Newton x Music.
mark
her
"Julia x Music.
mark
"John C. Ward.
"S. S. Cox."

Cox failed to pay any part of the $600 to Ward, though he had cut and moved much of the timber. He was selling the ties and some of the other lumber to Geo. B. Rice, who had advanced Cox more money than he was entitled to, and had other timber transactions with him in which Cox had been advanced more than he had delivered the lumber for. A few days before the six months had expired, Cox got Rice to advance enough more to pay off the Ward debt. Music was anxious that some such arrangement should be effected, as he feared that he would lose his land, as well as timber. Rice now claims that Music asked him to buy the bonds of Ward. But that would not have helped Music out of his predicament, further than as Rice might indulge him. The circuit court found from the evidence that Rice advanced the money to Ward on account of Cox, and that it operated to extinguish the sale bonds, and Cox's debt to Music. While a different conclusion might have been reached upon the evidence, it is so nearly balanced that we do not feel justified in disturbing the chancellor's finding of the fact.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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WRIGHT v. HAWES et al.

(Court of Appeals of Kentucky. Oct. 12, 1909.)

1. WITNESSES (§ 158*)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.

Where defendants obligated themselves to indemnify plaintiff in her suretyship for another since deceased, the delivery of their contract constituted a transaction with plaintiff; and not with the other, and defendants could testify to the time they signed the contract; that question bearing on the question of delivery, Civ. Code Prac. § 606, providing that one cannot testify for himself concerning a transaction with one who is dead, not being applicable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 665; Dec. Dig. § 158.*]

2. INDEMNITY (§ 3*)—CONSIDERATION.

Indemnitors whose contract is not coincident with the principal obligation are not bound, where there is no other consideration for it.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 4; Dec. Dig. § 3.*]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Mary C. Wright against W. S. Hawes and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

La Vega Clements and Miller & Todd, for appellant. Brown & Nuckols, Albert B. Oberst, and Little & Slack, for appellees.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 110 S. W. 361, 33 Ky. Law Rep. 457, 17 L. R. A. (N. S.) 1122. By the first appeal all questions between appellant Mary C. Wright and the Daviess County Bank & Trust Company were determined, and all questions between appellant and appellees W. S. Hawes and J. L. Thompson were left open for future determination. Upon the return of the case to the lower court the appellant, Mary C. Wright, paid to E. B. Anderson, assignee of the Daviess County Bank & Trust Company, the balance due on the note she had signed for Malcolm Thompson, amounting to $1,450.77. On February 9, 1909, appellant filed an amended petition against appellees Hawes and Thompson, pleading payment of the balance due to the assignee. On February 13, 1909, appellant moved to set aside so much of the former order of the lower court as overruled her exceptions to the depositions of appellees. On February 25, 1909, the court entered an order overruling this motion, and rendered judgment dismissing the action against appellees and awarding costs against appellant. From that judgment this appeal is prosecuted.

In its opinion on the former appeal this court said: "The indemnitors, Hawes and Thompson, were never bound upon their contract, if it was not executed coincidentally with the principal obligation, as it is not claimed that there was other consideration for it; for, if Mrs. Wright had already become bound (or her notes pledged, which is the same in principle) upon Malcolm Thompson's debt to the bank when the agreement of indemnity was entered into, then she undertook nothing additional, parted with nothing, being moved thereto by the understanding of Hawes and Thompson. Their agreement must have a consideration of its own to support it. There is none in this case, unless it was contemporaneous with Mrs. Wright's pledging her notes, and her agreement to do so was based in part, at least, upon that fact. Whether it was executed when or after Mrs. Wright became bound was not decided by the circuit court. That question will be for decision upon the return of the case."

It will be seen from the foregoing extract from our former opinion that the liability of appellees upon the indemnity contract depends upon whether or not it was signed and delivered to appellant simultaneously with the incurring by appellant of her liability for Malcolm Thompson to the bank. Appellant's contention on this appeal is that appellees are incompetent to testify, for the reason that they testified to a transaction with Malcolm Thompson, who was dead at the time the testimony was offered. It may be conceded that under section 606, Civ. Code Prac., they could not testify to anything that was said or done by Malcolm Thompson, or to any part that he played in the transaction in question; but, leaving out all the testimony with reference to things that he said or did, each of the appellees testified to the time that he signed the indemnity contract. Manifestly the indemnity contract did not take effect until its delivery, or, if delivered without being signed, it did not take effect at all. The time when appellees signed the contract bore directly upon the question of the time of the delivery of the contract. The delivery of the contract to appellant constituted a transaction with her, and not with Malcolm Thompson. As said by this court in the case of Hardin's Adm'r v. Taylor, 78 Ky. 593, the evident design of section 606 was to place the parties to an action, or those interested therein, on equal footing when their rights are being passed upon by the court. Appellant was alive at the time of the delivery, and there was nothing to prevent her from testifying to the date when the transaction was completed. In testifying to the time of signing the indemnity contract appellees did not testify to a transaction with Malcolm Thompson, who was dead, but to a transaction with Mary C. Wright, who was then alive. If Mary C. Wright were dead, we would necessarily hold that the transaction was with her and that neither of the appellees could testify. As appellees testified that the contract in question was not signed until some time after February 12, 1903, it is perfectly clear that the contract was not signed and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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delivered on February 12, 1908. That being the case, it follows, as said in our former opinion, that appellees were not bound on the contract in question. As there was no evidence for appellant except the contract itself, and as appellees both testified that the contract was signed about a month after it was dated, the trial court properly decided in favor of appellees.

In view of this conclusion, we deem it unnecessary to pass upon the other questions raised.

Judgment affirmed.

ALLEN v. NEALE et al.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

CORPORATIONS (§ 339½*)—OFFICERS—LIABILITY FOR FALSE STATEMENTS.

Officers of a corporation to escape liability under Ky. St. 1909, § 549 (Russell's St. § 2133), making them liable for knowingly causing to be published any false statement of the condition of the corporation, must exercise reasonable diligence, and must be presumed to know all the facts which ordinary diligence would have made known to them, and may not close their eyes to the existence of facts which they ought to know, and where the statements made by them are false, and where they so give out statements which are false, persons dealing with the corporation may recover from them the damages suffered by relying on them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1468–1472; Dec. Dig. § 339½.*]

Appeal from Circuit Court, Graves County.

"To be officially reported."

Action by Vick Allen against H. C. Neale and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Robbins & Thomas and R. G. Robbins, for appellant. W. J. Webb and W. T. Weaks, for appellees.

BARKER, J. This action was instituted by the appellant Vick Allen to recover of the appellees, who are the officers and directors of the May Pants Company, the sum of $1,500 lost by him in the purchase of worthless stock in the company. The action is based on section 549 of the Kentucky Statutes of 1909 (Russell's St. § 2133), which is as follows: "If the directors or officers of any corporation shall knowingly cause to be published or given out any statement or report of the condition or business of the corporation that is false in any material respect, the officers and directors causing such report or statement to be published or given out, or assenting thereto, shall be jointly and severally individually liable for any loss or damage resulting therefrom." In substance, the petition charges that in January, 1907, the appellant bought 10 shares of the capital stock of the May Pants Company from one Harve Harris, for which he paid the sum of $1,500; that at the time he bought the stock it was absolutely worthless. It is also charged that the appellees were president, vice president, general manager, and secretary of the May Pants Company, and had its business under their control and in their charge; that in November, 1906, a short while prior to the purchase of the stock, the appellees made and published and gave out and assented to the giving out of a false and fraudulent statement, whereby it was made to appear that the common stock of the May Pants Company was worth $161 per share; that at the time this statement was published and given out it was false in a material respect, and, instead of being worth $161 per share, was absolutely worthless; that the appellees (defendants) made and published this false representation for the purpose of deceiving the public as to the true value of the stock. All of the material allegations of the petition were denied, and a trial before a jury resulted in a verdict for the defendants (appellees), and from that judgment this appeal has been prosecuted.

It is both conceded by counsel and abundantly established by the evidence that on November 1, 1906, the officers of the corporation had drawn off a trial balance or statement of the affairs of the company, which showed that the common stock was worth $161 per share. It is also conceded by counsel and shown by the evidence that at this time the stock was worth nothing. In January, 1907, when the appellant was investigating the wisdom of purchasing the stock from Harve Harris, he was shown the statement of November 1, 1906, and he claims that several of the defendants—notably the president, Bowden—told him that the stock was worth $161 per share, and that he relied on the truth of these statements in making the purchase. In December, 1906, C. A. McDonald, who was the general manager of the corporation, resigned and went to California for his health. In May, 1907, another trial balance was taken from the books, and another statement was made showing that the corporation was still in a flourishing condition, and that the stock was worth something more than $161 per share. In August, 1907, the company collapsed wholly, and, as said before, it is now conceded that on the 1st of November, 1906, and at all times thereafter, the corporation was wholly insolvent and the stock worthless.

There is no sort of doubt that on the 1st of November, 1907, all the defendants knew McDonald had padded his statements to the extent of about $20,000 so as to make it appear to be more successful than it was, and thus satisfy the stockholders and keep them so encouraged that they would indorse the paper of the company and sustain its credit in bank. It is insisted, however, that this was so small

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an amount that no one imagined that it seriously affected the solvency of the corporation, and that, in spite of the known fact that the statement was falsely and fraudulently padded, they all thought the corporation was abundantly solvent and making money. After the resignation of McDonald, E. G. Minton, who had theretofore been assistant bookkeeper of the corporation, was made general manager. On May 1, 1907, Minton made a statement of the assets of the corporation, but, in order to protect himself from being put in what he considered a false attitude with reference to the corporation, he drew up a memorial of the facts which he required the president and vice president to sign. This shows that these officers thoroughly understood that McDonald had falsely and fraudulently padded the statement given out in November, 1906. It is as follows: "This is to certify that we have been advised by E. G. Minton that the above statement represents the true condition of the May Pants Company's business on May 1, 1907; also, that C. A. McDonald severed his connection with said company on or about December 1, 1906, at which time he advised us, as well as E. G. Minton, that the stock of the said May Pants was watered to the extent of 10 per cent., or, in other words, was represented to be 10 per cent. more than it actually invoiced. Since the organization of the company and up to about December 1, 1906, it had been the duty of Mr. McDonald as general manager of the company to invoice the merchandise stock and other property of the company, and report the results of same to the directors. When we had been advised by Mr. McDonald that the stock had been watered to the extent of 10 per cent., we felt that it would be an easy matter to add a small additional profit to our goods and work this out, but to our great surprise we are advised by E. G. Minton that in invoicing the stock on May 1, 1907, he finds the above to represent the true condition. As president and vice president of the company, we feel it our duty to devise plans and means, if possible, to get the company on sound financial basis, and, in order to do this, it will be absolutely necessary that the true condition be held in the strictest of secrecy. We have every reason to believe that the business can be gotten on good sound financial basis, and for this reason only are we to hold the matter as a secret. We feel in doing this that it is best for the company and every stockholder connected with it. We are also advised by Mr. Minton that the books of the company will naturally have to show an excessive amount of merchandise on hand, in order that the statement recorded thereon, under date of May 1, 1907, will show the company in good sound financial condition. This we have requested him to do, as it will be absolutely necessary for the protection of all concerned. This statement is written at the request of E. G. Minton, and in case of death to either or both of us would serve as an explanation on his part for remaining silent, and his reason for doing so. Signed May 6, 1907. Ben C. Bowden. H. C. Neale."

Upon the trial of the case the court instructed the jury as follows: "The court instructs the jury that if they believe from the evidence before plaintiff bought his stock that the defendants H. C. Neale, B. C. Bowden, E. G. Minton, and C. A. McDonald knowingly caused to be published or given out whilst officers or directors of the May Pants Company any statement or report of the condition or business of that corporation that was false in any material respect, or you believe from the evidence that any of the above-named directors or officers in said company knowingly conveyed to plaintiff Vick Allen any statement or report of the condition of the business of said corporation that was false in any material respect before said plaintiff bought his stock, and you further believe from the evidence that, by reason of any such statement or report, the plaintiff was induced to and did buy stock in said May Pants Company in January, 1907, and that the value of said stock at said time was of less value than paid for by plaintiff, then you will find for plaintiff the difference if anything between what he paid for the stock and what was the real value of the stock at said time not exceeding the sum claimed in the petition, $1,500, and your finding, if against any of the defendants, to be against those of said defendants making such report or statement, and you will find for any one or more of the defendants unless you do believe they made such report or statement." This instruction does not embrace the whole law of the case. City of Franklin, etc., v. Caldwell, 123 Ky. 528, 96 S. W. 605, 29 Ky. Law Rep. 935, involved the liability of the directors of a banking corporation for declaring unearned dividends, under statutes similar in principle to that at bar. There the statutes provided for the liability of any director or directors of a bank who knowingly violated or permitted an officer or employé of the bank to violate any provision of the law relating to banks. And it was insisted that, inasmuch as the directors did not knowingly declare dividends which had not been earned, they were not liable.

In discussing this phase of the case, we said: "To fix the liability of directors of corporations by the strict letter of section 548, Ky. St. 1903, and make them liable for all debts of the corporation if they declare any dividend when it is insolvent, or which would render it insolvent, although in declaring the dividend they acted in good faith based on an honest belief in the correctness of the statements made by the cashier and other officers of the corporation, would be giving to this statute an interpretation not intended by the legislative department in its

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enactment. This section of the statute should be so construed as to limit the liability of directors to the amount of the dividend declared when the facts show that in declaring it they have acted in good faith, and have used ordinary care and diligence in the conduct of the affairs of the institution. This section, when so construed, is not in conflict with, and should be read in connection with, section 598 (section 2187). There is no reason why directors of banks should be held to a less accountability than the directors of other corporations; but, if section 598 is construed to meet the views of counsel for appellee, bank directors would be virtually exempt from liability, however careless they might be in the management of the affairs of the bank. The directors of banks are the only persons who can declare dividends, and section 596 (section 2185), before quoted, provides when they may declare dividends; and, if in violation of this statute a dividend is declared, the directors will not be permitted to shield themselves from liability upon the ground that they did not knowingly violate its provisions. It is the duty of bank directors to use ordinary care to acquaint themselves with the condition of the business of the bank, and to exercise reasonable control and supervision of its officers. That which they ought by proper diligence to have known they will be presumed to have known in a contest between the corporation and those who do business with it, and have the right to believe that its directors have exercised ordinary care and prudence in the management of its affairs." So in the case before us it was the duty of the officers and directors of the May Pants Company to exercise reasonable diligence to understand its condition, and they must be presumed to know all the facts relative to the condition of the corporation which ordinary diligence on their part would have made known to them. Officers and directors of corporations may not close their eyes to the existence of facts which they ought to know, and then say they did not knowingly make false statements if the statements made by them are false. And, if they give out statements which are false in a material respect, those persons who deal with the corporation, or buy its stock based upon such reports, are entitled under the statute to recover for whatever damage they suffered by reason of having relied upon the statements so made and published. The trial court should have added to the instruction given by him the principle above enunciated with reference to the diligence incumbent upon officers and directors in acquiring information of the condition of the corporation for the purpose of making and publishing statements as to its financial condition, and the presumption of law as to their possession of such knowledge.

We do not mean to require of the officers and directors of corporations that they should be expert bookkeepers or financiers, or that they should be infallible in the accuracy of the conclusions reached by them. But we do mean to hold that they shall use ordinary diligence and perspicacity in informing themselves of the true condition of the corporation under their control.

Judgment reversed for proceedings consistent with this opinion.

WILSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 1, 1909.)

1. CRIMINAL LAW (§ 1160*) — APPEAL — REVIEW.

Cr. Code Prac. § 281, providing that the decision of the court on a motion for a new trial shall not be subject to exception, precludes the Court of Appeals from reversing a criminal case on the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. CRIMINAL LAW (§ 593*) — CONTINUANCE — GROUNDS.

Where accused was placed on trial 21 days after the finding of the indictment charging rape, and the evidence justified the belief that prosecutrix was mistaken in the belief that accused was the guilty person, and accused was confined in jail from the time of the finding of the indictment until the trial, and was unable by reason of poverty and ignorance to prepare his case, it was error to refuse a continuance on the ground of the illness of his counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

3. CRIMINAL LAW (§ 1156*)—APPEAL—QUESTIONS REVIEWABLE.

Under the Code, the ruling of the trial court on a motion for a new trial on the ground of misconduct of individuals influencing the jury while deliberating is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1156.*]

Appeal from Circuit Court, Christian County.

"To be officially reported."

Arthur Wilson was convicted of crime, and he appeals. Reversed, and new trial granted.

L. Yonts, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. The appellant, Arthur Wilson, was indicted by the grand jury of Christian county, charged with the offense of rape committed upon the person of Mrs. John T. Watson. To this indictment he pleaded not guilty, but a trial by a petit jury resulted in his being found guilty as charged in the indictment and his punishment fixed at death. Appellant's motion for a new trial having been overruled, he has appealed to this court for the purpose of having the judgment reviewed. When the defendant was brought into court after the indictment was returned, he announced that he had no

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attorney, whereupon the court appointed as counsel for him John Feland, who accepted the appointment and agreed to undertake the defense. The case was then set for the 23d day of March, just three weeks after the indictment was returned. The appellant was a poor, and, apparently, friendless negro, who had been in jail during the whole of the time since his arrest. When the case was called for trial on the 23d day of March, 1909, and after the commonwealth had announced ready for trial, the defendant announced not ready, and moved the court to continue the case on the ground that the attorney appointed for him by the court, John Feland, was sick in bed and unable to conduct the defense; that just before the trial the accused had ascertained this fact and had employed another lawyer, L. Yonts, to defend him; that Yonts was also sick and unable to take care of his interests at that time; that, by reason of these facts, he had been unable to prepare his case for trial, and was not ready to be tried; that he had a valid defense to the charge made against him, and verily believed if given sufficient opportunity to prepare his case he would be acquitted; that no other attorney save and except L. Yonts understood his case sufficiently to protect his interests, and that, he being sick and unable to defend the case properly, the accused felt and verily believed he could not have a fair trial at this term of the court. Although none of the allegations of this affidavit were controverted in any way, the court overruled the motion for a continuance, and the trial resulted as heretofore stated.

The only ground presented by this record sufficient to authorize a reversal of the judgment is the ruling of the trial court in refusing the defendant a continuance in order that his counsel might be present and defend him. That the defendant, a negro, was charged with the crime of rape committed upon the body of a white woman, of itself placed him in great peril. The crime is one which in this state is regarded with such horror that the very charge of it always excites such passion in the community as to make it difficult for the accused to have a fair and impartial trial, or, at least, there is always danger that he will not have a fair and impartial trial. And it is obvious that under these circumstances it was of the utmost importance to the accused that he should be represented by counsel acquainted with his defense and in full health and strength and vigor to present it to the jury. The defendant, as said before, had been in jail continuously. We think we are warranted in presuming that he was densely ignorant, and that the terrors of his surroundings were such as to paralyze the feeble mental faculties he possessed. That the officers in charge of him believed there was danger of his being mobbed if confined in the Hopkinsville jail is shown by the fact that he was sent to Henderson, some 50 miles away, for safe-keeping there. So far as this record shows, there was no adequate preparation made for the defense of the accused, and, if all the evidence introduced for the commonwealth be true (assuming the possibility of mistake on the part of the prosecuting witness in her identification of him), he could not have been guilty of the offense with which he was charged. In order to make this apparent, we will recite the salient facts as shown by the bill of exceptions.

John T. Watson and his wife, the prosecuting witness, on the 11th day of January, 1909, left Hopkinsville and drove some 20 miles south over the Lindsey's mill road for the purpose of collecting weekly payments due on sewing machines from the purchasers. About 4 o'clock in the afternoon they stopped at the cabin of a negro man, Buck Moss, for the purpose of making a collection from him. It was very cold and sleeting, and they went into the negro's house to warm by the fire, and stayed until after dark before leaving. They there met Arthur Wilson, and had some talk with him in regard to selling him a sewing machine. When they got ready to start, it being dark, they borrowed a lantern from Moss. The accused, Arthur Wilson, asked and was permitted to ride with them in their buggy to a roadside grocery at Pee Dee, where they stopped at Joe Ledford's saloon. They went into this saloon, and the husband bought a pint of whisky, and he and his wife drank some of the contents straight. Arthur Wilson also bought a pint of whisky, which he from time to time drank. All the parties left the saloon and drove southwardly. When they reached the bridge which crosses Little River at Lindsey's mill, the horse fell on the sleet, and the defendant, Arthur Wilson, helped to get it up, going to a roadside cabin and obtaining the assistance of two other negroes for this purpose. The husband and wife then drove on, leaving Wilson and the other two negroes together on the roadside. They drove some 300 yards further, crossed the bridge, where the horse again slipped and fell upon the ice, this time breaking the harness, and freeing itself entirely from the vehicle. John T. Watson got out of the buggy, and caught the horse, which had gone some thirty or 40 yards from the buggy. On the far side of the bridge and by the roadside, there was a store kept by William Dawson; this being about 300 yards from the place where the horse last fell. The husband called back to his wife, and told her he would have to go to Dawson's to get some strings to repair the harness, and also to borrow a lantern, and asked her if she was afraid to stay where she was until he came back. She answered "No," that she was not. Then the prosecuting witness stated as follows, as shown by the bill of exceptions: "And while his voice was still

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ringing in her ears, and before he had reached a distance of 40 yards from the buggy, the defendant come up to the side of the buggy, and took her by the arm and jerked her out of the buggy; that she told him he had better not bother her because her husband was not more than 40 yards away, and the defendant told her that if she screamed he would kill her; that he told her to lay down, and that he fully accomplished his desire by having carnal knowledge of her person, and she was afraid to hollow; that at the same time he jerked her from the buggy he struck her on the side of the head; that she was certain her husband, John T. Watson, was not further away than 40 yards at the time this occurred; that after the defendant accomplished his desire he ran away in the darkness. She said that the defendant did not hurt her except the blow on the side of the head, and to render her very nervous." The husband testified in all respects substantially as did the wife, except that he said he was not gone over 10 minutes, during which time his wife was ravished. We copy the following excerpt from the testimony of the husband: "He was sure that he was not gone from his wife more than 10 minutes. As he came up to the buggy, he saw his wife standing by the side of the buggy, and also saw the defendant going from the direction of the buggy round on the opposite side, and his wife remarked to him that 'that negro' had ravished her. He said nothing to the defendant, but went to his wife and found her very nervous. He then harnessed his horse, and hitched him to the buggy, and turned around and went back to Dr. Caudle's." As it was very dark, it is obvious that there was room for Mrs. Watson to be mistaken as to the identity of the negro who ravished her. Both she and her husband had been drinking, and the evidence shows that the husband was very much under the influence of what he had drunk.

The commonwealth then introduced William Dawson, whose testimony, as contained in the bill of exceptions, is so short that we copy it entirely, and it is as follows: "That he was in his store until a late hour the night of January 11, 1909; that John T. Watson was at his store three times after dark that night; that the first time he came after some matches and went away, and in a few minutes defendant, Arthur Wilson, came into the store in a drunken condition, and sat down and went to sleep, and while he was there in that condition Watson came back and borrowed a lantern, and got some strings, but did not come inside the store; that, after Watson had been there the second time, he (Dawson) put defendant, Arthur Wilson, out of the store and closed same up, and went into his residence. In a short time Watson came to the gate and called to him, and asked him to come out, that his wife had been ravished. He also heard a woman crying, and he refused to go out, and Watson told him he cared but little for the citizens of the country. He also said that Watson seemed to have been drinking. After he refused to go out, Watson drove away, and he did not hear any more that night."

It will be observed that Dawson says that the accused, Arthur Wilson, came into his store in a drunken condition, sat down, and went to sleep, and was in this condition when Watson came to borrow strings to repair his harness; that Dawson loaned Watson a lantern and gave him strings to repair his harness, and he had left to go back to his wife. Dawson then aroused Arthur Wilson from his drunken sleep, and put him out of his store. If what Dawson says is true, Wilson could not by any possibility have committed the crime with which he is charged, because the husband, John T. Watson, left him at Dawson's store and went directly back to his wife, and, after he was gone, Wilson was put out of Dawson's store by the proprietor. Mrs. Watson says she was assaulted when her husband was on his way to Dawson's store, and not more than 40 yards from her. At this time Watson was in a drunken sleep at Dawson's store, if Dawson is to be believed. As Dawson knew the accused and saw him sitting in his store drunk, he could not be mistaken in his statements. If his testimony is not true, then he lied. On the other hand, it seems to us that there is ample room for the belief that, if Mrs. Watson was ravished at all, she is mistaken in the belief that it was done by Wilson. As said before, the darkness of the night, the suddenness of the attack, the trepidation of the victim, all lead to the conclusion that it was possible for her to be mistaken in the identity of her assailant. On the other hand, Dawson, whose credibility is indorsed by the commonwealth, could by no possibility be mistaken in his identification of Wilson as being the drunken man who was put out of his store after John T. Watson left with the lantern and strings. Of course, under section 281 of the Criminal Code of Practice, it is not within our province to reverse this case upon the insufficiency of the evidence, or because the verdict was flagrantly against the weight of the evidence. We have discussed it with a view of showing the great importance to the accused of having his case intelligently prepared and his defense vigorously presented. This could not be done by a lawyer who was sick. No preparation—at least, no adequate preparation—was made to defend the accused. His poverty, his ignorance, his confinement in jail, and the terrors necessarily engendered by the awfulness of the charge made against him preclude the idea that he could do anything in the preparation of his case on his own behalf. He was necessarily dependent upon

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his lawyer, and that he did not receive adequate assistance of counsel in this case is apparent from the most casual inspection of the record. Only 21 days intervened between the finding of the indictment and the time he was put upon trial for his life without the aid of counsel to defend him. We think he was entitled to a continuance, and that it was the duty of the court to see to it, if he was unable to employ an attorney, that he was furnished with able counsel in order that his defense, if any he had, might be fully presented to the jury sworn to try him for his life.

There is evidence in the record to show other irregularities in the procedure, and that strong pressure was brought to bear upon the jury to inflict the death penalty in this case. Affidavits of disinterested parties show that several men while the jury were in charge of the sheriff spoke to them, calling the defendant a vile name, and telling the jury to hang him; that while the jury were in their room considering the case men stood out in the street and attracted their attention, and then made signs by drawing their hands across their throats and dropping their heads over their shoulders, thereby indicating that the defendant should have his neck broken. This we cannot under the Code consider on appeal; those facts as constituting grounds for a new trial being left exclusively within the jurisdiction of the trial court. We mention them here, as we discussed the evidence, with a view of illustrating the grave importance to the accused to have a strong, vigorous attorney in charge of his case, rather than one who is so indisposed as to be unable to attend to his duties. The law should be ever watchful of the interest of the accused who is poor and friendless. There is no time when the shadow of its protecting ægis should fall upon him more certainly than when public clamor calls for a victim, and, if it falls him then, it falls justly within the sneer of the dramatist who long ago said:

"* * * Plate sin with gold,
And the strong lance of justice hurtless breaks;
Arm it in rags, a pigmy's straw does pierce it."

Judgment reversed for a new trial consistent with the principles herein announced.

MORGAN v. CITY OF SHELBYVILLE.

(Court of Appeals of Kentucky. Oct. 7, 1909.)

MUNICIPAL CORPORATIONS (§ 729*)—INJURY TO PRISONER BY FELLOW PRISONER—LIABILITY OF CITY.

A city cannot be held liable for injury to a prisoner in its guardhouse by fellow prisoners because of its failure to provide a suitable keeper, on the theory that, as fines for violations of ordinances are covered into its treasury rather than paid to the state, the city is engaged in maintaining its guardhouse as a private enterprise, but the maintenance of the guardhouse is in pursuance of its governmental functions, and, in so doing, it is but an arm of the state in upholding the public peace.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545; Dec. Dig. § 729.*]

Appeal from Circuit Court, Shelby County.

"Not to be officially reported."

Action by Shelby Morgan against the City of Shelbyville. Judgment for defendant, and plaintiff appeals. Affirmed.

Gilbert & Gilbert, for appellant. P. J. Beard, for appellee.

LASSING, J. Appellant was arrested by a member of the police force of the city of Shelbyville, charged with being drunk and disorderly, and placed in the guardhouse in said city, and there detained over night. At the time he was placed in the guardhouse five or six other prisoners were being confined therein upon similar charges. Some time during the night appellant was set upon, and severely beaten by two of the prisoners. To recover damages for the injury which he says he sustained at the hands of his fellow prisoners he brought suit against the city, alleging that his injury was the direct result of the negligence of the city in failing to provide a suitable keeper or guard at the house where he was imprisoned. A general demurrer was sustained to his petition, and, to test the correctness of this ruling on the part of the trial judge, he prosecutes this appeal.

It is admitted that, as a general proposition, a city is not liable for the negligence of its officers or agents, and that the authorities in this state abundantly establish this proposition. But it is earnestly insisted that, as all fines which were imposed in the city court for violations of ordinances of the city were by virtue of the statute covered into the city's treasury rather than paid over to the state, the city was engaged in maintaining its guardhouse as a private enterprise for its especial benefit, and that, in erecting and maintaining this guardhouse, it was not engaged in the discharge of a public duty as an arm of the state. This proposition is contended for with much earnestness by counsel for appellant in brief, and, if a new question, would be entitled to consideration. But practically the identical point raised here was decided in the case of Jones v. City of Corbin, 98 S. W. 1002, 30 Ky. Law Rep. 374, in which this court held: "The maintenance of a municipal court and prison is in pursuance of the city's governmental functions, and in so doing it is but an arm of the state in upholding the public peace and safety. The principle is well established that municipal corporations are not liable either for the nonfeasance or malfeasance of their public officers in the discharge of their governmental functions."

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Under the authority of Jones v. City of Corbin the demurrer was properly sustained.

Judgment affirmed.

GREEN v. SMOCK.

(Court of Appeals of Kentucky. Oct. 7, 1909.)

EASEMENTS (§ 25*)—PASSWAY—DURATION OF RIGHT.

Where for more than 15 years plaintiff and his grantors used a passway as a matter of right, and the right to use it was given by the common grantor of plaintiff and defendant, and defendant knew of the passway and its use when he purchased, and it was at times almost indispensable to plaintiff's farm, the easement was not one at will, and plaintiff was entitled to restrain defendant from obstructing it.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 72; Dec. Dig. § 25.*]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by William Green against J. T. Smock. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

La Vega Clements and Ben D. Ringo, for appellant. Sweeney, Ellis & Sweeney, for appellee.

CARROLL, J. This is a passway case growing out of a suit by the appellant Green to enjoin the appellee Smock from obstructing a passway over his land that Green claimed the privilege of using as a matter of right. The lower court dismissed Green's petition, and he appeals.

The passway has been used by Green and his vendors for more than 15 years, so that the only question in the case is whether or not the use was a permissive one that could be revoked at the pleasure of Smock or his vendors, or a right that the users could not be deprived of. The land of Smock is situated between the land of Green and the Curdsville and Delaware road; and Green and the persons who occupied the land now owned by him have for a number of years been passing through the land now owned by Smock in going to and from the Green land to the public road. There is some evidence that there is another road, called the "Alvis Ferry road," that runs near Green's farm, and that affords as many facilities for getting to public places as does the Curdsville and Delaware road; but this Alvis Ferry road is inaccessible to Green a part of the year on account of high water following rains and floods that interferes, and, in fact, prevents the use of it by him. It also appears that the impassable condition of this Alvis Ferry road could be remedied by the erection of a bridge, but we do not deem it necessary to discuss further the evidence concerning this Alvis Ferry road except to say that, if Green is denied the use of an outlet through the Smock land, he will be prevented from getting to a public road many times during the year and often for many days.

Prior to 1880 the land now owned by Smock and Green was owned by Mitcheson. Some time in the 80's Mitcheson sold the Green land to McCann, and it passed from McCann to Likens, and from Likens to Brady, from whom Green purchased. After his sale of the Green land to McCann, Mitcheson sold the Smock land to Gilmore, and the Gilmores owned it until Green purchased it from them in 1907. McCann, Likens, and Brady each testify that, when they owned the Green land, there was a passway from it through the Smock land, which was used by them and their tenants. McCann testified that, when he bought from Mitcheson, it was agreed that he was to have a passway through the land now owned by Smock, and that Mitcheson promised that, if he ever sold the land now owned by Smock, he would reserve in the deed conveying it a right of way through the place for the benefit of the Green land; but for some reason no notice was made of the passway in the deed of Mitcheson to Gilmore. There have always been gates on this passway; and for a while when Gilmore owned the Smock land and Likens owned the Green land these gates were kept locked for the purpose of keeping some undesirable persons from using the passway. All of these witnesses testified that they used this passway as a matter of right, and that the persons who owned the Smock land never prevented them from traveling over the passway except on one occasion when the gate was locked by a tenant of Gilmore, but promptly opened after the matter was called to the attention of the county judge. The testimony for Smock, although it establishes that the occupants of the Green land had used this passway for many years, tends to show that it was used by the permission of the Gilmores, and never as a matter of right by any person.

We have carefully read the record, and our conclusion is that the right of Green and his vendors to use this passway was more than permissive. It is clearly proven that the right to use it was given by Mitcheson to McCann, and, when Smock purchased the land, he had full knowledge of the fact that this passway ran through it, and that it was used by Green and his vendors. That it is very useful and at times almost indispensable to Green's farm there can be no doubt, and to close it would subject him to great inconvenience and serious loss. We think he was entitled to the relief asked. The decided weight of the evidence is to the effect that Green and his vendors for more than 15 years prior to the institution of this action used the passway as a matter of right, and this view of the case is strongly supported by the manner in which the right to its use was first granted. The law on the

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subject of passways is so fully stated in Smith v. Pennington, 122 Ky. 355, 91 S. W. 730, 28 Ky. Law Rep. 1282, 8 L. R. A. (N. S.) 149, Stewart v. Brumley (Ky.) 119 S. W. 796, Chenault v. Gravitt, 85 S. W. 184, 27 Ky. Law Rep. 408, and Sparks v. Rogers, 97 S. W. 11, 29 Ky. Law Rep. 1170, that it is not necessary to do more than refer to these authorities.

Wherefore the judgment is reversed, with directions to enter a judgment awarding to Green the use of the passway, and restraining Smock from interfering with such use; but Smock may continue the gates as they were when this action was brought.

EVANS v. EVANS.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 121*)—ADMINISTRATORS CUM TESTAMENTO ANNEXO.

Under Ky. St. 1909, § 3891 (Russell's St. § 3937), providing that if there be no executor appointed by the will, or if the executor dies or fails to qualify, the court may grant administration with the will annexed, and section 3892 (section 3938), providing that such an administrator shall have the same power and authority "as the executors therein named," such an administrator appointed where no executor was named has such powers as an executor if named would have had; so that the will providing for sale of real estate for purpose of division, and not naming the donee of the power, such administrator is by necessary implication vested with the power.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 493, 493½; Dec. Dig. § 121.*]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by Elijah S. Evans, administrator, with the will annexed, against Edward Evans. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Smith Barlow, for appellant. Nat W. Halstead, for appellee.

HOBSON, J. Elijah S. Evans died a resident of Nelson county on October 23, 1908, leaving a will which was duly probated in the Nelson county court. The will is in these words:

"I, Elijah S. Evans of the county of Nelson, State of Kentucky, being of sound mind and disposing memory do make and declare this to be my last will and testament.

"1. I want all my debts and funeral expenses paid.

"2. I give and devise to my sister Mary Bell Evans all of my real estate, the farm that I now live on as long as she lives, and after her death it is to be sold and divided equally between my brothers and sisters or their heirs namely, Dr. J. B. Evans, Samuel P. Evans, James E. Evans, Augusta Shurley and the wife and children of W. H. Williams except the heirs of my sister Sallie Ann Gray, I give them one dollar each. My sister Rhoda E. Gray being in good circumstances I wish her to have only one dollar.

"Now this is to take place of any former will I may have written. I declare I wish this will to be carried out according to my bequest."

No executor being named in the will, the court appointed S. P. Evans administrator of the will annexed. Mary Bell Evans, the sister named in the will, died a few days after the testator. The administrator, after her death, for the purpose of carrying out the will, sold the tract of land referred to in it to Edward Evans for $4,968, making him a deed and taking his notes with surety for the purchase money. The purchaser refused to pay the first note when it fell due upon the ground that he did not get title to the land by the deed. The administrator then brought this suit. The circuit court held the title good, and entered judgment in favor of the administrator as prayed. From this judgment the purchaser appeals.

The only question arising in the case is: Had the administrator the power to sell and convey the land? This turns upon the proper construction of the statute regulating the matter, which is as follows: "If there be no executor appointed by the will, or if all the executors therein named die, or refuse the executorship, or fail to give bond as required by law, which shall amount to such refusal, the court may grant administration, with the will annexed, to the person who would have been entitled to administration if there had been no will." "An administrator, with the will annexed shall possess and exercise all power and authority, and shall have the same rights and interest, and be responsible in like manner, as the executors therein named, or any of them." Sections 3891, 3892, Ky. St. (Russell's St. §§ 3937, 3938). It will be observed that an administrator with the will annexed may be appointed if there is no executor named in the will, or if the executor or executors named therein die or fail to qualify. It will also be observed that an administrator with the will annexed possesses and may exercise the same power and authority "as the executors therein named or any of them." The will in contest named no executor, and it is insisted that only such power is conferred upon the administrator with the will annexed as the executor named in the will might exercise, and, if no executor is named, he has no power over the real estate. If this is the construction of the statute, then it does not define the power of an administrator with the will annexed where no executor is named in the will. The statute authorizes the appointment of an administrator with the will annexed if no executor is named in the will, or if the executor named dies or refuses to qualify. The second section was intended

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to define the power of the administrator with the will annexed, when appointed under the first section in either contingency named therein. To construe it otherwise would be to say that, where the will names no executor, the power of the administrator with the will annexed is not defined by the statute. The Legislature had no such construction in mind. The second section was intended to apply to all administrators with the will annexed, and the meaning is that he shall have the same power as he would have if named as executor in the will. The rule is ordinarily so expressed in the text-books. See 18 Cyc. 1321; Schouler on Executors, § 123.

It has often been held under the statute that the administrator with the will annexed may sell and convey land which is ordered by the will to be sold for the purpose of division. Gulley v. Prather, 7 Bush, 167; Shields v. Smith, 8 Bush, 601; Harding v. Weisiger (Ky.) 109 S. W. 890. In Sims v. Birdsong, 50 S. W. 993, 21 Ky. Law Rep. 75, where as here the will did not name an executor, the court said: "By the statute an administrator with the will annexed is given all the power and authority of an executor. He can sell and convey land, collect debts, divide and distribute the property, and perform every duty necessary to carry out the provisions of the will." Mobberly v. Johnson's Executor, 78 Ky. 274, is practically to the same effect. The will here directs a sale of the land, and a division of the proceeds equally among certain devisees. The purpose of appointing an administrator with the will annexed is to vest in him the carrying out of the testator's will. In Marrett v. Babb's Executor, 91 Ky. 90, 15 S. W. 4, the court said: "Upon the death of the owner his real estate at once passes to his heirs or devisees in the absence of testamentary counter direction from him. The personal representative, whether he be administrator or executor, has no inherent authority or title to it by virtue of his appointment merely. In case he be executor, such power or right does not exist, unless it be conferred by the will. To enable him to sell it, the power must either be expressly given or arise by implication. If the avails are to pass through his hands in the execution of his office, as for the payment of debts or legacies, then the power to sell will be implied. If the will directs a sale, but does not name the donee of the power, and the proceeds must, either by its provisions or by the rules of law, be distributed by the executor, then he, by necessary implication, is invested with the power of sale, unless some other intention upon the part of the testator be shown by his will." As the will here directs the sale and does not name the donee of the power, the person who is by law to execute the will, and who is given the same power as if named an executor, is by necessary implication invested with the power of sale.

Judgment affirmed.

BAIN, Treasurer, et al. v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

MUNICIPAL CORPORATIONS (§§ 270, 867*) — PUBLIC IMPROVEMENTS—SEWERS.

Under Ky. St. 1909, § 3105 (Russell's St. § 1194), empowering the city council to construct sewers, and to provide for their construction out of the general fund, the council has discretion both as to what sewers shall be constructed and when the work shall be done at the common expense, and, while the council may not incur any indebtedness beyond the revenues of the year without a vote of the people, it may, with the assent of a two-thirds vote, incur an indebtedness for this purpose, though the act for the government of cities of the second class does not in terms authorize the council to order an election on the question whether such an indebtedness shall be incurred.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 725, 1841; Dec. Dig. §§ 270, 867.*]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Petition by the City of Lexington for writ of mandamus against John W. Bain, treasurer, and others. Judgment for petitioner, and respondents appeal. Affirmed.

J. Embry Allen, for appellee.

HOBSON, J. On October 1, 1908, the city of Lexington desiring to issue its bonds in the amount of $25,000 for the purpose of obtaining funds to extend its main system of sewerage, authorized to be constructed, but not actually contracted for, prior to March 19, 1894, the general council passed an ordinance submitting to the qualified voters of the city at the regular election to be held November 3, 1908, the question whether bonds should be issued for the purpose indicated. The election was duly held under the ordinance. The county court also made an order at the request of the city directing the election to be held, and ordering the sheriff to advertise the election. At the election 2,861 votes were cast upon the question, 2,064 votes were cast in favor of the bond issue, and 797 were cast against it. The proposition having carried by a more than two-thirds vote, the general council on November 12, 1908, passed an ordinance directing the issue and sale of the bonds. The indebtedness thus to be incurred is, when considered with the other indebtedness of the city, within the constitutional limit. The treasurer and the city clerk declined to sign the bonds or attach the seal of the city to them, and this suit was brought against them for a mandamus to require them to do so. They filed a general demurrer to the petition. Their demurrer was overruled, and,

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they declining to plead further, a judgment was entered as prayed in the petition. From this judgment the appeal before us is prosecuted.

By section 3105, Ky. St. 1909 (Russell's St. § 1194), the general council is given power to construct sewers, and may provide for their construction out of the general fund. The sewers which were proposed to be constructed were an extension of the main sewers so as to afford better outlet for the lateral sewers. The council was authorized under the charter to make such necessary extension of the main sewers as was necessary at the public expense. The plain purpose of the statute was to leave it within the discretion of the council both as to what sewers should be constructed and when the work should be done at the common expense. And, while the council could not incur any indebtedness beyond the revenues of the year without a vote of the people, still it could with the assent of a two-thirds vote incur an indebtedness for this purpose. See State v. Babcock, 22 Neb. 614, 35 N. W. 941; State v. Madison, 7 Wis. 688; Richmond v. McGirr, 78 Ind. 192; 28 Encyc. of Law, 1578. That a municipality may issue bonds when authorized by a vote of the people as provided in the Constitution has in effect been held by this court in several cases. See O'Bryan, Clerk, v. Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. Law Rep. 469, 645; City of Lexington v. Kentucky Chautauqua Assembly, 114 Ky. 781, 71 S. W. 943, 24 Ky. Law Rep. 1568.

It is true that the act for the government of cities of the second class does not in terms authorize the council to order an election, taking the sense of the people as to the incurring of an indebtedness beyond the revenues provided for the year; but, as is pointed out in the cases referred to, when the several acts for the government of cities of the State are read together, it is manifest that the Legislature did not intend to leave the cities of the first, second, and third class without this power, and that it is necessarily granted in the general powers conferred upon these cities by the acts governing them. Judgment affirmed.

SLADE v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. Sept. 27, 1909.)

INJUNCTION (§ 84*)—RESTRAINING THE PASSING OF AN ORDINANCE.

A city council may not be enjoined from passing an ordinance defining and granting a franchise, such an ordinance being an exercise of legislative function; the remedy being by proceedings against enforcement of the ordinance if it be void.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 154; Dec. Dig. § 84.*]

Suit by J. T. Slade against the City of Lexington for injunction. Defendant moves to dissolve the injunction granted by the trial court. Motion sustained.

"Not to be officially reported."

Samuel M. Wilson, for plaintiff. Alex P. Humphrey, Allen & Duncan, George C. Webb, J. Embry Allen, and Stoll & Bush, for defendant.

HOBSON, J. To secure a better water supply for the city of Lexington, the Lexington Hydraulic & Manufacturing Company was incorporated by an act approved February 27, 1882 (Loc. & Priv. Acts 1881–82, p. 587, c. 333). The corporation was authorized to agree with the city of Lexington, its inhabitants, and others choosing to take water regarding the rates at which the water was to be furnished, provided the company should within two years furnish a supply of pure water sufficient for the use of all the citizens of the city agreeing to take it. The act contemplated that the company should go to considerable expense in providing reservoirs of water, laying mains, and equipping a plant. Pursuant to the act, the company constructed a system of reservoirs sufficient to supply the city with water at all times. It laid its mains, erected its plant, and under a contract with the city has since that time been supplying the city with water. The 10th section of the act is as follows: "This act shall be and remain in force for the term of sixty years from and after its passage; but the Legislature may at any time alter, amend or repeal this act by a vote of majority of each branch thereof; but such alteration, amendment or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the Legislature that there has been a violation by the company of some of the provisions of this act."

The city ordinance under which the contract with the water company was made, among other things, contained these provisions: "The said company shall build and put in operation within one year from the date of this contract a system of water works of a sufficient capacity to supply said city of Lexington with pure and wholesome water for public, private and manufacturing uses." "The said company further agrees to give to the city of Lexington the option of purchasing the pumps, engines, boilers, mains and all the other machinery and apparatus used in the construction and operation of said water works at any time after the expiration of five years from the completion of same, at a price to be fixed by three commissioners, one of whom is to be appointed by said city of Lexington, one by said company, the third to be chosen by these two." "At the expiration of twenty-five years from date of completion and testing of said water works if the city of Lexington does not, or has not, purchased said water works upon

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above terms, it shall renew the contract with said company for twenty-five years longer upon terms as mutually agreed upon at that time."

The twenty-five years named in the contract expires in the winter of 1910. In the spring of this year the mayor called the attention of the council to the fact that the contract between the water company and the city would expire in the early part of next year, and a committee of five was appointed to consider a new contract; the city not having exercised its option to purchase the plant. Subsequently five members of the Commercial Club were added to the committee, which was then called a commission, and was allowed 30 days in which to report to the council a contract. After hearing the parties at length, the commission reported to the council in favor of what is called in the record the Lazarus contract, rejected what is known in the record as the McDowell contract. Thereupon the mayor called a special session of the council, among other things, to take action upon the report of the commission in the matter of the contract with the water company. After the proclamation of the mayor calling the special session of the council had been issued, and before the council had met or any ordinance had been introduced before it, J. T. Slade, a taxpayer of the city, suing for himself and all other taxpayers, brought this suit against the city, the mayor, and the city council to enjoin the council from passing an ordinance authorizing the making of the Lazarus contract on the part of the city with the water company; the ground of the action being that such an ordinance was in effect the granting of a franchise, and the creation of an indebtedness beyond the income of the city provided for the year. The circuit court granted an injunction as prayed, and the defendants have entered a motion before me to dissolve the injunction. On the hearing of the matter all the other members of the court sat with me.

It is insisted for the defendants, among other things, that the provisions of the present Constitution are not applicable to the case because the water company has a vested right under its charter and contract made in the year 1883 before the adoption of the Constitution; but we have not found it necessary to pass upon this question, and no opinion is intimated as to it. At the time the suit was brought the council had taken no action. The legislative power of the city is vested in the council, and within its sphere the council is entitled to the same respect from the courts as the state Legislature would be in a matter within its jurisdiction. The courts will refuse to carry into effect a void ordinance, and they will enjoin its enforcement, but they will not entertain jurisdiction to enjoin the council from considering a matter within its jurisdiction. In New Orleans Waterworks Company v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518, the United States Supreme Court had before it this case. The city of New Orleans had granted to the New Orleans Waterworks Company a certain franchise. Before that franchise expired, it undertook to grant to a man named Rivers a like franchise. Upon appeal to the United States Supreme Court, it was held that the grant to Rivers was void, and he was enjoined from acting under it. Thereafter the council had before it ordinances granting similar franchises to persons other than Rivers, and the water company brought suit to enjoin the council from passing these ordinances on the ground that the question of its exclusive right had been settled in the Rivers Case. The court held that the bill could not be entertained. After referring to a number of authorities, it thus summed up the matter: "In view of the adjudged cases, it cannot be doubted that the Legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the Legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin." See, also, Stevens v. St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832, 36 Am. St. Rep. 438; Cape May R. R. Co. v. City of Cape May, 35 N. J. Eq. 419; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; Harrison v. City of New Orleans, 33 La. Ann. 223, 39 Am. Rep. 272; Montgomery Gaslight Co. v. City of Montgomery, 87 Ala. 245, 6 South. 113, 4 L. R. A. 616; Lewis, Mayor, v. Denver City Waterworks, 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248; State ex rel. Rose v. Superior Court of Milwaukee County, 105 Wis. 677, 81 N. W. 1046, 48 L. R. A. 819; Lee v. City of McCook (Neb.) 116 N. W. 955.

The authorities are practically agreed that an ordinance defining and granting a franchise is the exercise of a legislative function, and that a court of equity will not enjoin a council in the exercise of its legislative functions. There is sound reason for this; for, if the legislative authority of a city may be enjoined from exercising its judgment in all cases in governmental matters where it is insisted by the complainant that the council is about to do something which it has no authority to do, great confusion in the government of cities would ensue, and the distinction between legisla-

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tive and executive functions would amount to little. The Constitution forbids the judicial department from interfering with the Legislature in its functions. The purpose of the separation of the government into three departments was to preserve the independence of each. If an ordinance defining and granting a franchise may be enjoined, then all legislative matters before the council may be controlled by injunction, such as the question of high or low license, the fixing of boundaries of the city, the erection of buildings within the city, and the like, wherever it is conceived that the council is about to pass some ordinance without authority to do so. If such were the practice, the dignity of the council would be entirely destroyed, and the office would be so burdensome that many persons would shrink from assuming it.

In the case before us the plaintiff's petition proceeds upon the ground that the water company has no franchise beyond the termination of its present contract. If this is true, the ordinance in question is necessarily one defining and granting a franchise, and, if such an ordinance may be enjoined, then all ordinances defining and granting franchises may likewise be enjoined. The water company cannot, after the expiration of its present contract, use the streets of the city unless it has a franchise so to do. If the proposed ordinance is not one defining and granting such a franchise, it must be so because the water company already has the franchise under its charter and present contract; and in that case no reason is shown for an injunction. The court does not determine that this is the case. It expresses no opinion as to what are the rights of the water company under its charter and present contract. It only determines that the plaintiff is not entitled to an injunction before the council has acted or passed upon the matter. In City of Newport v. Newport Light Co., 84 Ky. 166, the Newport Light Company had a franchise, and the city had granted to the Dueber Light Company a franchise and had made a contract with it. The question in the case was whether the city should be enjoined from carrying out its contract with the Dueber Light Company. In Roberts v. City of Louisville, 92 Ky. 95, 17 S. W. 216, 13 Ky. Law Rep. 406, 13 L. R. A. 844, the question involved was as to the right of the city to control certain property. The case turned upon a property right, and not upon the exercise of a governmental function by the council. In Keith v. Johnson, 109 Ky. 421, 59 S. W. 487, 22 Ky. Law Rep. 947, the court carefully pointed out the distinction between an ordinance defining and creating a franchise and one granting the franchise to the highest and best bidder after it had been created. We do not find anything in the Kentucky cases cited inconsistent with the trend of authority against the granting of injunctions to restrain the exercise of legislative powers by municipal councils.

The motion to dissolve the injunction is sustained.

STAMPER et al. v. CORNETT et al.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. EVIDENCE (§ 419*)—PAROL EVIDENCE AFFECTING WRITING—DEEDS—CONSIDERATION.

Under Ky. St. 1909, § 470 (Russell's St. § 1775), providing that no action shall be brought to charge any person on any contract for the sale of real estate unless the contract or some memorandum thereof be in writing and signed by the party to be charged therewith, but the consideration need not be expressed in the writing but may be proved when necessary, or disproved by parol or other evidence, the recited consideration of a conveyance may be shown to be otherwise by parol evidence without an allegation of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1912; Dec. Dig. § 419.*]

2. WITNESSES (§ 139*) — COMPETENCY — CONVERSATIONS WITH DECEDENTS.

Under the express provisions of Civ. Code Prac. § 606, witnesses are incompetent to testify for themselves as to conversations of persons deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582–597; Dec. Dig. § 139.*]

3. VENDOR AND PURCHASER (§ 315*)—ACTION TO RECOVER PURCHASE PRICE—SUFFICIENCY OF EVIDENCE.

In an action by heirs to recover the price of lands conveyed by their ancestor, evidence *held* to support a finding that the actual consideration agreed on differed from that recited in the deed, and that it was not paid by the vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 315.*]

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Action by Cynthia Cornett and others against John W. Stamper and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Ira Fields, D. D. Fields, and E. E. Hogg, for appellants. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellees.

O'REAR, J. Prior to 1890 Isom Stamper owned about 15,000 acres of land in the counties of Letcher and Perry. He sold 10,000 or 12,000 acres for about $7,000. He was then very old, and, being much harrassed in mind because of some lawsuits involving his liability on the warranty of titles to some of the land he had sold, he determined to dispose of the remainder of his property. As a matter of fact it is not shown in this suit we now have in hand that there was any legal or asserted liability against Stamper when he made the conveyances in question. Yet he was in such dread on the score that some sort of suit might be brought against

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him that he put all his property out of his hands. His money he intrusted to his son L. N. Stamper. He at or about that time made conveyances of his lands to certain of his children, the main body of it to his son L. N. Stamper. The proof shows (so the chancellor found, and we think is sustained by the record in doing so) that he took obligations from the grantees to pay for the lands at the rate of $4 per acre. But these obligations, which were called notes, he delivered to others of his children, and then executed receipts to the ones who had executed the notes showing that they had been paid. The old man died intestate a few years later. Shortly thereafter L. N. Stamper died intestate. Isom Stamper had 12 children. He was survived by all, or their descendants, save two. He had made no material advancements to any of them. This suit is by certain of his heirs against the heirs of L. N. Stamper to recover the purchase price of the land conveyed to him and above mentioned, described as containing about 800 acres. The administrator of Isom Stamper, having refused to prosecute the suit, disclaiming the existence of the debt, was made a defendant. L. N. Stamper's heirs defended upon the ground that their ancestor had paid his father for the land conveyed to him. The circuit court found that he had not. In concurring in that conclusion, without extended comment, we set out the evidence tending to support and that tending to refute it. L. N. Stamper's heirs rely upon (1) the recitals in his deeds; (2) receipt of Isom Stamper; (3) the testimony of John W. Stamper, a son, and the administrator of Isom Stamper, and the testimony of the widow and three sons of L. N. Stamper.

The rule contended for by appellants that a writing which is the evidence of a contract cannot be impeached by testimony as to a contrary parol stipulation does not apply to this case. The statute allows (section 470, Ky. St. [Russell's St. § 1775]) the recited consideration of a conveyance to be shown to be otherwise without an allegation of fraud or mistake, and that, too, by parol testimony. Nor do appellants pretend that the recitals in the deed that the purchase money was paid when the deed was executed are true. Their claim is it was paid subsequently. So the statement in the deed that the purchase price had been paid was not only shown to be, but was admittedly, false. John W. Stamper and Wesley Stamper, brother and son of L. N. Stamper, testify that the consideration for the 600-acre tract, called in the record "Sawmill Tract," was $1,000 as recited in the deed. Wesley says he wrote the deed. John W. says he was present. Alex Stamper, another brother of L. N., testified that he was also present, was a party to the arrangement, at least called by his father to witness it, and that the consideration was $4 an acre, but not to be paid until the correct quantity was ascertained. Another tract, called in the record "Cowan Tract," was put in at the same price. John W. admits such was the price of that tract; also, that the price fixed upon another parcel, at the same time conveyed to a daughter and son-in-law of Isom Stamper under an identical arrangement, was $4 an acre. The original deed to L. N. Stamper is brought up. It shows on its face that the consideration clause had been erased and rewritten. This fact is not explained by the draftsman of the deed. One Back, a disinterested witness so far as shown, was called in by Isom Stamper as a witness to the transaction. He testified that the consideration was $4 an acre. Another witness corroborates them. Then the transactions are all of a kind, entered into at the same time; the lands being of equal value. Isom Stamper was a very old man, and unlettered. His wants were few and simple. He is not shown to have had the money claimed to have been paid to him. While a faint attempt was made to explain the disappearance of the $7,000 which he had had on hand, none is attempted as to this additional $2,000 (about). He gave nothing away. He did not deposit in banks. He is not shown to have spent any except in a simple if not childish prospecting adventure on Pine Mountain "looking for silver and gold." His papers were in the possession of L. N. Stamper and another son a few days before the old man's death. These were handed to a sister for keeping. Shortly after his death she returned them to L. N., who from the package gave up to that sister her and her husband's note for one of the tracts conveyed away by the old man in his panic. Isom Stamper, a few years before his death, and immediately after the conveyances named, executed a broad power of attorney to these same sons to collect his notes, and sell his lands, etc. He then thought he had notes. So they all considered, too, at that time.

L. N. Stamper's heirs produced a note for $1,000, bearing even date with the deed for the "Sawmill Tract." It was apparently attested by John W. Stamper, and has a receipt indorsed upon it for $1 and then for $1,000. This note is also brought up. It is admitted by the sons of L. N., who testified, that it was not signed by him. It is admitted by them, and testified to by John W., that the latter did not sign his name to it as a witness. The face of the note, all signatures to it, and the indorsements are in the handwriting of some one unidentified, and for whom there is no sponsor, as to his authority. The testimony of the widow and sons as to statements made by either Isom Stamper or L. N. Stamper are incompetent. The witnesses were testifying for themselves as to conversations of persons deceased (section 606, Civ. Code Prac.), and, as to L. N. Stamper's alleged statements, they could not

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be received in any event, as they were in his favor.

There are still other circumstances, slight in themselves, but all setting the color of the case. From all these, and the evidence above outlined, the chancellor below found the fact to be that the consideration was $4 an acre, and that it had not been paid. We do not feel justified in disturbing his finding of the facts. Isom Stamper was not in fact indebted or liable so far as the record shows. Nor was it then claimed that he was. He was old, illiterate, and scared. His act was not fraudulent as to any creditor. His son and daughter who took receipts against the notes knew the facts, or at least were laboring under the same mistake that their father was. He was not nor were his heirs estopped to deny the validity of the receipts. Nor can his grantees rely upon the alleged fraudulent conveyances as invalidating them.

The judgment is affirmed.

ASHCRAFT et al. v. COURTNEY et al.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. TRESPASS (§ 19*)—TIMBER TRESPASS—TITLE OF PLAINTIFF.

In an action for timber trespass on land, plaintiff must recover on his own title, not on the weakness of defendant's title.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18–31; Dec. Dig. § 19.*]

2. ADVERSE POSSESSION (§ 44*)—CONTINUITY OF POSSESSION.

To acquire title by adverse possession, the possession must be such as to give a cause of action for every moment of the fifteen years, and, if the possession is broken, the time must be counted from the break, and not from the commencement of possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226–231; Dec. Dig. § 44.*]

3. ADVERSE POSSESSION (§ 44*)—CONTINUITY OF POSSESSION—PASTURAGE.

The putting of stock on land in the summer or of hogs in the fall and winter when there was mast, was not such continuous possession as was required to acquire title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226–228; Dec. Dig. § 44.*]

4. ADVERSE POSSESSION (§ 57*)—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show continuity of possession for the period of limitations so as to vest title in plaintiffs by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 57.*]

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by Herbert Ashcraft and others against M. H. Courtney and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

For former appeal, see 105 S. W. 106, 31 Ky. Law Rep. 1324.

J. B. White and Hazelrigg & Hazelrigg, for appellants. H. L. Wheeler, for appellees.

HOBSON, J. Herbert Ashcraft, etc., brought this action against M. H. Courtney, etc., to recover the value of certain timber cut from a tract of 498 acres of land, which the plaintiffs alleged they owned. It was alleged in the petition that the plaintiffs derived title to the land under the John Carnan 29,873-acre patent through Thomas Duckham; that the defendants claimed the same right and title, but had, in fact, no valid title. It was also alleged in the petition that the plaintiffs and those under whom they claimed had been in the adverse possession of the land for over 30 years. The defendants answered, setting up title in them to the land under the John Carnan patent. A trial was had which resulted in a verdict and judgment in favor of the plaintiffs for the sum of $2,500. An appeal was taken by the defendants to this court, and on the appeal it was held by this court that the plaintiffs did not connect themselves with the John Carnan patent; also, that the defendants had title under the John Carnan patent. It was further held that the evidence did not show adverse possession of the land by the plaintiffs or those under whom they claimed. The judgment was reversed, and the cause remanded for a new trial. See Courtney v. Ashcraft, 105 S. W. 106, 31 Ky. Law Rep. 1324. On the return of the case to the circuit court, the plaintiffs filed an amended petition, in which they charged, in substance, that they had by mistake alleged that the land lay within the John Carnan patent, and that the fact is that that patent does not include the 498 acres in dispute. Issue was taken upon this pleading, and, the case having been again submitted to a jury, the court at the conclusion of all the evidence instructed the jury peremptorily to find for the defendants, and, the plaintiffs' petition having been dismissed, they appeal.

The plaintiffs introduced some proof on the trial to the effect that the 498 acres in controversy are not within the John Carnan patent. This would show that the defendants do not own the land; but it does not establish in any way the plaintiffs' right to it. The plaintiffs sue the defendants for trespass upon the land. They cannot recover upon the weakness of the defendants' title. If they recover, they must recover upon their own title. The reason for this rule is plain. Only the owners of the land can complain of the timber being cut; and, if the defendants were held liable to the plaintiffs, when the plaintiffs are not the owners of the land, they would still be liable to the true owners, and the plaintiffs would have recovered money to which they had no right. In order to recover therefore in this action, the plaintiffs must show that the timber was cut from their

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land. They gave in evidence on the trial no record title. Their only attempt to show title was by adverse possession. They showed, in substance, that they claimed the land under Oliver Crawford, who in 1839 received a deed from one Duckham for it. Crawford lived about six miles from the land. He had two cabins upon the land conveyed him by Duckham which included the tract in controversy. He would take cattle and horses there in the summertime, and hogs in the fall and winter, when there was mast. He had a tenant named Stuart who lived in one of the cabins for a year, and the other cabin was used by hunting parties. He sold off to several persons land from the boundary, and they settled on the part they bought. He hunted on the land, claimed the boundary embraced in the deed from Duckham, and kept cattle and hogs on the boundary at different times, and at different places. He died in the year 1876. After his death the land was sold, and about the year 1889 Ashcraft built a house on it, and had a tenant on it after that for several years. This suit was brought in the year 1900.

It is manifest that there was no 15 years' adverse possession by Ashcraft after his purchase, as he did not enter on the land until the year 1889, and the suit was brought in the year 1900. It is equally evident from the proof that, while Crawford exercised occasional acts of ownership over the land, the proof wholly fails to show a continuous adverse possession by him of the land at any time for fifteen years. The rule is that, to acquire title by adverse possession, the possession must be such as to give a cause of action for every moment of the 15 years, and, if the possession is broken, then the time must be counted from the break, and not from the time when the possession began. Crawford's putting his stock on the land in the summer or his hogs in the fall and winter when there was mast would not be such continuous possession as is required to acquire title to land. There is no proof of any such living on the land or holding it for 15 years continuously as to make out a title by adverse possession. The proof now before us is no stronger than it was on the former appeal, when we held that the plaintiffs had failed to show title by adverse possession. It is true there is proof in the record that certain persons at different times lived on the 1,000-acre tract, but it does not appear that they held as tenants of Crawford or were in possession for him of the land in dispute, or held possession for him to any boundary that included it. What they held, or to what lines, does not appear, and it is not shown that there was an unbroken holding for 15 years of the land in dispute or of any plainly marked or well-defined boundary that included it.

Judgment affirmed.

WATSON'S EX'R v. WATSON et al.

(Court of Appeals of Kentucky. Oct. 5, 1909.)

1. WILLS (§ 53*)—PROBATE—EVIDENCE—ADMISSIBILITY.

In a proceeding to probate a will, contested on the ground of testamentary incapacity and undue influence, it is error to allow evidence of proceedings six months after the execution of a will, resulting in a judgment finding testator at that time mentally incompetent to manage his estate by reason of infirmity and age, since it takes less capacity to make a will than to transact business generally.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 121; Dec. Dig. § 53.*]

2. WILLS (§ 52*)—PROBATE—PRESUMPTIONS—BURDEN OF PROOF.

Where the propounder of a will proves the due execution thereof, and it is not irrational in its provisions or inconsistent in its structure with the sanity of testator, the presumption of law makes for him a prima facie case, and the burden of proving testamentary incapacity is shifted to contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101, 103; Dec. Dig. § 52.*]

3. WILLS (§ 324*)—PROBATE—EVIDENCE—INSTRUCTIONS.

Where, in a proceeding to probate a will, the testimony of the subscribing witnesses, testifying unequivocally and consistently to the execution of the will, was not contradicted or impeached, and their evidence showed that testator acknowledged the signature as his and had the witnesses witness it, it was error to submit to the jury the question whether testator executed the will and the genuineness of the signature to the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 767–770; Dec. Dig. § 324.*]

4. WILLS (§ 50*)—"TESTAMENTARY CAPACITY."

One having such mental capacity as enables him to know the natural objects of his bounty, his obligations to them, the character and value of his estate, and to dispose of it according to a fixed purpose of his own, has testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96–100; Dec. Dig. § 50.*

For other definitions, see Words and Phrases, vol. 8, pp. 6929–6931.]

5. WILLS (§ 155*)—"UNDUE INFLUENCE."

Undue influence defeating a will is any influence over the mind of testator to an extent that destroys his free agency and to constrain him to do against his will what he would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated on his mind at the time he executed the paper, but any reasonable influence obtained by acts of kindness or by appeals to the feelings or understanding, and not destroying free agency, is not undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 380; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172, 7823–7824.]

6. TRIAL (§ 307*)—PERMITTING JURY TO TAKE PAPERS.

It is the better practice not to allow the jury to take papers to the jury room for examination after the case is submitted, unless by consent of counsel, and, where the jury wish to examine any paper given in evidence, they should ordinarily be brought back into the courtroom, and the examination had in presence of the court and counsel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 732–737; Dec. Dig. § 307.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Appeal from Circuit Court, Logan County.

"To be officially reported."

Proceeding for the probate of the will of W. N. Watson, deceased, in which Eugene B. Watson and others appeared as contestants. From a judgment denying probate, the propounder appeals. Reversed and remanded.

Sims, Du Bose & Rodes, S. Y. Trimble, and R. W. Davis, for appellant. Browder & Browder and John S. Rhea, for appellees.

HOBSON, J. W. N. Watson died in May, 1907, a resident of Logan county. After his death a paper purporting to be his will was offered for probate in the Logan county court. On a hearing of the matter the county court refused to probate the paper as his will. An appeal was taken to the Logan circuit court. The case was there heard before a jury, who found by their verdict that the paper was not his will. The court entered judgment on the verdict, and the propounder appeals.

For the purposes of the appeal, it will be necessary to state only the substance of the proof heard on the trial. W. N. Watson was 87 years old at the time of his death. He owned a farm worth about $7,500, and some personal property on the farm. He was married in the year 1853. His wife died not long after their marriage without children, and he did not marry a second time. His heirs at law were numerous nieces and nephews, and the descendants of nieces and nephews who had died. He had a great-niece, Onie Kockem, who was living with him at the time the will was made, and by the will in contest he left her his whole estate. The paper is in these words: "February 12th, 1906. I, W. N. Watson, being of sound mind and disposing memory, and realizing the uncertainty of life, and wishing to direct the disposition of my property while living, do make and declare this writing to be my last will and testament, and I hereby revoke any will heretofore made by me. First, I direct that all of my just debts be paid, together with my funeral expenses, and that a neat and simple tombstone be erected at the head of my grave, and an iron railing be placed around my grave. Second, having known Roderick Perry during his life time, as a man of integrity and honesty, I hereby nominate and appoint his son Wesley Perry as my executor, but I direct that the court require him to execute bond for the faithful discharge of his duty. Third, I give and bequeath to my dearly beloved grand-niece, Onie H. Kockem, in consideration of her continual kindness and aid to me in my old age and loneliness, all the remainder of my property and effects of whatsoever nature, real, personal and mixed owned or possessed by me at the time of my death, the same to be held by my grand-niece, Onie H. Kockem aforesaid, absolutely for her own use and benefit, with power to dispose of as she may wish." He lived on his farm from the death of his wife alone with some negro servants, who lived in a cabin not far from his house, until July, 1905, when Mrs. Kockem became a member of the family, and lived with him from that time until after the will was made. In March after the will was made he and she went to New York, and returned after a month or so, when a proceeding had been instituted to declare him incompetent by reason of age and infirmity to manage his estate. After their return from New York an inquest was found declaring him incompetent, a committee was appointed for him who took charge of him and his estate, and placed him at a neighbor's house, where he remained until his death the following May. The subscribing witnesses to the will were introduced by the propounders on the trial, and testified to the due execution of the will, and that the testator was at the time of sound mind. The contestants then introduced a large amount of evidence showing that after he was moved from home in August following the execution of the paper he had little or no mind, and was suffering from senile dementia, which is a disease of slow development, and physicians who saw him testified that from his condition then he was not in their judgment competent to make a will in the preceding February. There was some proof to the effect that he then declared he had made no will; also, that he said that he had signed some paper which they had brought to him but he did not know what it was; that he was not attached to Mrs. Kockem, but spoke slightly of her, and there was considerable evidence tending to show that she exercised a dominating influence over him while they lived together at his old home. On the other hand, the testimony for the will was, in effect, that he had been especially attached to Mrs. Kockem's mother; that, when she was 15 years old, she paid him a visit of some length, and he became very much attached to her, called her "his little girl"; that from that time on the most affectionate relation existed between them, she visiting him from time to time and sending him presents; that in December, 1903, he had a fall, breaking his hip. She at once came from New York, bringing a servant with her, and, finding him in a neglected condition, stayed with him, nursed him, and provided him with such things as he needed, and took care of him until he was discharged by the doctor the following spring. During the years 1904 and 1905 he ran his farm, attended to his business, drove about in his buggy, and lived pretty much as he had done before. Mrs. Kockem came back to see him in the fall of 1904, and, when she returned in the summer of 1905, she found that his servants were neglecting him, and at his request she then stayed with him. Several witnesses testify to his declarations that she had been very good to him, and that he intended to leave her what he had. Other witnesses testify to declarations made by him

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after he was taken from home to the effect that he had made a will and had left her everything he had because she was so good to him. He was a man of naturally good sense and strong character. He was from the infirmity of age in a very bad condition when Mrs. Kockem took charge of the household. He needed tender ministrations, constant care. She washed him, shaved him, attended to his personal wants, which were of a peculiar nature, owing to a bowel trouble from which he suffered. His other relations appear to have paid him little or no attention, and to have left him entirely to the mercies of the negroes on the place until it was conceived that a proceeding should be instituted to have him declared incompetent to manage his estate. Mrs. Kockem evidently waited upon him very tenderly and at no little personal sacrifice. There was a large amount of evidence for the propounders tending to show that he was entirely competent to make a will, and that the will was executed in pursuance of a long cherished purpose on his part and in view of the services and self-sacrifice of Mrs. Kockem on his behalf.

The court allowed the contestants to read to the jury the verdict and judgment finding him mentally incompetent to manage his estate by reason of infirmity and age in August, 1906. This was error. It takes less capacity to make a will than to transact business generally. A person may by reason of infirmity and age be mentally incompetent to look after a farm and attend to business transactions of this sort when he would be entirely competent to make a will. At the time the inquest was held he was sick in bed, and too sick to be moved from the house for some weeks after the inquest. A man in this condition might well be in the judgment of a jury incompetent from age and infirmity to take care of his estate. This was not the issue to be tried here. The question here is: Had he testamentary capacity in February 1906? The verdict of the jury found six months later upon a different issue would serve only to confuse and mislead the jury, and should not have been admitted. No evidence should be allowed as to that proceeding on another trial, unless necessary to explain some other material fact, and then the jury should be charged not to consider it as evidence here. Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735.

The court at the conclusion of the evidence gave the jury the following instruction: "The court instructs the jury that if they should believe from the evidence before them that the name of W. N. Watson was subscribed to the paper offered for probate and purporting to be the will of the deceased, W. N. Watson, by the said Watson or by some other person in his presence at his direction, and that the said paper was subscribed in the presence of T. D. Evans and R. W. Davis as witnesses, or that the same was acknowledged by the testator in the presence of T. D. Evans and R. W. Davis, and that said T. D. Evans and R. W. Davis subscribed their names to said paper as witnesses thereto in the presence of said W. N. Watson, and that the said Watson was then of sound mind, the jury should find the paper to be the will of said Watson." This instruction is erroneous in two particulars. In the first place, it places the burden upon the propounders to show that Watson was of sound mind at the time he executed the will. This was improper. The rule is that when the propounders of a will have proved the due execution of the paper, and it is not irrational in its provisions or inconsistent in its structure, language, or details with the sanity of the testator, the presumption of law makes out for them a prima facie case, and the burden of showing that the testator was not in fact of testamentary capacity at the time of the execution of the will is shifted upon the contestants. Milton v. Hunter, 13 Bush, 170; Woodford v. Buckner, 111 Ky. 241, 63 S. W. 617, 23 Ky. Law Rep. 627; Henning v. Stevenson, 118 Ky. 318, 80 S. W. 1135, 26 Ky. Law Rep. 159, and cases cited.

The instruction is also erroneous in that it submits to the jury the question whether Watson executed the paper. The subscribing witnesses testify unequivocally and consistently to his execution of the paper. They are in no wise contradicted or impeached. The contestants put in evidence before the jury some checks, and it is said that the signature to these checks is so unlike the signature to the will as to show that Watson did not write it. We have examined the checks, and we find as great difference between the signatures to some of them as between the signature to the will and any of them. More than this, though Watson did not write it himself, still, the proof being unimpeached or uncontradicted that he acknowledged the signature as his and had the witnesses to witness it, the question of the genuineness of the signature should not be submitted to the jury. The subscribing witnesses are men of high character, and to submit the question to the jury would be to imply that there was something in the case warranting the jury in disregarding their uncontradicted testimony. In lieu of instruction 1, the court under the evidence should tell the jury that they should find the paper offered for probate to be the will of W. N. Watson unless they believe from the evidence that said Watson was at the time of its execution not of sound mind, or that the execution of the paper was procured by undue influence. Instruction 3 is the converse of No. 1, and is for the same reasons erroneous. In lieu of it, the court should tell the jury that if they believe from the evidence that W. N. Watson was not of

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sound mind at the time of the execution of the paper, or that the execution of the paper was procured by undue influence, they should find it not to be his last will and testament. These two instructions, with one defining testamentary capacity and another defining undue influence as below indicated, are the whole law of the case. A person is of sound mind in making a will if at the time of its execution he has such mental capacity as to enable him to know the natural objects of his bounty, his obligations to them, the character and value of his estate, and to dispose of it according to a fixed purpose of his own. Woodford v. Buckner, 111 Ky. 246, 63 S. W. 617, 23 Ky. Law Rep. 627. Undue influence is any influence obtained over the mind of the testator to such an extent as to destroy his free agency and to constrain him to do against his will what he would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated upon his mind at the time he executed the paper. But any reasonable influence obtained by acts of kindness or by appeals to the feelings or understanding, and not destroying free agency, is not undue influence. Turley v. Johnson, 1 Bush, 117; Broaddus v. Broaddus, 10 Bush, 299; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762, 11 Ky. Law Rep. 708. It is better practice not to allow the jury to take papers to the jury room for examination after the case is submitted unless by consent of counsel. If the jury wish to examine any paper given in evidence, they should ordinarily be brought back into the courtroom, and the examination had in the presence of the court and counsel. It is not necessary for them to have any other paper than the court instructions in the jury room. We do not mean to hold that it would be cause for reversal if other papers were taken to the jury room. The court has a discretion in such matters (L. & N. R. R. v. Berry, 96 Ky. 609, 29 S. W. 449, 16 Ky. Law Rep. 722), and its discretion will not be reviewed unless abused.

The other matters complained of will not likely occur on another trial.

Judgment reversed, and cause remanded for a new trial.

BAUSTIC et al. v. PHILLIPS et al.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. DEEDS (§ 95*) — CONSTRUCTION — MEANING OF WORDS.

Where a word in a deed is misspelled, the court will construe the deed according to the meaning of the word intended, rather than according to the meaning of the word actually used, especially where the latter construction would give no effect to the clause containing the word.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 241; Dec. Dig. § 95.*]

2. LOGS AND LOGGING (§ 2*)—RESERVATION OF TIMBER IN CONVEYANCE OF LAND — CONSTRUCTION.

A deed of land providing that all poplar, etc., 20 inches and upward in diameter is "accepted" in this deed, and all the walnut timber 16 inches in diameter is "accepted, and all rights to remove same," reserves in the grantor the timber described; the word "accepted" being intended for the word "excepted."

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 2, 5; Dec. Dig. § 2;* Deeds, Cent. Dig. §§ 462, 464.]

3. LOGS AND LOGGING (§ 2*)—CONVEYANCE OF LAND WITH RESERVATION OF TIMBER — RIGHTS OF GRANTOR.

Where the vendor reserves the trees growing on the land, or any portion thereof, they remain his property, and, as against the purchaser of the land, he may enter thereon, and, without doing any unnecessary damage, remove the timber, or he may sell such right or give license to another to exercise it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 4; Dec. Dig. § 2.*]

4. LOGS AND LOGGING (§ 5*)—SEVERANCE OF OWNERSHIP OF LAND AND TIMBER — REAL AND PERSONAL PROPERTY.

Standing timber is realty unless bought with the intention of immediate severance from the soil, and standing timber reserved in the grantor of the land is realty.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 14; Dec. Dig. § 5;* Property, Cent. Dig. § 8.]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by William Baustic and another against Hays Phillips and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. H. Flanery and J. E. Childers, for appellants. J. M. Roberson, Butler & Moore, Roscoe Vanover, and A. F. Childers, for appellees.

CLAY, C. Appellants, William Baustic and Louisa Baustic, instituted this action against appellees, Hays Phillips and Grant Phillips, to recover certain saw logs in the possession of appellees and $100 for their detention. Appellees answered, denying appellants' title, and pleading title in themselves to the logs in question. The case was submitted to a jury, which returned a verdict in favor of appellees. From the judgment based thereon, this appeal is prosecuted.

It appears from the record that on May 8, 1896, John Phillips and Dora Phillips executed to William Baustic and Louisa Baustic a deed conveying to them a certain tract of land situated in Pike county, Ky. The deed contains the following provision: "All the poplar, cucumber and ash timber, 20 inches and upward in diameter, is accepted in this deed, and all the walnut timber, 16 inches and upward in diameter, is accepted, and all rights to remove same off of said land." On September 18, 1896, John Phillips and his wife sold and conveyed by deed to Hays Phillips and Grant Phillips, appellees, the timber

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excepted from the provisions of the above deed. The conveyance from John Phillips, etc., to Hays Phillips, etc., contains the following clause: "There is no set time for taking said timber off of said land." Appellants contend: (1) That the title to the timber in question actually passed to them under and by virtue of the provisions of the deed to them bearing date May 8, 1896. (2) If by the terms of the aforesaid deed title to the timber in question was reserved to the grantors, they had only a reasonable time within which to cut and remove the timber. (3) That, having been in adverse possession of the land and timber for more than 13 years, they had title thereto by virtue of the statute of limitations.

1. Upon the first point it is argued that there is a wide difference between the words "accepted" and "excepted"; that the deed should be construed to mean that the timber in question actually passed under the deed and was accepted by the grantees. In determining this question we must take into consideration the fact that no provision accepting any property conveyed by a deed is ever necessary in order to make the deed effective. If the deed convey a certain property, the mere acceptance of the deed itself carries with it an acceptance of the property. To construe the deed, then, as contended for by appellants, would be to give no effect whatever to the clause in question. Where it is perfectly plain that a word is misspelled, the courts will construe the deed according to the meaning of the word intended, rather than according to the meaning of the word actually used, especially where the latter construction would give no effect to the clause containing the doubtful word. If the word "accepted" be read "excepted," then the clause in question has real meaning, and there is no reason why it should have been inserted in the deed. We therefore conclude that the parties intended to use the word "excepted," and thereby to reserve in the grantors the timber in question.

2. But it is insisted that the grantors had only a reasonable time within which to remove the timber; that, having failed to remove it in reasonable time, the title thereto became vested in the appellants. In support of this position they cite several cases. An examination of these cases, however, will show that the time of removal was actually fixed, or the contracts of sale contemplated the severance of the timber from the realty. In such cases it is held that the purchaser has only a reasonable time within which to remove the timber. Bell County Land & Coal Co. v. Moss, 97 S. W. 354, 30 Ky. Law Rep. 6; Chestnut v. Green, 120 Ky. 385, 86 S. W. 1122; Jackson v. Hardin, 87 S. W. 1119, 27 Ky. Law Rep. 1110. In the case under consideration, however, the grantors did not reserve to themselves the mere right to cut and remove the timber. They excepted from the provisions of the deed the timber in question. Therefore the title never passed to the grantees, but remained in them. Where the vendor of land reserves the trees growing thereon, or any portion thereof, they remain his property, and as against the purchaser of the land he has a right to enter on the land and without doing any unnecessary damage cut and remove the timber, or he may sell such right or give license to another to exercise it. Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776. Here the appellees, having title to the timber in question, simply cut the timber which belonged to them. The issue, then, was simply whether or not the timber so cut was of greater or less dimensions than those specified in the exception clause at the time of the purchase of the land by appellants. This issue was properly presented by the instructions of the court.

The statute of limitations with reference to personal property has no application to the facts of this case. Standing timber is realty unless bought with the intention of immediate severance from the soil. Dils v. Hatcher, 69 S. W. 1092, 24 Ky. Law Rep. 826; Asher Lumber Co. v. Cornett, etc., 63 S. W. 974, 23 Ky. Law Rep. 602.

Perceiving no error in the record prejudicial to the substantial rights of appellants, the judgment is affirmed.

NORTH BRITISH & MERCANTILE INS. CO. v. ROBERTSON.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

1. INSURANCE (§ 390*)—FIRE POLICY—WAIVER OF CLAUSE AGAINST ADDITIONAL INSURANCE.

A forfeiture under the clause against additional insurance may be waived either by parol agreement or the conduct of the insurer, and silence for an unreasonable time after notice of breach of the condition will constitute such conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.*]

2. INSURANCE (§ 668*)—FIRE POLICY—QUESTIONS FOR JURY.

Whether fire policies constituting additional insurance in violation of that clause were issued without the request of insured and by mistake, notwithstanding his acceptance thereof, and payment of premiums, *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1740; Dec. Dig. § 668.*]

3. APPEAL AND ERROR (§ 1003*)—REVIEW—QUESTIONS OF FACT.

A finding not flagrantly against the evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. § 1003.*]

4. INSURANCE (§ 336*)—FIRE POLICY—ADDITIONAL INSURANCE.

Fire policies issued without the request of insured and by mistake and which he did not seek to enforce are in effect no insurance at all,

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and their mere formal existence does not render void another policy under a clause providing that it should be void if insured then had or should thereafter procure any additional insurance, whether valid or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 858; Dec. Dig. § 336.*]

Appeal from Circuit Court, Logan County.

"To be officially reported."

Action by Eugene Robertson against the North British & Mercantile Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sims, Du Bose & Rodes and Chas. H. Shield, for appellant. Browder & Browder, for appellee.

CLAY, C. Appellee, Eugene Robertson, instituted this action against appellant, North British & Mercantile Insurance Company, to recover the sum of $2,500. The jury returned a verdict in favor of appellee, and from the judgment based thereon the North British & Mercantile Insurance Company appeals.

Among the conditions contained in the policy is the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." On the policy was the following indorsement: "15,000.00 total concurrent insurance permitted on stock." At the time of the fire, which occurred on the 10th day of March, 1907, and at the time the adjuster was called to adjust the loss, there were policies of insurance on the stock of goods in the Phœnix, Hartford, Firemen's Fund, and other insurance companies, amounting to $20,800.

Appellant's defense to the action was based on the fact that the policy allowed only total concurrent insurance in the sum of $15,000, while, as a matter of fact, appellee had insurance on his stock of merchandise amounting to $20,800. To overcome this defense the appellee pleaded knowledge on the part of the company's agent, and of the company, of additional insurance amounting to $17,300. As to the other insurance in excess of the $15,000, to wit, $3,500, appellee pleaded that at the time of the destruction of his property there was in his possession a policy purporting to have been issued to him by the American Central Insurance Company of St. Louis for $2,500, which policy was dated December 30, 1906, and was to expire December 30, 1907; that said policy was not issued to him at his instance or request, and that he did not know that he had any such policy of insurance covering his property until after the fire of March 10, 1907; that it was issued by mistake of the local agent of the American Central Insurance Company at Adairville; that he never at any time requested said agent to issue said policy, and that it was issued by mistake and was never in fact in existence as a contract between the plaintiff and the American Central Insurance Company; that the policy had been returned to said company and the amount of the premium thereon, to wit, $41.25, had been refunded to him. Appellee also pleaded that a certain policy, No. 1086, which had been issued to him by the Phœnix Insurance Company on February 6, 1907, purported to insure his property in the sum of $2,000, when, as a matter of fact, it should have provided for insurance on said property in his favor in the amount of $1,000 only; that, by mistake of the local agent at Adairville, said policy was written for $2,000 when it ought to have been written for $1,000; that in settling his claim against the Phœnix Insurance Company said policy, No. 1086, was treated by appellee and said insurance company as a policy for $1,000, instead of a policy for $2,000. Both appellee and appellant's local agent, M. L. Fugate, swear that the latter at the time the policy herein sued on was issued knew that appellee had $17,300 insurance, including the policy herein sued on. Upon this point there is no evidence to the contrary. Appellant insists, however, that we should now depart from the rule laid down in the case of Phœnix Insurance Co. v. Spiers & Thomas, 87 Ky. 285, 8 S. W. 453, 10 Ky. Law Rep. 254, wherein this court laid down the rule that, where a policy of insurance provides for a forfeiture in case of additional insurance without the written consent of the company indorsed upon the policy, the condition may be waived, either by parol agreement or by the conduct of the company; and silence for an unreasonable time upon the part of the company, after knowledge or notice of the breach of the condition, will constitute such conduct. We see no good reason, however, why the rule above announced should be departed from. It has been followed in a number of cases by this court. The doctrine is not only well settled, but in our opinion is based upon sound reasoning. Where the company's agent leads the insured to believe that the company will not insist upon the forfeiture under the additional insurance clause and accepts the premium which the insured pays, it would not be equitable or just to permit the company thereafter to avail itself of such forfeiture when such action would lead to the injury of the insured who was misled by the company's representative. For authorities in point, see Rogers v. Farmers Co., 106 Ky. 371, 50 S. W. 543, 20 Ky. Law Rep. 1925; May on Insurance, p. 754; Sun Mutual Co. v. Crist, 39 S. W. 837, 19 Ky. Law Rep. 305; Citizens' Co. v. Crist, 56 S. W. 658, 22 Ky. Law Rep. 47; Germania Insurance Co. v. Wingfield, 57

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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S. W. 456, 22 Ky. Law Rep. 455; Gragg v. Home Insurance Co., 107 S. W. 321, 32 Ky. Law Rep. 988.

The evidence as to the American Central Insurance Company policy of $2,500 is as follows: That policy bore date December 30, 1906, and expired December 30, 1907. The policy herein sued on bore the same date and expired the same date. E. R. Moore was the local agent for the American Central. M. L. Fugate was appellant's local agent. Appellee had large property and carried many insurance policies. They were kept in the bank, of which M. L. Fugate was cashier. Robertson did not know the names of the companies, the respective amounts of the policies, or how they were divided between building, stock, and fixtures. M. L. Fugate was Robertson's banker, and E. R. Moore was a patron of his store. These two agents were continuously soliciting Robertson for insurance business. Some time in 1905 or 1906, Robertson concluded to divide his insurance between these two agents and to give Moore an increase. The policy herein sued on is an old policy. Some time in 1906 Robertson, knowing this policy was to expire, gave Moore the date of the expiration of the policy, and instructed him to write a policy for $2,500 in one of his companies when the North British & Mercantile Insurance Company policy expired. Moore then made a note of the expiration of the latter policy, and on December 30, 1906, wrote $2,500 of insurance for Robertson in the American Central Insurance Company. In the meantime Robertson had been interviewed by Fugate, and at the latter's solicitation agreed to change his plans and allow Fugate to keep the business and to renew the North British policy on December 30, 1906. Accordingly Fugate did renew it and Moore wrote the same insurance in the American Central. In December, 1906, after he had agreed to let Fugate retain the insurance, Robertson sent one of his clerks to E. R. Moore with instructions not to write the policy in the American Central. The clerk corroborates Robertson's testimony on this point, and says he delivered the message to Moore. The latter had no remembrance of receiving any such instructions, but wrote the insurance. The policy in the American Central was delivered to Robertson and the premium thereon paid, partly in cash and partly by merchandise obtained at Robertson's store. Fugate also delivered the policy herein sued on and collected the premium thereon. Robertson took both policies at separate times, and, placing them in his pocket, took them to the bank, and had them deposited in his box there. He did not read or examine them. Both Fugate and Moore had instructions from Robertson to watch the expirations, and to renew the various policies when they expired. This they had done for years. From time to time they would present new policies to Robertson and collect for them. When Moore presented the American Central policy, Robertson merely supposed it was some such renewal and acted accordingly. He never collected, or attempted to collect, on the American Central policy, and surrendered it when he discovered the mistake.

As to the Phœnix policy, No. 1086, issued for $2,000, the evidence is as follows: This policy was dated February 6, 1907. Robertson says it should have been for only $1,000. About that time E. R. Moore was carrying for Robertson a $2,000 policy in the Phœnix and a $1,000 policy in the Ætna. Robertson claims that he telephoned Moore before the date of the expiration of the Phœnix policy that he had agreed to let Fugate have that $2,000 policy. He thereupon instructed Moore to renew the $1,000 policy in the Ætna, and let the $2,000 policy lapse. Accordingly, on February 6, 1907, the date on which the Phœnix policy expired, Fugate wrote a $2,000 policy in the Firemen's Fund Company. Moore, instead of allowing the $2,000 policy to lapse and renewing the $1,000 policy, did the very reverse. Moore testified that he had the two policies—one for $2,000 and one for $1,000—referred to by Robertson; that Robertson telephoned him to let one lapse and renew the other. His recollection was that Robertson told him to renew the $2,000 policy and let the $1,000 policy lapse; that was the way he understood the message, but it was not impossible that Robertson told him to renew the $1,000 and let the $2,000 policy lapse.

Several insurance adjusters, who had been sent to Adairville by their respective companies to adjust the loss, testified that they asked appellee for the policies of insurance he was claiming under, and he exhibited to them insurance policies amounting to $20,800. Among them were the two policies, the one in the American Central for $2,500 and the other in the Phœnix for $2,000. They asked him how he happened to exceed the amount of insurance permitted, and he answered that he did not know he had exceeded it. At that time he made no mention of the fact of any mistake in regard to either the Phœnix or American Central policies. Robertson, on the contrary, testified that they merely asked him for his policies, and he exhibited the same without making any mention in regard to them.

It is insisted by appellant that it was entitled to a peremptory instruction so far as additional insurance was represented by the American Central and Phœnix policies, because the proof shows that Robertson actually had these policies in his possession and paid the premiums thereon, and that he made no claim of any mistake therein until the fact developed that he was carrying more insurance than the policy in question permitted. In view, however, of the explanation made by Robertson and of the circum-

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stances attending the issual of the two policies, we are unable to say as a matter of law that his acceptance of the policies and payment of the premiums thereon conclusively establishes the point that the policies were actually in force at the time the policy herein sued on was written. Upon this question there was a sharp issue of fact. There are many circumstances tending to corroborate Robertson's statement. The probability or improbability of his story was a question for the jury. Being unable to say that their finding was flagrantly against the evidence, we cannot disturb it on the ground of insufficient evidence.

It is next insisted that the additional insurance clause provided that the policy should be void if the insured then had, or should thereafter make or procure any other contract of insurance, whether valid or not, and, even if the policies in the Phœnix and American Central companies were not valid, this fact invalidated the policy sued on. In other words, appellant's contention is that the two policies referred to were either valid or invalid, and that in either event the North British policy was rendered void. Our conclusion, however, is that if the two policies constituting the additional insurance were not authorized by Robertson to be issued, and were issued by mistake, and he did not claim any rights thereunder or seek to enforce their collection, they were neither valid nor invalid insurance, they were in effect no insurance at all, and their mere formal existence as policies did not render void the policy sued on.

For the reasons given, the judgment is affirmed.

JONES v. LOUISVILLE TOBACCO WAREHOUSE CO.

(Court of Appeals of Kentucky. Sept. 24, 1909.)

1. FRAUDULENT CONVEYANCES (§ 154*) — TRANSFERS BETWEEN HUSBAND AND WIFE—VALIDITY AS TO THIRD PERSONS—REGISTRATION.

Under Ky. St. § 2128 (Russell's St. § 4631), providing that a transfer of personal property between husband and wife shall not be valid as to third persons, unless in writing and recorded, a surrender of tobacco by husband to wife, not reduced to writing or recorded, was invalid as to his other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485–492; Dec. Dig § 154.*]

2. FRAUDULENT CONVEYANCES (§ 184*)—RENT LIEN — EFFECT OF INVALID TRANSFER OF PROPERTY TO LANDLORD.

A surrender of tobacco by husband to wife being invalid, as to his other creditors under Ky. St. § 2128 (Russell's St. § 4631), because not reduced to writing and recorded, left unchanged her superior landlord's rent lien, under section 2317 (Russell's St. § 4574), on the tobacco raised on land leased by him of her.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 583; Dec. Dig. § 184.*]

3. LANDLORD AND TENANT (§ 254*) — RENT LIEN—ENFORCEMENT—LOSS OF RIGHT.

Under Ky. St. § 2317 (Russell's St. § 4574), giving the landlord a superior lien for a year's rent on produce of the leased farm, but for no rent that has been due for more than 120 days, and providing that if the produce be removed openly from the leased premises, without fraudulent intent, and be not returned, the landlord shall have his lien on it for 15 days from its removal, and may enforce it against the property wherever found, where after the end of the year for which a farm was rented, at which time the rent became due, the tenant, being indebted for the rent, surrendered tobacco raised on the farm to the landlord, which surrender was invalid as against the tenant's other creditors because the landlord was his wife, and she then shipped the tobacco to defendant to sell as her agent, and it sold it, applied the proceeds on the tenant's debt to it, and refused to pay the landlord, all this within 15 days after the removal of the tobacco from the premises, and 120 days after the termination of the lease —the landlord's right of action against defendant to enforce its lien against the proceeds accruing when it refused to pay her the same was not lost by failure to bring the action within 120 days after the rent became due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1040; Dec. Dig. § 254.*]

4. FRAUDULENT CONVEYANCES (§ 20*)—PARTIAL INVALIDITY.

A lease by the wife of the lessee and another not being recorded, its provision that the landlord shall have a lien on the crop for the rent is invalid as to creditors so far as concerns the lien given the wife.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 26; Dec. Dig. § 20.*]

5. SUBROGATION (§ 1*)—NATURE AND THEORY OF RIGHT.

Subrogation is only allowed where there is some equitable reason for it.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. SUBROGATION (§ 26*) — VOLUNTARY PAYMENT.

One who pays a debt for another voluntarily is not ordinarily subrogated to the rights of the creditor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 67; Dec. Dig. § 26.*]

7. PLEADING (§ 8*)—SUBROGATION—CONCLUSIONS.

The allegation of the petition that plaintiff, one of two landlords, who paid to the other landlord her part of the rent, was subrogated to the rights of the other, is a mere legal conclusion; it being necessary to state the facts showing a right of subrogation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–31; Dec. Dig. § 8.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by M. N. Jones against the Louisville Tobacco Warehouse Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

B. G. Williams and J. Morgan Chinn, for appellant. Brown & Nuckols, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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HOBSON, J. Appellant, Maggie N. Jones, brought this suit against the Louisville Tobacco Warehouse Company to recover the proceeds of certain tobacco which she alleged she had shipped to it in March, 1906, and it had sold as her agent. The warehouse company claimed the right to hold the money as the property of John W. Jones, the husband of Maggie N. Jones, on account of a debt which he owed to it contracted about the year 1896. The circuit court sustained a demurrer to the plaintiff's reply to the defendant's answer, and, she declining to plead further, dismissed her petition. From this judgment she appeals.

The facts admitted by the demurrer are these: Maggie N. Jones and her mother, Minerva Noel, owned a farm in Franklin county, and on March 1, 1905, they entered into the following written contract by which they rented the farm to J. W. Jones: "For and in consideration of the sum of nine hundred dollars ($900.00) to be paid on or before the first day of March, 1906, we, Mrs. Minerva Noel and Maggie N. Jones of the first part have this day rented to J. W. Jones of the 2nd part of our farm known as the S. M. Noel farm for the term of one year. Parties of the first part reserve for their own use the tenement house at front gate, the two tenement houses at the mouth of branch, the pump house and right of way to said tenement house and pump house right of way over and for repairing of pipe line by the distillery company and also the slop privilege at the new cattle sheds. First parties also reserve a lien on all crops grown on said farm until all moneys for rent are paid. First parties reserve all right for seeding purposes in the fall of the year. First parties are not to repair any fencing on said farm. Possession of farm to be given 1st of March 1905, given up March 1st, 1906. Second party is allowed to work lands on farm any way he wants to, or to sublet any lands that he wants to, or to plow any lands, and is to do all the repairing on barns, fencing, etc., at second parties own expense. Minerva Noel. Maggie N. Jones. J. W. Jones." On March 1, 1906, Jones owed $550 of the rent, and Maggie N. Jones then paid to Mrs. Noel her part of the rent, and thus became entitled to all the rent as between her and her husband. He had sublet the farm the year before to a number of tenants who had raised a crop of tobacco on it, under contracts by which they were to have one-half of the tobacco and he one-half. J. W. Jones then surrendered to Maggie N. Jones his half of the tobacco which was then on the place, and she took possession of it and shipped it to the warehouse company. The net proceeds of half of the tobacco when sold by the warehouse company amounted to $214.54. The rent contract above quoted was not recorded. The arrangement by which J. W. Jones surrendered to his wife his one-half of the tobacco was verbal, and not reduced to writing or recorded. Section 2128, Ky. St. (Russell's St. § 4631), which gives the wife the right to make contracts as a single woman, contains this proviso: "A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers." It is insisted for the warehouse company that, as the transfers between the husband and wife were not recorded, they were void, and the title to the tobacco still remained in the husband. Section 2317, Ky. St. (Russell's St. § 4574), is as follows: "A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found." It is conceded that under this section the wife had a lien on the tobacco for her rent; but it is insisted that this lien was lost because it was not asserted within 120 days after the rent fell due or within 15 days after the removal of the tobacco from the premises.

In Eberhardt v. Wahl, 124 Ky. 223, 98 S. W. 994, 30 Ky. Law Rep. 412, Mrs. Eberhardt and her husband, Jacob, executed two notes to a bank for $250 for money borrowed by him. To secure the first note he pledged 10 shares of stock which he owned and to secure the second note she pledged 10 shares of stock which she owned. She paid to the bank $250 of her own money, intending to pay the note which was secured by the pledge of her own stock. But the bank applied it to the payment of the first note which was secured by the pledge of her husband's stock. She applied to the bank to correct the mistake, and was told by the bank officers that all that was necessary was that her husband should deliver to her the 10 shares of stock which had been released to secure her in the $250 which she had paid, and protect her against liability on the second note. This was accordingly done, but the agreement was not recorded. In this condition of things another creditor attached the husband's 10 shares of stock. It was held by this court that the arrangement between the husband and wife was void, and that the wife acquir-

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ed no lien on the husband's 10 shares of stock by reason of the transfer of the stock to her by him. But it was also held that the bank had a lien on the 10 shares of stock, and that the wife, having paid the note to the bank which was secured by the stock, was entitled to be subrogated to the lien of the bank under the circumstances, independently of any transaction between her and her husband. See, also, Stroud v. Ross, 118 Ky. 630, 82 S. W. 254, 26 Ky. Law Rep. 521. In Marquess v. Ladd, 100 S. W. 305, 30 Ky. Law Rep. 1142, the tenant, while the tobacco was on the leased premises, turned over his interest in the crop to the landlord under an agreement that he should retain possession of it and place it upon the market with the Dark Tobacco Protective Association, where it was to remain until sold, and that out of the proceeds of it when sold the landlord was to pay himself what the tenant owed him and pay the remainder to the tenant. Under this arrangement the landlord took possession of the tobacco, and instituted no proceedings to enforce his lien. More than 20 days after the expiration of the lease suit was brought to enforce a mortgage given by the tenant before the tobacco was turned over to the landlord; and it was insisted that the landlord had lost his lien by failing to institute proceedings to enforce it. Rejecting this claim, the court said: "When the agreement between the landlord and the tenant was made in November, 1904, the landlord had a superior lien upon the tenant's interest in the tobacco to secure the payment of the money and property advanced to him, and the crop was on the leased premises. This lien he had the right under the statute to enforce at any time within 120 days after the expiration of the tenancy. The purpose of the statute was to secure the landlord for advances made to his tenant by giving him a lien upon the crop. If, after the crop has been planted and at any time during the period for which the lien of the landlord exists, the tenant for any reason concludes to deliver his interest in the crop to the landlord as security for advances made, we cannot perceive any reason why the lien in this way may not be preserved. An agreement of this kind does not extend the lien of the landlord beyond the statutory period, as the legal effect of it is the same as if the landlord had instituted leagl proceedings to enforce the collection of his lien, and had acquired possession of the crop under process of the court. Creditors of the tenant cannot be prejudiced by an agreement of this character because the landlord holds the tenant's interest as a pledgee, and must account for whatever surplus remains after discharging his debt."

Under the statute a gift, transfer, or assignment of personal property between husband and wife is invalid as to third persons unless in writing, acknowledged and recorded as chattel mortgages are required to be acknowledged and recorded. The surrender of the tobacco by Jones to his wife was a transfer of personal property, and, not being reduced to writing or recorded, was invalid. After that arrangement was made, the parties stood where they were before it was made. It took from the wife no right she then had and it added nothing to her rights. Before that surrender was made, she had a lien on the tobacco for her rent under the statute, and this superior lien she continued to have after the arrangement was made. The rent was not due until March 1, 1906. The tobacco was sold during that month. When the tobacco was sold, her demand against the warehouse company accrued, and, it then refusing to pay her the money, her right to the money was in no wise affected by the fact that she did not bring her suit against the warehouse company until December 10, 1906. The tobacco having been sold and the proceeds being in the hands of the warehouse company, her right of action against it accrued when it refused to pay the money over to her, and, this all having occurred within 120 days after the rent became due, her delay in suing after the liability accrued did not prejudice the warehouse company. There is nothing in the case to show that the tobacco had been removed from the premises more than 15 days before it was received or sold by the warehouse company and the proceeds applied by it upon its debt against J. W. Jones. This case differs from Marquess v. Ladd, in this: in that case the landlord and tenant could contract with each other and a surrender by the tenant to the landlord was not invalid. In this case the landlord and tenant can only contract as provided by the statute, and a surrender of personal property by the tenant to the landlord is invalid unless made as required by it. But, as it does not appear that 15 days had elapsed after the removal of the property from the premises and before its receipt or sale by the warehouse company, no opinion is indicated as to what would be the effect of such removal in a case like this. The circumstances indicate that only a short time elapsed after the removal of the property from the premises before its receipt and sale by the warehouse company. The written lease provided that the owner of the land should have a lien on the crop for the rent, but, as this was not recorded, the special contract was invalid so far as it stipulated for a lien on the crop in favor of the wife. It was valid, however, as to Mrs. Noel. She had a lien by virtue of the contract on the crop of tobacco as against the warehouse company whose debt was created in the year 1896. It is alleged in the petition that Mrs. Jones when she paid Mrs. Noel her part of the rent became subrogated to her rights. But no facts are alleged showing a right of subrogation. One who pays a debt for another voluntarily is not ordinarily subrogated to the

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rights of the creditor. Subrogation is only allowed where there is some equitable reason for it. The allegation that the plaintiff was subrogated to the rights of Mrs. Noel is only a conclusion of the pleader. The facts must be stated showing a right of subrogation, if the plaintiff bases her right of recovery upon the lien given Mrs. Noel in the lease; but the plaintiff is entitled to a lien under the statute for the rent due her.

We therefore conclude that the court erred in sustaining the defendant's demurrer to the plaintiff's reply. On the return of the case the parties will be allowed to amend their pleadings if they desire to do so.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NETTER'S ADM'R v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. Oct. 5, 1909.)

1. NEW TRIAL (§ 75*)—GROUNDS—INADEQUACY OF DAMAGES.

Civ. Code Prac. § 341, providing that a new trial shall not be granted on account of the smallness of the damages, in an action for injuries to the person or reputation, "or in any other action in which the damages equal the actual pecuniary injury sustained," includes not only actions for injury to the person or reputation, but any other action in which it is sought to recover damages, whether the action is founded in tort or on breach of contract, and it applies to an action by a personal representative for damages for the destruction of decedent's life, and, where the recovery equals the actual pecuniary loss, a new trial cannot be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.*]

2. NEW TRIAL (§ 75*)—GROUNDS—INADEQUACY OF DAMAGES.

In an action for death, a new trial may be granted where the evidence shows, even approximately, the pecuniary loss the estate of decedent sustained, and the amount assessed is insufficient as compensation, but, where there is no evidence on which to base an opinion as to the pecuniary loss suffered by the estate, the verdict will not be disturbed on the sole ground that it is inadequate.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 152; Dec. Dig. § 75.*]

3. NEW TRIAL (§ 75*)—GROUNDS—INADEQUACY OF DAMAGES.

Where, in an action for injury to a person, the evidence showed the amount of the pecuniary loss the injured person had sustained, and the amount assessed was insufficient as compensation, a new trial, on the ground of inadequacy of the verdict, might be granted, but, where a recovery is sought solely for mental or physical pain, the verdict will not be disturbed on the sole ground of inadequacy.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 152; Dec. Dig. § 75.*]

4. STREET RAILROADS (§ 95*)—OPERATION OF CARS—CARE REQUIRED.

To relieve a street railroad company from liability for killing a child struck by a car, on the ground that the child came on the track so close to the car that the motorman, by ordinary care, could not stop it in time to prevent the injury, it must appear that the car was run at a reasonable speed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 202; Dec. Dig. § 95.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for the death of a child struck by a car, the jury found the negligence of the motorman, the error in an instruction stating the law defining the liability of the company in case the child came on the track so close to the car that the motorman could not stop it in time to prevent the injury, arising from the failure to direct the attention of the jury to the speed at which the car was running, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

6. NEW TRIAL (§ 42*)—DISQUALIFICATION OF JUROR.

Ky. St. 1909, § 2247 (Russell's St. § 3070), providing that service as a juror in any circuit court on the regular panel within 12 months shall be ground for challenge for cause, though adopted in 1906 (Acts 1906, p. 519, c. 156), must be read as a part of section 2253 (section 3076), defining the qualifications of jurors, and providing that the fact that a person not competent served on a jury shall not be cause for setting aside the verdict, adopted in 1893 (Acts 1891–92–93, p. 958, c. 210, § 13), and amended in 1894 (Acts 1894, p. 219, c. 98), and the fact that a juror had served within 12 months does not justify setting aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 78; Dec. Dig. § 42.*]

7. NEW TRIAL (§ 54*)—DISQUALIFICATION OF JUROR—WAIVER.

Where, in civil actions, the incompetency of a juror because related to one of the parties, or not fit, by reason of prejudice, to render a fair decision, is not discovered until after trial, the verdict may be set aside, provided due diligence was exercised to discover the facts disclosing the incompetency of the juror before his selection.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 112–114; Dec. Dig. § 54.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Irene Netter's administrator against the Louisville Railway Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Edwards, Ogden & Peak, for appellant. Fred Forcht, Jr., Fairleigh, Straus & Fairleigh, and D. W. Baird, for appellee.

CARROLL, J. Irene Netter, a child about 12 years of age, was run over and killed by a street car operated by the appellee company. This action was brought by her administrator to recover damages for the destruction of her life—the petition not seeking to recover any special damages. Upon a trial before a jury a verdict was returned in favor of the administrator for $500. Not being satisfied with the amount of the recovery, he prosecutes this appeal, asking a reversal upon two grounds: First, because the damages assessed are inadequate; and, second, for error in instructing the jury.

In reference to the first error assigned,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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section 341 of the Civil Code of Practice provides that: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, or in any other action in which the damages equal the actual pecuniary injury sustained; nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence." Counsel for appellant insist that this section is not applicable to actions to recover damages for injuries resulting in death, urging that it should be limited to actions for personal injuries in cases where death does not result from the injuries sustained. It will be observed that the section is not confined to actions for injuries to person or reputation, but embraces all "other actions in which the damages equal the actual pecuniary injury sustained." So that, giving to the language used its fair meaning, the section must be held to include not only actions for injury to the person or reputation, but any other action in which it is sought to recover damages, whether the action be founded in negligence or tort, or grow out of the breach of a contract. It follows, therefore, that the section is fully as applicable to an action brought by the personal representative of a person whose life has been destroyed as it is to an action brought by the injured person in his own behalf. In either case, if the recovery equals the actual pecuniary loss, a new trial cannot be granted. Therefore the only question left for the courts to determine in actions where this question is presented is whether the damages awarded equal the actual pecuniary injury sustained. If the damages do not equal the actual pecuniary injury sustained, then a new trial may be granted, whether the action is for an injury to the person or an injury to the reputation, or is rested on some other grounds growing out of negligence, breach of contract, or wrongful act. But if in an action for breach of contract or for an injury to the person or the reputation, or an injury resulting from negligence or wrongful act, the damages equal the actual pecuniary injury sustained, a new trial cannot be granted, although the damages awarded may seem to be inadequate. As no special damages were claimed, and there was no evidence introduced to show what loss if any the estate of the decedent sustained by her death, the recovery being sought solely for the destruction of the life of the decedent, we are unable to say with any reasonable or approximate degree of certainty what the pecuniary injury to her estate was. It is true that under our system of practice juries are called upon in every case where a recovery in damages is sought for the destruction of life by negligence or wrongful act to fix the loss the estate of the decedent has suffered by reason of his death; and often they must do this when there is no evidence upon which they can rest their conclusion as to the amount that should be awarded. But this means or method of arriving at and fixing the amount of recovery, although recognized as unsatisfactory, is the best attainable under the circumstances, and hence it is generally agreed that the verdict of a jury in respect to the amount awarded will not be disturbed unless it is flagrantly against the evidence. Verdicts in personal injury cases and in actions to recover damages when death has resulted from a tort are often set aside because the amount of damages awarded is excessive. And so verdicts in actions to recover damages for injuries to the person have been set aside because the amount awarded was insufficient, in that it did not equal the actual pecuniary loss sustained. In the early case of Taylor v. Howser, 12 Bush, 465, the contention was made that the section of the Code under consideration was divisible into two parts, each stating a distinct rule of practice; the first part providing that in no action for an injury to the person or reputation could a new trial be granted on account of the smallness of the damages, the second that a new trial might be granted in actions not involving an injury to the person or reputation if the damages did not equal the pecuniary loss sustained. But the court rejected this construction of the section, and held that whether the action be for an injury to the person or the reputation or rested on other grounds a new trial might be granted if the amount awarded did not equal the actual pecuniary injury sustained; and this construction was followed in Ray v. Jeffries, 86 Ky. 367, 5 S. W. 867. In Jesse v. Shuck, 12 S. W. 304, 11 Ky. Law Rep. 463, it was held that in an action for personal injuries where special damages were sought to be recovered as for loss of time, cost of medical attention, and expense in effecting a cure, and there was evidence showing approximately the amount and value of the time lost, or the amount expended in effecting a cure, the section of the Code did not deny a new trial if the amount awarded did not equal the loss sustained as shown by the evidence in the particulars mentioned. To the same effect is Baries v. Louisville Electric Light Co., 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186, 27 Ky. Law Rep. 653. Adopting and following the reason of these cases, we are of the opinion that, in an action to recover damages for loss of life, a new trial might be granted if there was evidence showing even approximately the pecuniary loss the estate of the deceased sustained, and it appeared that the amount assessed was wholly insufficient as compensation. And the same rule would apply in an action for an injury to the person if there was evidence showing the amount of the pecuniary loss the injured person had sustained by reason of his injuries in being deprived of the ability to follow his vocation in life, or otherwise

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unfitted for the performance of such services as he might have rendered except for his injuries, and this, independent of the amount sought to be recovered as special damages as for lost time or expenses in effecting a cure. But, where a recovery is sought solely for mental or physical pain or suffering, or where the action is to recover damages for the death of a person, and there is no evidence upon which to base an opinion as to the pecuniary loss suffered by his estate, the verdict of the jury will not be disturbed upon the sole ground that it is inadequate. It follows from this that in the case before us we are not at liberty to disturb the finding of the jury upon the ground that the assessment of damages was inadequate, because there was no evidence whatever tending to show the loss the estate of the deceased sustained by reason of her death, nor any pleading asking compensation in the way of special damages.

In considering the second error assigned, it will be necessary to state briefly the facts. The deceased was run over and received the injury from which she died while attempting to cross Preston street at its intersection with Camp street. Several witnesses on behalf of the plaintiff below testified that the car that struck the deceased was at the time running at a high and unreasonable rate of speed; while other witnesses on behalf of the company said that the car was running slowly, or not at an unusual or unreasonable rate. With this evidence before the jury upon this vital issue in the case, the court gave instruction No. 4, reading as follows: "If you shall believe from the evidence that Irene Netter suddenly ran in front of the car, and so close to the car that the motorman in charge of the car could not by the exercise of ordinary care have stopped the car and prevented the injury to Irene Netter, then the law is for the defendant, and you should so find, unless you should further believe from the evidence that after Irene Netter came in peril from the car the motorman could by the exercise of ordinary care have discovered her peril, and by the exercise of ordinary care could have stopped the car or so controlled it as to prevent injury to her. In the last event, the law would be for the plaintiff." The error in this instruction consists in the failure to incorporate in it the idea that the car at the time deceased was struck was running at a reasonable rate of speed. If the car was running at such a rate of speed that the motorman could not by the exercise of ordinary care on his part have prevented the injury, even though he had discovered the peril of the child in time to have done so, if the car had been running at a reasonable speed, then the fact that Irene Netter "suddenly ran in front of the car and so close to the car that the motorman in charge of the car could not by the exercise of ordinary care have stopped the car and prevented the injury" would not relieve the company from liability. In other words, to excuse the company upon the ground that Irene Netter came upon the track so close to the car that the motorman in the exercise of ordinary care could not stop it in time to prevent the injury, it was necessary that the car should have been operated at a reasonable rate of speed. This view of the law is fully supported by the cases of Louisville Railway Company v. Buckner (Ky.) 113 S. W. 90; Goldstein's Adm'r v. Louisville Railway Co. (Ky.) 115 S. W. 194; Louisville Railway Co. v. Gaar (Ky.) 112 S. W. 1130; Lexington Railway Company v. Van Laden, 107 S. W. 740, 32 Ky. Law Rep. 1047. But this error is not one that will in this case authorize a reversal, although, if the verdict had been for the railroad company, it would, as then it might be well said that the jury reached the conclusion that the deceased came so suddenly in front of the car that the motorman could not stop it in time to avoid striking her, although they may have believed that, if the car had been running at reasonable speed, the accident could have been avoided. The omission in the instruction could only have weighed with the jury in considering whether or not the defendant was guilty of negligence, and, as this point was decided in favor of the plaintiff, it is clear that the instruction was not prejudicial, and that the failure to direct their attention to the speed at which the car was running did not influence the jury in reaching the conclusion that the accident could have been avoided. Before the jury could find for the plaintiff in any sum, they must have agreed that the defendant company was guilty of negligence, and, having so agreed, the next question was the amount to be awarded.

Complaint is also made that the court erred in refusing to sustain a challenge for cause presented against George Deucer, who was summoned as a juror. Section 2247 of the Kentucky Statutes (Russell's St. § 3070) provides in part that: "If a juror drawn from the drum or wheel case has served in any circuit court on the regular panel within twelve months, such service shall be ground for challenge for cause; if a juror is summoned as a bystander, after having within twelve months served on any jury in any circuit court as a bystander, such service shall be ground for challenge for cause; and if the name of a juror does not appear on the last returned assessor's book for the county, it shall be a ground for challenge for cause." The record is not clear upon the question that Deucer was asked if he had served as a juror within the last year in any of the divisions of the Jefferson circuit court, or that he answered "No." This trial was had in March, 1907, and the transcript of the official stenographer shows that, when Deucer was challenged for this cause, "it appeared that said juror had not served as a juror in any division of the Jeffer-

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son circuit court since October last." The bill of exceptions recites that Deucer was asked if he had served as a juror within the last year in any of the divisions of the Jefferson circuit court," to which he answered "No." While the affidavit of the counsel who propounded the questions to Deucer recites that, when Deucer was asked if he had served in either of the divisions of the Jefferson circuit court within the last year, he answered "No, sir; that he had served in one of the divisions last April, but had not served in either of the divisions since the beginning of the present term of the court, to wit, October, 1908." But whatever Deucer's answer was, and whether true or false, the failure of the court to sustain a challenge to him and the fact that he remained on the jury is no ground for a new trial. If we should assume that Deucer had served on the regular panel of a jury in the Jefferson circuit court within a year, and that when inquired of concerning his service as a juror he answered "that he had not so served," or further assume that, if he had answered "Yes," the challenge would have been overruled, or if we should assume that he falsely answered and his false answer induced the court to rule him competent, it would not yet be such error as would authorize us to reverse the case. Section 2253 of the Kentucky Statutes (Russell's St. § 3076), after describing the qualifications of a juror, mentions a number of persons who are incompetent to sit on a jury, and then provides: "But the fact that a person not competent served on a jury shall not be cause for setting the verdict aside, nor shall exceptions be taken to any juror for such cause after the jury has been sworn. This section is part of an act of 1893 (Acts 1891–92, 93, p. 958, c. 210, § 13), as amended by an act of 1894 (Acts 1894, p. 219, c. 98), while section 2247, supra, is an act of 1906 (Acts 1906, p. 519, c. 156); but in our opinion so much of the act of 1906 as relates to the qualifications of jurors should be read in connection with and as a part of section 2253. In other words, in addition to the qualifications for jury service specified in section 2253, there should be added the disqualification arising from service on a regular panel within a year. The provisions in both acts in so far as they concern the qualifications of jurors relate to the same subject and the construction that is given to the one should be applied to the other. Especially should this construction prevail in view of the fact that section 2247 does not provide the practice in the event the challenge is overruled, or declare what effect the incompetency of a juror shall have on the verdict. If the fact, that a person who is not a citizen, or 21 years of age, or a housekeeper, is not ground for setting aside a verdict made by a jury of which such person was a member; neither should service upon a regular jury within a year be cause for setting the verdict aside. It was intended by the statute that the trial judge should have the final disposition of questions touching the competency of jurors in so far as their qualifications are described in the sections of the statute we have been considering. The Legislature evidently assumed that if a juror was challenged in time because incompetent under the statute, and it was made to appear that the challenge was well taken, the trial judge would excuse the person challenged, and we have no doubt in the present case that, if the trial judge had understood that Deucer had served on a regular panel of the Jefferson circuit court within a year, he would have promptly sustained the challenge made to him for this cause. But, if the trial judge refuses to sustain a challenge upon the ground that the person challenged does not possess the statutory qualifications of a juror, that ends the matter; and his erroneous ruling will not be grounds for setting aside the verdict.

As said in Finley v. Hayden, 3 A. K. Marsh. 330: "The exception to a juror because he is not a housekeeper of the county is, no doubt, a valid one, and ought to be sustained when taken in proper time; but, as it is an exception which does not affect the impartiality or intelligence of the juror, it can furnish no presumption against the justice of the verdict; and it was held in the case of Bratton v. Bryan, 1 A. K. Marsh. 212, and in the case of Rennick v. Walthal, 2 A. K. Marsh. 23, that it was too late to take the exception after a trial of the cause." If, however, in civil cases the fact that a juror is related to one of the parties, or is shown to have expressed an opinion as to the merits of the case, or for other substantial cause is not fit by reason of prejudice or partiality for or against one of the parties to render a fair decision, and the fact of his incompetency for this reason is not discovered until after the trial, it will be cause for setting aside the verdict if it appears that due diligence was exercised to discover the facts disclosing his incompetency before he was selected as a juror. Vance v. Haslett, 4 Bibb, 191; Taylor v. Combs, 50 S. W. 64, 20 Ky. Law Rep. 1828.

For the reasons stated, we are unable to grant the request of appellant that the judgment be reversed; and therefore, the whole court sitting, it is ordered to be and is affirmed.

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MADISONVILLE, H. & E. R. CO. v. GATTON et al.

(Court of Appeals of Kentucky. Oct. 12, 1909.)

1. WATERS AND WATER COURSES (§ 178*)—OVERFLOWING LAND—EXCESSIVE DAMAGES.

In an action against a railroad for diverting a water course causing it to overflow plaintiffs' land, their proof showed that three or four acres were covered with sand rendering it unfit for cultivation, and that their spring was destroyed. The proof for the railroad showed that only about one-third of an acre was covered with sand, and that practically no other damage was done. The land was worth perhaps $50 an acre. *Held*, that a verdict of $200 was not so palpably against the evidence or excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 255; Dec. Dig. § 178.*]

2. WATERS AND WATER COURSES (§ 178*)—OVERFLOWING LAND — MEASURE OF DAMAGES.

Where, at the time of suit against a rail road for diverting a water course and flooding land, it has depreciated by reason thereof, the owners may recover for such depreciation, and that they do not ask in their petition for future damages if the wrong is continued is no reason why they may not recover for depreciation already suffered.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 255; Dec. Dig. § 178.*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by W. T. Gatton and wife against the Madisonville, Hartford & Eastern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Browder & Browder and Benjamin D. Warfield, for appellant. R. Y. Thomas, Jr., for appellees.

HOBSON, J. The railroad of the Madisonville, Hartford & Eastern Railway Company was constructed through the land of W. T. Gatton and wife. After the construction of the road they brought this suit against the company, alleging that it had diverted a natural water course, thereby causing the water to run upon their land, when by nature it flowed in another direction, and had thus washed sand upon the land, made it wet, and unproductive; that it had so filled up their spring that the water could not be used, in all to their damage in the sum of $1,000. The petition contained these words: "That this suit is brought not for any future damage, but for the damage which has occurred up to the filing of same." The defendant filed an answer traversing the allegations of the petition. The case was heard before a jury, who returned a verdict in favor of the plaintiffs for $200. Judgment was entered upon the verdict, and the defendant appeals.

The proof heard on the trial showed clearly that the defendant had diverted the water, and had turned upon the plaintiffs' land water which by nature did not run there. It also showed that about the time this suit was brought the defendant had remedied the trouble by cutting a ditch which turned the water back to its original course. Practically the only controversy on the trial was as to the amount of damages. The proof for the plaintiffs showed that three or four acres of land were covered with sand; that the spring was filled up so that they could not get water from it; and that the sand rendered the land unfit for cultivation. The proof for the defendant was to the effect that only about one-third of an acre was covered with sand, and that this was practically the only damage done. The land was worth perhaps $50 an acre, and we cannot say that the verdict is palpably against the evidence or that it is so excessive as to indicate passion or prejudice on the part of the jury.

The court instructed the jury, in substance, that, if they found for the plaintiffs, they should find such a sum in damages as would fairly and reasonably compensate the plaintiffs for the depreciation, if any, in the market value of their land caused by the flowing of the water upon it, before the bringing of the suit. It is insisted that, as the plaintiffs in their petition expressly reserved future damages and only sued for the damages which had occurred up to the filing of the suit, this instruction was erroneous. But, if the defendant had thrown water and sand upon the plaintiffs' land thus injuring it, they were entitled to recover for the damages which had been done them. If at the time the suit was filed their land had been depreciated in value by the acts of the defendant $200, they may recover this; for this is the loss they have sustained. No question of the right to recover future damages arises in the case for the trouble has been removed. When the defendant had by its wrongful act rendered the plaintiffs' property less valuable than it would have been but for this wrong, he may recover in an action like this compensation for the injury suffered. No question as to injury to crops arises in the case. The sole question submitted to the jury was the amount of the depreciation of the land by reason of the defendant's wrong. The fact that the plaintiffs did not sue in their petition for future injury in case the wrong was continued is no reason they may not recover for the depreciation of their land already suffered.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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THOMPSON v. THOMPSON et al.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

WILLS (§ 359*)—PROBATE—APPEAL.

Under Ky. St. 1909, § 1404 (Russell's St. § 3947), providing that a widow may relinquish what is given her by her husband's will, and thereupon receive her dower and distributable share as if no will had been made, etc., a widow who has renounced the will and elected to take under the law may not appeal from the order probating the will, though her husband left real estate in other states.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 359.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Ella Thompson against H. S. Thompson and others to contest a will. From the judgment, plaintiff appeals. Affirmed.

Chatterson & Blitz, for appellant. Burnett & Burnett and C. B. Seymour, for appellees.

LASSING, J. This is an appeal from a judgment of the Jefferson circuit court denying to Ella Thompson, widow of Joseph H. Thompson, the right to prosecute an appeal from the order of the Jefferson county court admitting his will to probate. He died in 1905, and a few days thereafter a paper, purporting to be his last will and testament, was admitted to probate. Within less than a week thereafter appellant, Ella Thompson, his widow, appeared in the county court and in due form and according to law renounced the provision made for her in said will and elected to take under the law. Thereafter, in due course of time, there was allotted to her a one-third interest in the real estate of her husband and a one-half interest in his personalty. After the lapse of nearly four years from the death of her husband, she filed in the Jefferson circuit court a statement and sought to contest the validity of her husband's will. A demurrer was filed to this statement and sustained, whereupon she filed an amended statement in which she set out at length the facts which she contended warranted the court in permitting the contest to be prosecuted. These facts, in brief, were that her husband owned real estate in states other than Kentucky, and that under the laws of these several states she was entitled, in the absence of a will, to a larger interest therein than the laws of Kentucky gave her. To this amended statement a demurrer was filed and sustained, and, the plaintiff declining to plead further, her appeal was dismissed.

The sole question before us for determination is the right of a widow to prosecute an appeal from the order of the county court probating her husband's will. For all practical purposes, Joseph H. Thompson died intestate so far as his widow is concerned, and she has received all of the estate from her husband which under the laws of this state it is possible for her to receive, and her attempt to prosecute the appeal from the order probating his will is nothing short of a collateral attack thereon, when she by her own statement has shown that she has no actual interest in the result thereof. If she should be permitted to prosecute the appeal and should finally be successful in overthrowing the will, her interest in the estate of her husband could in no wise be increased or enlarged. The only effect it could have would be to defeat certain other bequests in the event those to whom they are made were not so related to the testator as to entitle them to inherit in the absence of a will. The will of Joseph H. Thompson could be probated in any other state where real estate owned by him is situated, but, when so probated, it would necessarily show that its provisions had been renounced by the widow, and that, so far as she is concerned, there is no will. All of his personalty is controlled by the laws of this state, the place of his domicile, whereas, lands owned by him in other states are controlled by the laws of such states, and the question does not arise here as to what effect the renunciation of the will by the widow might have in other states, but, as above indicated, the sole question is: Can a widow of a citizen of Kentucky, who dies in Kentucky, prosecute an appeal from a judgment probating his will, the provisions of which she has renounced? This question has been before this court at least twice, and in each instance she has been denied the right of appeal.

Under our statute of distribution, the widow has been most favored. She is given an exclusive, speedy, and expenseless remedy when she is dissatisfied with the provision made by her husband for her in his will. Under this statute, she has the right at any time within 12 months after the probate thereof to go into the county court where the will has been probated and file a statement to the effect that she does not desire to accept the provision made for her by her husband in his will, but elects rather to take what the law gives her. Upon the filing of such statement she is at once entitled to her distributable share in her husband's estate, both personal and real, as though he had left no will. This statute which thus secures to her this right to renounce the will of her husband is as follows: Section 1404, Ky. St.: "When a widow claims her dowable and distributable share of her husband's estate, she shall be charged with the value of any devise or bequest to her by his will; or she may, though under full age, relinquish what is given her by the will, and thereupon receive her dower and distributable share as if no will had been made; but such relinquishment must be made within

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twelve months after the probate, and acknowledged before and left for record with the clerk of the court where probate was made, or acknowledged before a subscribing witness, and proved before and left with the clerk." Russell's St. § 3947. It will be observed that there is no exception in this statute in favor of any widow whose husband may own property in other states; but the statute is applicable alike to all widows and was intended to and does provide for an adequate, safe, and speedy remedy in all cases where they are dissatisfied with the provision made for them by their husbands. In construing this section, in the case of Mercer v. Smith, 107 S. W. 1196, 1197, 32 Ky. Law Rep. 1003, 1005, this court says: "The wife has no right to an appeal from the order probating her husband's will. If she does not approve of its provisions in her favor, section 1404, Ky. St. (Russell's St. § 3947), gives her an ample and an exclusive remedy by which she can obtain her legal rights as her husband's widow by renouncing the provisions in the will in the manner pointed out in the statute." Again, in the case of Mercer v. Smith's Guardian, 107 S. W. 1197, 32 Ky. Law Rep. 1008, in extending the conclusion reached in the case of Mercer v. Smith, this court, holding that the wife might not collaterally attack the will, said: "In this case the wife seeks to attack the will collaterally, and also sets up a claim to homestead in the real estate left by her husband. If she had not desired to accept the provisions of her husband's will in her favor, section 1404, Ky. St., gave her the right to renounce its provisions, and claim under the law. This she failed to do for more than two years after the will was probated. She accepted the provisions of the will in her favor, and enjoyed the whole estate. Having married the second time, she, by the terms of the will, lost her property rights in the estate; and after this she had no greater interest in her former husband's estate than if she had been an entire stranger. She has now no right to call in question the validity of the will, the provisions of which she accepted and enjoyed until she concluded to marry again. Having elected to take under the will, she lost all claim to either dower or homestead right."

And the court cited in support of this conclusion the case of Watson v. Christian, 12 Bush, 524. In each of these cases, in which the court denied to the widow the right of appeal, there had been no renunciation, and the result of the court's finding was to deprive the widow of all interest in her husband's estate because she had married again, and, under the provisions thereof, upon the happening of this event, she surrendered all right to further use and enjoy the property of her husband. In the present case the widow, having elected to renounce the will, has received all of the property from her husband's estate in Kentucky which she could possibly receive if she were permitted to prosecute the appeal and succeeded in overthrowing the will. There is much more reason for the enforcement of the rule in the present case than there was in the case of Mercer v. Smith.

It is not necessary for the purposes of this appeal to, nor do we, decide what interest, if any, the widow of a resident of Kentucky, who has renounced the provision made in his will for her, would have in his real estate located outside of Kentucky; but simply hold that, having renounced the will and elected to take under the law, she may not prosecute an appeal from the order probating the will of her husband.

The chancellor having so held, the judgment of the lower court is affirmed.

CINCINNATI ABATTOIR CO. v. STOLLER.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

APPEAL AND ERROR (§ 1002*)—VERDICT ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal unless flagrantly against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

Appeal from Circuit Court, Kenton County; Criminal, Common-Law and Equity Division.

"Not to be officially reported."

Action by John Stoller against the Cincinnati Abattoir Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Byrne & Read, for appellant. Richard G. Williams, for appellee.

NUNN, C. J. This appeal is from a judgment for $300 obtained by appellee against appellant. There is no complaint of the action of the court with reference to the admission or rejection of testimony, or of the instructions given. Appellant claims that the court should have given a peremptory instruction in its behalf, and should have sustained its motion for a new trial and set aside the verdict for the reason that there was no testimony to support it, or at least it was flagrantly against the evidence. Appellee instituted the action for the recovery of appellant the sum of $1,900, which consisted of two items, one was for $1,500, which he alleged was a reasonable charge for keeping and maintaining a horse and buggy for five years and for which appellant agreed and promised to pay him. The other item was $400 for acting as appellant's agent in Covington, Ky., for four months. Appellant denied any contract or agreement to pay appellee for either of the items, and alleged that appellee performed the serv-

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ices as agent gratuitously, and that the horse and buggy mentioned were the property of appellee, and were used by him when in the employ of appellant for his own convenience without intending to charge appellant anything therefor. The issues were completed, proof heard, and the jury returned a verdict in favor of appellee on the first item mentioned for the sum of $100, and on the second for $200.

Appellee testified that he became the agent for appellant, and acted as such for four months, at the special instance of one of the officers of appellant and under a promise that he should be paid a reasonable sum for his services, and that the same were worth $100 per month. The officer denied that he requested or employed appellee to act as such agent or that he promised him any pay to act as such, but admitted that he consented for him to act as such agent with the understanding at the time that appellee was to perform the services as an accommodation. Appellee also testified that the president of appellant made a contract with him in the year 1902 to pay him for his services as an employé so much per week in cash, and, in addition, pay him the expenses necessarily expended in keeping and maintaining the horse and buggy during the time he used them in the interest of appellant's business; that he so used it daily for five years next thereafter, most of the time in traveling over Cincinnati, Covington, Newport, and other places transacting business for appellant; that appellant's collector used it on Mondays in collecting accounts due appellant. Appellee was corroborated in these statements to some extent by other witnesses. Appellee with three liverymen, who professed to be experts, testified that a reasonable price for keeping and maintaining the horse and buggy for five years was from $1,200 to $1,500. The president of appellant denied having made such a contract with appellee, and stated that the company had no use for the horse and buggy; that it had horses and vehicles of its own, but admitted that appellee's horse and buggy were used to some extent, but mostly by appellee in going to and from his home and place of work. Appellant confines its testimony to disproving any contract made with appellee by which it agreed to pay him anything for his services as agent of the company or for keeping and maintaining his horse and buggy, and did not introduce any testimony controverting the values for each as fixed by appellee and his witnesses. A strong circumstance favoring appellant in its contention that it did not promise to pay appellee the expenses incurred in keeping and maintaining his horse and buggy was the fact that appellee received from time to time the contract price which it agreed to pay him for his services, but did not bring any action to recover the expense of keeping and maintaining the horse and buggy until some time after he left the employment of appellant. Appellee's only excuse for his conduct was to the effect that he did not present his claim for the expenses of keeping and maintaining the horse and buggy because he wanted to bring his action therefor in Kentucky; also, that he had from time to time during the five years complained to several persons in charge of appellant's business in Cincinnati that he was not being paid according to his contract; that they were failing to pay him these expenses.

We are of the opinion that the preponderance of the evidence favors appellant upon the items of the expenses in keeping and maintaining the horse and buggy, but we are not prepared to say that the verdict of the jury is flagrantly against the evidence. There was evidence introduced supporting appellee upon both items of his accounts, and the jury was the trier of the facts.

For these reasons, the judgment of the lower court is affirmed.

LEWIS & POTTER v. COMMONWEALTH.
(Court of Appeals of Kentucky. Oct. 19, 1909.)

INTOXICATING LIQUORS (§ 106*)—LICENSE—FORFEITURE—STATUTES.

Ky. St. 1909, § 4204 (Russell's St. § 6146), forbids the furnishing of any liquor to a minor, and section 4208 (section 6150) declares that any tavern keeper, merchant, etc., who shall violate any provision of the article shall forfeit his license. *Held* that, where a liquor license was granted to two persons as a firm, the gift of liquor to a minor by one of the firm justified the revocation of the license as against the firm and both members thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 115; Dec. Dig. § 106.*]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Proceedings by the Commonwealth against Lewis & Potter to cancel a liquor license. From a judgment granting the relief prayed, defendants appeal. Affirmed.

Wright & McElroy and Sims, Du Bose & Rodes, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. This appeal is prosecuted from a judgment of the Warren circuit court entered on the 12th day of June, 1909, affirming a judgment of the Warren county court revoking the liquor license of the firm of Lewis & Potter, granted under section 4205, Ky. St. (Russell's St. § 6147). Lewis & Potter were partners conducting a business in Delafield, a small village adjoining the city of Bowling Green. By virtue of section 4208, Ky. St. (Russell's St. § 6150), the county attorney gave the firm notice that he would apply on a day named to the county court

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for the revocation of the license granted the firm to sell liquor as merchants, for the reason that they had violated the statute in two instances by selling to one Morris, who at the time of the sale was under 21 years of age, one quart of whisky, and at another time in selling a quart of whisky to one Davidson, who was a minor at the time. The county court heard the motion and revoked the license. The firm appealed the case to the Warren circuit court, and that court affirmed the action of the county court, and they then took an appeal to this court. Both members of the firm appeal, but their counsel admit that the action of the lower court in revoking the license of John M. Potter was correct, as the evidence showed that he sold the liquor to the minors. Their contention is that the license of Lewis, the other member of the firm, should not have been revoked because the evidence failed to show any guilty act or knowledge on his part; and this is the only question necessary to be considered.

Section 4208, Ky. St., provides: "Any tavern keeper, merchant, distiller or druggist who shall violate any provision of this article, shall forfeit his license," etc. It is evident that the word "his" as used in this section was meant to include a partnership and a corporation as well as an individual. In the same article and by section 4204 (section 6146) it is provided: "It shall be unlawful for any person to whom a license is granted as contemplated in this subdivision, to suffer any gaming, scandals or disorderly conduct in their houses or on their premises, or to furnish any liquor to any person who is drunk, or who is a known inebriate, or who is under twenty-one years of age, or to sell any liquor on Sunday, or any other day the law may prohibit the sale thereof," etc. The penalty fixed by the statute to be imposed upon a person for selling liquor to a minor is $50. As this law had been clearly violated, the court had the power and right to revoke the license. There was but one license granted, and that was granted to the firm doing business under the name of "Lewis & Potter," and not to Lewis or Potter individually, and, as Potter had no license, to have made the revocation apply to him alone would not have been effective. The court did not have power to dissolve the partnership existing between them for the sale of merchandise, and hence the business could have been continued by the partners as before with Lewis as the licensee. To construe the statute as contended for by appellants' counsel would render it inoperative, as several persons might become partners in selling merchandise and obtain license to sell liquor by the quart, and one of them take the place of salesman of the liquor, and, when he had violated the law in making a sale, then the right to sell would remain in the other members and one of them would become salesman, and so on, until the 12 months for which they had obtained the license had expired, and in this way defeat the object of the statute. Appellants in this case were partners in the sale of merchandise and in the license to sell liquor, and in the matter under consideration they must stand or fall together. In matters pertaining to their partnership each represented both of them.

We are of the opinion that the lower court was correct in revoking the license of the firm.

For these reasons, the judgment of the lower court is affirmed.

HUGHES v. JACKSON et al.
GARRISON v. SAME.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

FRAUDULENT CONVEYANCES (§ 299*) — EVIDENCE.

Evidence *held* not to show that a conveyance of land was taken in a wife's name by the husband to defraud his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 881; Dec. Dig. § 299.*]

Appeal from Circuit Court, Allen County.

"Not to be officially reported."

Actions by Joe Hughes and E. A. Garrison against W. T. Jackson and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Goad & Oliver and N. F. Harper, for appellants. Thurman B. Dixon, for appellees.

BARKER, J. The appellants obtained judgments for certain debts against W. T. Jackson. Executions were issued and returned "No property found." Whereupon these proceedings were instituted for the purpose of subjecting a house and lot in Scottsville, Allen county, Ky., claimed by the appellee, Mattie Jackson, wife of W. T. Jackson, to the payment of the judgments. The land is described by metes and bounds, and then it is alleged substantially that the husband, W. T. Jackson, bought the property from B. W. Alexander and wife, but fraudulently had it conveyed to his wife, Mattie Jackson, in order to defraud his creditors. The appellees answered, denying all the allegations of the petition, and pleading, affirmatively, that the wife purchased the land with her own money from B. W. Alexander, and that it was conveyed to her, and is now her property and not subject to her husband's debts. The chancellor, having heard the case, adjudged the property to belong to Mrs. Mattie Jackson and dismissed the petition, from which judgment this appeal is prayed.

The question is one largely of fact, although there is a question of law lying at the very threshold. The deed from Alexander and wife on its face shows that the conveyance to Mattie Jackson was made on

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the 24th day of April, 1899, but seems never to have been recorded. The question, then, is whether or not the property was purchased by the husband. The entire consideration was the sum of $215; $100 of which was paid by the vendee transferring to the vendor one mare and a cow and calf. We think the appellee Mattie Jackson proved conclusively that the cow and calf belonged to her; they being lineal descendants of a cow given to her by a neighbor and friend when she married Jackson. The mare was given to the wife by the husband several years before the conveyance which is assailed. It is now insisted that the mare belonged to the husband, and that to this extent, at least, the consideration was furnished by the husband. We think this whole phase of the case may be disposed of by saying that this is an attack upon the conveyance from Alexander and wife to Mattie Jackson, charging fraud. The burden of proving this was upon the appellants. There is nothing in this record which shows that the cow and horse were not exempt under the statute from the debts of W. T. Jackson, assuming him to have been the original owner, and, if exempt, his creditors could not complain of the transfer to his wife. The balance of the purchase money the appellee Mattie Jackson satisfactorily shows was paid by her out of the rents of the property, reinforced by contributions from her two sons who were at work.

We do not feel that it is necessary to enter into a minute discussion of the evidence in this case. It is a small matter, and the chancellor found the facts in favor of the appellees. We think his judgment was correct; and it is therefore affirmed.

HOWELL v. SALT LICK LUMBER CO.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

WITNESSES (§ 150*)—TRANSACTIONS WITH DECEDENT.

Under Civ. Code Prac. § 606, subd. 2, providing that no person shall testify for himself concerning any verbal statement of, or any transaction with, one deceased, in an action by a grantee, under a warranty deed, to recover possession of land, evidence as to an oral agreement between defendant and the deceased grantor of plaintiff that defendant was to be paid the cost of buildings erected by him on the land, or else be permitted to remove them from the grounds, was incompetent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 653–657; Dec. Dig. § 150.*]

Appeal from Circuit Court, Bath County.

"Not to be officially reported."

Action by the Salt Lick Lumber Company against Jeff Howell. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Gudgell and Hazelrigg & Hazelrigg, for appellant. J. J. Nesbitt and C. W. Goodpaster, for appellee.

LASSING, J. The Salt Lick Lumber Company filed a suit in the Bath circuit court wherein it sought to recover of Jeff Howell a certain parcel of land, and alleged that it was the owner and entitled to the immediate possession thereof. Howell answered, and denied that the plaintiff was the owner of the land or entitled to the possession of the buildings thereon. He pleaded, further, that in 1902 he was employed by one A. B. Camp, the immediate vendor of appellee, to erect certain buildings and install the necessary machinery for the equipment of a sawmill on his, Camp's, property; that, in order to enable him to carry on this work, it became necessary for him to have a dwelling for himself and family; that he entered into a contract with Camp, by the terms of which it was agreed that he, Howell, should erect at his own expense on the land of Camp a dwelling house and necessary outbuildings, to be occupied by himself and family so long as he continued in the employ of Camp; and that, when he ceased to work for Camp, he was to be paid the cost price of the buildings, or else permitted to remove them from the ground. He asked for an enforcement of his contract, and that he either be given judgment for the value of the improvements, or else permitted to remove them. All of the affirmative matter in the answer was traversed in the reply, and it is further pleaded in the reply that Camp bore all of the expense incurred in the purchase of the materials and building of the dwelling and outbuildings by Howell, as set up in the answer. The allegation that the money expended in making these improvements was furnished by Camp is not denied. In support of his claim the defendant, Howell, gave his own deposition and introduced several mechanics and materialmen, who assisted in erecting the buildings and furnished material therefor. He offered no proof in support of his contract with Camp further than his own testimony, and, as it appears that at the time this testimony was given Camp was dead, on exceptions filed to the deposition of the defendant, Howell, the trial court held that, under subdivision 2 of section 606 of the Civil Code of Practice, his testimony was incompetent. With this evidence excluded, the defendant's claim was wholly unsupported, and the chancellor adjudged that the plaintiff was the owner of and entitled to the immediate possession of the property described in the pleadings, and dismissed the defendant's claim with judgment for costs. From that ruling this appeal is prosecuted.

A. B. Camp was the immediate vendor of the plaintiff, the Salt Lick Lumber Company, and under his deed of general warranty his estate would have been liable for any breach thereof. Hence, while this suit is not between the representatives of Camp and ap-

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pellant, his estate must necessarily be affected by the result thereof, and the Code provision above referred to applies with as much force as though the litigation were between appellant and the personal representative of A. B. Camp. This court has so frequently upheld this section of the Code that a citation of the authorities thereon is deemed unnecessary. The chancellor correctly held the evidence incompetent. Appellant admitting that appellee is the owner of the land, and it being undenied in the pleadings that the money expended in building the dwelling and other improvements thereon was furnished by A. B. Camp, the conclusion reached by the chancellor was correct; and the judgment is affirmed.

ILLINOIS CENT. R. CO. v. MAJOR et al.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

COURTS (§ 223*) — JURISDICTION — TITLE TO REAL ESTATE.

In an action against a railroad for injury to a passway, plaintiff alleged ownership of and title thereto. The railroad merely denied plaintiff's title, and that it damaged the passway, and did not plead that it owned or had title thereto. The jury simply found that plaintiff had been damaged in a sum specified. *Held*, that title to the passway was not involved so as to give the Court of Appeals jurisdiction of an appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by Mollie S. Major and others against the Illinois Central Railroad Company. Judgment for plaintiffs, and defendant appeals. Appeal dismissed.

Selden Y. Trimble, Trimble & Bell, Trabue, Doolan & Cox, and Blewett Lee, for appellant. C. H. Bush, for appellees.

CLAY, C. Appellee Mollie S. Major instituted this action against appellant, Illinois Central Railroad Company, to recover damages on account of injury to her crops by live stock passing over certain cattle gaps on appellant's road, which were claimed to be insufficient, and also for damages on account of injury to her passway. The court sustained a demurrer to that part of the petition seeking a recovery for damages to the crops, and dismissed the petition to that extent. The case went to trial upon the question of damages to the passway, and the jury returned a verdict in appellee's favor for the sum of $150.

Appellee has moved to dismiss this appeal on the ground that this court is without jurisdiction. In her petition she alleged ownership of and title to the passway in question. Appellant merely denied the title of appellee, and that it damaged the passway. It did not plead that it owned or had title to the passway in question. The jury simply found that appellee had been damaged in the sum of $150. Upon the verdict thus returned judgment was entered directing that appellee recover that amount of appellant. As the amount of the judgment is not of itself sufficient to give this court jurisdiction, jurisdiction depends upon whether or not title to the passway was involved. The question herein involved was before this court in Ponder, etc., v. Lard, a case ordered to be reported and which may be found in 102 Ky. 605, 44 S. W. 138, 19 Ky. Law Rep. 1649. As the petition is short, we quote it in full: "This is an action for trespass for cutting timber, brought by appellee against appellants in the Wolfe circuit court. Upon trial by jury a judgment of $25 was rendered against appellants; that being the value of the timber cut as fixed by the jury. The question of the jurisdiction of this court is presented by appellee in a motion to dismiss. If there be no question of title involved, this court clearly has no jurisdiction of a judgment of only $25. The petition alleges title and possession of a certain boundary of land, and charges trespass by appellants cutting timber, etc. The answer 'denies that appellee (plaintiff below) is the owner or in possession of the boundary described or of any land extending west of the north 9 west line of Samuel Young,' etc., and 'deny that they unlawfully or wrongfully entered, cut and removed timber,' etc. The answer nowhere claims the land as that of defendant; and, while it denies the right of recovery, the answer does not bring into question the title, so that a judgment herein would bar an action in ejectment. Therefore we are of opinion that the only amount in controversy is the judgment for $25, and, that sum being below this court's jurisdiction, the appeal is dismissed."

It is insisted by counsel for appellant that the effect of the judgment in this case is to establish appellee's claim and title to the passway in question. That, however, is not the case. The judgment herein is not a bar to an action in ejectment, either by appellant or appellee. It does not establish appellee's title to the passway. The right to the passway may be hereafter litigated. As appellant's answer did not bring into question the title, so that the judgment would bar an action in ejectment, the amount in controversy is only $150. This is not sufficient to give this court jurisdiction.

For the reasons given, the appeal is dismissed.

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LURKER v. ROSS.

(Court of Appeals of Kentucky. Oct. 12, 1909.)

1. APPEAL AND ERROR (§ 959*)—DISCRETION OF TRIAL COURT—AMENDMENT OF PLEADINGS.

The setting aside of the submission, and the allowing, before the taking of any proof, of an amended answer, which only states in a new form what was stated in the original answer, is within the court's discretion, and not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

2. EVIDENCE (§ 580*)—AFFIRMATIVE EVIDENCE—NEGATIVE EVIDENCE.

In a suit to restrain the maintenance of a gate across a private road, the affirmative evidence of the existence of a gate across the road during its existence is entitled to more weight than the negative evidence of the same number of witnesses to the absence of any gate during such period.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

3. EASEMENTS (§ 58*)—OBSTRUCTION.

The grant of a passway in general terms over a particular part of the grantor's land does not imply a negation of his right to erect gates where the way enters and leaves his land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 124; Dec. Dig. § 58.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Caroline Lurker against Thomas Ross. From a judgment for defendant, plaintiff appeals. Affirmed.

Faber & Warren, for appellant. H. M. Healy, Jr., and Healy & Hawkins, for appellee.

HOBSON, J. The farm of Thomas Ross lies along the turnpike. That of Caroline Lurker lies back of it. For many years a road has existed over his farm by which she, and those she claims under, have gotten out to the pike. He erected a gate at the pike across the road, so as to inclose his land; and thereupon she brought this suit against him to enjoin him from erecting and maintaining a gate across the road where it leaves his land. Upon final hearing, the circuit court dismissed her petition, and she appeals.

The court did not abuse a sound discretion in setting aside the submission and allowing the defendant's amended answer to be filed. Courts have a wide discretion in the matter of allowing amendments, which will not be reviewed here unless abused. No proof had been taken. In fact, the amended answer only stated in one form what was stated in the original answer in another. It did not in any way change the defense the defendant originally set up.

There is a gate, and has practically always been one, at the line between plaintiff's land and the defendant's. From this point the road runs through his land. The proof for her is to the effect that there was never any gate at the pike until he erected the one in controversy. The proof for him is to the effect that there was a gate there many years ago, which remained until it rotted down; that afterwards he put up some drawbars, which he kept up whenever he wished this part of his land inclosed. The circuit court, upon the evidence, found as a fact that a gate had been maintained at this point, and that the plaintiff's easement had been exercised subject to his right. Upon a careful reading of the evidence we cannot say that the chancellor's finding is against the weight of it. While many witnesses for the plaintiff testify to passing along the road, and to the absence of a gate at the pike or of drawbars there, there are at least an equal number who testify to seeing the gate and opening it. Affirmative evidence on a question of this sort is necessarily entitled to more weight than negative evidence; for the witnesses who testify to the absence of the gate or drawbars may have passed through when the gate was open or the drawbars not up. The witnesses who testify to the affirmative are so numerous that it is hard to believe they could be mistaken, and they are unimpeached.

Counsel misunderstand the case of Miller v. Pettit, 127 Ky. 387, 105 S. W. 892, 32 Ky. Law Rep. 337. In Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409, the court thus laid down the rule: "The statutes which authorize the establishment of private passways, on application to the county courts, contemplate the necessity or propriety of erecting gates across them, and provide that the applicant for the way shall pay the expenses. In view of this provision, and of the general convenience by which it was dictated, it might be safely assumed that the grant of a passway in general terms over a particular part of the grantor's land does not imply a negation of his right to erect gates at the termini of the way in entering and leaving his land, and we suppose that among the proprietors and cultivators of land such a grant would not be generally understood as depriving the owner of the land of the right of thus inclosing his land." This case was followed in Bland v. Smith, 66 S. W. 181, 23 Ky. Law Rep. 1803.

In Miller v. Pettit the road did not run through Pettit's land, but ran along the line, and it had been fenced off as an open lane and used as such for 30 or 40 years. No controversy had arisen as to it until the parties who then owned the land were all dead. The court there simply held that such a case as that did not fall within the rule laid down in Maxwell v. McAtee. Here the road runs through Ross' land, and, if he cannot maintain a gate where the road leaves his land, he must either leave his land uninclosed, or build a fence on both sides of it. No

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lane has been established here by the acts of the parties, or maintained for such a length of time as to raise a presumption of grant. The case does not, therefore, fall within the rule announced in that case.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. MILLER.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

1. RAILROADS (§ 274*)—CROSSINGS—DUTY OF COMPANY.

The place where plaintiff was struck by defendant's engine, a track running through defendant's depot platform, being in constant use by the public, defendant had to anticipate the presence of persons, and to exercise ordinary care for their safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868–872; Dec. Dig. § 274.*]

2. RAILROADS (§ 383*) — CROSSING TRACK — STOP, LOOK, AND LISTEN.

The rule of stop, look, and listen where one crosses a railroad track at a place in constant use by the public does not obtain in Kentucky.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305–1310; Dec. Dig. § 383.*]

3. RAILROADS (§ 385*) — CROSSING TRACK—DUTY OF TRAVELER.

One crossing a railroad at a place in constant use by the public, where it is the company's duty to keep a lookout, run at a reasonable speed, and give timely warning, is bound only to exercise ordinary care for his safety, such as may be usually expected of an ordinarily prudent person to learn of the approach of an engine, and keep out of its way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1311–1313; Dec. Dig. § 385.*]

4. RAILROADS (§ 400*) — CROSSING TRACK — CONTRIBUTORY NEGLIGENCE.

Whether one crossing a railroad track at a place in constant use by the public used ordinary care for his safety, to learn of the approach of an engine, and keep out of its way, depending on a number of circumstances on which persons may differ, is a question for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. § 400.*]

5. RAILROADS (§ 400*) — INJURY TO PERSON CROSSING TRACK—GROSS NEGLIGENCE.

Though an engine was run rapidly down a coal track through a depot platform, a place where the presence of persons should reasonably be anticipated, and no lookout was kept and no warning given, and one stopping on the track just in front of the engine was struck, yet it having been at 6 o'clock in the morning, when the travel was small, the danger to those then out would not be so imminent as to warrant submission of the question of gross negligence and consequent punitive damages.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

6. RAILROADS (§§ 369, 372, 376*) — PERSONS CROSSING TRACK — DUTY OF COMPANY — SPEED OF TRAINS.

While a railroad company, whose track is through a populous community, along or across a public place, where presence of persons on the track may be reasonably anticipated, should keep a lookout, give timely warning of approach of a train or engine, and operate it at such speed and under such control as ordinary care for the safety of such persons requires, it is not bound to so operate it to stop it in case of necessity before injury has occurred, where one comes on the track just in front of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259–1262, 1267–1269, 1271–1274, 1279; Dec. Dig. §§ 369, 372, 376.*]

7. RAILROADS (§ 401*)—INJURIES ON TRACK—INSTRUCTIONS.

An instruction, submitting the question whether those in charge of an engine could have known of plaintiff's peril in time to avoid injuring him, is improper; all the proof being that he stepped on the track just in front of the engine.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

Appeal from Circuit Court, Bullitt County.

"To be officially reported."

Action by John Miller against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Charles Carroll and Benjamin D. Warfield, for appellant. Chapze & Waide, for appellee.

HOBSON, J. Lebanon Junction is a town of about 1,400 people, situated at the junction of the Knoxville Branch of the Louisville & Nashville Railroad, with the main line. The Knoxville Branch leaves the main line a short distance north of the passenger depot, which is located between the main line and the Knoxville Branch. Just south of the station the company maintains large coal bins on the east side of the main line. East of the depot and only a few feet from it a track runs through the depot platform, known as the "coal bin track," and used to take cars up to the bins which are elevated something like 40 feet above the level of the station. An engine coming down this track from the bins descends a considerable incline. On the morning of January 14, 1908, about 6 o'clock, John Miller, who worked for the company in the roundhouse located on the Knoxville Branch east of the station, was going home to his house on the west side of the main line. He worked at night and got off at 6 o'clock in the morning. He came along the Knoxville Branch track until he got opposite the depot, when he started across the platform to the depot. As he stepped upon the coal bin track, he was struck by an engine coming out on that track. Two of his ribs were broken, and one kidney was dislocated, and is now described as a floating kidney. He was also bruised and injured about the head and back. At the time he was struck his attention was attracted to a freight train passing on the main track. He did not look up the incline before stepping on that track. The proof for him tended to show that the engine was running very rapidly; that no lookout was maintained upon it, and no signals of its approach given. The proof for the defendant was, in effect, that the men in charge of the engine were running at a

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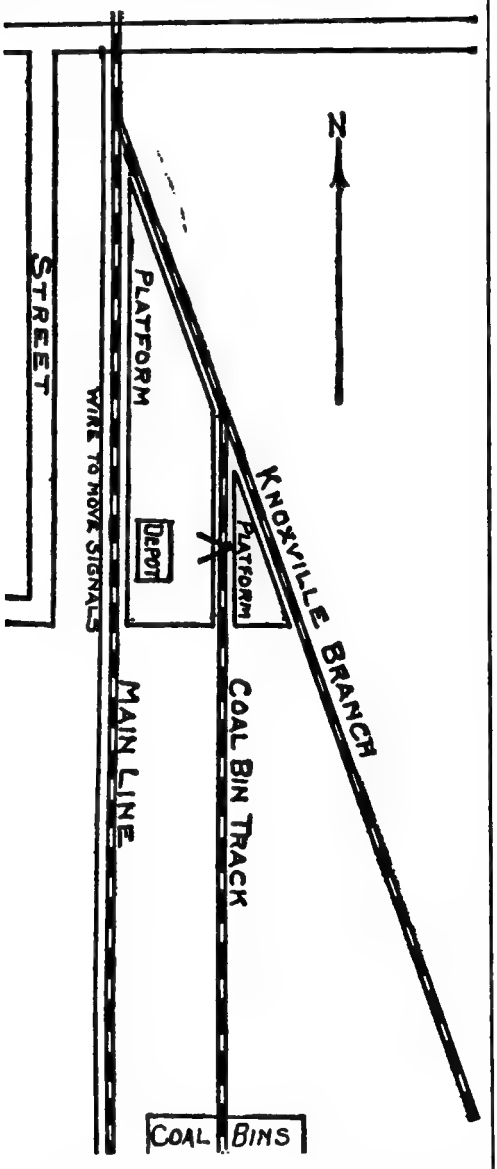
reasonable speed and on the lookout, but that Miller came on the track so close to the engine that they could not see him; that the bell was ringing automatically, and had been so ringing from the time the engine started at the top of the incline. This situation is shown approximately by the following map; Miller being hurt near the point A.



The defendant moved the court to instruct the jury peremptorily to find for it. The court overruled the motion, and instructed the jury as follows:

"(1) The court instructs the jury that, if they believe from the evidence that the injuries to plaintiff complained of in the petition resulted from or were caused by the negligence of defendant, its agents, servants, or employés operating, managing, and controlling the engine and tender of defendant which struck plaintiff, if he was struck, then they should find for plaintiff such damages as they believe from the evidence will fairly and reasonably compensate him for any physical and mental pain and anguish he has sustained or suffered, if any, or that the jury from the evidence may believe he is reasonably certain to hereafter suffer and for any permanent impairment of his power to earn money, not exceeding $15,000, the amount claimed in the petition. And, if they shall believe from the evidence that plaintiff's injuries and suffering, if any, were the result of gross negligence upon the part of defendant or its said employés, then, in addition to compensatory damages, they may find for him such sum in punitive damages as from all the evidence in the case they may deem proper, not in all to exceed the sum of $15,000 sued for.

"(2) The court instructs the jury that where a railroad track runs through a populous community along or across streets, where from the nature of things persons may reasonably be expected at any time, it is the duty of those in charge of trains or engines to signal by blowing the whistle or ringing the bell, and to so operate them at a speed which has the train or engine under control, and keep such a lookout as will enable the operatives to give timely warning of the approach of said trains or engines, as well as to stop them in case of necessity before injury has been inflicted.

"(3) Gross negligence, as used in the instruction, means the absence of slight care.

"(4) By 'ordinary care,' as used in these instructions, is meant such care as is usually observed by ordinarily careful persons under the same or similar circumstances as those proven in this case.

"(5) The jury are instructed that plaintiff cannot recover in this case if the injuries to plaintiff set out and complained of in the petition could not have occurred but for plaintiff's own negligence; and, if the jury believe from the evidence that the injuries complained of by plaintiff were caused by and resulted from his own negligence, then they should find for the defendant, unless defendant's agents, servants, and employés operating, managing, and controlling the engine and tender which struck plaintiff, if he was struck, could by ordinary care have known of the peril in which plaintiff's negligence had placed him, and thereafter failed to observe reasonable care to avoid the injuries which ensued to plaintiff, if he was injured.

"(6) The court instructs the jury that it was plaintiff's duty in crossing defendant's track to use ordinary care, and to look out to discover an approaching train or engine; and, if he failed to do so, and was injured in consequence thereof, they should find for defendant, unless defendant's agents operating the train or engine which struck plaintiff, if he was struck, could by ordinary care have

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known of the peril in which plaintiff's negligence had placed him, if he was negligent, and thereafter failed to observe reasonable care to avoid the injuries which ensued to plaintiff, if he was injured, in which event they will find for plaintiff and allow him damages as set out in instruction No. 1."

It is earnestly insisted that the court should have instructed the jury peremptorily to find for the defendant because Miller did not look up the track before walking upon it. The place where he was struck was in constant use by the public. It was within the station platform and a part of it. At such places it is incumbent upon the railway company to anticipate the presence of persons, and to exercise ordinary care for their safety. The rule stop, look, and listen has not been adopted in this state. On the contrary, we have uniformly held that at places like this it is a question for the jury whether the traveler exercised ordinary care where the train is run at a dangerous rate of speed, or timely warning of its approach is not given, or a proper lookout is not maintained. Crowley v. L. & N. R. Co., 55 S. W. 434, 21 Ky. Law Rep. 1436; L. & N. R. R. Co. v. Lowe, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122; L. & N. R. R. Co. v. Lucas, 120 Ky. 359, 86 S. W. 682, 27 Ky. Law Rep. 769; Davis v. Louisville, etc., R. Co., 97 S. W. 1122, 30 Ky. Law Rep. 172; Perkins v. C. & O. Ry. Co., 123 Ky. 229, 94 S. W. 636, 29 Ky. Law Rep. 660; L. & N. R. R. Co. v. McNary's Adm'r, 128 Ky. 408, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224. The case before us cannot be distinguished from those cited, and under the rule there laid down the court properly refused to instruct the jury peremptorily to find for the defendant.

It is incumbent upon the person crossing the railroad track to exercise ordinary care for his own safety. But what will be ordinary care in such cases is a question dependent on a number of circumstances on which persons of like intelligence and judgment may differ. It is the duty of the railroad company to keep a lookout at such places, to run at a reasonable rate of speed, and to give timely warning of the approach of engines or trains. A person who is about to cross the track is not required to assume that the railroad company will neglect its duty, and that the customary precautions for the safety of the public will not be taken. When these precautions are omitted, and a person who relied on the presumption that the track was safe is hurt, the primary negligence is on the part of the railroad company, and it should not be exonerated where he exercised such care as may be reasonably expected of an ordinarily prudent person under the circumstances. If no warning is given, a person will sometimes walk on a railroad track before he is conscious that he is near it. Though exercising ordinary care, he may at times be misled by appearances. So it is that for the protection of life at those places where the presence of persons on or about the track is to be anticipated those operating trains and engines are required to give reasonable warning of their approach, keep a lookout, and so operate them that these will not be unavailing. The sacredness of human life does not permit a less stringent rule. The whole burden is not to be placed on the traveler. But, when he is led to believe the way is clear by the conduct of the railroad company, he may recover if he exercises ordinary care; and this, like other questions depending on a number of circumstances, varying in importance, according to their relation to other facts, is ordinarily a question for the jury.

But in view of the fact that the accident occurred about 6 o'clock in the morning in January, and the condition of things at the time, there was not enough in the evidence to warrant an instruction on punitive damages, and the latter part of instruction No. 1 should have been omitted. It was a place where the presence of persons should be reasonably anticipated, but at that time in the morning there would be less travel than during business hours, and the danger to others so early in the morning would not be so imminent as to warrant the submission of gross negligence to the jury.

Instruction 2 requires the railroad company at such places to so operate its trains and engines as to stop them in case of necessity before injury has been inflicted. This goes too far. The company is only required to exercise ordinary care at such places. If the plaintiff came on the track so close to the engine that his injury could not have been avoided by ordinary care, the defendant is not liable; and to make it liable in all cases where it fails to keep such lookout or to run at such speed as to stop in case of necessity before injury has been inflicted would be practically to make it an insurer at such places. In lieu of instruction No. 2, the court should have told the jury that, where a railroad track runs through a populous community along or across streets or other public places where the presence of persons on the track may be reasonably anticipated, it is the duty of those in charge of the trains or engines to keep a lookout, to give timely warning by bell or whistle of their approach, and to operate them at such speed and under such control as ordinary care for the safety of such persons requires. Instruction No. 3 should be omitted.

Instructions Nos. 5 and 6 are erroneous, in that they submit to the jury the question whether those in charge of the train saw, or could by ordinary care have known of, the plaintiff's peril in time to avoid the injury to him. It is evident from all the proof that the plaintiff stepped upon the track just in front of the engine, and was struck before he could step off of it. He was so close to the engine manifestly that those in charge

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of it could do nothing for his safety after his danger was discovered or could have been discovered. In cases of this sort such a qualification to the instruction is improper. L. & N. R. R. Co. v. Joshlin, 110 S. W. 382, 33 Ky. Law Rep. 513; L. & N. R. R. Co. v. Veach's Adm'r (Ky.) 112 S. W. 869. In lieu of instructions Nos. 5 and 6, the court on another trial will instruct the jury that it was the duty of Miller on approaching the track to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the engine, and keep out of its way, and that, if he failed to exercise such care and but for this would not have been injured, the law is for the defendant and the jury should so find, even though they may believe from the evidence that the defendant's employés were negligent as set out in instruction No. 1.

Judgment reversed, and cause remanded for a new trial.

GREEN RIVER COAL & COKE CO. v. PHAUP.

(Court of Appeals of Kentucky. Oct. 7, 1909.)

1. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A mule driver in a mine who with knowledge of the defective condition of a car proceeds to ride on it without any direction so to do assumes the risk incident to its defective condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 591; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 97*)—INJURIES TO SERVANT—ANTICIPATION OF CONSEQUENCES.

To prove the negligence of a mine operator because of his piling cinders in a mule track in a mine to the height of six inches, and thereby creating an object frightening a mule using the track, it must appear that cinders that high would be reasonably calculated to frighten a mule of ordinary gentleness, and the fact that a mule may take fright at them is not sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

3. MASTER AND SERVANT (§ 208*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

One undertaking to drive a mule in a mine assumes the dangers ordinarily incident to the occupation, and, unless the master knowingly furnishes him a vicious mule, he assumes the risk of the mule being frightened by ordinary objects lying in or near the passway.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

4. MASTER AND SERVANT (§ 97*)—INJURIES TO SERVANT—IMPROBABLE CONSEQUENCES.

Where a mule driver in a mine knew of the existence and the condition of cinders in the track, and drove the mule over the cinders, and the mule did not become frightened at them, the master was not liable merely because the mule, shortly thereafter, became frightened when again passing over the cinders, and ran away, and injured the driver.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

Appeal from Circuit Court, McLean County.

"To be officially reported."

Action by Levia Phaup against the Green River Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed.

Belcher & Sparks, for appellant. R. Y. Thomas, Jr., for appellee.

CLAY, C. Appellee, Levia Phaup, instituted this action against appellant, Green River Coal & Coke Company, to recover damages for personal injuries. The jury returned a verdict in his favor for $1,500. From the judgment based thereon this appeal is prosecuted.

Several grounds for reversal are assigned, but we deem it necessary to consider only the question whether or not a peremptory instruction should have gone in favor of appellant. The negligence charged in appellee's petition and amended petition was twofold: First, that appellant piled cinders in the middle of the track along which appellee had to drive a mule in appellant's mine so as to frighten the mule and cause it to kick and run away; second, that the door of the car to which the mule was attached was sprung over the bumper so as to entirely cover it and thus prevent appellee from standing thereon, that because of the defective condition of the car he was unable when the mule ran away to loosen the mule from the car.

The evidence for appellee is as follows: Appellee at the time he was injured was engaged in driving a mule in appellant's mine. In the entry in which he was working there was not much more than enough room for the car to pass. A short time previous to the accident appellee and John Hunt, the boss driver, Tom Gardner, the second boss, and Tom Graves, inside manager of the mines, took about a half car load of cinders, and put them in some holes in the track. The cinders were left in piles about six inches high, although it was customary to level them down. Thereafter the appellee drove the mule back over these cinders. At that time it did not take fright. When appellee went to get on the car, which he was riding at the time of the injury, he saw that the door was sprung out over the bumper. He put one foot on the spreader stick and the other on a piece of iron projecting out in front of the car. After going a short distance, the mule came to the point where the ashes were piled, became frightened and began to kick and run away. The car jumped the track, and appellee fell to the ground. He was badly bruised about the back and legs. If there had been bumpers on the car, appellee could have stood on them and unhitched the mule, thus preventing the injury.

It is perfectly apparent, from appellee's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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own testimony and from that of other witnesses, that he knew of the alleged defective condition of the car. The defect, if any there was, was right before his eyes. With full knowledge of it and without complaint, he proceeded to ride on the car, without any direction so to do, and thereby assumed the risk of any danger incident to its defective condition. However, the condition of the car plays but a small part in this case. There is no fact from which we could conclude that the existence of bumpers on the car would have in any way changed the result of the accident. It is true, the appellee says, that, if there had been bumpers, he could have stood on them and loosened the mule. This, however, is mere speculation on his part. The proximate cause of appellee's injuries was due to the fact that the mule kicked and ran away. But for this fact the appellee would not have been injured.

While the alleged defective condition of the car has been brought into this case, it is manifest that the real question in controversy is whether or not the piling of cinders in the track for a height of six inches was negligence. In order to render it negligence, it was necessary to show that cinders that high would be reasonably calculated to frighten a mule of ordinary gentleness. It is true, there was some attempt to show that the mule was vicious and that the master had knowledge of this fact. Upon this point, however, there was a complete failure of proof. So far as the record shows, the mule appellee was driving was of the ordinary kind. Not a single witness in the case testifies that the placing of ashes on the track in piles six inches high was reasonably calculated to frighten an ordinarily gentle mule. When a person undertakes to drive a mule, he assumes all the risk and dangers ordinarily incident to that particular occupation. Unless the master knowingly furnishes him a vicious mule to drive, he assumes the risk of the mule being frightened by ordinary objects, which may lie in or near his passway. In this case the appellee not only knew of the existence and the condition of the cinders in the track at the place in question, but he drove the mule over the cinders just previous to the accident. At that time the mule did not become frightened. Under such circumstances, the master is not liable merely because the mule becomes frightened. He can only be guilty of negligence when the facts show that he permitted the track to become in such condition as would reasonably be calculated to frighten an ordinarily gentle mule. As said before, no witness testified that such condition existed at that time; indeed, we fail to see how any reasonable or sensible man could give such evidence. It is a matter of common knowledge that cinders piled six inches high will not ordinarily frighten a gentle mule. Of course, a mule may take fright at them. So he may, and frequently does, take fright at a mere shadow; but this fact is not sufficient to lead to the conclusion that the thing at which he becomes frightened is reasonably calculated to occasion the fright. The piling and spreading of cinders on a track under such circumstances is an ordinary and usual thing. The risk attached to such piling, in so far as it may frighten his mule, is assumed by the driver. The mere fact that the cinders were piled six inches high is not proof of negligence on the part of appellant. That being the case, we are of opinion that the trial court erred in refusing appellant a peremptory instruction.

The judgment is reversed for proceedings consistent herewith.

NEWMAN et al. v. FLOWERS' GUARDIAN.

(Court of Appeals of Kentucky. Sept. 28, 1909.)

1. GUARDIAN AND WARD (§ 175*)—APPOINTMENT—STATUTORY PROVISIONS—BOND.

Ky. St. 1909, § 3903 (Russell's St. § 3924), requires the county court in each county to appoint a fit person to act as administrator of decedents' estates of which there is no personal representative and as guardian of such orphans as have none; section 3904 (section 3925) provides that he shall execute bond with surety and shall be styled "public administrator and guardian of —— county"; section 3905 (section 3926) requires the county courts of all counties in which there is a public administrator and guardian to confide to him the administration of the estate of all deceased persons, if after three months after their death no one applies for their administration, and to confide to such public administrator and guardian the control of the estate of minors without testamentary guardians; and section 3906 (section 3927) provides that the public administrator and guardian shall have all powers and be subjected to the same liabilities as administrators and guardians. *Held*, that the statutes impose upon the same person both the duty of public administrator and of public guardian, and that the clerk of the court, in entering the order of appointment of such official and taking his official bond, only styled him "public administrator," omitting the title "guardian," did not relieve him of the duties of public guardian, where he undertook to care for an orphan's estate, so that his sureties cannot object that they were not bound for his acts as public guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 175.*]

2. EVIDENCE (§ 65*)—PRESUMPTION—KNOWLEDGE OF STATUTES.

The official sureties of a public administrator and guardian are presumed to know the statutes under which their principal is appointed, and that such statutes require the county court to confide to him the estate of both deceased persons and infant orphans.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

Appeal from Circuit Court, Ballard County.

"To be officially reported."

Action by Elsie Flowers' guardian against D. P. Newman and another. From a judg-

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ment for plaintiff on demurrer to the answer, defendants appeal. Affirmed.

J. B. Wickliffe, for appellants. I. E. Conley, for appellee.

NUNN, C. J. This appeal is from a judgment of date May 9, 1909, rendered against appellants, D. P. Newman and Charles Wickliffe, as sureties of B. F. Burton, as public administrator and guardian of Ballard county. The date of his appointment was January, 1904. J. J. Grace, the present guardian of Elsie Flowers, first instituted an action against Burton and recovered a personal judgment against him for something over $1,100, the amount he wasted and failed to account for of the fund belonging to his ward. Appellee collected a small portion of that judgment, and then recovered the balance, $1,088, from his sureties in this action. There is no claim that Burton did not misappropriate that amount of the fund belonging to his ward. The only question made by appellants is that they as his sureties, under the peculiar facts of the case, are not responsible to appellee for the sum or any part of the sum adjudged against them.

It was alleged in the petition that Burton was appointed by the county court of Ballard county public administrator and guardian for that county, and as such executed bond, according to law, with appellants as his sureties; that after the appointment and the execution of the bond the county court, in the year 1905, ordered that Burton, as public administrator and guardian, take possession of the funds of Elsie Flowers, now appellee's ward, she at that time having no one to take charge of and care for the funds belonging to her, and no one would apply for and serve as such by appointment of the court. Appellants answered the petition as follows: "Now comes the defendants, D. P. Newman and Chas. Wickliffe, for answer herein deny that they entered into bond as surety for the defendant Burton as public guardian of Ballard county. They state that they signed the bond as surety for said Burton as public administrator of Ballard county, and did not sign said bond as surety of the said Burton as public guardian, and that said bond does not bind them in any respect for the acts of said Burton as guardian of Elsie Flowers or any one else, and they deny that they ever did or ever intended, or that it was ever understood by them or any one else that they should become the sureties of said Burton as public guardian of Elsie Flowers or as guardian of any one else. They deny that B. F. Burton was ever appointed public guardian of Ballard county. They therefore deny that they are indebted to the plaintiff herein in any sum whatever, or that they are liable to him as the surety of Burton for any sum whatever." A demurrer was filed to this answer, which was sustained by the court, and, appellants failing to plead further, judgment was rendered against them, from which they appeal. It will be observed that appellants admit that Burton was duly appointed public administrator, and that they signed and executed his bond as such for Ballard county, Ky. The point made by appellants is that Burton was not appointed public guardian, nor did they sign his bond as sureties as such. We have not been cited to, nor have we been able to find, an opinion by this court which throws any light upon the question before us. The sections of the statutes which have reference to the question under consideration are as follows:

"Sec. 3903. There shall be appointed in each county in this state, by the county court thereof, a discreet, fit person to act as administrator of decedents' estates, of which there is no personal representative, and as guardian of such orphans as have none.

"Sec. 3904. He shall continue in office two years, and until his successor is qualified; but may be removed by the court in the same manner and for the same causes for which administrators or guardians may be removed. He shall be sworn and execute bond, with good surety, to the commonwealth for the faithful discharge of his duties, and shall be styled 'Public Administrator and Guardian of ——— county.'

"Sec. 3905. The several county courts of this Commonwealth, in which there is a public administrator and guardian, shall confide to him the administration of the estate of deceased persons in all cases in which, by law, the jurisdiction to grant letters testamentary or administration applies, if it shall appear, after the expiration of three months from the death of the decedent, that no one will qualify as executor or apply for administration; and shall also confide to said public administrator and guardian the care and control of the persons and estates of all minors, in case that it shall appear that such minor hath no testamentary guardian, and no one will apply for or serve as such by the appintment of the court.

"Sec. 3906. The public administrator and guardian shall have all the powers, be subjected to the same liabilities, and be governed by the same laws in all respects as are prescribed for administrators and guardians." (Russell's St. § 3924–3927.)

It appears from the statute that it was the imperative duty of the county court of Ballard county to appoint a discreet and fit person to act as public administrator and guardian for that county. The county court was not authorized, under the statute, to appoint one person public administrator and another person as public guardian. The statute requires that one person perform all the duties named therein, and that he execute bond for the faithful performance of his duties, and that he be styled "public administrator and guardian." It appears that the trouble

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arose in this case from the fact that the clerk of the court in entering the order of appointment of Burton and taking his official bond omitted to style him as guardian, and only referred to him as public administrator. This was evidently a mistake or oversight. The styling of him as public administrator and guardian was a matter of form. The purpose and intent of the statute was to have a discreet and fit person designated to whom the settlement of deceased persons' estates and the estates of all minors should be confided for protection and settlement under the conditions and circumstances named in the statute. The official name by which he is designated is not in our opinion very material. In our opinion, it was as much the duty of Burton in his official capacity to receive and care for the estate of the infant Elsie Flowers when confided to him by the county court as it was to receive and disburse the estate of deceased persons, and appellants, his sureties, were bound for the faithful discharge of Burton's duties in respect to her estate, and they cannot now be heard to say that they had no intention of becoming bound for his acts as public guardian, for, when they signed the bond, they were presumed to have knowledge of the statutes above copied which compelled the county court to confide to him the estates of both deceased persons and infants, and they cannot escape on account of the oversight of the clerk of the court in failing to insert in the order and bond the word "guardian." The statute by its terms placed the word there.

For these reasons, the judgment of the lower court is affirmed.

GROW v. GROW.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. DIVORCE (§ 130*)—CRUEL AND INHUMAN TREATMENT—EVIDENCE.

Evidence *held* to justify an absolute divorce to a wife on grounds of cruel and inhuman treatment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442–445; Dec. Dig. § 130.*]

2. DIVORCE (§ 252*)—DISPOSITION OF PROPERTY.

Where, at the time of marriage, a husband brought to his wife's farm, where they lived, $400 in personalty, which if kept separate from his wife's property, and loaned at the usual rate of interest, would, at the date of their separation, have been worth about $500, he should be awarded that sum upon the granting of an absolute divorce to the wife with custody of her own property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713–715; Dec. Dig. § 252.*]

Appeal from Circuit Court, Garrard County.

"To be officially reported."

Divorce action by Peachie B. Grow against Francis Breckinridge Grow. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

W. I. Williams, for appellant. Wm. Herndon, for appellee.

LASSING, J. This is an appeal from a judgment of the Garrard circuit court refusing to divorce the appellant, Peachie B. Grow, from her husband, Francis Breckinridge Grow. The petition seeking the divorce alleges that they were married in 1904, and that for some time, and particularly during the six months next preceding the filing of her suit, her husband behaved towards her in such a cruel and inhuman manner as to indicate on his part a settled aversion to her, and to permanently destroy her peace and happiness of mind.

The proof shows that each had theretofore been married, and that the defendant is the brother of plaintiff's first husband. By her first marriage she had three children, all boys, and at the date of this marriage these boys were about grown. The defendant, so far as the record shows, had but one child by his former marriage, a girl, who at the commencement of this litigation was about 12 years of age. No children were born of this marriage. The plaintiff at the death of her husband was the owner of a farm of some 115 acres, worth perhaps $7,000, where she and two of her children were living, surrounded by such home comforts as might be expected upon a farm of that size and character. The defendant is shown to have been a man of little means, his entire estate consisting of some $400 worth of personalty. After their marriage they lived upon her farm, the defendant taking the active management and control thereof, and thus matters continued from that time until their separation in May, 1908. The evidence shows that beginning shortly after their marriage the defendant was rude to his wife, frequently speaking to her in a rough, coarse manner, and showed an utter disregard for her opinions and feelings. He resented any effort on her part to have a voice in the management of her property, and frequently in the presence, not only of their children and their immediate neighbors and friends, but of strangers, behaved towards her in such a manner as to bring the blush of shame to her cheeks and tears to her eyes. He would tell her to shut her mouth, and, according to the testimony of two witnesses, curse and abuse her. When she was not treated in the manner above indicated, he would at times refuse to answer questions which she would ask him and utterly ignored her and her wishes as expressed to him, and, according to many of the witnesses, he seemed to invariably adopt one of two courses toward his wife when in the presence of others, either to speak to her in such

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a way as to indicate that he entertained an utter contempt for her and her opinions, or else refused to recognize or speak to her at all, when both the occasion and her conversation required that he should speak. All of the witnesses for both plaintiff and defendant testify that he was a rough, coarse man, who seemed to think it smart to "cut monkey shines," as the witnesses describe it.

The most that is offered in the record in palliation or defense of his conduct is the testimony of some of his witnesses who say that they were occasionally at the Grow home and saw no evidence of misconduct on his part, although they, too, testified that he had a rough, curt way of talking. Some of them testified that he had always talked and acted in this way. From this it is argued that his wife must have known when she married him what kind of a man he was, and been familiar with the fact that he had a rough, curt way of speaking, and for this reason that she may not now complain. To this line of argument, however, we cannot subscribe. She may have regarded him as a diamond in the rough, but she certainly would not have married him had she thought or even dreamed that he would have treated her in the way and manner in which the record shows he has habitually done since their honeymoon began to wane. The fact that a man has a rough exterior and a plain, blunt way of speaking does not justify the conclusion that he is lacking in those finer attributes, affection, consideration, and attention, that go to make up the happiness of every married woman's life. She had a right to expect that, even though uneducated and rough, he would at least treat her kindly and with that degree of consideration which every wife deserves at the hands of her husband. In this it appears that she was mistaken, for he did neither, and, although she evidently realized soon after their marriage the mistake she had made, she tried to make the best of a bad bargain and get along with him, for, as one neighbor expressed it, "she bore up under his mistreatment better than any one I ever saw," and, although she was frequently put to shame and deeply humiliated by the conduct of her husband toward her in the presence of others, she bore it all with commendable fortitude until finally, when forebearance ceased to be a virtue and she could stand it no longer, she asked the chancellor to relieve her from her unhappy lot.

The bonds of matrimony should not be severed and the home broken up for slight or trivial causes, but no woman should be required to live with a man whose conduct day by day toward her is such as to indicate that he has no respect for her, no consideration for her wishes, and no regard for her feelings. When he habitually behaves toward her in a rough, rude, and insulting manner, humiliates her upon any and all occasions, and without cause is cross, rude, and unkind to her, she should not be required to live with him, and this is especially true when this treatment of her and conduct on the part of her husband toward her, as in the case at bar, is shown to have gradually grown worse. During all their married life, as between the plaintiff and her husband, she is not shown to have given him a cross word or to have offered him the slightest excuse to justify him in treating her in the way and manner in which he is shown to have done. On the contrary, it is shown that she has been a kind, considerate, and, so far as may be under the circumstances existing, an affectionate wife. An effort is made to show that at times she quarrelled with her sons, and particularly one of them, because he was not inclined to take her advice. This conduct on the part of the son may have been, and doubtless was, brought about in a large measure by the example which his stepfather set for him. But, even if all this be true, it offers neither justification nor excuse for the defendant's conduct, and has no place in our consideration of this case; our inquiry being confined to the question as to how the plaintiff and defendant behaved toward each other.

We are of opinion that the record abundantly supports the charge that the defendant behaved toward the plaintiff, his wife, in such a cruel and inhuman manner for a period of time covering more than six months before their separation as to indicate a settled aversion on his part toward her. That such conduct as is portrayed by the witnesses was calculated to break her spirits and permanently destroy her peace and happiness there can be no doubt. On this showing the chancellor should have granted her an absolute divorce from the defendant, and given her the custody and control of all of her property. The record is very meager as to what property the defendant owned. It is claimed by his counsel in his brief that it was worth about $400 at the date of their marriage. Such property as he had he is entitled to have returned to him with its reasonable and fair increase. Conceding that at the date of their marriage he brought to the place personal property of the value of $400, this, if kept separate and apart from his wife's property and loaned at the usual and customary rate of interest, would at the date of separation have been worth about $500, and we are of opinion that the chancellor should have awarded to the defendant $500 to be paid by the plaintiff out of such stocks and personalty as were on hand at the date of their separation, and have awarded all other personalty on the place to the plaintiff.

The judgment is reversed, and cause remanded, with instructions to enter a judgment in conformity with this opinion.

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SMITH et al. v. PHELPS et al.

(Court of Appeals of Kentucky. Oct. 8, 1909.)

1. PLEADING (§ 310*)—EFFECT OF EXHIBIT.

Where petition in ejectment had the will under which plaintiff deraigned title attached as an exhibit, and it showed title in another, the petition stated no cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 944–947; Dec. Dig. § 310.*]

2. WILLS (§ 602*)—CONSTRUCTION.

Testator in his will, in bequeathing certain lands to his sons, reserved a right of possession in his wife during her lifetime, if she desired it. He further provided that should any of his children die without legal heirs, the portion allotted to such child should be equally divided between testator's other children, or their heirs, "my meaning by heirs is, my sons and daughters, and not their wives or husbands, or the children of my sons and daughters." The will further provided: "My intention is that my children shall all share equally of my estate when my youngest child becomes of age." *Held*, that there was nothing in the will to indicate an intention to provide for the grandchildren, that it simply created a defeasible fee, and that, one of the sons having children which survived him, the estate which he took in the land was absolute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. § 602.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Mary Smith and others against S. B. Phelps and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. A. Sullivan, J. Tevis Cobb, and S. M. Wallace, for appellants. A. R. Burnam & Son, for appellees.

HOBSON, J. Mary Smith and Nannie Phelps brought this suit against S. B. Phelps and M. A. Phelps to recover a tract of land in Madison county. They alleged in their petition that they were the only children and heirs at law of Josiah Phelps, who was a son of Samuel Phelps, and died in the year 1908; that Samuel Phelps prior to his death was the owner in fee simple and in possession of the land; that by his will, which was duly probated, he devised the land to their father, Josiah Phelps, for life, with remainder to his children, and that, their father having died, they as the only children are the owners and entitled to the possession of it. A copy of the will of Samuel Phelps was filed with the petition as an exhibit. The circuit court sustained a demurrer to the petition, and dismissed the action. The plaintiffs appeal.

The plaintiffs do not allege in their petition that Josiah Phelps was the owner of the land at his death, or that it descended to them from him. Their only claim to the land as set out in the petition is by virtue of the will of their grandfather, Samuel Phelps. While an exhibit will not help a bad petition, an exhibit may make a petition bad; and, if the will of Samuel Phelps shows that the plaintiffs took no interest in the land under it, the petition states no cause of action. The case then turns on the construction of the will of Samuel Phelps. The third and eighth clauses of the will are in these words:

"3rd. I will and bequeath to my wife, Tabitha Phelps, all my land south of the Creek. * * * [Here follows description.] Also I will and bequeath to my wife all my negroes and stock except the negroes, eight in number, heretofore given to my two married children, to stay with her and my children under twenty-one years of age, until as my children become of age or marry. For the purpose of rearing and educating my younger children, and for any other purpose that my wife and my executors may think necessary for the benefit of my estate. I also further wish my wife and unmarried children to occupy all my other lands not hereafter disposed of."

"8th. I will and bequeath to my three youngest sons, Marcus A. Phelps, Thomas Phelps and Josiah Phelps, all the land bequeathed to my wife, together with sixty or seventy acres lying east of Boonesborough road, known as the Portwood place, to be equally divided between them as they become of age. In the bequest to my three last sons I reserve the right of possession to my wife her lifetime if she desires it."

The first and second clauses relate to the burial expenses and the payment of his debts. By the fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth clauses he devises property to his other children and disposes of his slaves. The fourteenth clause is as follows: "14th. I further will and desire that should any of my children die without legal heirs or heir, the portion allotted to him or her be equally divided between my other children or their heirs,—my meaning in this my last will and testament by heirs is my sons and daughters, and not their wives or husbands, or the children of my sons and daughters." The fifteenth clause appoints the executor. It also contains these words: "I further wish should my wife die previous to the time my youngest child becomes of age, that the farm allotted to my wife should be carried on by my executors as though she was living and the younger children to have their portion of land and negroes as above alluded to." The sixteenth clause is as follows: "16th. My object and intention in this my last will and testament is, that my children shall all be made equal or share equally of my estate when my youngest child becomes of age." He made a codicil to his will, which, among other things, contains this: "I hereby deprive my son, Marcus A. Phelps, of the gift in the land of my home place alluded to in the above will, and I will his portion in the home place to be divided equally between Thomas Phelps and Josiah Phelps at the death of their mother."

It is apparent from the will that the tes-

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tator contemplated making all his children equal, that some of the children were not of age, and that he contemplated that the family was to be preserved, and the final division of the estate made when the youngest child became of age. There is nothing in the will to indicate an intention to provide for his grandchildren. His children were the sole objects of his bounty. When he provided that if any of his children died without issue, the portion allotted to them should be equally divided between his other children or their heirs, he apparently had in mind that some of the children might die without issue before the final distribution of his estate. And when we read the whole will it would seem that the fourteenth clause was inserted with this view; but, however this may be, there is nothing in it to vest any interest in the grandchildren. It simply creates a defeasible fee. Josiah Phelps left children surviving him at his death. He did not die without legal heir or heirs, and so the defeasance did not occur. The defeasance not having occurred, the estate which he took in the land was absolute. See Simpson v. Adams, 127 Ky. 790, 106 S. W. 819, 32 Ky. Law Rep. 617; Harvey v. Bell, 118 Ky. 512, 81 S. W. 671, 26 Ky. Law Rep. 381; Smith v. Ballard, 117 Ky. 179, 77 S. W. 714, 25 Ky. Law Rep. 1290.

Judgment affirmed.

INDIAN REFINING CO. v. MOBLEY.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

NEGLIGENCE (§ 32*)—DANGEROUS PREMISES—INJURIES TO LICENSEE.

Plaintiff applied to one of defendant's officers for permission to go through defendant's works and solicit insurance, which being granted him, plaintiff on several occasions wrote the insurance for defendant's employés. On the day plaintiff was injured he went into defendant's boiler room to solicit insurance from one of defendant's servants employed there, in accordance with such permission, and while there was injured by the explosion of the steam pipe resulting from its negligent construction. *Held*, that plaintiff was but a licensee as to whom defendant owed no duty except to refrain from willful acts of injury, and was therefore not liable for his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42–44; Dec. Dig. § 32.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Scott County.

"To be officially reported."

Action by John J. Mobley against the Indian Refining Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Allen & Duncan and Bradley & Bradley, for appellant. T. L. Edelen, for appellee.

LASSING, J. This is an appeal from a judgment of the Scott circuit court awarding appellee, John J. Mobley, $5,000 damages for injuries received by him in the explosion of a steam pipe in appellant's plant in Georgetown, Ky., while he was there soliciting insurance. Appellee is, and was at the time of the injury complained of, a solicitor of insurance for a fraternal order. Appellant owns and operates a large refining plant near Georgetown, and has in its employ a great many men. While appellee was working at Versailles he received word from the management of his company to go to Georgetown and write insurance. Acting under this order, he did so, and went out to the plant of the Indian Refining Company, and there met some one apparently connected with the company, and asked of him permission to enter the company's grounds for the purpose of working among the employés. He stated to this person that he had a sick and accident policy that was carried by working people, and he wanted to distribute his literature among the employés of the refining company. From him he received permission to enter the grounds of appellant company. Whether the person from whom he received this permission was an employé or not does not appear from the record, but it is immaterial, as he later had a talk with Mr. Olsen, an officer of the defendant company, and he told Olsen what he had come for, and Olsen said to him: "Go through the works. Do what you can at any time. Come as often as you please, and any assistance I can be to you I would be glad to do it. I would like to see all the boys have that sick and accident policy. I think it is a good thing." This conversation took place on the first day that he visited the plant and some time before the date of the injury. In the interim he was there quite frequently, and solicited and wrote a great number of policies for men about the works. On the day that he was injured he states that he was looking for a young man named Arvidson, whom he desired to write, and was informed that he would find him in the boiler room. He went there to see him, found his man, and was talking insurance to Arvidson at the time he was injured. This is, in detail, a statement of the circumstances under which appellee went upon the premises of appellant, as testified to by him. The explosion which caused the injury was due, according to the testimony of William Rudd, the only witness introduced by appellee who attempts to account for it, to the negligent manner or method in which the steam pipes or fittings were constructed, and he attributes the explosion directly to the carelessness and lack of forethought on the part of appellant's employés in the handling of the steam pipe. Upon this showing, it is urged for appellant, the trial judge should have given a peremptory instruction at the conclusion of the plaintiff's testimony to find for the defendants, inasmuch as the evidence clearly shows that appellee was a mere licensee who had been

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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suffered or permitted by the appellant company to go upon its premises for the purpose of prosecuting his own business, in which the company had no interest whatever, and that, therefore, it owed him no duty, and, owing him no duty, could not be held responsible for any injury which he received while upon their premises, in the absence of a showing that such injury was willfully or wantonly inflicted. Many other errors are assigned why the judgment should be reversed, but, from the conclusion which we have reached, we will consider only the question as to whether or not a peremptory instruction should have been given.

Much evidence has been introduced for the purpose of showing that appellee was invited to enter or come upon the premises of appellant, and that, in fact, he was more than a mere licensee, but when all of this testimony is read in connection with the statement of appellee himself, as to the circumstances under which he went upon the grounds and through the plant of appellant company, we are of opinion that it does not have the effect which counsel for appellee would give it. It was, at most, but a consent on the part of the company that appellee in the prosecution of his business might come upon the premises and through their works. The company had no interest whatever in the placing of this insurance, and, while an individual officer connected with the company may have looked upon fraternal or accident insurance as a good thing for laboring men, and regarded it as especially advantageous for men engaged in a hazardous employment, still there is nothing in the record to warrant the conclusion that the company in any wise sought to have their employés apply for or take out policies in appellee's company. On the contrary, it shows that appellee was paid both a salary and commission for the work which he did, not by appellant, but by the insurance company for which he was working. The fact that Mr. Olsen carried policies of insurance similar to those written by appellee, and regarded it as a good thing and would like to see all the employés of the company carry such policies, cannot be construed into an invitation on the part of appellant to appellee to enter its works, especially when that statement was only made after permission to do so had been expressly sought by appellee. The company was doing him a favor in permitting him to come upon its grounds and labor among its men. Hence, in our consideration of the case, he will be treated as a mere licensee, who went upon the premises of appellant for purposes of his own, and that in his being there appellant was in no wise interested or concerned. For the purpose of determining whether or not a peremptory instruction should have been given, it must be accepted as true that the explosion which caused the injury resulted directly from the negligent manner in which the steam pipe was constructed and managed.

Plaintiff's right to recover at all is rested upon the idea that the defendant company owed him some duty. If, under the circumstances above detailed, it owed to him no duty to protect him against injury while upon its ground resulting from the explosion of the steam pipe as detailed by the witness Rudd, then the peremptory instruction should have been given. In 2 Cooley on Torts, p. 1268, the general rule governing cases of this character is thus stated: "The general rule supported by the authorities is that the owner or occupant of premises owes no duty to licensees and trespassers further than to refrain from willful acts of injury." If this general rule is recognized and the principle applied in this case, there could be no recovery, for it is not claimed, much less shown, that the injury to plaintiff resulted from a willful act of the defendant or its agents. In the case of Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218, 15 Ky. Law Rep. 75, the principle here under consideration was before the court. The facts in the case were as follows: One Stoker, who was superintendent for Lutz, requested a boy named Lackat to go to defendant Lutz's place of business and notify him that his, Stoker's, child was dead, and he would not come to work on that day. While on his way to the building owned by the defendant for the purpose of delivering the message the boy was directed to go into a small room where a man would be found who would deliver his message. This room was poorly lighted, and he stepped in an opening or hole that had been negligently left or made in the floor, and his leg was caught in a large revolving wheel and crushed. He did not know of the danger to which he was exposed, and could not discover it on account of the darkness of the room; and the agent of the defendant who directed him to said room failed to notify him of the danger. A demurrer was sustained to the petition, and upon review here this court said: "It is not alleged plaintiff, when injured, was in performance of any duty to defendant, or that he was at the place of defendant with his knowledge or consent. On the contrary, a fair inference from statements of the petition is that he went there at the instance and for the accommodation of only Stoker, who was, for that day at least, not in the service of the defendant. It is not alleged that the room in which plaintiff received the injury was designed or used as a passageway for strangers, or was ever, in fact, entered by any others than employés of defendant. The defendant, therefore, owed to plaintiff no other duty or care than any other stranger or person intruding upon his premises without his consent or knowledge. And, as the actual condition of the room in question was not a subject affecting the rights or interests of any other than defendant and

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his employés, we have the case of a plaintiff, not alleged to be deficient in intelligence, voluntarily going where he need not have gone, and the exercise of ordinary care would have kept him from going." In this case the right to a recovery was denied, although the plaintiff had been directed by some employé to go into and wait in the room where he received his injury. In many respects the case from which we have just quoted is like the case under consideration. There the plaintiff was sent to the place of business of the defendant upon a matter of business in which the defendant company had no interest; he was directed to go into a certain room where he would find some one to whom he could deliver his message; the injury was received by plaintiff stepping into a hole and having his leg caught in a wheel, the room being so poorly lighted that he could not see the hole into which he stepped; and defendant had negligently permitted the hole to remain in the floor in a dark room, thereby exposing the plaintiff to danger—whereas, in this case plaintiff was sent to the place of business of the defendant upon a matter of business in which the defendant company had no interest; he was advised by some one connected with the defendant's plant that the man whom he was seeking could be found in the boiler room; the steam pipe was so improperly constructed and managed that it exploded and caused the injury. The only difference between that case and the case under consideration lies in the fact that the court in that case held that the defendant did not know of the plaintiff's presence upon its premises, whereas in the case under consideration the defendant is shown to have consented that plaintiff might enter its premises. But the opinion of the court in the Lutz Case was rested primarily upon the idea that no recovery could be had because the defendant owed to the plaintiff no duty.

In the case of Johnson v. Paducah Laundry Co., 122 Ky. 369, 92 S. W. 330, 29 Ky. Law Rep. 81, 5 L. R. A. (N. S.) 783, the defendant had placed a vat in an uninclosed lot a few feet from the street, and this vat was filled with boiling water used in connection with the defendant's business. Johnson, for purposes of his own, left the street, and went upon the lot and fell into the vat. He sued for damages. In the lower court a peremptory instruction was given, and in passing upon the question here this court said: "It is insisted, however, that the owner of this uninclosed city lot ought to know that trespassers are liable to come upon it, and that a vat of boiling water is a thing so dangerous that it is negligence in the owner not to guard it as to one who falls into it in the dark. The general rule is that the owner of private grounds is under no obligation to keep them safe for the benefit of intruders who come upon them for their own purposes, however innocent the purpose may be. The exceptions to this rule are when the owner of the property expressly or impliedly invites the use of it, or so maintains it as to make it what is sometimes called an attractive nuisance, especially in the case of children and animals. In Hounsell v. Smyth (7 C. B. [N. S.] 731), a person was crossing an open tract of land between two highways, and fell into an unfenced mine. The court held that persons crossing the ground with the owner's permission must take the permission with its concomitant conditions, and it may be peril. In Benson v. Baltimore Traction Company, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436, a class of students were given permission, upon request, to inspect a power house. One of them while there fell into an uncovered vat of boiling water in a dark place where he could not see. It was held that he could not recover. The general rule on this subject is thus admirably stated by Chief Justice Bigelow in Sweeney v. Old Colony R. R. (10 Allen [Mass.] 368), 87 Am. Dec. 644: 'All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been omitted. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. So a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner of the premises, cannot recover damages caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant peril. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated or occupied or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon. Any number of authorities might be cited to sustain this conclusion. The tendency of the later cases is rather to limit the exceptions to the rule than to extend it.'" In this case it will be observed that the court draws no distinction between cases where the plaintiff has entered the premises of the defendant without the knowledge of the defendant and those where he has sought and been given permission to enter for purposes of his own. In other words, no distinction is drawn between

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a trespasser and a licensee; the court holding that the defendant owes to the one no more duty than to the other, unless the defendant has enticed, allured, or induced the plaintiff to enter upon his premises, and whether he goes there as a trespasser or a licensee he goes at his own risk.

A case almost identical with the case under consideration is Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611. There a party called at the office of the defendant company, and requested permission to see one of its employés. He was informed by some one in the office where the employé could be found. He went to the building indicated for the purpose of finding this employé, and in so doing passed through a room where a large quantity of cotton seed was being manipulated on the floor. He stepped upon this cotton seed, and his foot sank through the seed and against a screw in the floor, and was injured. The screw was concealed by the cotton seed, and he had no knowledge of its existence there. In passing upon his right to recover, the court said: "In our opinion the facts fail to show that appellant owed appellee the duty to send a guide along to prevent him becoming entangled in the machinery, and being injured, for the reason he was not there on business with appellant, or by his invitation, either express or implied, because he made no request for any one to accompany him. To require the proprietor of a steamboat, a factory, or a mill, conducted in the usual manner, whenever a man should ask permission to see an employé engaged in his duties, to anticipate that such a person might become involved in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence, but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction, and position, and needs no attendant, or otherwise he would have made a request to that effect." In Brown v. Thomas Blackwell Coal & Mining Co., 124 Ky. 324, 99 S. W. 299, it was shown that the defendant owned, controlled, and operated a blacksmith shop in connection with its mines; that plaintiff sought and was granted permission to use this shop for his own purposes; that he did so, and in shaping a piece of iron after it had been heated a spark fell into a keg of blasting powder which was stored there, and which was uncovered at the time. The powder was exploded, and the plaintiff injured. He sued to recover damages, alleging that defendant had negligently suffered this highly explosive powder to remain there in an exposed and dangerous position where he and others were in danger of being injured. The lower court sustained a demurrer to the petition, and, upon appeal here, this court said: "It will be observed that the petition does not allege that the blacksmith shop was being used by appellee on the day or at the time of appellant's receiving his injuries, or that any of appellee's agents or employés were then in or about the shop. It is not averred that appellant entered the shop by appellee's invitation at the time or on that day extended. * * * In view of all that is said in the petition in respect to his use of the shop, and the reasonable inference deducible therefrom, we are of opinion that its fair meaning is that appellant had permission or consent of appellee to use his shop. Therefore what the pleader designates an invitation was in truth but a license. It does not appear from the averments of the petition that appellant was a licensee upon the premises under an arrangement for the mutual benefit of appellee and himself which could have imposed upon appellee the duty of maintaining the premises in a reasonably safe condition for his use as for an employé or guest. In our opinion the petition does not state a good cause of action." Here we have a stronger case against the contention of the plaintiff than that under consideration. Brown was given permission to use the shop at any time he saw fit, and, knowing that he might so use it, the defendant company had placed therein a keg of blasting powder and left it open and exposed to the danger of being ignited by sparks of fire which it must have known would fly from the heated iron as it was being beaten or shaped by any one who was using the shop; and yet a recovery was denied on the well-recognized ground that, where a licensee enters the premises of another for business of his own, he does so at his peril.

Counsel for appellee admits the general application of the rule announced in the opinions above cited, but seeks to draw a distinction between that class of cases where one is injured by coming in contact with dangerous machinery or other agency which has been left exposed or unguarded, and that other class of cases where injury has resulted from what he terms "positive negligence," to which latter class it is urged the injury in the present case may be assigned; or, differently expressed, it is contended that the rule announced in the various opinions from which we have quoted applies only to that class of cases where injury has resulted from some positive act of the plaintiff, and that it is only where injury has so resulted that the defendant has been held not liable, but that in a case like that under consideration, where the plaintiff has done absolutely nothing to produce the injury, the defendant cannot escape liability. The argument in support of this proposition is ingeniously made and presented with much force. However, after a most thorough examination, we fail to find any such distinction recognized by the text-writers or courts of last resort, and our own court has certainly not made such classification. But, on the contrary, the generally recognized and established rule is that liability attaches only where some duty is owed, and that a licensee in entering upon the

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premises of another does so at his peril, the owner of the premises being liable only for injuries resulting from willful acts. The only exception in the application of the rule announced is in that class of cases where one owning premises in a locality where children are apt to congregate places thereon something attractive to children and dangerous to them if meddled with, without taking steps to warn and keep the children out of danger. In cases of this character, where a recovery has been allowed, it has not been upon the ground that the company has been guilty of any positive negligence, but because of the fact that the children injured are too young to appreciate the danger, and the law throws around such its protecting care because they are not able to take care of themselves, and imposes upon the owner of such premises the duty to take such reasonable precaution as the circumstances will admit of to protect them from injury while playing upon such premises. Of this class, forming an exception to the general rule, are the cases of Bransom's Administrator v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, and Ball v. Middlesboro Land Co., 68 S. W. 6, 24 Ky. Law Rep. 114. While this exception in the application of the general rule has been recognized by most courts, the modern tendency is to restrict rather than enlarge it. The cases of Louisville & Nashville R. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. Law Rep. 258, or Conley v. C., N. O. & T. P. Ry. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602, relied upon by appellee, do not militate against the position which we have taken. In the Conley Case a recovery was allowed because the railway company was found to be guilty of having violated what the court termed to be "a plain and manifest duty for the protection of human life and safety." And in the Webb Case a recovery was denied because the court found that the agents of the defendant in charge of the train, not knowing of plaintiff's presence upon the train nor the peril in which he was placed when attempting to leave it, owed him no duty, and, owing him no duty, the company was not liable. In this case the opinion is rested upon the basic principle that, in order to establish liability, some duty must have been owing and violated by the defendant company.

Applying this same principle to the case at bar, we are of opinion that the peremptory instruction should have been given at the conclusion of the plaintiff's testimony. For this reason, the judgment is reversed and cause remanded for a new trial and further proceedings consistent herewith.

NUNN, C. J. I agree to the reversal but cannot agree to the peremptory instruction, for the reason there was evidence which conduced to show that appellee's injury was caused by the positive act of negligence of appellant's agent in charge of the machinery. For this appellant is responsible. It had no right to invite or license appellee to go upon its premises, and then by positive and active negligence injure him without impunity and without any responsibility.

CHESAPEAKE & O. RY. CO. v. WENDT et al.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. APPEAL AND ERROR (§ 292*)—REVIEW—INSTRUCTIONS.

Errors in instructions not made a ground for a new trial in the lower court do not constitute a ground for reversal on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1697–1699; Dec. Dig. § 292.*]

2. SALES (§ 234*)—BONA FIDE PURCHASER—SALE BY BAILEE.

The lessor of a quarry on regaining possession thereof could not pass title to rock theretofore sold by his lessee to plaintiffs, and set aside and left on the premises; the lessor being only a bailee for plaintiffs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 669; Dec. Dig. § 234.*]

3. APPEAL AND ERROR (§ 1003*)—VERDICT—CONCLUSIVENESS.

A verdict and the judgment thereon are conclusive, unless flagrantly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Louis H. Wendt and others against the Chesapeake & Ohio Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Galvin & Galvin and Wm. A. Burkamp, for appellant. Wm. U. Warren, for appellees.

O'REAR, J. Rath owned a rock quarry. He leased it to the Western Construction Company, a corporation, who operated it by quarrying the rock. The latter sold a quantity of the rock, 3,000 cubic yards, to appellees, trading as the Ohio River Stone Company. The rock sold to them was set aside and paid for, so appellees claim. It was stored on the leased premises. Later Rath came again into possession of the leased premises. It is said he sold the rock to appellant for ballast for its roadbed. This suit was by the Ohio River Stone Company, a partnership composed of appellees, against the railroad company for the value of some 300 perch of the rock which the plaintiffs claim was part of the purchase from the Western Construction Company, and which it was alleged the defendant had converted to its own use without the plaintiffs' consent. An issue was tendered on the subject of title.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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In addition the defendant pleaded that it had purchased the stone from Rath in good faith, for value, and without notice of the plaintiffs' claim of ownership, that it found the stone in Rath's possession, and that he was the ostensible owner. This plea we think was insufficient, for the reason pointed out below, but an issue was nevertheless tendered upon it. The case went to trial before a jury, whose verdict was for the plaintiff for the market value of the stone at the time of its conversion.

The errors asserted against the judgment are two. One, that the defendant was entitled to a peremptory instruction at the close of the evidence; second, that the verdict is flagrantly against the evidence. Appellant also criticises the instructions given the jury by the trial court, but, as they were not made a ground for a new trial in the court below, they do not constitute a ground for reversal in this court. We must confine the case to the two grounds available to the appellant, and which have been noted above.

The first ground is predicated upon the principle that a vendor retaining possession of a chattel may pass a good title to it by his sale to a stranger for value and in good faith. The proposition is not applicable for this reason: Rath was not the vendor of the stone to appellees. Rath was, at best, but bailee for appellees. He could not as such pass a good title to their property without their consent, unless they had given him such color of authority as permitted him to impose upon the ultimate purchaser. It is not pretended that appellees did anything of the kind. No one can alone sell and pass the title to a chattel which he does not own. Caveat emptor is the rule. Chism v. Woods, Hardin, 540, 3 Am. Dec. 740; Pool v. Adkisson, 1 Dana, 110; Reid v. King, 89 Ky. 388, 12 S. W. 772, 11 Ky. Law Rep. 615.

The identity of the stone was sharply contested in the evidence, which is not entirely reconcilable. As many as half a dozen witnesses testified that the stone taken by appellant was not the stone sold to appellees by the Western Construction Company. The testimony of as many, at least of four witnesses, and other evidence tending to corroborate them, went to show that the stone taken included 282 perch of the stone set apart to appellees, which they had bought from the construction company and paid for. A verdict might have been given upon this evidence for either side. But there is not such overwhelming preponderance either way as to justify our saying that a contrary verdict would be flagrantly against the evidence, and that is the only ground upon the score of weight of evidence upon which this court can interfere with the verdict of the trial jury, and the judgment of the trial court.

Judgment affirmed, with damages.

DICKERSON v. EASTERN KENTUCKY LUMBER CO.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. NEW TRIAL (§ 118*)—TIME FOR APPLICATION—EXTENSION.

Though, under Civ. Code Prac. § 342, providing that the application for a new trial must be made at the term in which the verdict is rendered, and shall be within three days after the verdict is rendered, unless unavoidably prevented, the time for filing motion and grounds for new trial may not be extended beyond the term, yet an extension in terms till a time beyond the term, being made because the party was unavoidably prevented from filing the motion within three days, is good for the balance of the term.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 242; Dec. Dig. § 118.*]

2. APPEAL AND ERROR (§ 933*)—PRESUMPTION.

Though the record does not show on what the trial court acted in extending time for filing motion for new trial, yet, in the absence of anything in the record to the contrary, it will be presumed the extension was because the party was unavoidably prevented from filing the motion within the three days after the rendering of the verdict, in which case it was authorized by Civ. Code Prac. § 342.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3773; Dec. Dig. § 933.*]

"To be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 119 S. W. 222.

CLAY, C. On June 6, 1908, the day the verdict was returned and judgment was entered thereon, the trial court on motion of plaintiff below entered an order giving plaintiff until the 3d day of the next October term, 1908, to prepare and file his motion and grounds for new trial. This order was entered without objection on the part of defendant. On June 15, 1908, and during the same term, plaintiff filed his motion and grounds for new trial without objection by defendant. During the same term the motion was overruled and an appeal granted.

On the original hearing of this case the point was made by appellee that this court was without authority to consider the evidence because the motion and grounds for a new trial were not filed within the time prescribed by the Code. In our former opinion we failed to consider this point, though it was passed upon by the court. It is now relied upon by appellee as a reason for granting its petition for rehearing. Under section 342, Civ. Code Prac., the trial court could not extend the time for filing motion and grounds for new trial beyond the term in which the verdict was rendered. The order of extension then did not give plaintiff the right to file the motion and grounds after the June term. Inasmuch, however, as the court was authorized by the section in question to extend the time for filing beyond three days, if the plaintiff was unavoidably

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prevented from doing so before that time, the order extending the time was good for the remainder of the term, if made for the reasons indicated. The record does not show upon what the trial court acted. But, having authority to act, it will be presumed, in the absence of anything in the record to the contrary, that he granted the extension of time because it was made to appear that plaintiff was unavoidably prevented from filing the motion within three days. As the order of extension was valid for the remainder of the term and as the application for a new trial was made during that term, we are of the opinion that the motion and grounds were filed in time. That being the case, this court had the right to consider the evidence.

Petition for rehearing overruled.

LOUISVILLE RY. CO. v. FLANNERY.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. STREET RAILROADS (§ 90*) — COLLISION WITH VEHICLE—NEGLIGENCE.

A motorman who sees a standing vehicle close to the track, and who knows that the only person in the vehicle is a boy not old enough to appreciate the danger, must stop the car until the vehicle is moved to a place of safety; and, where he attempts to pass, the street railroad company will not be relieved from liability for injuries to the boy because the horse attached to the vehicle by a slight movement throws the wagon in such a position that the rear of the car strikes it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 192; Dec. Dig. § 90.*]

2. STREET RAILROADS (§ 90*)—COLLISION WITH VEHICLE—NEGLIGENCE.

Where a standing vehicle is so close to the street car track that the slightest movement of the horse attached to it will bring it in contact with a car, and this fact is known or by ordinary care should be known to the motorman, that a part of the car passes in safety will not excuse the company if another part of the car strikes it, and causes injury to person or property.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190–192; Dec. Dig. § 90.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Arthur Flannery, by his guardian, against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, Fred Forcht, Jr., and Howard B. Lee, for appellant. R. L. Page, for appellee.

CARROLL, J. The father of Arthur Flannery drove his wagon in front of a fruit store on Jefferson street, and left it standing as close to the sidewalk and as far from the street car track in the middle of the street as he could, considering the position of other vehicles that were in front of the store. He got out of the wagon to go into the store, and left his son Arthur, a little boy about eight years old, as the only occupant of the wagon. Almost immediately after Flannery left the wagon, or at least in a minute or so, a street car going east on Jefferson street came up to the place the wagon was standing. The motorman saw the nearness of the wagon to the track as he approached it, and was running at slow speed. When in a few feet of the wagon, he stopped the car, apprehensive that it would not pass the wagon without striking it, and asked Arthur Flannery to move the wagon, but the little boy did not pay any attention to the request, and the motorman, concluding that he could pass in safety, started his car. The front step of the car passed the wagon without striking it, but the rear step hit one of the wagon wheels, the collision throwing the little boy out of the wagon, injuring him severely and permanently. The evidence shows that after the front part of the car passed the wagon, missing it by two or three inches, the horse slightly moved his position, and this caused one of the wheels of the wagon to come in contact with the car.

The only error assigned is the failure of the trial court to give the following instruction: "The court instructs the jury that if they believe from the evidence that the wagon in question was a sufficient distance from the track for the defendant's car to pass the same in safety, and that the front part and step of said car did pass said wagon in safety, and that afterwards, and while said car was passing said wagon, said wagon changed its position by reason of the horse moving or otherwise, and thus brought said wagon so close to said car that the rear of the car collided with said wagon, then the law is for the defendant, and the jury should so find." This instruction was in effect a peremptory direction to find for the railway company, and, if it should have been given, it is manifest that the failure to do so was prejudicial error. But in our opinion the court did not under the facts of this case commit error in refusing the instruction.

The motorman saw the little boy in the wagon before attempting to pass it. He knew, or must have known, that the boy was not old enough to appreciate or understand that he was in any danger, and that his tender years made him indifferent to his request to move the wagon out of the way. He also knew that the boy was the only occupant of the wagon, and further knew that the closeness of the wagon to the track made it doubtful if the car would pass without striking it. With full knowledge of all these facts, it was the duty of the motorman under the circumstances to have stopped his car until the wagon was moved to a place of safety. If the wagon had been so far from the track that the car could have passed it with reasonable safety, or, in other

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words, so far that an ordinary or slight movement of the horse would not have thrown it in contact with the car, and, after the front of the car had passed the wagon, the rear of the car collided with it on account of the negligence of the driver of the wagon or the restlessness of the horse, the instruction offered would have been appropriate. But, when a motorman sees a vehicle so close to the track that it appears to him doubtful if it can be passed in safety, the company will not be excused because the horse attached to the vehicle by a slight movement throws the wagon in such a position that the car will strike it. Here we have a case where the motorman had full notice of the dangerous proximity of the wagon to the track, and evidently believed when he stopped his car and asked the little boy to move the wagon that it would be dangerous to attempt to pass it. In attempting under these circumstances to pass the wagon the motorman assumed the risk of passing it in safety. Having taken the risk and lost, the company must pay the penalty for his negligence. To say that under a state of facts like those proven in this case the company should be absolved from liability would be, in effect, holding that, however perilous the situation of the occupant of a vehicle upon a street, the persons in charge of the car may take the chance of not injuring him and be free from liability if the vehicle from any cause be moved a few inches so as to come in contact with the car. This is not the law. When a vehicle is so close to the car track that the slightest movement of the horse attached to it will bring it in contact with the car, and this fact is known or in the exercise of ordinary care should be known to the motorman, the mere fact that a part of the car passes it in safety will not excuse the company if another part of the car strikes it, and causes injury or loss to person or property. When confronted by a situation like this, the motorman should stop his car until the vehicle is moved to a place of safety.

There is no conflict in this view of the law and that expressed in the cases of the Louisville Railway Company v. Meglemery, 78 S. W. 217, 25 Ky. Law Rep. 1587; Lexington Railway Company v. Woodward, 106 S. W. 853, 32 Ky. Law Rep. 653; Lexington Railway Company v. Van Laden, 107 S. W. 740, 32 Ky. Law Rep. 1047; Louisville Railway Company v. Gaar (Ky.) 112 S. W. 1130; Goldstein's Adm'r v. Louisville Railway Company (Ky.) 115 S. W. 194. In the cases mentioned the court held that the instruction approved not only presented the railway company's theory of the case, but contained a correct exposition of the law. The instruction offered in this case, while based on facts sufficient to authorize it, and doubtless stating the company's defense, does not properly present the law of the case as we understand it. An instruction should not only be based on the facts developed by the evidence, but contain a correct statement of the principles of law applicable to the facts. In each of the cases mentioned the exoneration of the company from liability depended upon the fact that the motorman was exercising ordinary care to prevent the accident, and that it was caused by the negligence of the injured party. Here the motorman was not exercising ordinary care, nor was there any fault upon the part of the injured boy. Indeed, we might well say under all the circumstances that the accident was due to the inexcusable negligence of the motorman.

Wherefore the judgment of the lower court is affirmed.

CITY OF COVINGTON v. BOLLWINKLE.

(Court of Appeals of Kentucky. Oct. 12, 1909.)

1. MUNICIPAL CORPORATIONS (§ 816*)—DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—PETITION—SUFFICIENCY.

A petition, in an action against a city for injuries to a child falling from a sidewalk into a gutter and into a catch-basin, which sets forth the dangerous condition of the gutter and opening into the catch-basin, the manner in which the child fell into the basin, and the character and extent of his injuries, and which alleges that the city owned and controlled the streets, charged with the duty of maintaining the same in a reasonably safe condition, that the duty was not performed, and that it negligently maintained the gutter and catch-basin so as to render the street and sidewalk unsafe, and that the dangerous condition was known to the city at such a time as would have enabled it to repair the defect, etc., states a cause of action as against a demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711–1716; Dec. Dig. § 816.*]

2. MUNICIPAL CORPORATIONS (§ 784*)—DEFECTIVE STREETS—EVIDENCE.

Where, in an action for injuries to a child falling from a sidewalk into an open gutter and slipping down the gutter into the catch-basin, the evidence showed that the gutter had too great a fall for safety, that the opening from the gutter into the catch-basin was so large as to render the street and sidewalk dangerous for pedestrians, especially children, and that the city knew of the dangerous condition of the gutter and basin, for both had been constructed by its employés, the evidence established actionable negligence on the part of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1637; Dec. Dig. § 784.*]

3. MUNICIPAL CORPORATIONS (§ 755*)—PUBLIC IMPROVEMENTS—LIABILITY.

A city may, free from interference, determine whether a public street improvement is necessary, and exercise discretion in the selection of a plan for the improvement, but where the plan adopted is palpably unsafe, or the work is so negligently performed as to make the street or sidewalk dangerous for use, the city is liable for injuries resulting to persons therefrom.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1587; Dec. Dig. § 755.*]

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4. MUNICIPAL CORPORATIONS (§ 763*)—CARE OF STREETS.

A city must keep its streets and sidewalks in a reasonably safe condition for use by travelers in the usual manner, and it is liable for injuries resulting from negligence of such duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1612; Dec. Dig. § 763.*]

5. MUNICIPAL CORPORATIONS (§ 763*)—CARE OF STREETS.

Children, as well as adults, are entitled to the benefit of the rule requiring a city to keep its streets and sidewalks in a reasonably safe condition for use by travelers, in the usual modes.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 763.*]

6. MUNICIPAL CORPORATIONS (§ 804*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child of only 20 months cannot be charged with contributory negligence, even if negligence be shown, for falling from the sidewalk into the gutter and slipping thence into the catch-basin.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1674; Dec. Dig. § 804.*]

7. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A child 20 months old fell into an open gutter, and slipped down the gutter and through the opening into a catch-basin, 8 or 10 feet deep. He was rescued with great difficulty. As a result of bruises received in falling and of coming in contact with the filth and sewer gas, he contracted blood poison and catarrhal pneumonia, which made him very ill and permanently injured his health. *Held*, that a verdict for $1,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"Not to be officially reported."

Action by Henry Allen Bollwinkle, by his father as next friend, against the City of Covington. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Shepard, for appellant. F. J. Hanlon, for appellee.

SETTLE, J. The appellee, Henry Allen Bollwinkle, an infant of tender months, while walking with his grandmother on Jefferson avenue, a street of the appellant, city of Covington, stepped or fell from the sidewalk crossing into a gutter and catch-basin, whereby he was greatly injured. To recover for the injuries thus received the infant, by his father as next friend, brought this action against the appellant, city of Covington, in the court below, laying his damages at $5,000, and alleging that his injuries resulted from the negligence of appellant in maintaining in a dangerous condition the gutter and catch-basin. The appellant filed an answer containing two paragraphs; the first traversing the averments of the petition, and the second pleading contributory negligence on the part of the infant. The court sustained a demurrer to the second paragraph, which left the case to be tried upon the issue raised by the traverse. The trial resulted in a verdict and judgment in favor of appellee for $1,000. Appellant was refused a new trial, and, being dissatisfied with the judgment, has appealed.

According to the evidence the catch-basin is at the intersection of Jefferson avenue and an alley. It has a depth of perhaps 8 or 10 feet, and a large opening with which the gutter connects, and through which the surface water from the gutter enters it. After the surface water from the gutter falls into the catch-basin, it enters a sewer, through which it is emptied into the Ohio river. The opening is about 18 inches from the crossing at the intersection of the street and alley, and the gutter from the crossing to the opening to the catch-basin is of unusual pitch or descending grade, and wholly uncovered, and the opening into the catch-basin was unguarded by an iron grating or other barrier. It also appears from the evidence that the infant appellee, then 20 months of age, without fault on the part of his grandmother, with whom he was walking, upon reaching the crossing fell from it into the open gutter, and slipped along or down the gutter, and through the opening into the catch-basin, from which he was rescued with great difficulty by a passing pedestrian, who pushed his own body through the opening, and suspended himself, head downward, in the catch-basin several feet, in order to reach appellee with his hands and remove him therefrom. As a result of the bruises received in falling into the catch-basin and of his coming in contact with the filth and sewer gas thereof, the infant appellee contracted blood poison and catarrhal pneumonia, which made him very ill, and permanently injured his health. It is insisted for the appellant that the court erred in the following particulars: (1) In overruling the demurrer to the petition; (2) in overruling its motion for a peremptory instruction; (3) in giving to the jury instructions 1 and 2 as the law of the case; (4) in refusing to give certain instructions asked by appellant.

No reason is perceived for sustaining the first ground of complaint. The petition in apt language sets forth the dangerous condition of the gutter and opening to the catch-basin, the manner in which the infant appellee fell into the basin, and describes the character and extent of his injuries. It also alleges that appellant is the owner and in control of the streets within its corporate limits, and by law charged with the duty of maintaining the street in and upon which the gutter and catch-basin are situated in a reasonably safe condition for the use of the public; that this duty it did not perform, but on the contrary, so negligently maintained the gutter and catch-basin as to render the street and sidewalk unsafe for persons, and especially small children, using them;

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that their dangerous condition was known to appellant for such a time as would have enabled it to repair the defects and remove the danger before appellee was injured; and finally that the latter's injuries were caused by the negligence of appellant in failing to keep and maintain the gutter and catch-basin in such condition as would have rendered the street and sidewalk at that point reasonably safe for persons using them. Manifestly the petition well states a cause of action, and therefore the demurrer was properly overruled.

It is equally clear to us that the peremptory instruction asked by appellant was properly refused by the trial court, for the evidence fully sustained the averments of the petition, and established every fact essential to a recovery. In other words, it is manifest from the evidence that the gutter had too great a fall for safety, and that the opening at the point of connection between the gutter and catch-basin was so large as to render it unsafe, and that the steepness of the gutter and great size of the opening to the catch-basin together made the street and sidewalk at that point dangerous for the use of pedestrians, especially children, many of whom, beside appellee, reside in that vicinity. It is also patent from the evidence that appellant knew of the dangerous condition of the gutter and catch-basin, for both had been constructed by its employés shortly before appellee was injured, and it is a significant fact that neither its engineer who planned and supervised the construction of the gutter and catch-basin, nor the contractor who did the work, was required to testify in its behalf. It was, however, made to appear from the testimony of one Kenney, a civil engineer introduced by appellee, that the gutter and opening leading into the catch-basin were improperly constructed by a person or persons unskilled in such work. The authorities of a municipality may, free from interference, determine whether a public improvement such as the construction or repairing of a street or sidewalk is not necessary, and also exercise their discretion in the selection of a plan therefor, but if the plan adopted is palpably unsafe to travelers, or the work be so negligently performed as to make the street or sidewalk dangerous for use, the municipality would be liable for injuries resulting to persons therefrom. Carroll's Adm'r v. City of Louisville, 117 Ky. 758, 78 S. W. 1117, 25 Ky. Law Rep. 1890; City of Covington v. Bryant, 70 Ky. 248; Thompson on Negligence, 6173. It is patent, therefore, that appellant cannot escape liability in this case because the gutter and basin were constructed according to a plan of its adoption, as they made the street and sidewalk dangerous to those using them.

The general rule is that under the powers conferred upon municipal corporations in respect to streets and sidewalks within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers, in the usual modes, and that they are liable in damages for injuries resulting from neglect of such duty. City of Henderson v. Reed, 62 S. W. 1039, 23 Ky. Law Rep. 463; City of Carlisle v. Secrest, 75 S. W. 268, 25 Ky. Law Rep. 337; City of Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381, 23 Ky. Law Rep. 2375; City of Midway v. Lloyd, 74 S. W. 195, 24 Ky. Law Rep. 2449. Children, as well as adults, are entitled to the benefit of this salutary rule, and especially is this true as to an infant of tender years who, in respect to the accident complained of, was not chargeable with contributory negligence, if such negligence had been proved. It is safe to say that the mere presence of an iron grating over the opening leading into the catch-basin would have prevented the injuries received by appellee.

We think the instructions given aptly set forth and explained to the jury all the law of the case, for which reason it is unnecessary for us to consider the refused instructions asked by appellant. It is not seriously complained that the verdict was excessive in amount, and we do not think it more than the evidence entitled appellee to receive. Wherefore the judgment is affirmed.

LOUISVILLE & N. R. CO. v. MOORE.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. CARRIERS (§ 278*)—CARRIAGE OF PASSENGERS—FAILURE TO TAKE UP PASSENGERS—QUESTION FOR JURY.

Whether signals by plaintiff at a railroad flag station were sufficient to attract the attention of the engineer *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 278.*]

2. APPEAL AND ERROR (§ 1067*)—REVIEW—HARMLESS ERROR—FAILURE TO INSTRUCT.

In an action against a carrier for failure to stop a train at a flag station, where the evidence was undisputed that, before the arrival of the train, the rainfall was insufficient to produce any ill effects upon plaintiff, and that while she was on her way to her stopping place, after the train had passed, it was cold and raining hard, that she was compelled to walk, and that, when she reached her destination, her feet and clothing were wet, the failure to charge that the jury could not take into consideration in awarding damages the exposure she had been subjected to before the arrival of the train was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Pearl Moore against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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Jas. C. Wright and Benjamin D. Warfield, for appellant. Howard M. Bennett and Harry V. Metzel, for appellee.

CARROLL, J. The appellee brought this action against the appellant to recover damages sustained by her by reason of the failure of one of its passenger trains to stop at White Villa station in order to permit her to board the train and be transported to her destination at Newport, Ky. A trial resulted in a verdict in her favor for $200. From the judgment thereon this appeal is prosecuted.

White Villa station is merely a platform at which trains stop when signaled to do so by persons desiring transportation. There is no station building or agent at the place. It is not denied that appellee desired to be transported from White Villa to Newport, or that she was at the station some time before the train arrived. Appellee and two or three others who also desired to board the train, and who were standing on the platform as it approached and passed, endeavored by waving handkerchiefs, newspapers, and in other ways to attract the attention of the engineer, who was seated in the engine on the side next to the platform. The engineer testifies that, although keeping a lookout, he did not see the persons on the platform, or their signals to stop. The primary question in the case, therefore, is whether or not the engineer was guilty of negligence in failing to stop the train. If he saw the signals to stop, his failure to do so was negligence. The company had made this point a stopping place for trains when signaled; and hence it was the duty of the engineer in approaching it to keep a lookout for signals to stop. On the other hand, if on account of the darkness of the evening the signals were not reasonably sufficient to attract his attention, the plaintiff failed to make out any case. Upon this disputed question of fact the plaintiff and others testified that, although it was about 5 o'clock in the afternoon when the train passed, the signals they gave could be seen by the engineer in time to have stopped the train if he had been keeping a lookout. On the contrary, other witnesses said that it was so dark that the signals given could not be seen. But it does not seem necessary to further elaborate this feature of the case, except to say that there was sufficient evidence upon this point to submit the issue to the jury. Indeed, our opinion is that, if the engineer had been keeping a lookout, he would have seen the signals. Soon after appellee reached the platform and a few minutes before the arrival of the train, a mist commenced to fall that soon developed into a cold hard rain. After the train went by, appellee was obliged to and did walk in the rain to the house of her uncle about a mile distant, at which she was visiting. As the result of the exposure, she contracted a severe cold, accompanied by serious hemorrhages of the lungs, and was subjected to considerable pain and anxiety as well as some expense in effecting a cure.

Under these facts the court instructed the jury, in substance, that if they believed from the evidence that the appellee and those with her gave such signals as would reasonably enable the persons in charge of the train to receive notice that she desired the train to stop, and they failed to do so, the law was for the appellee, and they should find for her in damages such sum as would reasonably compensate her for the inconvenience and discomfort, if any, she suffered by reason of not being permitted to return to her home in Newport upon the train; and, if they further believed that she was rendered sick or became sick as the result of the negligence in failing to stop the train, they should find for her in such sum as would reasonably compensate her for the pain and suffering she endured resulting therefrom, including the reasonable expense incurred in effecting a cure. They were further instructed that they could not find for her in any sum on account of illness or suffering therefrom or medical expense if they believed from the evidence that such illness might with equal reason be attributed to causes other than the failure to stop the train.

The point is made that the court erred in failing to instruct the jury that they could not take into consideration in awarding damages the exposure appellee was subjected to before the arrival of the train; and it is argued that, if an instruction presenting this view had been submitted, the jury could not say from the evidence whether her illness was due to the exposure before the train passed or after it passed, and so there could be no recovery on this claim for damages. It is true that the appellee was not entitled to recover any damages for discomfort or illness caused by her exposure before the arrival of the train; and, if there was sufficient evidence to warrant us in saying that from the rainfall or other cause her exposure before the train arrived contributed in any reasonable degree towards her illness, the court should have given an instruction along the line indicated. But the evidence is practically undisputed that before the arrival of the train the rainfall, if it might be so called, was slight and not sufficient to have produced any ill effects upon appellee; but that while she was on her way to her uncle's after the train passed it was cold and raining hard, and she was compelled to walk exposed in the mud, and, when she reached her uncle's house, her feet and clothing were wet and muddy. Under these circumstances, we cannot say that the failure to direct the attention of the jury to the fact that they should exclude what happened before the arrival of the train from consideration in estimating the damages was prejudicial. All the evidence tended to show that it was the conditions after the passage

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of the train, and not before, that subjected appellee to the injuries of which she complains.

Wherefore the judgment is affirmed.

MONTGOMERY v. GLASSCOCK.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. DAMAGES (§ 157*) — PLEADING — SPECIAL DAMAGES.

Where, in an action for injuries to plaintiff's mare, plaintiff simply pleaded damages from the loss of use in the total amount asked, the plea was not sufficient to warrant evidence as to such loss.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 431; Dec. Dig. § 157.*]

2. COURTS (§ 121*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the amount of damages sought is sufficient to give the circuit court jurisdiction, plaintiff has a right to have the case tried there, regardless of the amount which the proof shows he is entitled to recover, where there is some evidence tending to establish his claim.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 414; Dec. Dig. § 121.*]

3. PLEADING (§ 177*)—ADMISSIONS.

A party does not admit the allegations of every pleading which he fails to deny, but only those facts which are well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 354, 355; Dec. Dig. § 177.*]

4. PLEADING (§ 177*) — REPLY — NECESSITY—ADMISSIONS.

In an action for damages to plaintiff's property by trespass of defendant's horses, an answer alleging that, if plaintiff was damaged, he could by ordinary care have prevented such damage, and that he failed to use such care, was insufficient; and a failure to deny such allegations did not admit their truth.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 355; Dec. Dig. § 177.*]

5. ANIMALS (§ 98*)—TRESPASSING ANIMALS—FENCES.

The test of a lawful fence is its height at the point where stock gets over it, and it is immaterial in an action for damages from trespassing stock that the fence at another point was not of a lawful height, or that the gate was actually left open, when as a matter of fact the stock got over the fence at a point where it was of lawful height.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 346–348; Dec. Dig. § 98.*]

6. ANIMALS (§ 100*)—TRESPASSING ANIMALS—ACTIONS—EVIDENCE.

In an action for damages through trespassing horses, evidence that the horses had a reputation for roguishness was properly excluded.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 359; Dec. Dig. § 100.*]

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Action by E. W. Montgomery against Sim Glasscock. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Jas. Montgomery and H. L. James, for appellant. Layman & Holbert, for appellee.

CLAY, C. Appellant, E. W. Montgomery, charging that appellee owned two vicious horses, and that they entered his grounds over a fence 4½ feet high, tramped down his grass, destroyed his crop, and kicked and permanently injured a valuable mare, instituted this action to recover damages in the sum of $250. After the filing of the original petition, appellant filed several amended petitions. Thereupon the court required appellant to reform his pleadings and present his various claims in one petition. This appellant did. Upon the trial of the case, the court peremptorily instructed the jury to find for appellee on the ground that the proof for appellant showed that he was entitled to recover only $35, and that the court was therefore without jurisdiction to try the case. In presenting his case, appellant showed that appellee's horses had entered his grounds and destroyed corn of the value of $10; but he did not show that he had a lawful fence inclosing his grounds at that time. The only damage he was permitted to show to his mare was a permanent injury amounting to $25; that being the difference in the market price of the mare before and after she was kicked. The court did not permit appellant to introduce evidence of the loss of the use of the mare, for the reason that appellant in his reformed petition did not properly plead such special damages. Instead of specifying the amount of damages incurred by reason of the loss of the use of the mare, he simply included these damages in the total amount asked. This was not a sufficient plea of special damages. Appellant should have specified the amount of such special damages. Upon the return of the case he will be permitted to amend his petition.

The circuit court erred in holding that it was without jurisdiction to hear and determine the case. The amount of damages sought by appellant was $250. This was sufficient to give the court jurisdiction. After obtaining jurisdiction, the court could not dismiss the case, because in its opinion the proof showed appellant entitled to only $35. Jurisdiction in such cases depends, not upon the amount to which plaintiff shows himself entitled, but upon the amount sued for. Thus this court in the case of Denham v. Western Union Telegraph Company, 87 S. W. 788, 27 Ky. Law Rep. 999, held in an action against a telegraph company by an aunt of the deceased to recover damages for mental suffering caused by having to keep the corpse two days and nights by reason of the delay of the company in sending telegrams to relatives of the deceased that while the court properly struck out so much of the petition as sought to recover for mental suffering, leaving alone the question of nominal damages, it was error in the court to sustain a demurrer to the petition for want of jurisdiction of the amount in controversy, as the plaintiff was entitled to have the question

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adjudicated, although the court was of opinion that there was no merit in her claim. In other words, if the amount in controversy is sufficient to give the circuit court jurisdiction, then the plaintiff has a right to have the case submitted to the jury, regardless of the amount which the proof shows he was entitled to recover in every case where there is some evidence tending to establish his claim, it matters not how small it may be.

But it is insisted by counsel for appellee that, even if the circuit court had jurisdiction, a peremptory instruction in favor of appellee was proper, for the reason that his reply was not denied by appellant. The reply in question was to the effect that if plaintiff was damaged in any sum or at all, at any of the times complained of, as set out in any of the nine paragraphs of the reformed petition, plaintiff, by the use of ordinary care, could have prevented such damage, and that he failed to use ordinary care to prevent such damage, if any there was. A party does not admit the allegations of every pleading which he fails to deny. He admits only those facts which are well pleaded. One of the elementary rules of pleading is that it should be certain, positive, and direct, and not hypothetical. Maxwell on Code Pleading, p. 12. The reply in question violates this rule and is therefore insufficient. The failure of appellant to deny the allegations of the reply was not therefore an admission that they were true. As this case must go back for another trial, we deem it necessary to decide that the test of a lawful fence is its height at the point where the proof shows the stock got over it. It is immaterial that the fence at another point was not of lawful height, or that the gate was actually left open, when as a matter of fact the stock gets over a fence at a point where it is of lawful height.

Evidence that the horses causing the damage had a reputation for roguishness was properly excluded.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

WEBB v. HARDAWAY.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. ESTOPPEL (§ 71*)—DENIAL OF TITLE.
Plaintiff's father and his brother being jointly indebted to V., he entered into negotiations to purchase certain land in payment of the debt from plaintiff's uncle, and, being referred to plaintiff's father, he stated that he owned no land on the Pine creek side of a ridge which included the land in controversy, and that V. might accept a conveyance from plaintiff's uncle, which he thereupon did, relying on such statement. *Held*, that plaintiff's father was thereafter estopped as against V., and his successors in title to claim that he owned any land on the Pine creek side of the ridge.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 174; Dec. Dig. § 71.*]

2. ESTOPPEL (§ 98*)—KNOWLEDGE—CONCLUSIVENESS AGAINST VENDEE.
A vendee is bound by an estoppel of his vendor, of which the vendee has knowledge at the time of the purchase.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.*]

3. ESTOPPEL (§ 114*)—PLEADING.
Where, in a suit to quiet title to certain land, defendant pleaded an estoppel as against plaintiff's vendor, plaintiff could not claim greater rights than his vendor had in the absence of an appropriate plea that he was a bona fide purchaser for value without notice.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 304; Dec. Dig. § 114.*]

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Action by N. R. Webb against H. Hardaway. Judgment for defendant, and plaintiff appeals. Affirmed.

Dishman & Dishman and D. D. Field, for appellant. Smith & Combs and John M. Baker, for appellee.

LASSING, J. Appellant, N. R. Webb, brought a suit to quiet title to certain lands, to which he alleged he held the legal title and was in the actual possession. Appellee answered, traversing the material allegations of the petition, and pleaded affirmatively that years before the remote vendors of himself and appellant had established a conditional line between their respective farms, and that this conditional line had been acknowledged and recognized by their remote vendors for a great number of years, and that the property in dispute belonged to appellee, and not to appellant. In an amended answer defendant pleaded that many years ago, and prior to the 8th day of February, 1879, M. M. Webb and W. W. Webb had executed their joint promissory note for about $137.50 to one D. I. Vermillion; that about this date the said Vermillion entered into negotiations with W. W. Webb to buy from him certain lands, including the land in controversy; that said Vermillion sent W. W. Webb to M. M. Webb to see him about it, and that M. M. Webb, in response to this inquiry, said that he did not own any land on the Pine creek side of the spur or ridge, which is claimed to be the conditional line, and requested Vermillion to take said land from W. W. Webb in satisfaction of the note which had been executed by him and W. W. Webb to Vermillion; that, relying upon his statement and representation, Vermillion purchased of W. W. Webb all of the land in question lying on the Pine creek side of the spur or ridge, and in payment therefor canceled the note for $137.50, and took the conveyance of W. W. Webb therefor; that in canceling said note and buying said land he relied purely upon the representations and promise of M. M. Webb that he did not own or claim any land on the Pine

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creek side of the ridge in question. He pleaded this conduct on the part of M. M. Webb, the vendor of the plaintiff, and appellant N. R. Webb, in bar of the plaintiff's right to claim or seek to recover this land. No response was filed to this pleading, nor was it traversed of record. Proof was taken, and upon submission the chancellor found in favor of the defendant, dismissed plaintiff's petition, and adjudged that defendant, appellee here, was the owner of the land in question, and quieted his title thereto.

If the matter set up in this amended answer, in which the estoppel is pleaded and relied upon, in fact presents an equitable estoppel as against appellant, who is the son of M. M. Webb, then it is unnecessary to consider the other questions raised upon this appeal. Clearly, if M. M. Webb by his statements and representations made to Vermillion, the vendor of appellee, through his brother, W. W. Webb, who was jointly bound with him to Vermillion for the payment of the note in question, induced the said Vermillion to purchase the land in question, believing when he did so that the spur or ridge was the line, and that M. M. Webb laid no claim to any land on the Pine creek side of said ridge, which is the land in dispute, he should not now be heard to assert claim or title to any portion thereof. This principle has often been recognized and upheld by our court, and almost the identical question presented was under consideration in the case of Alexander v. Woodford Spring Lake Fishing Company, 90 Ky. 215, 14 S. W. 80, 12 Ky. Law Rep. 107, in which it was held that, where one with full knowledge of his title sees another ignorant of the fact purchase and pay for that which belongs to him and says nothing, he will be precluded from thereafter setting up or asserting title thereto. This conduct on the part of M. M. Webb would clearly estop him from asserting title to any portion of the land on the Pine creek side of the ridge, but does it have the same effect as to the claim which is being asserted by his son and vendee, the plaintiff herein? If at the date of his purchase he knew of the existence of the facts which operate as a bar to the claim of his father, this knowledge would likewise operate as a bar against his asserting title to any of the property described in his deed which his father might not lawfully convey. There are many facts and circumstances brought out in the evidence which would tend to show that he was in possession of the knowledge of these facts at that time. He lived in the immediate neighborhood of this land where many of the witnesses say it was common knowledge that the ridge was recognized as the dividing or conditional line between the Vermillion and Webb farms. In 1889 he accepted a deed from his father calling specifically for this conditional line, and he held this deed from that time to 1907, when he induced his father, then grown old and enfeebled by the weight of years, to execute to him a second deed for the same land, in which last-named deed all mention of the conditional line was at his instance omitted.

But from the conclusion which we have reached it is not necessary to rest the opinion upon the fact as to whether or not it is established that appellant had actual knowledge of the trade which his father and uncle made with Vermillion, the remote vendor of appellee, for, in order that he may hold more than his father might lawfully convey, he must show by appropriate plea that he is an innocent purchaser for value, and, when appellee filed his amended answer setting out the state of facts which he relied upon to operate as an estoppel against his father and vendor and him, it then became the imperative duty of appellant, in order to successfully maintain his suit, to show by appropriate plea that he was an innocent purchaser for value; for, as said by this court in the case of Deskins v. Big Sandy Co., 121 Ky. 601, 89 S. W. 695, 28 Ky. Law Rep. 565: "A stream rises no higher than its source. Ordinarily a vendee gets no more than his vendor has. But an exception is made in favor of a bona fide purchaser without notice. He is not bound by secret trusts existing against his vendor. To entitle him to this advantage, however, he must plead the facts showing that he is a bona fide purchaser without notice." And in 2 Pomeroy's Equity Jurisprudence (3d Ed.) § 785, in defining the necessary allegations of a pleading where the defense relied upon is that the holder is an innocent purchaser for value, we find the following: "The allegations of the plea or of the answer so far as it relates to this defense must include all those particulars which as has been shown are necessary to constitute a bona fide purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not. The denial must correspond with the settled rules upon the subject of notice, so as to bring the case within the operation of those rules. Concerning the foregoing averments there has been, and can be, no doubt." The appellant having failed to plead to the answer of appellee setting up the estoppel, he is in no position to claim more under the deed from his father than the latter might rightfully convey, and, he being estopped from claiming title to any land on the Pine creek side of the ridge, appellant can claim none.

The trial judge having so held, the judgment is affirmed.

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HARDISON v. PACE, County Judge.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. PLEADING (§ 236*)—AMENDMENTS—ALLOWANCE—DISCRETION OF COURT.

The quarterly court has a large discretion in the matter of allowing amendments to pleadings, and, where it believes that amendments are offered for some future advantage on a trial in another court, it may, without abusing its discretion, refuse them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

2. MANDAMUS (§ 26*)—OFFICE OF WRIT.

The office of mandamus, as applied to courts, is to compel a court to act, and it cannot be issued to compel an inferior court to decide a matter in any particular way.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 62; Dec. Dig. § 26.*]

3. MANDAMUS (§§ 39, 53*)—OFFICE OF WRIT.

Where the quarterly court refused to allow certain amendments of pleadings, and rendered judgment, mandamus would not lie to compel it to set aside the judgment, and to make an order allowing the amendments.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 84, 102–107; Dec. Dig. §§ 39, 53.*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Mandamus by T. C. Hardison against R. O. Pace, county judge, to compel the setting aside of a judgment and the making of an order allowing an amended pleading. From a judgment denying the writ, plaintiff appeals. Affirmed.

Robert H. Hardison, Jr., for appellant. Willis & Meredith, for appellee.

NUNN, C. J. Appellant was sued by one E. J. Ragar on an account for damages for $49.50 in a justice court in the county of Muhlenberg. On a trial in that court Ragar recovered of appellant a small judgment, from which an appeal was taken to the Muhlenberg quarterly court. The parties entered into a trial in that court, and, after Ragar had completed the introduction of his testimony, appellant moved the court for a peremptory instruction to the jury to find in his behalf. The court refused to give this instruction, and thereupon appellant moved the court to allow him to withdraw his answer in which he had denied every allegation made by Ragar against him, and offered to file another answer admitting all that Ragar had charged, and offered to confess judgment for the whole claim as presented by Ragar. Ragar by counsel then offered to amend his claim by reducing it from $49.50 to $24.50. The court overruled both motions, and required the parties to proceed with the trial of the case on the original pleadings, which resulted in a small verdict in behalf of Ragar.

Appellant instituted this action in the Muhlenberg circuit court against R. O. Pace, judge of the quarterly court of that county, after the trial referred to was had, seeking a mandamus to compel the quarterly court judge to set aside the small judgment rendered upon the verdict of the jury, and to make an order allowing his amended pleading to be filed. The lower court refused to grant this writ, and appellant appealed. It is pretty clear that appellant on the trial in the quarterly court felt that he would be defeated after the court refused him the peremptory instruction, and he offered the amended pleading with a view of getting the matter in shape to authorize an appeal in his behalf to the circuit court, and, likewise, Ragar's amendment was offered to reduce the amount below $25 to prevent an appeal to the circuit court. The quarterly court had jurisdiction of the subject-matter and the parties, and had a large discretion in the matter of allowing amendments to the pleadings, and when the court believed, as it had a right to do, that these amendments were offered not for the purpose of meeting the ends of justice in the trial then in progress before him, but for some future advantage on a trial in another court, and he had a right to refuse to allow them to be filed, it was no abuse of discretion on the part of the court.

There is another ground upon which the lower court must be affirmed. The writ of mandamus cannot be issued to compel an inferior court to decide a matter in any particular way. The only office of such writ, as applied to courts, is to compel the court to act. In the case at bar the petition alleged that the court acted, but acted in a way different from what appellant desired. The circuit court had no power to control the judgment of the inferior court in that matter, unless upon appeal to it as required by law. In the case of Shine, Presiding Judge, v. Kentucky Central R. R. Co., 85 Ky. 177, 3 S. W. 18, 8 Ky. Law Rep. 748, this court said: "True, courts will not interfere with the exercise of discretionary power; but where an officer or inferior judicial tribunal, vested with it, refuses to exercise it at all, or act in any manner, they will, by mandamus, set him or it in motion, without, however, controlling the direction. The judgment in such a case must be left free to act, and reach such a result as it deems proper. Thus mandamus will lie to compel a judge to act upon a bill of exceptions, or to receive a verdict, or to try a cause, or to hold a court. If this were not so, a denial of justice would result." In the case at bar the quarterly court did not refuse to act, but acted upon appellant's motion and refused to allow the amendment to be filed; and, if the case was here on an appeal, we would be unwilling to say that the court abused its discretion in refusing the amendment.

For these reasons, the judgment of the lower court is affirmed.

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JACKSON v. CITY OF OWINGSVILLE.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

MUNICIPAL CORPORATIONS (§ 747*) — NEGLIGENT ACTS OF OFFICERS—LIABILITY.

A city is not liable for injuries, sustained by one while breaking rock on the municipal rock pile to pay a fine, in consequence of a splinter of the hammer—used by another engaged in a like occupation flying off and striking him in the eye, though the accident was caused by the negligence of its officers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1573; Dec. Dig. § 747.*]

Appeal from Circuit Court, Bath County.

"Not to be officially reported."

Action by James Jackson against the City of Owingsville. From a judgment of dismissal, rendered on sustaining a general demurrer to the petition, plaintiff appeals. Affirmed.

W. S. Gudgell and Hazelrigg & Hazelrigg, for appellant. J. J. Nesbit and C. W. Goodpaster, for appellee.

BARKER, J. The petition of appellant states that the appellee is a city of the fifth class, and that appellant was forced, against his will, by the marshal of the city, to break rock on the municipal rock pile, in order to pay off and discharge a fine (euphemistically called in the petition an "old unacknowledged debt"); that while so engaged another person, also in durance vile and engaged in the same occupation, was placed so near appellant that a splinter of the hammer he was using flew off and struck appellant in the eye, wholly destroying his vision therein. To recover damages for this injury this action was instituted, based upon the theory that plaintiff's injury was caused by the negligence of the officers of the city. A general demurrer was filed by the appellees, and sustained by the court. Appellant (plaintiff) refusing to plead further, his petition was dismissed.

The judgment was correct. In enforcing the criminal laws of the state and city, the municipality is the agent of the state, and is not responsible for the tortious or negligent acts of its officers while so engaged. Pollock v. City of Louisville, 13 Bush, 221, 26 Am. Rep. 260; Taylor v. City of Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. Law Rep. 856, 56 Am. St. Rep. 361; Jones v. City of Corbin, 98 S. W. 1002, 30 Ky. Law Rep. 374; Dudley v. City of Flemingsburg, 115 Ky. 5, 72 S. W. 327, 24 Ky. Law Rep. 1804, 60 L. R. A. 575, 103 Am. St. Rep. 253; Having v. City of Covington, 78 S. W. 431, 25 Ky. Law Rep. 1617; Twyman's Adm'r v. City of Frankfort, 117 Ky. 518, 78 S. W. 446, 25 Ky. Law Rep. 1620, 64 L. R. A. 572; Simons v. Gregory, 120 Ky. 116, 85 S. W. 751, 27 Ky. Law Rep. 509; Ernst v. West Covington, 116 Ky. 850, 76 S. W. 1089, 25 Ky. Law Rep. 1027, 63 L. R. A. 652, 105 Am. St. Rep. 241.

Judgment affirmed.

NOTE TO JACKSON v. CITY OF OWINGSVILLE.

[a] (U. S. 1903) The gathering of refuse and waste by a city, and the establishment, maintenance, and operation of dumping grounds for its ultimate disposal, under the direction of the officers of the city health department, is a duty of local or municipal concern, not performed in the exercise of any governmental function; and hence the city is liable for the negligence of its officers and agents engaged in the performance of such work.—City of Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; Denver, U. & P. R. Co. v. Same, Id.

[aa] (U. S. 1901) A municipal corporation is liable in a court of admiralty for a collision caused by the negligence of its servants in charge of a vessel of which it is owner, who were operating the same under the directions of the corporation; and it is immaterial whether the vessel was employed in a municipal service or under orders which were ultra vires, the relation of master and servant being sufficient to render the corporation responsible under the rule of respondeat superior.—The Major Reybold (D. C.) 111 Fed. 414.

[b] (Ala. 1901) Where a bill by a water company against a city avers a discrimination by the city against the complainant, causing it to lose its customers by reason of certain double charges, and the city, through its officers and agents, was able to enforce its unjust regulations, it is not subject to demurrer on the ground that the acts complained of were unlawful and void acts of the officers and agents of the city, for which the city was not responsible, as the city was unable to commit the alleged wrongs, except through its agents and officers.—City of Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 South. 445.

[bb] (Cal. 1897) The rule of respondeat superior does not apply to render a city liable for injuries caused by the negligence of the city engineer in the performance of a duty imposed upon him by law.—Sievers v. City and County of San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

[c] (Colo. 1900) A city authorized generally by statute to build a jail, to make rules and regulations for its government, and to appoint keepers, is not liable to a prisoner arrested and confined in such jail on a charge of violating an ordinance for an injury received, while so confined, through the negligence of the keepers; the city acting in a public capacity for the benefit of the general public as well as its own inhabitants.—McAuliffe v. City of Victor, 15 Colo. App. 337, 62 Pac. 231.

[cc] (Conn. 1898) In an action against a city for damages resulting from a default of its sheriff in permitting the escape before judgment of one arrested under a civil process, and for a failure to return the process, the plaintiff is required to prove the judgment which he could have obtained in the action against the escaped prisoner had the process been returned.—Swan v. City of Bridgeport, 70 Conn. 143, 39 Atl. 110.

[d] (Ga. 1898) A municipal corporation, while enforcing a valid ordinance requiring citizens and residents of the city to submit to vaccination, is exercising a governmental power, and is not liable to a citizen who may sustain damage on account of impure vaccine matter administered to him by one of the officers or agents of such corporation.—Wyatt v. City of Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41.

[dd] (Ga. 1900) Where a person who was arrested without cause by the police officers of a city and confined in the city jail suffered injuries because of the improper construction and unwholesome condition of such jail, he cannot maintain an action against the city for such in-

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juries, since a municipal corporation is not liable for the illegal arrest of a person by its police officers, nor his consequent imprisonment, under Pol. Code, providing that a municipal corporation shall not be liable for torts of policemen engaged in the discharge of their duties.—Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131.

[e] (Ga. 1900) Under Pol. Code, § 748, providing that a municipal corporation is not liable for an error committed in the exercise of judicial authority, a city is not liable in damages because its mayor required of a person charged with a violation of a city ordinance a larger bond for his appearance than the law authorized, though the failure of such person to give bond, and his consequent confinement, was occasioned by such act of the mayor.—Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131.

[ee] (Ill. 1896) A municipality is not liable for the acts of negligence of its officers, who are independent of the corporation as to their tenure of office and the manner of discharging their duties.—Backer v. West Chicago Park Com'rs, 66 Ill. App. 507.

[f] (Ill. 1896) The West Chicago park commissioners is a municipal corporation, and, as such, is not liable for damages resulting from the negligence of its officers in giving an employé a vicious and unsafe horse to use.—Backer v. West Chicago Park Com'rs, 66 Ill. App. 507.

[ff] (Ill. 1899) A city is not liable for an assault committed by a special policeman while in the performance of his duties. Judgment (1898) 78 Ill. App. 312, affirmed.—Craig v. City of Charleston, 180 Ill. 154, 54 N. E. 184.

[g] (Ill. 1899) Where the charter of a city empowered the common council to support and maintain schools, to grade and regulate the same, to erect and purchase school buildings, to assess a tax for the same, and to enact such ordinances as may be necessary to carry said powers into effect, it is no defense to an action against said council, for an alleged illegal discrimination against children of African descent, that the acts complained of were done or permitted by a board of education to whom the council had delegated the "power to indicate and determine what schools the pupils of the public schools shall attend."—People v. City of Alton, 179 Ill. 615, 54 N. E. 421.

[gg] (Ind. 1901) Under Horner's Rev. St. 1897, §§ 7060, 7061, giving control of the department of health and charities to three commissioners who shall be practicing physicians and placing in their charge the city hospital and the efficient regulation and management thereof, the board acts for the public, and not as agent of the municipality in its corporate character; and hence a city is not liable to a patient, treated without charge at the city hospital, injured by the alleged unskillful treatment of a physician employed therein.—Williams v. City of Indianapolis, 26 Ind. App. 628, 60 N. E. 367.

[h] (Iowa, 1896) A town is not liable for the acts of its officers, under an illegal ordinance, attempting to enforce the police powers of the town.—Easterly v. Incorporated Town of Irwin, 99 Iowa, 694, 68 N. W. 919.

[hh] (Iowa, 1900) While driving along the street of defendant city, plaintiff's horse, being frightened by the employés of defendant's fire department, ran off, injuring plaintiff, who sued to recover for her injuries. *Held*, that there could be no recovery, as the employés were public officers engaged in a public duty at the time of the accident.—Saunders v. City of Ft. Madison, 111 Iowa, 102, 82 N. W. 428.

[hhh] (Iowa, 1906) A municipal corporation is not liable, in the absence of a statute imposing a liability, for the negligence of its officers in executing health regulations adopted for the purpose of preventing the spread of contagious diseases; for it, while undertaking such duty, is performing a governmental function.—Beeks v. Dickinson County, 131 Iowa, 244, 108 N. W. 311, 6 L. R. A. (N. S.) 831.

[i] (Kan. 1896) Cities are not liable in an action for false imprisonment for the acts of their officers while enforcing invalid ordinances.—City of Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949.

[ii] (Ky. 1877) Under Gen. St. c. 57, § 8, providing that if the life of any person is destroyed by the willful neglect of any person or corporation, or its agents or servants, an action may be maintained against such person or corporation, a city is not liable for the alleged loss of life through the alleged willful neglect of its police officers, where such officers arrested the intestate on a charge of felony without a warrant and removed her to a jail, which it was claimed caused her death.—Pollock's Adm'r v. City of Louisville, 76 Ky. (13 Bush) 221, 26 Am. Rep. 260.

[iii] (Ky. 1877) A municipal corporation, being required by the sovereign power to establish and maintain a fire department, is not liable for an injury to a person on the street who was struck by fire apparatus in proceeding to extinguish a fire, on the ground that the injury resulted from the negligence of the employés and of defective machinery, as, the duties being imposed by the legislature, and the proper exercise of them depending on the judgment of those of whom they are required, the corporation is not responsible in damages either for a failure to perform them or for errors in their performance.—Greenwood v. City of Louisville, 76 Ky. (13 Bush) 226, 26 Am. Rep. 263.

[j] (Ky. 1897) A city is not liable for the trespass committed by its officers in enforcing a void judgment for a fine where the charge was an offense against the general law of the state.—Fox v. City of Richmond, 19 Ky. Law Rep. 326, 40 S. W. 251.

[jj] (Ky. 1900) A city is not liable for the tort of its police officers in making an unlawful arrest.—Bean v. City of Middlesboro, 22 Ky. Law Rep. 415, 57 S. W. 478.

[jjj] (Ky. 1900) As a person injured by the violation of a statute may recover from the offender such damages as he may sustain thereby, a city is liable in damages to one who is injured by the acts of its officers in violation of Ky. St. § 3909, providing that it shall not be lawful to locate or maintain any pest house within a distance of one mile of the boundary line of a city, though the statute provides a remedy by action only against the city officers.—City of Henderson v. Clayton, 22 Ky. Law Rep. 283, 57 S. W. 1, 53 L. R. A. 145.

[k] (Ky. 1900) A city is not liable for an injury to a stock of goods by water, resulting from the negligence of its firemen in attempting to extinguish a fire.—Davis v. City of Lebanon, 108 Ky. 688, 57 S. W. 471, 22 Ky. Law Rep. 384.

[kk] (Ky. 1904) Where a city, acting in its governmental capacity, passed ordinances for the care of persons having contagious diseases at the pesthouse, and for their removal thereto, the city could not be a participant in the negligent acts of its officers who had charge of the enforcement of such ordinances.—Twyman's Adm'r v. Board of Councilmen of Frankfort, 78 S. W. 446, 117 Ky. 518, 25 Ky. Law Rep. 1620, 64 L. R. A. 572.

[kkk] (Ky. 1904) Where plaintiff's decedent was confined in a contagious hospital of a city, and died by reason of maltreatment received from the city's officers in charge thereof, plaintiff's remedy was by indictment of such officers and a civil action against the individuals guilty of such wrongs.—Cty of Lexington v. Batson's Adm'r, 81 S. W. 264, 118 Ky. 489, 26 Ky. Law Rep. 363.

[l] (Ky. 1906) A person having a cause of action for indignities offered by city officials having him in charge while working on the streets during his imprisonment on conviction for violating a city ordinance must bring the ac-

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tion against the officials, and not against the city.—Bartlett v. City of Paducah, 91 S. W. 264, 28 Ky. Law Rep. 1174; Murray v. Same, 91 S. W. 265, 28 Ky. Law Rep. 1135.

[ll] (Mass.) Where a municipal corporation elects or appoints an officer, in obedience to an act of the Legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent of the town or city.—(1860) Hafford v. City of New Bedford, 82 Mass. (16 Gray) 297; (1861) Walcott v. Inhabitants of Swampscott, 83 Mass. (1 Allen) 101; (1861) Buttrick v. City of Lowell, 83 Mass. (1 Allen) 172, 79 Am. Dec. 721; (1861) Kimball v. City of Boston, 83 Mass. (1 Allen) 417; (1862) Rossire v. City of Boston, 86 Mass. (4 Allen) 57; (1862) Griggs v. Foote, 86 Mass. (4 Allen) 195; (1864) City of New Bedford v. Inhabitants of Taunton, 91 Mass. (9 Allen) 207; (1868) Barney v. City of Lowell, 98 Mass. 570; (1873) Dunbar v. City of Boston, 112 Mass. 75; (1875) Alger v. Inhabitants of Easton, 119 Mass. 77.

[lll] (Mass. 1900) A liquor-licensing board do not act as agents of the city or town, but as public officers, and in the absence of any statute to the contrary the municipality is not answerable for the acts of such officers.—McGinnis v. Inhabitants of Medway, 176 Mass. 67, 57 N. E. 210.

[m] (Mass. 1906) A city is not liable for injuries to a third person by the negligence of its servant, while engaged in the removal of ashes from a dwelling house, for which it received no compensation, under Rev. Laws, c. 25, § 14, authorizing a town to contract for the disposal of its "refuse," notwithstanding the city also removed ashes from steam boilers, for which it charged a nominal sum only sufficient to pay for the service.—Haley v. City of Boston, 191 Mass. 201, 77 N. E. 888, 5 L. R. A. (N. S.) 1005.

[mm] (Mich. 1897) One injured by the negligence of a city board of health in allowing one who had been exposed to smallpox to enter plaintiffs' boarding house as a guest, cannot sue the city, since the board of health represents the entire state.—Gilboy v. City of Detroit, 73 N. W. 128, 115 Mich. 121, 4 Detroit Leg. N. 841.

[mmm] (Mich. 1898) If the officers of a board of health do their work negligently, and thereby cause unnecessary damage, such officers, and not the city, are liable, if any one is.—Webb v. Board of Health of City of Detroit, 116 Mich. 516, 74 N. W. 734, 5 Detroit Leg. N. 1, 72 Am. St. Rep. 541.

[n] (Neb. 1902) A city is not liable for the manner in which the board for the inspection of buildings exercises its office, and no recovery can be had against it for the alleged wrongful tearing down of certain frame buildings, condemned by the board as nuisances under provisions of a municipal ordinance, because within fire limits.—Murray v. City of Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

[nn] (N. Y. 1896) Police officers appointed by a city in obedience to a statute are not agents or servants for whose torts the city will be liable, under the rule of respondeat superior.—Woodhull v. City of New York, 150 N. Y. 450, 44 N. E. 1038.

[nnn] (N. Y. 1896) A policeman appointed by the board of trustees of the Brooklyn bridge in pursuance of Laws 1875, c. 300, § 8, authorizing the board to appoint an adequate police force, and to regulate and direct the same for the protection of the bridge and persons, etc., passing over the same, and conferring upon the policemen so appointed all the powers of policemen of the cities of New York and Brooklyn, is a public officer, for whose torts the cities are not responsible. 28 N. Y. S. 120, 76 Hun, 390 (1894) reversed.—Woodhull v. City of New York, 150 N. Y. 450, 44 N. E. 1038.

[o] (N. Y. 1898) Certain employés of defendant, a municipal corporation, were directed to remove certain trunks and bags from a sidewalk, where they constituted an incumbrance, which it was the duty of the city to remove, and to carry them to the corporation yard for retention for the purpose of redemption under the city ordinances. Acting solely on a reasonable and honest, but erroneous, belief that a bag held by plaintiff was one of those they had taken in custody, they undertook to take it from him, and, in so doing, inflicted injuries. *Held*, that plaintiff was entitled to damages therefor.—Scott v. City of New York, 50 N. Y. S. 191, 27 App. Div. 240.

[oo] (N. Y. 1898) Since the duties of an attendance officer, under Laws 1894, c. 671 (Compulsory Education Act), are prescribed by the act, and power only to appoint and remove such officer and prescribe duties not inconsistent with the act is reserved to the board of education, the rule of respondeat superior does not apply, and the board is not liable for misuser by such officer.—Reynolds v. Board of Education of Union Free School Dist., 53 N. Y. S. 75, 33 App. Div. 88.

[ooo] (N. Y. 1898) Since Consolidation Act, § 704, charges the commissioner of street cleaning of New York with the duty of removing from the city, or otherwise disposing of, ashes and garbage, as often as the public health may require, the city is not liable for a personal injury caused by the driver of a vehicle in the street-cleaning department while employed in removing garbage from houses, as under the act it was not a duty performed for the benefit of the city as a corporation, but a general governmental function performed for the general welfare of all the people.—Davidson v. City of New York, 54 N. Y. S. 51, 24 Misc. Rep. 560.

[p] (N. Y. 1899) Consolidation Act, § 704, as amended by Laws 1892, c. 269, provides that the department of street cleaning in the city of New York shall keep its streets in repair, and see that they are thoroughly cleaned, and remove the sweepings, ashes, and garbage as often as the public health and use of the streets require it to be done. The negligence of the driver of an ash cart, employed in the street-cleaning department, caused the death of plaintiffs' intestate. *Held*, that the city is liable, because acting, in relation to the care of the streets, in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions, where it acts as a sovereign. Judgment and order (1897) 45 N. Y. S. 592, 17 App. Div. 536, 4 N. Y. Ann. Cas. 186, reversed.—Missano v. City of New York, 54 N. E. 744, 160 N. Y. 123.

[pp] (N. Y. 1899) The duty imposed on New York City of removing the dirt accumulating in the streets, and ashes and garbage from abutting residences, by Laws 1892, c. 269, § 704, is a quasi private duty, and no part of the exercise of the city's governmental powers, and hence the city is liable for the torts of its servants while engaged in its performance of such duty.—Quill v. City of New York, 55 N. Y. S. 889, 36 App. Div. 476.

[ppp] (N. Y. 1899) A city is not liable for negligent injury inflicted on a truant schoolboy by an attendance officer while in the performance of his duties; the appointment of such officers being required, and their duties being prescribed, by Laws 1894, c. 671, as amended by Laws 1896, c. 606, thereby making them officers of the state, and not servants of the city.—Rhall v. Board of Education of New York City, 57 N. Y. S. 977, 40 App. Div. 412.

[q] (N. Y. 1900) The fact that a city permits its police department to construct or use a wir-

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and that such department is created by law for the discharge of a public duty, will not release the city from responsibility for injuries resulting from defective erection of the wire. Judgment (1899) 55 N. Y. S. 850, 37 App. Div. 307, affirmed.—Twist v. City of Rochester, 59 N. E. 1131, 165 N. Y. 619.

[qq] (N. Y. 1900) Consolidation Act, § 1029, provides that title to all school property in the city of New York shall be vested in the mayor, aldermen, and commonalty of said city, but shall be under the care and control of the board of education, and all suits in relation to the same shall be brought in the name of said board. Plaintiff, a pupil in the public schools, while on the playground, which had a board floor, fell and caught her leg in a hole in the flooring, whereby she sustained injuries, for which she sued the city. *Held*, that the city was not liable, as it could not be held for the negligence of the board of education.—Brown v. City of New York, 66 N. Y. S. 382, 32 Misc. Rep. 571.

[qqq] (N. Y. 1904) The bureau of buildings of the borough of Manhattan is not an administrative department of the city, rendering the city liable for the default of the superintendent.—(1904) McGuinness v. Allison Realty Co., 93 N. Y. S. 267, 46 Misc. Rep. 8, affirmed (1906) McGuiness v. Same, 97 N. Y. S. 1141, 111 App. Div. 926.

[r] (N. C. 1897) A city is not liable for arrests made by its policeman for violation of its ordinances, and the commitment to prison of the person arrested, even if the officer is negligent, acts under a mistake, or uses violence in making the arrest and commitment, but is liable only for failure or neglect to provide a prison so furnished as to afford reasonable comfort and protection from suffering and injuries to health, and for failure to exercise ordinary care in procuring necessaries for prisoners and supervising its subordinates.—Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482.

[rr] (N. C. 1900) A policeman though appointed by the mayor and aldermen of a city, is a state officer, and not an officer of the city, for whose torts such city is liable, in the absence of a statute imposing liability.—McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470.

[rrr] (N. C. 1900) The fact that a policeman was notoriously careless and incompetent, and that this was known to the mayor and aldermen when they made the appointment, does not render the city liable for his torts.—McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470.

[s] (N. C. 1901) A city is not liable in damages to one who was arrested and detained under Laws 1893, c. 214, §§ 14, 15, 25, on the ground of having been exposed to smallpox, where the officers acted properly and without malice, though the plaintiff may have suffered damage thereby.—Levin v. City of Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396.

[ss] (Ohio, 1898) A city is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department or any of its members.—Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35.

[sss] (Ohio, 1898) A city is not liable for damages arising from the act of its board of health in quarantining plaintiff's house and place of business.—Turner v. City of Toledo, 15 Ohio Cir. Ct. R. 627, 8 O. C. D. 196.

[t] (Ohio, 1903) A city, in constructing and maintaining a workhouse, acts, not in its corporate, but in its governmental, capacity, and hence is not liable to a prisoner in such workhouse for injuries received by him through the wrongful acts of the superintendent thereof.—Rose v. City of Toledo, 24 Ohio Cir. Ct. R. 540.

[tt] (Or. 1902) The board of fire commissioners appointed under a city charter authorizing the mayor to appoint a board of fire commissioners, which board shall have exclusive power and authority to organize and control the fire department, is not an independent body, but its acts are those of the city, for which it is liable.—Wagner v. City of Portland, 40 Or. 389, 67 Pac. 300.

[ttt] (Pa. 1904) Where the public building commission created by Act Aug. 5, 1870 (P. L. 1871, p. 1548), employed an operator of an elevator in a city building, which at the time of the accident was in the control of the city and was used in carrying the public to the courts, the city is liable to a passenger injured by the negligence of the operator.—Fox v. City of Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214.

[u] (Pa. 1904) Police officers, in the preservation of the peace, are not agents or servants of a borough; their powers and duties are derived from the state, to which their primary responsibility is due; therefore the borough is not liable for their omissions or commissions, malfeasance or nonfeasance in the performance of their duties.—Miller v. Borough of Hastings, 25 Pa. Super. Ct. 569.

[uu] (Pa. 1905) The city of Philadelphia, which is coterminous with the first school district of Pennsylvania, and has legal title to the public school buildings therein, is not liable in damages for injuries to a pupil in a public school by a fall of a part of the plastering from the ceiling of a schoolroom, although the board of education and its architect had several weeks' notice of the defect in the ceiling before the accident occurred. The ground for the city's exemption in such a case is that the school buildings are in the actual possession and control of the sectional school board and board of public education, and that the city has no voice in the selection of the officers, agents, or architects of the school district, and no power to remove them.—Rosenblit v. City of Philadelphia, 28 Pa. Super. Ct. 587.

[uuu] (R. I. 1898) In an action against a city for an unlawful arrest by its police officers, it was alleged that the complainant was negligently cared for while temporarily confined in its police station. *Held*, that such negligence did not render the city liable, since, in caring for persons under arrest, the city discharged a public duty, for the conduct of which it is not responsible.—Kelly v. Cook, 21 R. I. 29, 41 Atl. 571.

[v] (R. I. 1898) A city is not liable for an unlawful arrest and imprisonment by its police officers, since such officers, being appointed by the city to perform a public service, are not such agents or servants as render the city liable for their acts.—Kelly v. Cook, 21 R. I. 29, 41 Atl. 571.

[vv] (Tenn. 1899) While a municipal corporation is not liable for personal torts committed by a policeman, if he acts under the direction or with the sanction of the authorities his acts become those of the corporation, for which it is responsible.—Town of Johnson City v. Wolfe, 103 Tenn. 227, 52 S. W. 991.

[vvv] (Tex. 1896) Where a city is empowered to provide by ordinance for the quarantine of persons infected with pestilential diseases, its health physician, in enforcing quarantine as to a family residing in the city, acts as a public officer in discharge of public duties, and not as the city's agent for the private, corporate benefit of the city, and it is not liable for his negligent or willful acts in the discharge of his duties.—Bates v. City of Houston (Tex. Civ. App.) 37 S. W. 383, 14 Tex. Civ. App. 287.

[w] (Tex.) A city is not liable for trespass committed by its mayor, police force, and city physician in quartering and detaining a body of yellow-fever suspects in plaintiff's hotel for six days, where such action was not authorized nor ratified by the city council.—(Civ. App. 1900) City of San Antonio v. White, 57 S. W. 858, af-

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firmed White v. City of San Antonio (1901) 60 S. W. 426, 94 Tex. 313.

[x] (Tex. 1901) Under Rev. St. arts. 4328, 4330, which make health officers of a city officers of the state, and hence vest them with functions of interest to the public at large, a city is not liable in damages for the negligence or misconduct of such officers in enforcing quarantine regulations. Judgment City of San Antonio v. White (Civ. App. 1900) 57 S. W. 858, affirmed.—White v. City of San Antonio, 94 Tex. 313, 60 S. W. 426.

[y] (Tex. 1902) The chief of police of the city of Galveston, acting under the instructions of the mayor to impress any horses he could find to be used in removing the dead and caring for the sick after the flood in that city, September 8, 1900, directed a policeman to get a team anywhere he could, and the policeman took defendant's horses without his knowledge and consent. *Held* that, in the absence of anything to show that the city had any charter power to impress personal property of any kind, it was not liable for the trespass, since a municipal corporation is not liable for torts of its officers unless within scope of their authority.—City of Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156.

[z] (Tex. 1903) Where plaintiff was injured by the negligence of a fireman driving a hose cart during a parade ordered by the city council, and while engaged in the line of his duty, the city was not liable therefor, whether the city had authority to direct its fire department to take part in the parade or not.—Blankenship v. City of Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805.

BOARD OF EDUCATION OF MERCER COUNTY v. ALLIN et al.

SAME v. COMMONWEALTH et al.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. ATTORNEY AND CLIENT (§ 126*)—PAYMENT OF MONEY COLLECTED—POWER OF COURT—JUDGMENT.

Under the express provisions of Civ. Code Prac. § 444, a judgment may be obtained on motion by a client against his attorney for money collected or property received.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 266; Dec. Dig. § 126.*]

2. ATTORNEY AND CLIENT (§ 126*)—SCHOOL FUND—COLLECTION.

Under Acts 1908, p. 133, c. 56 (Ky. St. 1909, § 4426a), vesting the title to all school property, excepting that given to those districts not embraced by the act, in the county board of education, any money due under a judgment recovered by the commonwealth in an action to recover into the common school fund of a county money claimed to be due for violation of a bond belonged to the county board of education, which became the real party in interest and the real client of the county attorney, who was by the judgment directed to collect the same; and hence the board was the proper party to ask a rule requiring the county attorney to pay over the money.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 271; Dec. Dig. § 126.*]

3. PARTIES (§ 40*) — INTERVENTION — NECESSARY PARTIES.

Civ. Code Prac. § 23, provides that any person may be made a defendant who claims an interest in the controversy adverse to plaintiff, or who is necessary to a complete determination of the action. Section 28 provides that the court may determine any controversy between parties before it, if it can do so without prejudice to others; but, if not, it must require such other persons to be made parties. The commonwealth recovered a judgment for the benefit of the common schools of a county, which judgment directed the county attorney to collect the amount thereof and see that it was converted into the school fund. Thereafter the county attorney filed a petition in the suit asking the court's advice as to the distribution of the amount remaining in his hands after payment of costs, expenses, etc. *Held* that, the county attorney having made himself a party to the action and the county board of education being entitled under the law to whatever was due, it should have been allowed on petition to become a party to the action, and to litigate the questions between it and the county attorney as to the amount due.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 62; Dec. Dig. § 40.*]

Appeal from Circuit Court, Mercer County.

"To be officially reported."

Actions between the County Board of Education of Mercer County and W. I. Allin and others, and between such board and the Commonwealth of Kentucky and others. From the judgment in each case, the board appeals. Reversed and remanded.

E. H. Gaither, Tom B. McGregor, Asst. Atty. Gen., and J. Morgan Chinn, for appellant. W. I. Allin and B. F. Roach, for appellees.

CLAY, C. These two appeals involve the same subject, and the parties thereto have agreed that they shall be considered and heard together. In 1907, in an action of Commonwealth of Kentucky, by Ora L. Adams, County Superintendent of Common Schools of Mercer County, v. D. C. Heath & Co., a judgment was rendered setting aside a former judgment against D. C. Heath & Co., and requiring that company to pay to the common schools of Mercer county the sum of $10,000, with interest. In December, 1908, D. C. Heath & Co. paid to W. I. Allin, county attorney, something over $12,000. This payment was made under the judgment referred to, which directed Allin to collect the judgment and see that it was converted into the school fund of Mercer county. On January 29, 1909, appellant County Board of Education for Mercer County served notice upon W. I. Allin, county attorney, that on the 9th day of February, 1909, it would move the circuit court for a judgment against him for the sum then held by him. In the notice the facts upon which appellant relies were fully set out, and on the day designated a motion was made for a rule requiring the payment of the money to appellant. Upon objection by the county attorney the court refused to grant the rule. From the order to this effect, the County Board of Education prosecutes the first appeal herein.

Some of the courts hold that, even in the absence of a statute, they have the power to compel an attorney to pay over to a client

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money collected by him. This summary jurisdiction to deal with such matters is found in the disciplinary power which the court has over attorneys as officers of the court. Anderson v. Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 474, 97 Am. St. Rep. 692. In this state express authority is given by the Civil Code of Practice for such proceeding. Section 444 is as follows: "A judgment may be obtained, on motion, by a surety against his principal or cosurety for money paid; by a client against his attorney for money collected or property received; by a party or officer against a surety for costs; and by a party against an officer for money collected or property received, and for the damages which such party is entitled to recover; and in all other cases specially authorized by statute; and the service of the notice shall be regarded as the commencement of the proceeding."

But it is insisted by appellee that the above provision has no application to this case, for the simple reason that the County Board of Education is in no sense a client of appellee. The original action of Commonwealth, etc., v. D. C. Heath & Co., was brought by the commonwealth for the purpose of recovering into the common school fund of Mercer county the amount claimed to be due for violation of a bond executed by D. C. Heath & Co. to the commonwealth. The proceeding, while in the name of the commonwealth, was for the benefit of the common schools of the county. By virtue of the act of 1908 (Acts 1908, p. 133, c. 56), being section 4426a, Ky. St., the title to all school property, with the exception of that given to those districts not embraced by the provisions of the act, is vested in the county board of education. Thus the handling of the county school property and fund is placed in the county board of education, instead of the county school superintendent. Any money due under the original judgment is, therefore, due to the county board of education. By operation of law it has now become the real party in interest, and therefore appellee's real client. Having the right to whatever money is coming to the common school fund, it should not be denied the right to proceed by rule to have the money turned over to it. While not appellee's client in name, it is appellee's client in every substantial respect. We therefore conclude that appellant proceeded properly in asking a rule against appellee, and that the circuit court erred in refusing to grant the rule.

On February 2, 1909, appellee W. I. Allin, who was county attorney, filed a petition in the original suit of Commonwealth v. D. C. Heath & Co., asking the advice of the court as to the distribution of the sum of about $5,000, which he claims was all that remained in his hands after the payment of the costs and expenses of the original litigation and after certain payments were made to certain school districts. On the 12th day of February, and after the court had refused the rule asked for in the action above considered, appellant filed a petition to be made a party to the suit of the Commonwealth, by, etc., v. D. C. Heath & Co. In this petition it alleged that it has charge and control of the schools of Mercer county, and that it is authorized and empowered to collect and disburse all money for the benefit of said schools. It also charges that appellee Allin, as county attorney, holds the sum of $12,133, collected by him as county attorney from D. C. Heath & Co., for the use and benefit of the common schools of Mercer county; that he has held said money since the 12th day of December, 1908, and failed and refused to pay it over to the petitioner. It asked judgment against Allin for the total amount received by him. To the filing of this petition Allin objected. The objection was sustained by the court, and the petition was not allowed to be filed. From the order refusing to permit appellant's petition to be filed, and appellant to be made a party to the proceeding, the second appeal is prosecuted.

It is insisted by appellee that the action of the trial court was proper, because appellant had no right to come into the action and ask judgment over against him who was not a party to the proceeding. This position is not sound, for the reason that Allin had already filed an original petition in the above action, in which he sought the advice of the court as to the distribution of the funds in his hands. He thus made himself a party to the action. Section 23, Civ. Code Prac., provides: "Any person may be made a defendant who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved in the action." Section 28 of the Code is as follows: "The court may determine any controversy between parties before it, if it can do so without prejudice to others; if it cannot do so, it must require such other persons to be made parties, or must dismiss the action without prejudice." Here, then, we have a case where the county attorney voluntarily made himself a party to the proceeding by his original petition. Thereafter he would necessarily be bound by any orders which might be entered in that action. As appellant's petition to be made a party, and that it be taken as an answer and counterclaim against appellee, showed that there was a question as to the amount of funds in his hands due the common school fund, and as the law requires that whatever is due should be paid to the county board of education, the circuit court should have allowed appellant to be made a party to the action, so that the questions between it and the county attorney could be properly presented and adjudicated by the court. Having a right to whatever was due the common schools, the county board of education also had the right to contest the amount with ap-

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pellee. As appellant was compelled to take this proceeding because of the failure of the court to grant the rule in the first proceeding, we are of the opinion that the court erred in refusing to permit appellant to be made a party and to submit the questions between it and the county attorney by appropriate proceedings.

While, in our opinion, both methods of procedure adopted by appellant are correct, it will not be permitted to proceed in both ways upon a return of these cases, but will be required to elect which method of procedure it will adopt. Upon the merits of the contest between appellant and appellee we, of course, express no opinion. We only decide that appellant has a right to have the questions adjudicated in one or the other of the actions herein considered. When appellant elects, the appellee may, of course, present such defense as he may have.

The judgment in each case is reversed, and cause remanded for proceedings consistent with this opinion.

PALMER & HARDIN v. GRAND LODGE K. OF P. OF KENTUCKY.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. BENEFICIAL ASSOCIATIONS (§ 19*)—LIABILITIES—PERSONS NOT MEMBERS.

A corporation was formed to provide entertainment for a biennial meeting of a fraternal organization, consisting of a supreme lodge composed of representatives from state grand lodges. The president of the corporation and the chairman of the finance committee were not members of the organization. The finance committee collected funds, a part of which was contributed by the state grand lodge and local lodges. Plaintiff furnished the corporation certain cots, etc. The corporation did not have sufficient funds to pay the debts incurred. *Held*, that plaintiff could not recover the balance due him from the state grand lodge and subordinate lodges.

[Ed. Note.—For other cases, see Beneficial Associations, Dec. Dig. § 19.*]

2. PRINCIPAL AND AGENT (§ 1*)—RELATION.

The relation of principal and agent cannot exist, where the person acting acts for himself, and not for another, and is without authority to act for the latter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Palmer & Hardin against the Grand Lodge of the Knights of Pythias of Kentucky. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Bingham & Davies and W. W. Davies, for appellants. Hazelrigg & Hazelrigg, Flexner & Campbell, and Alfred Selligman, for appellee.

HOBSON, J. The Grand Lodge of the Knights of Pythias of Kentucky is a corporation. Its chief officer is called the Grand Chancellor. The Supreme Lodge of the Knights of Pythias is a national organization, composed of representatives from the various state Grand Lodges regularly elected by them. The Supreme Lodge meets every two years in some city, and at that meeting it is customary for another city to be chosen for the next meeting. In 1902 the biennial meeting of the Supreme Lodge was held in San Francisco, Cal. Some time before the meeting a movement was started in Louisville to secure the next meeting of the Supreme Lodge in that city. As the result of that movement the two representatives of the Grand Lodge of Kentucky and the Grand Chancellor of that lodge went to San Francisco, taking with them an invitation to the Supreme Lodge to hold the next meeting in Louisville, from the mayor of the city, the board of council and the aldermen of the city, the Governor of Kentucky, and others. Quite a delegation attended the San Francisco meeting from Louisville. The two representatives from the Grand Lodge of Kentucky, who had seats on the floor of the Supreme Lodge, presented the invitation; and one of them made a speech in which he urged its acceptance, pledging the visitors all the necessities and comforts that circumstances and custom demanded. The invitation was accepted by the Supreme Lodge. After this had been done, the persons who had the matter in charge in Louisville set to work to raise a fund and carry out their promises. A corporation was formed in February, 1903, under the name of the Knights of Pythias Biennial Association. Mr. Marion E. Taylor, who was also the president of the Board of Trade of the city, was made president of the association. A finance committee was appointed, and J. J. Telford was made chairman of it. Neither Taylor nor Telford were then Knights of Pythias. The persons who signed the articles of incorporation and got it up were citizens of Louisville and interested in the main in the welfare of the city. The finance committee set to work to raise funds, and collected from all sources about $43,000. Of this amount the Grand Lodge of Kentucky contributed $3,178.75. The local lodges in the city contributed $764.66. The balance of the $43,000 was contributed by hotels, carriers, merchants, and other individual subscribers. The committee insisted that the Grand Lodge should subscribe $10,000; but it declined to give more than the sum indicated. The meeting was held. The committee thought it had enough funds to meet all demands. Palmer & Hardin made an offer to the association to furnish it certain cots, pads, etc., on certain terms. The offer was accepted, and the goods were furnished. At the last, expenses which the association had not counted on came up, and it turned out

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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that the funds subscribed were insufficient by something like $5,000 to pay its debts. A balance was left unpaid of the debt of Palmer & Hardin amounting to something over $300, to recover which they brought this suit against the Grand Lodge of Kentucky and four subordinate lodges, charging in substance that the lodges had authorized the buying of the goods and were responsible for the money. An answer was filed, denying the allegations of the petition. At the conclusion of all the evidence, which showed practically the facts we have stated, the plaintiffs dismissed their case as to the subordinate lodges, and the court instructed the jury peremptorily to find a verdict in favor of the Grand Lodge. This was done, and, the plaintiffs' petition having been dismissed, they appeal.

It is manifest from the proof that the plaintiffs sold their goods to the corporation called the "Knights of Pythias Biennial Association," of which Marion E. Taylor was president. It is also manifest that the purpose of forming this corporation was to avoid personal responsibility on the part of the people who were trying to get up the entertainment. The corporation was regularly formed, and those who dealt with it had notice of the fact that they were not doing business with the persons composing it individually. The Grand Lodge had no part in the buying of the goods, or in the management of the entertainment. The goods were not bought for it, or by its authority. It was a subscriber to the fund; but it was no more responsible for a deficit than any other subscriber to the fund. There is nothing in the record to indicate that the Grand Lodge at any time assumed any responsibility beyond the amount it paid into the fund. The persons who were preparing the entertainment were not in any sense the agents of the Grand Lodge. The corporation of which Marion E. Taylor was president, in contracting debts and disposing of the funds it had, acted in its own behalf, and not as the agent of the Grand Lodge. The Grand Lodge had no control over it. The relation of principal and agent cannot exist, where the person acting acts for himself, not for another, and is without authority to act for him.

Judgment affirmed.

BRADY v. BRANNON.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. COURTS (§ 178*)—POLICE COURTS—JURISDICTION—INJUNCTION.

A police court, on which Const. § 143, authorizes civil jurisdiction not exceeding that of justices of the peace to be conferred, and on which Ky. St. 1909, § 3513 (Russell's St. § 1526), confers such jurisdiction "equal to that of justices of the peace," has no jurisdiction of an action to enjoin collection of a tax, on the ground of its levy having been illegal; justices of the peace, on whom Const. § 142, authorizes the Legislature to confer such jurisdiction as it deems proper, being given by Ky. St. 1909, § 1086 (Russell's St. § 3100), civil jurisdiction only in actions and proceedings for "the recovery of money or personal property" of not more than a certain amount or value.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 408; Dec. Dig. § 178.*]

2. COURTS (§ 180*)—QUARTERLY COURTS—JURISDICTION—INJUNCTION.

The quarterly court having, under Const. § 139, only such jurisdiction as is conferred on it by the Legislature, and being granted by Ky. St. 1909, § 1051 (Russell's St. § 3126), civil jurisdiction only of actions for recovery of money or personal property, has no jurisdiction of an action to enjoin collection of a tax.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 180.*]

3. APPEAL AND ERROR (§ 20*)—JURISDICTION ON APPEAL FROM COURT HAVING NO JURISDICTION.

Though the circuit court has, under Ky. St. 1909, § 966 (Russell's St. § 2813), original jurisdiction of an action for injunction, which, not having been conferred on any other court, is exclusive, it cannot entertain such a case on appeal from a court that had no jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 83; Dec. Dig. § 20.*]

Appeal from Circuit Court, Mason County.

"To be officially reported."

Action by Thomas Brannon against Stanley Brady. From a judgment of the circuit court, dismissing an appeal by defendant from a judgment of a police court, defendant appeals. Affirmed.

Luther C. Reynolds and T. D. Slattery, for appellant. J. M. Collins, for appellee.

NUNN, C. J. It appears that in the year 1907 there was a school tax levied for the benefit of some school district in Mason county, Ky., and that appellant was appointed collector thereof. This action was instituted in the police court of the city of Maysville in the month of March, 1908, in which appellee procured an order restraining appellant from proceeding to collect of him taxes alleged to be due, amounting to $14, upon the ground that the levy of the tax was illegal and void. It appears that appellant did not answer, and on the 7th day of September, 1908, the following order was entered: "This cause coming on for trial on the regular call of the docket, and the defendant failing to appear, and the court, having considered the pleadings herein, and on proof heard and argument of counsel, and being advised, now orders and adjudges that the restraining order granted herein on March 17, 1908, be now made permanent, and that the plaintiff recover from defendant his cost herein expended. And the parties are hence dismissed." Appellant appealed from this judgment direct to the circuit court, and that court entered an order dismissing the appeal, which is as follows: "The court having considered ap-

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pellee's motion to dismiss the appeal herein, for the reason that this court has no jurisdiction of same, and being advised, sustains the motion; and it is ordered that the appeal herein be, and the same is, now dismissed, and that the appellee recover of appellant his costs herein expended. To all of which appellant objects and excepts, and prays an appeal to the Court of Appeals, which is granted."

It appears from the briefs of counsel that the circuit court dismissed the appeal for the reason that an appeal was not first taken to the quarterly court from the police court; that section 978, Ky. St. (Russell's St. § 2834), provides only for appeals to the circuit court from a judgment of the fiscal, county, and quarterly courts in civil cases; and that section 1054 (section 3130) provides that appeals from judgments and orders of justice, fiscal, and city or police courts, in civil cases, shall be taken to the quarterly court. Appellant contends that the circuit court had jurisdiction of the appeal by virtue of section 3520, Ky. St. (Russell's St. § 1533), which is as follows: "In all civil cases an appeal shall lie to the quarterly court or to the circuit court of the county, where the amount exceeds twenty-five dollars, exclusive of interest and costs, and under the rules and regulations prescribed by law for appeals from inferior courts to circuit courts." Appellee claims that this section is unconstitutional, as it applies alone to police courts in fourth-class cities; that it is inhibited by section 59 of the Constitution, which declares that the General Assembly shall not pass local or special acts with reference to the jurisdiction of courts.

It is not necessary for us to consider and pass upon this question, as we have arrived at the conclusion that the circuit court did not have jurisdiction of the appeal, for the reason that the judgment of the police court was void, as it had no jurisdiction of the action. The action was not instituted in the police court to recover a judgment for money or personal property. The only purpose was to restrain the collecting officer from levying upon appellee's property and collecting a small tax bill. The state Constitution (section 143) provides as follows: "The General Assembly may confer civil jurisdiction on police courts in cities and towns of the fourth and fifth classes, and in towns of the sixth class having a population of two hundred and fifty or more, which jurisdiction shall be uniform throughout the state, and not exceed that of justices of the peace." We find from this section that civil jurisdiction may be conferred only upon police courts in the fourth, fifth, and sixth class towns, and it shall not exceed the jurisdiction of justices of the peace. By section 3513, Ky. St. (Russell's St. § 1526), which applies to fourth-class cities, the General Assembly conferred civil jurisdiction upon police courts "equal to that of justices of the peace." In section 142 of the Constitution, it is provided: "The jurisdiction of justices of the peace shall be coextensive with the county, and shall be equal and uniform throughout the state."

It will be observed that the General Assembly has authority to confer such jurisdiction upon justice courts as it deems proper; but it must be uniform. The General Assembly, acting within its power under the section of the Constitution referred to last, enacted section 1086 of the Kentucky Statutes (Russell's St. § 3100), which is as follows: "Justices' courts shall have jurisdiction concurrent with circuit and quarterly courts of this commonwealth of all actions and proceedings for the recovery of money or personal property in civil cases, where the matter in controversy, exclusive of interest and costs, does not exceed one hundred dollars, and shall have jurisdiction, exclusive of circuit courts, and concurrent with quarterly courts in civil cases, of all actions and proceedings for the recovery of money or personal property when the value in controversy, exclusive of interest and costs, is fifty dollars or under," etc. It will be observed that by this section the civil jurisdiction of justices' courts is limited to cases for the recovery of money or personal property. Therefore a justice of the peace in this state has no jurisdiction of an action where the sole object is to restrain an officer from collecting taxes, and, as the General Assembly is prohibited by the Constitution from conferring upon police courts jurisdiction in excess of that conferred upon justices of the peace, the police court was without authority or jurisdiction to pass upon the questions presented in this action, and his attempted action thereon is void.

The quarterly court had no jurisdiction of an appeal from the judgment of the police court, nor would it have had original jurisdiction thereof. By section 139 of the Constitution it is provided, in effect, that the quarterly courts should have such jurisdiction as is conferred by the General Assembly. By section 1051, Ky. St. (Russell's St. § 3126), there is conferred upon quarterly courts civil jurisdiction of all actions for the recovery of money or personal property. Therefore the quarterly courts have no jurisdiction of cases like the one at bar. The circuit court of Mason county was the only court that had original jurisdiction of the cause of action presented by appellee. Its jurisdiction was exclusive, as the General Assembly had not conferred it upon any other court. Although the circuit court had original jurisdiction, it had no right to entertain the case on an appeal from an inferior court that had no jurisdiction. Section 966, Ky. St. (Russell's St. § 2813), provides that circuit courts "shall have original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal," etc. The members of the constitutional convention and

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the General Assembly thought it proper to limit the jurisdiction of inferior courts by not allowing them to pass upon such cases as the one at bar, for there might be as many conclusions about the constitutionality or legality of a tax levied for any purpose as there were inferior courts in the county, and some of the citizens might be forced to pay the tax while others would be relieved therefrom by the judgments of such inferior courts.

Our opinion is that the action of the police court in the case at bar was without authority, was a nullity, and constituted no bar to the collection of the tax, and the action of the lower court in dismissing the appeal was proper.

For these reasons, the judgment of the lower court is affirmed.

GARTH v. RUNNER'S EX'X et al.
SAME v. DAVIS & JOHNSON et al.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. PRINCIPAL AND AGENT (§ 97*)—AUTHORITY OF AGENT.

A principal wrote his agent: "When G. has given you a mortgage on [certain property] and had the bond [describing a sale bond] transferred to me, give him a check," etc., "if you think this a good loan." *Held*, that this did not authorize the agent to release the principal's lien on the land under the bond, or to direct a sale of the land by the sheriff, under an execution on the bond, or to accept, in lieu of the lien, any other notes or evidences of debt that G. might take from persons to whom he sold any part of the land on which the sale bond was a lien.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 376; Dec. Dig. § 97.*]

2. PAYMENT (§ 5*)—TO THIRD PERSON—EFFECT.

A creditor is not bound by a payment to one not acting as his agent or authorized to receive the money.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 7; Dec. Dig. § 5.*]

3. SPECIFIC PERFORMANCE (§ 95*)—DEFENSE—LACK OF MERCHANTABLE TITLE.

Lack of a merchantable title is a defense to an action by the vendor for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 258; Dec. Dig. § 95.*]

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Actions by William Runner's executrix and others against W. E. Garth, and between Davis & Johnson and others and said Garth. From the judgment in each case, said Garth appeals. Affirmed.

John W. Ray and W. E. Garth, for appellant. W. E. Settle, Jr., Thos. W. Thomas, and John B. Rodes, for appellees.

CARROLL, J. These two appeals grow out of transactions so intimately connected that they may properly be disposed of together. Prior to 1903 C. J. Smallhouse purchased at judicial sale a tract of land, and executed a sale bond to Mrs. Clara Dulaney for the purchase money, with W. E. Garth and A. J. Cole as his sureties. The sale bond was a lien on the land, and a lien was also retained for the purchase price in the commissioner's deed made to Smallhouse soon after his purchase at judicial sale. In February, 1903, an execution on this sale bond issued against Smallhouse, Garth, and Cole. In the April following, while the execution was in the hands of the sheriff, the bond for a valuable consideration was assigned by Mrs. Dulaney to William Runner, now deceased; and although it does not appear that the execution was ever assigned to him, it is conceded that the purchase and assignment of the sale bond upon which the execution issued invested him with the beneficial title to the execution. The facts relating to Runner's purchase of the sale bond are substantially as follows: He was a farmer and money lender, living in Warren county, some miles from Bowling Green, and had on deposit in the bank of J. E. Potter some $3,000 that he wished to loan. W. E. Garth went to see Runner to induce him to purchase the sale bond, and after some little delay Runner wrote to J. E. Potter the following note: "When Garth has given you a mortgage on the house and lot on Kentucky street, No. 401, and had the bond from Mrs. Clara Dulaney, with A. J. Cole and W. E. Garth as sureties, for C. J. Smallhouse, transferred to me, then give him a check for $2,250, if you think this is a good loan. April 1, 1903. William Runner."

On April 2, 1903, Garth and wife executed to Runner, "as collateral and additional security for the payment of the sale bond and the interest thereon," a mortgage on a house and lot on Kentucky street, No. 401, and also on other property, and this mortgage on the day of its execution was placed on record in the proper office. The sale bond was also assigned to Runner, and thereupon he paid to Mrs. Dulaney the amount of it. After the assignment of the sale bond to Runner, the execution remained in the hands of the sheriff, who, after advertising the property, sold it on May 18th, when W. E. Garth became the purchaser for the amount due. Garth did not pay any part of the purchase money, except about $300; but on May 26th the sheriff executed to Garth a deed for the property, reciting the payment of the full purchase price. It seems that this deed on the day of its execution was given to the county clerk, with directions not to record it until further orders, and that on May 29, 1903, J. E. Potter wrote the sheriff to deliver the deed to the county clerk for record, and accordingly on that date the deed was placed on record. In December, 1904, William Runner died, and shortly thereafter his executrix brought a suit against Garth and several other persons, who had purchased from him par-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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cels of the land upon which the sale bond was a lien. In this suit, the lien by virtue of the sale bond was set up, as was also the lien evidenced by the mortgage given by Garth to Runner on April 2d, and it was averred that no part of the sale bond had been paid, except about $150, indorsed thereon as a credit, together with one year's interest. A judgment was asked directing a sale of the property secured by both liens to satisfy the sale bond.

In answer to this suit, Garth set up that it was agreed between himself and Runner that Garth should purchase the property at the execution sale and obtain a deed therefor acknowledging the payment of the purchase money, and that the purchase money should be treated as a debt due by Garth to Runner, which debt should be paid and secured by the delivery to J. E. Potter, agent for Runner, of the money and notes Garth might receive from purchasers to whom he sold the land, which was to be divided into lots and sold on May 26th. He further averred that the notes taken by him from purchasers of the lots amounted to more than enough to satisfy Runner's debt, and that in accordance with the agreement Runner's executrix should be required to accept these notes in satisfaction of the indebtedness. Other pleadings completed the issues, and after the evidence had been taken the case was submitted and a judgment rendered, decreeing that Runner's executrix had a lien upon the property for which the sale bond was executed, as well as that described in the mortgage executed by Garth to Runner, except some lots sold to H. F. Stovewall. The only defendant in the action objecting to the judgment is W. E. Garth, who excepted to so much of it as refused to allow a credit of $83.30 paid by Hughes to J. E. Potter, and as adjudged Runner's executrix a lien and rejected a cross-petition offered against Robert Rodes. The only parties to this appeal are W. E. Garth, appellant, and Runner's executrix, Robert Rodes, Jr., and Davis and Johnson, appellees.

From a careful examination of the record it seems to us that the real question in this case is whether or not Potter had the right, as agent of Runner, to direct the sheriff to execute a deed acknowledging the payment of the purchase money when in fact it was not paid, or to make any other arrangements in reference to the sale of the land under the execution. Upon this controlling point in the case there is absolutely no evidence that Potter had any authority whatever to act as the agent of Runner, except that given him in the writing of April 1st, heretofore mentioned. This writing defined Potter's powers as agent, and in our opinion did not confer upon him authority to release in any manner Runner's lien upon the property, or to direct a sale of it by the sheriff, or to accept in lieu of the lien by virtue of the sale bond any other notes or evidences of debt that Garth might take from persons to whom he sold any part of the land upon which the sale bond was a lien. The writing limited the power of Potter to giving to Garth a check for $2,250 when Garth had executed a mortgage on the Kentucky street property and the sale bond was assigned to Runner. This being the full extent of his authority, it is manifest that in directing the sheriff to make a deed to Garth acknowledging the payment of the purchase money and also in agreeing to accept other notes in satisfaction of the debt, he was acting entirely outside the scope of his authority, and what he did was not binding upon Runner.

Potter testified in the case, but did not pretend to have any other authority from Runner than that expressed in the writing. The testimony of W. E. Garth relating conversations had by him with Runner fully supports his contention; but, of course, all his conversations with Runner are incompetent. Therefore, however correct and meritorious Garth's claim may be, as it is not supported by competent evidence, we cannot on the record before us do otherwise than rule that the lower court properly decided that Runner had a lien upon the property by virtue of the sale bond and mortgage.

In reference to the $87.30 paid by Hughes to Potter, Hughes testifies that he bought a lot in the Hobson Grove from Garth, and paid $87.30, which was a part of the purchase price, to Potter; but it does not appear that it was paid to Potter as the agent of Runner, or that in receiving the money Potter received it as his agent, or that he had any authority to so receive it. This being so, Runner's executrix should not be charged with this $87.30.

In this suit Garth also offered to file a pleading, which he made a cross-petition against Rodes, as sheriff, seeking to recover damages on account of the failure of Rodes to lodge for record on May 26th the deed made by him as sheriff to Garth for the land sold under the execution, which deed, although executed by Rodes on May 26th was not permitted by him to be recorded until May 29th. The court, upon objection being made, refused to permit this pleading to be filed, and of this ruling Garth complains It is set out in this pleading that Garth on May 26th had a public sale of lots, which were a part of the land purchased by him at the execution sale; that he obligated himself to make immediately to the purchasers a good title to these lots, and could have done so if the deed acknowledging the payment of the purchase money made by Rodes had been placed on record on May 26th; that the failure of Rodes to permit this deed to be recorded left Garth without any record title to the lots until May 29th, and consequently the purchasers of the lots refused to take them, when they would have done so and complied with their contract of purchase if the deed had been recorded. From what we have

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heretofore said, neither Potter nor any other person had authority from Runner to direct the sheriff to make a deed acknowledging the payment of the purchase money, and as no part of the purchase money, except about $300, was paid to the sheriff at the time of the sale, it follows that the sheriff committed no breach of duty in failing to make and deliver for record a deed acknowledging the payment of the purchase price. In fact, as it appears to us from the record, the sheriff, in permitting the deed which acknowledged the payment of the purchase money to go on record when he did, laid himself liable to Runner, if Runner had suffered any loss by this fact, as the sheriff should have received the purchase money before making a deed.

The case of Garth against Davis & Johnson grows out of this state of facts: Davis & Johnson purchased some lots at the sale of the Hobson Grove property made by Garth on May 26th. They refused to comply with the terms of their purchase, upon the ground that Garth could not make to them a good title to the lots in accordance with his contract. Garth obligated himself to convey to them the lots purchased by a good title; but, in view of the fact that Garth did not have any title whatever until May 29th, and had at no time an unincumbered title, Johnson and Davis were relieved from their obligation to take the lots. It may be conceded that on May 26th Garth had a good paper title to the lots, and that if the situation had remained unchanged he could have successfully compelled the purchasers in a suit for specific performance to accept the lots and comply with the terms of sale. But, when his action for specific performance was brought, facts were developed showing conclusively that he did not at any time have a merchantable title. These facts the purchasers had the right to, and did, avail themselves of to defeat his action.

Wherefore the judgment in each case is affirmed.

SETTLE, J., not sitting.

HALL v. LEEPER et al.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 671*) — OBSTRUCTION OF STREET—ACTION—SUFFICIENCY OF PETITION.

In an action by owners of lots on a street which had been extended through another's lot, to connect with a road, which extension had been obstructed by the owner of the land through which it passed, to compel the removal of the obstruction, a petition which neither alleged a dedication by the owner of the street through his lot, nor stated facts from which a dedication thereof could be inferred, nor such use of the street as would create a right thereto by prescription, was fatally defective.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 671.*]

2. MUNICIPAL CORPORATIONS (§ 646*)—STREETS —ACQUISITION.

Under the express provisions of Ky. St. 1909, § 3561 (Russell's St. § 1583), a city of the fourth class may acquire streets, or the ground therefor, by conveyance, by a dedication of the owner, or by condemnation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 646.*]

3. DEDICATION (§ 16*)—DEDICATION OF STREET.

A dedication to a city of the ground for a street may be made by parol, or by some such act of the owner as the making and recording in the proper office of a plat or a map laying off or otherwise indicating the location, length, and width of the street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15–49; Dec. Dig. § 16.*]

4. DEDICATION (§§ 35, 37*) — ACCEPTANCE OF STREET.

The acceptance of the dedication of a street by a city may be by an express memorial of record, by any act that would imply an acceptance, such as the constructing or repairing of the street, or by the continued use and recognition of the ground as a public street for such length of time as would imply an acceptance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. §§ 35, 37.*]

5. DEDICATION (§ 44*)—EVIDENCE—STREETS.

The owner of a lot had said that he would give a street through his land if the owners of other land would widen another street, but they did not comply with the condition. He had disclaimed any purpose of allowing the street to be opened, and there was no evidence of any acts of his amounting to a recognition of plaintiffs' right, or that of the public, to extend the street through his lot. It did not appear that plaintiffs' vendor had announced, when plaintiffs purchased their lots, that the street would remain open, or that the owner of the lot through which it passed, had acquiesced in such a statement, or that there had ever been a street through the lot, but only that the ground was uninclosed when plaintiffs had bought their lots, and had remained open several months thereafter. *Held*, that a dedication of the street through the lot was not shown.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85–87; Dec. Dig. § 44.*]

6. MUNICIPAL CORPORATIONS (§ 648*)—STREET BY PRESCRIPTION.

That there was, for several months, considerable travel over a lot, through which it was sought to compel the opening of a street by the owner, which travel was not confined to the part of the lot over which it was claimed that the street should be opened, and which travel over the lot by the public did not extend over more than two years, and by plaintiffs not more than a few months, did not create a prescriptive right to the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 648.*]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by F. H. Leeper and others against W. L. Hall. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Gibson & Kincheloe, for appellant.

SETTLE, J. Appellees, F. H. Leeper and others, own lots in the city of Madisonville which they purchased of Lynn & Barnett

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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in 1905. The lots are remote from the business center of the city, and were parts of a plot of ground which appellees' vendors, Lynn & Barnett, in contemplation of an early sale of them, divided into lots, streets, and alleys. Among other streets thus opened was a short one, extending from a considerable lot of ground owned by the appellant, W. L. Hall, westwardly to intersect with another street running north and south, neither the location nor name of which is given on the plot appearing in the record. To this new street Lynn & Barnett gave the name "Hall street." The lots of appellees front on the new street; some of them being on the north and others on the south side thereof. Appellant's lot lies between the east end of Hall street and Harrig street. If the new street were extended through appellant's lot east to Harrig street, it would equally divide it. Appellant's entire lot, however, is inclosed with a fence which prevents appellees from reaching Harrig street through or over it. In other words, Hall street, at the point where it reaches appellant's lot, is obstructed by a fence, and the lot is likewise fenced on the side next to and along Harrig street.

This action was instituted by appellees in the court below to enforce the opening or extension of Hall street through appellant's lot; it being claimed in the petition that it formerly ran through his lot to Harrig street, and that he had wrongfully erected a fence across the street on both the east and west lines of his lot, thereby depriving appellees and the public generally of the use of the street on and through his lot, and putting appellees to the inconvenience of traveling a greater distance to reach the business part of the city of Madisonville. The petition contains the further averment that Hall street was open through appellant's lot when appellees purchased their lots, respectively; that they then believed the street would remain open and continue a street through appellant's lot, free to their use; and that it did remain open, and was used by them and the public generally as a street, for about two years after the purchase by them of their lots. It was also alleged in the petition that at the time appellees purchased their lots Lynn, one of their vendors, publicly announced that Hall street would remain open through appellant's lot for the use of all persons who might buy lots of him (Lynn), and that appellant, being present and hearing this statement of Lynn, did not gainsay or deny it. The petition does not, however, plead the alleged acquiescence of appellant to Lynn's statement as an estoppel. After filing a demurrer to the petition, which the circuit court overruled, appellant answered, traversing the averments of the petition, and by consent of parties the witnesses furnishing all the evidence in the case were permitted to orally testify on the trial, at the conclusion of which judgment was rendered by the court requiring appellant to remove his fences and open Hall street through his lot for the use of appellees and all others. Complaining of that judgment, appellant prosecutes this appeal.

Our consideration of the law and facts of the case leads to a conclusion wholly at variance with that manifested by the judgment appealed from. In the first place, the petition is fatally defective. It neither alleges a dedication by appellant of the street through his lot, nor states facts from which a dedication could be inferred, and no such use of a street through the lot by appellees or others as would create a right thereto by prescription is alleged. Madisonville, which is a city of the fourth class, may acquire streets, or the ground therefor, by conveyance, by a dedication on the part of the owner, or by condemnation. Section 3561, Ky. St. (Russell's St. § 1583). A dedication of ground to a city for a street may be made by parol, or by some such act on the part of the owner as the making and recording in the proper office of a plat or may laying off or otherwise indicating the location, length, and width of the street. As said in Spurrier v. Bland, etc., 49 S. W. 469, 20 Ky. Law Rep. 1342: "While a dedication by parol is as binding and effective as if in writing, still the proof of this dedication must be clear and conclusive before the land of a citizen will be taken for public use or without compensation, and acceptance of the dedication is as necessary." Acceptance of the dedication by the city may be by an express memorial of record; by any act that would imply an acceptance, such as the constructing or repairing of the street; or by the continued use and recognition of the ground as a public street for such length of time as would imply an acceptance. Dillon, Municip. Corp., § 642; Gedge v. Commonwealth, 9 Bush, 61; Cochran v. Town of Shepherdsville, 43 S. W. 250, 19 Ky. Law Rep. 1193. Obviously the averments of the petition are not sufficient to show either a dedication or acceptance of Hall street through appellant's lot. Therefore the demurrer to the petition should have been sustained.

We also find that the evidence falls far short of showing a dedication of the street through appellant's lot. None of the witnesses claim to have heard from appellant any statement that even by implication could be held to give a street through his lot. He did on one occasion say he would give the street through his lot if Lynn & Barnett would widen Harrig street; but they did not comply with the condition—in fact, refused to do so—and there the matter ended. The witnesses who said anything to appellant on

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the subject of the street admit that he disclaimed any purpose of allowing it to be opened through his lot. The evidence also failed to prove any acts on the part of appellant that amounted to a recognition of appellees' right, or that of the public, to extend Hall street through his lot. There was no attempt to prove that Lynn announced, when appellees purchased their lots, the street would remain open through appellant's lot, or that appellant acquiesced in such statement or arrangement. Appellees did not even prove that Lynn or Barnett gave them any assurance that Hall street would be continued through appellant's lot.

According to the weight of the evidence there was never a street through the lot. The ground through which appellees claim a street was unInclosed when appellees bought their lots and remained open several months thereafter; but it was never in the shape of a street. Appellant's stable was in part on it, and much of it was in constant use by him as a place of storage for brick manufactured at his brickyard, situated on that part of his lot lying south of the strip on which appellees insist the street should be opened. That there was for several months considerable travel over his lot appellant admitted; but it was not, as he proved, confined to that part of the lot where appellees claim the street should be opened. It extended to parts of the brickyard as well. Appellees cannot enforce the opening of the street on the ground of prescriptive right by long user on their part or by the public, for according to the evidence their use of the street had continued only a few months, and that of the public not exceeding two years.

Whether, in fencing his lot and preventing appellees and others from using any part of it as a street, appellant acted in an unneighborly and ungracious manner, we need not say; but under the evidence in this case we are bound to hold that he had the legal right to object to the use of any part of his lot for a street and to prevent its appropriation to such use, even by the erection of a fence around it. It cannot be opened or used for a street without his consent. If appellees would, over his objection, compel the use of a part of his lot for a street, they must, through the city, resort to proceedings of condemnation as allowed by law. Manifestly, the circuit court had no right, on the record here presented, to establish a street on appellant's lot, and his motion for a nonsuit, made at the conclusion of appellees' evidence, and again after all the evidence was heard, should in each instance have been sustained.

Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

DINE v. DONNELLY et al.

(Court of Appeals of Kentucky. Oct. 13, 1909.)

1. SHERIFFS AND CONSTABLES (§ 151*)—INDEMNIFYING BONDS — ACTION AGAINST SURETY.

In an action against a surety on an indemnity bond to an attaching sheriff, a defense that the sheriff, in levying, had acted wantonly, willfully, maliciously, and contrary to the attaching creditors' instructions, was an affirmative defense, the burden to establish which rested upon the surety.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 151.*]

2. SHERIFFS AND CONSTABLES (§ 151*)—LEVY ON PROPERTY—WILLFULNESS—EVIDENCE.

Evidence *held* not to show that a sheriff acted willfully and maliciously and against the wishes and directions of attaching creditors in levying an attachment.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 151.*]

3. JUDGMENT (§ 256*)—CONFORMITY TO VERDICT.

Where defendant denies all liability, and the amount claimed was not disputed, if any liability attached, a verdict for plaintiff was sufficient to support a judgment for the amount sued for.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 452; Dec. Dig. § 256.*]

4. SUBROGATION (§ 41*) — CROSS-PETITION — OFFICE.

Civ. Code Prac. § 96, subsec. 3, defines a cross-petition to be the commencement of an action by defendant against a codefendant or some person not a party to the action, and which is not allowed to a defendant except upon a cause of action which affects, or is affected by, the original cause of action. Plaintiff sued on a sheriff's bond for wrongful levy on her property. She pleaded the execution of the bond by the attaching creditors indemnifying the sheriff, but for which the attachment would not have been levied. *Held*, that a cause of action by the sheriff's sureties over against the sureties on the indemnifying bond was so intimately connected with the other cause of action that the sheriff's sureties could proceed against the sureties on the indemnifying bond to be subrogated to sheriff's right thereunder by cross-petition in the original action.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 109; Dec. Dig. § 41.*]

5. PLEADING (§ 236*)—TRIAL AMENDMENTS—DISCRETION OF COURT.

The Code gives the trial judge a broad discretion in permitting and refusing trial amendments to pleadings, and where litigation over an attachment of goods had been pending for 10 years, and a former action by the owner against the sheriff and his bondsmen had brought out the place where the goods had been stored and the extent to which they had been damaged, so that if a surety on a bond of the attaching creditors, who were sued by the sheriff's sureties, had wished to defend on the ground that damage to the attached property was due to the negligence of the sheriff in caring for the goods, instead of through the willful acts of the sheriff contrary to instructions, and in disregard of the creditors' command, which was the issue upon which the parties went to trial, he could have made the defense at an earlier date, the court did not abuse its discretion in refusing an amendment setting up the defense during the progress of the trial and after the evidence had in part been introduced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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6. SUBROGATION (§ 7*) — BONDS — RIGHT OF SHERIFF'S SURETIES TO BE SUBROGATED TO HIS RIGHT ON INDEMNIFYING BOND.

Where one has been compelled to pay a debt for which another was primarily liable, he is entitled to be subrogated to the rights of the creditor; and where sureties on the official bond of the sheriff had been obliged to answer for the default of their principal in making an erroneous seizure of property, they are entitled to be subrogated to his rights in an indemnity bond given him by the attaching creditors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21–23, 25–28; Dec. Dig. § 7.*]

Appeal from Circuit Court, Kenton County, Criminal, Common-Law, and Equity Division.

"To be officially reported."

Consolidated actions by Maggie Hatch against C. Donnelly and others. Defendants filed a cross-petition, making Phillip Dine a defendant. Judgment against Dine on the cross-petition, and he appeals. Affirmed.

Chas. H. Fisk and Stephens, Lincoln & Stephens, for appellant. Robt. C. Simmons, for appellees.

LASSING, J. In 1896 the Robert Mitchell Furniture Company and the Geo. F. Otte Company filed suits in the Kenton circuit court against L. S. Hatch, wherein they sought to recover of him certain moneys which they alleged to be due them for household goods sold to him. Each caused a general order of attachment to be issued and placed in the hands of the sheriff, John O'Donnell. The sheriff, before executing the order of attachment, demanded an indemnifying bond as provided for by section 211 of the Code, and the following bond was thereupon given: "We undertake to indemnify John O'Donnell, sheriff of Kenton county, Kentucky, against any damage he may sustain by reason of the levy of the attachment in this action. Ph. Dine. P. Dine, by H. H. Dine." After the indemnifying bond above set out had been executed, the deputy sheriff, having the orders of attachment to be served, called upon William Goebel, attorney for plaintiffs, for instructions, and was directed by him to levy "on everything in sight" at the Hatch residence. Armed with this instruction, the said deputy, accompanied by a representative from the house of each plaintiff, went to the residence of Hatch, and in the absence of both himself and his wife levied upon and took therefrom all of the household goods and effects therein. When the property was removed from the Hatch residence, it was stored by the sheriff in a storage room in Covington. Each of the plaintiffs endeavored to hold all the property attached as belonging to L. S. Hatch, while Maggie Hatch, his wife, sought to have the attachment discharged as to that part of the household goods which had not been sold by plaintiffs, and claimed the property, which she thus sought to have discharged from the attachment, as her own individual property. This litigation, between Mrs. Hatch and the attaching creditors, was from the start spirited, and the attempt on the part of plaintiffs to subject her property in satisfaction of their debts was, at the expiration of about two years from the institution of the suit, defeated by Mrs. Hatch. When she finally recovered her property, she instituted two suits against the administrator of the sheriff, who had died in the meantime, and the sureties of his official bond. In each of these suits she sought to recover damages for the wrongful taking and withholding of her property. The suits were consolidated, and she finally recovered a judgment against the administrator and the sureties on the sheriff's bond for $650. To these actions Dine, the surety on the indemnifying bond, was made a party defendant, and was later made a defendant to the cross-petition filed by the sureties of the sheriff, who sought to be subrogated to the rights of their principal in the indemnity bond executed by the attaching creditors. Upon the trial of the issues between the sureties on the sheriff's bond and Dine, the surety on the indemnifying bond, judgment was finally rendered in favor of the sureties on the sheriff's bond for the amount which they had been compelled to pay Mrs. Hatch. To reverse this judgment, Phillip Dine, the surety on the indemnifying bond, prosecutes this appeal.

A great many reasons are urged why the judgment should be reversed, and we have given to each a careful consideration. The suits filed by Maggie Hatch, wherein she sought to recover of the sheriff and his sureties on his official bond damages for the wrongful seizure and withholding of her property, are identical in all respects, except that in one she charges that certain property was taken by the Mitchell Company and in the other by the Otte Company. She alleged that, prior to the taking of her goods by the sheriff, he had been warned not to do so, and that he had procured an indemnifying bond, signed by Phillip Dine, before making the levy; that the sheriff placed her said goods in a storeroom, and held and kept same in his possession until ordered by the court to deliver them to her; that when the goods were returned to her they were in a badly damaged condition, many of the articles were rendered absolutely useless, and the carpets and curtains were eaten by moths and rats, and all so badly damaged as to be almost unfit for use. These allegations were denied, and in addition the sureties on the bond made their answer a cross-petition against Dine, the surety on the indemnifying bond, and prayed judgment over and against Phillip Dine, the surety on said indemnifying bond, for such sum as they

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might be required, under the judgment of the court, to pay.

After filing various preliminary motions, Phillip Dine answered. The plaintiff, Mrs. Hatch, was called upon to elect whether she would prosecute her claim against Dine, the surety in the indemnifying bond, or the appellees, the sureties on the sheriff's bond, and she elected to proceed against the latter. The issue between plaintiff, Mrs. Hatch, and the appellees having been tried, with the result above indicated, and appellees having satisfied said judgment, they, appellees, filed an amended cross-petition against appellant, Phillip Dine, setting out in detail the trial and judgment rendered in favor of Mrs. Hatch, the satisfaction of same by them, and prayed judgment against him for the amount which they had so paid. To this cross-petition he answered, and charged that the sheriff had acted wantonly, willfully, and maliciously, and contrary to the instructions and in utter disregard of the direct command of the plaintiff. Issue was joined by the reply on these allegations of the answer, and upon a trial thereof before a jury the judgment from which this appeal is prosecuted was rendered.

The trial court held that as appellant admitted that his principals had caused the orders of attachment to be issued and levied, but alleged that the sheriff, in levying same, had acted wantonly, willfully, maliciously, and contrary to their direct instructions, the burden rested upon him to establish this fact. Of this ruling we think he may not complain; for, unless the sheriff did proceed in the manner set out in his answer, the plaintiffs, who procured the order of attachment and directed its levy, would clearly be liable. The record shows that the employés of the attaching creditors who accompanied the sheriff when he made this levy wanted to take the property, or portions thereof, out of the hands of the sheriff and across the river to their respective places of business in Cincinnati. This the sheriff refused to permit them to do, and while there is some testimony tending to show that certain articles were pointed out by them as not having been sold, and which they did not want to take, when notified that their lawyer had instructed him to make a clean sweep, "take everything in sight," they made no objection, and the sheriff, following his instructions, took everything. The decided weight of the evidence is against the contention of appellant that the sheriff acted wantonly, willfully, and maliciously, and against the wishes and direction of the plaintiffs in levying the attachment; and the conduct of the attaching creditors during the extended litigation over this property between them and Mrs. Hatch shows that they were endeavoring to hold all the property which had been attached. A complete inventory of what was taken was returned with his report to them, and upon examination of this inventory they were fully advised as to what had been taken. The fact that they sought to hold it all, and offered to release none of it, is, while not conclusive, most persuasive evidence that the sheriff was acting in accordance with, rather than against, their express direction in seizing all the property that he found at the home of the defendant Hatch and his wife. On the state of the pleading, the burden was upon appellant to make out his case, and the court properly so held.

The proof abundantly supports the finding of the jury, and while complaint is made that their verdict was not in form, still as the amount was not in controversy, a finding on the part of the jury in favor of plaintiff was sufficient to support the judgment predicated thereon. The instructions plainly told the jury the amount which the cross-petitioners were entitled to recover if they found for them. In the case of Cooper v. Poston, 1 Duv. 92, 85 Am. Dec. 610, this court held, in an action on a note, where the only defense was a plea of usury, that a verdict, "We, of the jury, find for the plaintiff," would support a judgment for the amount of the note and interest. And in the cases of Brannin v. Foree, 12 B. Mon. 506, and Jackson v. Hill, 58 S. W. 434, 22 Ky. Law Rep. 563, this principle, that what can be made certain is certain, was recognized and applied. In 29 Am. & Eng. Ency. of Law, 1021, the rule is thus stated: "Where the amount is not actually in issue, a simple finding for the plaintiff or the defendant is usually sufficient, without specifying any particular sum." Here appellant denied all liability. The amount claimed was not disputed, if any liability attached, and hence a verdict in favor of the plaintiff necessarily meant for the amount sued for.

We next come to consider the question as to whether or not appellees might proceed against appellant by cross-petition. Subsection 3 of section 96 of the Civil Code of Practice defines a cross-petition to be "the commencement of an action by a defendant against a codefendant, or a person who is not a party to the action, * * * and is not allowed to a defendant except upon a cause of action which affects, or is affected by, the original cause of action." The test, then, as to whether or not they might properly in this case proceed by cross-petition is: Was the action asserted by appellees affected by the cause of action asserted by Mrs. Hatch against O'Donnell? Clearly it was. In the suit of Mrs. Hatch against O'Donnell, she pleaded the execution of the indemnity bond, but for the execution of which the attachment would not have been levied at all. Therefore the execution of the indemnity bond caused the levy of the attachment which resulted in the damage to Mrs. Hatch. Clearly the causes of action are so closely and intimately connected that appellees were justified in proceeding as they did. In the case

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of Gibson v. Ky., etc., Ben. Society, 8 Ky. Law Rep. 520, a case somewhat similar to the one under consideration here was presented. There the society, without authority, issued a certificate of membership, in which it contracted to pay the amount due upon the death of the member to one other than a member of his family. The member died, and the society paid the amount due to the named beneficiary. Under its charter the death benefit belonged to the widow and children of the member, and they sued the society to recover the amount due them. In the same action the society filed a cross-petition against the person to whom it had paid the fund, and asked that it recover judgment against him for the amount so paid, if it should be held answerable to the widow and children of the deceased member therefor, and upon appeal here it was held that the cross-petition could be maintained. This, if anything, is a stronger case than the case at bar, for the reason that in that case the beneficiary named, so far as the record shows, had been in no wise instrumental in procuring the deceased member to name him as beneficiary. And again, in the case of Edwards v. Grimes Bros., 66 S. W. 515, 23 Ky. Law Rep. 2055, where suit was brought to enforce a purchase-money lien, the defendant was permitted to prosecute a cross-action to quiet the title to the same property against persons claiming it. And in Trabue v. McAdams, 8 Bush, 80, a lessee, who was sued for rent, was permitted in the same action by cross-petition to proceed against a sublessee to compel him to pay his portion of the rent and release the lessee from responsibility therefor.

Several authorities are cited and relied upon by appellant in support of his contention that this is not such a claim as might be asserted by cross-petition. But a careful analysis of those cases shows that they are not in point. The case of Royse v. Reynolds, 10 Bush, 286, was an equitable proceeding, wherein one Fee sought to enjoin Royse from enforcing a judgment against him on the ground that he was surety only and had been released from liability by lapse of time. Royse, by cross-petition, then sued the sheriff, Reynolds, for breach of duty by the latter in failing to return an execution for more than 30 days after return day and in failing to sell certain property levied upon. The court, in holding that he could not maintain the action by cross-petition, said: "There is no connection whatever between these causes of action and the subject-matter of Fee's suit, except that Fee was a party defendant in the judgment upon which the execution issued. None of his property had been seized, and he was released, if at all, not by the delay or neglect of the sheriff, but by the want of diligence on the part of Royse." Thus it is seen the right of Royse to recover from the sheriff for failure to return the execution neither affected, nor was affected by, the right of Fee to enjoin the collection of the judgment from which he had been released by lapse of time. And so, also, in the case of Wells v. Boyd, 1 Duv. 366, relied upon, we find that the right to proceed by cross-petition was denied, because the right of Preston to recover from Boyd on the note did not affect the right of Boyd to recover from Wells on the warranty.

During the progress of the trial, and after the evidence had in part been introduced, appellant offered to file an amended answer, to the filing of which appellees objected. The court sustained the objection and refused to permit the amendment to be filed, and of this ruling appellant now complains. The Code gives to the trial judge a broad discretion in permitting and refusing amended pleadings to be filed, and it is at times difficult to determine when, in pursuance of justice, this discretion on the part of the trial judge should be interfered with. The issue, as made up and upon which the parties had gone to trial, was as to whether or not the sheriff had proceeded wantonly, willfully, maliciously, and contrary to instructions and in utter disregard of the direct command of the appellant. In the amendment offered, appellant set out that the damage to the property of Mrs. Hatch was due to the negligence of the sheriff in storing and caring for the goods. The issue upon which the case was being tried had been made for nearly three years. The litigation had been pending for about ten years. During the time that the pleadings were being made up, appellant had filed a great many motions and had presented his defense in almost every conceivable form, and if he had wanted to make this defense which he sought to inject into the case almost at the conclusion of the trial, he should certainly have done so at an earlier date. All of the facts upon which he might have based such a defense had been brought out during the progress of the trial between Mrs. Hatch and the sheriff and his bondsmen—for in that trial it was shown where the goods had been stored and the extent to which each article thereof had been damaged—so that appellant did not present a case which appealed to the sense of justice of the trial court when, after so long a delay, and almost at the conclusion of the trial, he was proposing to make a new issue. Under these circumstances the trial judge was warranted in refusing to permit the amendment to be filed. To have done so would have necessarily prolonged the trial, if, in fact, it had not necessitated the continuing of the case.

The only remaining question which we deem it necessary to consider is the right of the sureties on the sheriff's bond to be substituted or subrogated to the rights of the sheriff on the indemnifying bond. This is the principal, if not the only, question in the case. The sheriff took the indemnifying bond to protect him against possible loss resulting

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from the seizure of the property, about which he entertained some doubt as to whether or not it was liable to seizure and sale under attachment. Having levied upon the property, and being held answerable in damages for doing so, the sureties on his official bond were required to pay the damages assessed against him. Why are they not entitled to be subrogated to the rights of the sheriff on the indemnifying bond? We find no case directly in point in this state; but the text-writers, with a degree of uniformity, hold that the state of facts here presented is such as entitles the sureties to be subrogated to the rights of their principals. In 27 Am. & Eng. Ency. of Law (2d Ed.) p. 221, we find the principle thus stated: "As a general rule, sureties on the official bond of a sheriff, who have been obliged to answer for the default of their principal, are entitled to relief by subrogation. Thus, where they pay a judgment against the sheriff for an erroneous seizure of property, they will be subrogated to his rights in respect to any indemnity which he may have demanded and received from the judgment creditor." Sheldon on Subrogation (2d Ed.) § 90, thus states the rule: "The sureties of a sheriff, who have been compelled to pay a judgment recovered against him by the owner of property which he had taken on an execution against a third party and had turned over to the judgment creditor, have been allowed to recover the value of such property against that plaintiff. The sureties who had satisfied the owner were substituted to his cause of action against the creditor." In Murfree on Sheriffs, § 910, we find the following: "The right of subrogation does not rest upon contract or privity, but depends upon principles of natural justice and equity, and will be applied in favor of one who has been compelled to perform the obligations of another. Hence, when the sureties of a deceased deputy sheriff have been compelled to pay for such deputy's default, they are entitled in equity to be substituted to his rights against the creditor by whose direction the default was occasioned, and to resort to a bond taken by him from the creditor as an indemnity against the consequences of such default."

In the case of Philbrick v. Shaw, 61 N. H. 356, we find a set of facts almost identical with those here presented. There the sureties of a deceased deputy sheriff had been compelled to pay for his default in not making proper application of the proceeds of an execution. They sought to be substituted to his rights against the creditor by whose directions the default was caused, and to resort to a bond taken by him from the creditor as an indemnity against the consequences of such default. In disposing of their right so to do, the court said: "The contention of the defendant is that there is no privity of contract or obligation between the plaintiff and himself; that the condition of the bond was to save Haynes harmless, and not his sureties; and that, inasmuch as neither Haynes nor his estate has sustained any loss, the contingency upon which the obligation depended has not happened, and there has consequently been no breach of the bond. This defense is both ingenious and novel; but it has no foundation in principle or upon authority. The right of subrogation does not rest upon contract or privity, but depends upon principles of natural justice and equity, and will be applied in favor of one has been compelled to perform the obligations of another. * * * Nor was the defendant's bond for the protection of Haynes alone. His sureties were responsible for his official conduct, and equally liable with him to make compensation to any injured party for his wrongful acts. His protection was their protection; and, as both stood upon a common ground of interest in respect to the bond, it is to be regarded in equity as intended for the joint benefit of both, and as now held by the administrator of Haynes in trust for the plaintiff surety. But, even if it was intended for the sole benefit of Haynes, Philbrick, having performed the obligations resulting from Haynes' default, which the defendant occasioned, and from which he derived a substantial benefit, is entitled to be subrogated to all the rights Haynes had, or would have had, if living, against the defendant, and may therefore resort to the bond as a means of reimbursement. * * * The right of subrogation exists where, from all the circumstances of the case, it ought in equity and good conscience to exist. * * * This is such a case."

The same principle is recognized and upheld in People v. Schuyler, 4 N. Y. 176, in Skiff v. Cross, 21 Iowa, 459, and in Blalock v. Peake, 56 N. C. 323. In Meyer Bros. Drug Co. v. Davis, 68 Ark. 112, 56 S. W. 788, a constable wrongfully attached and sold personal property. The owner of the property recovered a judgment against the constable for its value, which had been paid by his sureties. The plaintiffs in the attachment then gave to the constable a note for the amount of the judgment the owner had obtained against him. It was held that the sureties were entitled to be subrogated to the constable's right of action on the note. And in Dowell v. Woodsides, 27 S. W. 853, 16 Ky. Law Rep. 325, a master commissioner mortgaged his property to his bondsmen to indemnify them. A litigant, who had funds in the hands of the master, brought suit, and was permitted to be subrogated to the rights of his bondsmen in the mortgage. Bispham, in his Principles of Equity, § 377, in speaking of the doctrine of subrogation, says: "The principle is a general one, and will apply in every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable." In the case of Albro v. Robinson, 93

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Ky. 195, 199, 19 S. W. 587, 588, 14 Ky. Law Rep. 124, the sureties on the bond of a deceased executor had been held liable for his default. They sought to be subrogated to his claim for subrogation as executor, and in disposing of the matter this court said: "If entitled to compensation, this would certainly be equitable. It would be in the direction of doing complete justice, and this is the basis of the doctrine of subrogation."

As above stated, we have not, so far, been called upon to decide a case in all respects similar to the one at bar; but this court has frequently been called upon to apply the doctrine of subrogation, and it has uniformly held that, where one has been compelled to pay a debt for which another was primarily liable, the former is entitled to be subrogated to the rights of the creditor. This was the rule announced in Finn v. Stratton, 5 J. J. Marsh. 364; Perkins v. Scott, 7 Ky. Law Rep. 608; Ely v. Harvey, Keith & Co., 6 Bush, 620; Ogden v. Totten et al., 34 S. W. 1081, 17 Ky. Law Rep. 1390; Nesbit v. Wood, 56 S. W. 714, 22 Ky. Law Rep. 128; Riddle v. Riddle, 80 S. W. 1129, 26 Ky. Law Rep. 231; Treadway v. Pharis, 18 S. W. 225, 13 Ky. Law Rep. 787. In each of the foregoing cases the principle that one who has paid a debt for which another was primarily liable was entitled to be subrogated to the rights of the creditor was fully recognized and upheld. In the case at bar the sheriff had executed a general official bond as a guaranty to the public and the commonwealth that he would faithfully and according to law discharge the duties of his office. As a part of those public duties he was required to execute the orders of the court that came to his hand. When the plaintiffs, in the original suits, caused the orders of attachment to be issued and placed in his hands, it at once became his duty to levy same upon any property of the defendant that he could find that was subject to execution. The plaintiffs in the suit desired that he should levy upon all the property of the defendant which the sheriff might find in defendant's home. This the sheriff declined to do until the defendants had executed the indemnifying bond as above set out. The levy having been made, and the right of the sheriff to take the attached property being contested, it was found that he had acted beyond his lawful authority in so doing, and the sureties on his bond were compelled to pay the judgment recovered against him because of this illegal levy. They at once became creditors of the sheriff to that extent, and, under the well-established rule announced by all text-writers and by courts of last resort generally, they were entitled to the benefit of any security which he had taken from the plaintiffs guaranteeing him against loss. Thus they became clearly entitled to the same benefit and protection under the indemnifying bond which accrued to the sheriff himself. The trial court correctly held that the record presented a state of facts authorizing and justifying the application of the doctrine of subrogation.

Perceiving no error in the conduct of the trial prejudicial to the substantial rights of appellant, the judgment is affirmed.

HOFFMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 6, 1909.)

1. HOMICIDE (§ 253*)—MURDER—EVIDENCE.
Evidence *held* to sustain a conviction of murder in the first degree.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 523; Dec. Dig. § 253.*]

2. CRIMINAL LAW (§ 622*)—JOINT DEFENDANTS—SEPARATE TRIAL.
Under Cr. Code Prac. § 237, providing that, if two or more defendants are jointly indicted for felony, any defendant is entitled to a separate trial, it is the mandatory duty of the court to grant a separate trial when demanded by one of several joint defendants.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1380; Dec. Dig. § 622.*]

3. CRIMINAL LAW (§ 622*)—CODEFENDANTS—SEVERANCE BY STATE.
Cr. Code Prac. § 237, though giving to a joint defendant the absolute right to a separate trial, does not confer on him the right to a joint trial, nor does such right exist at common law; the court being authorized, at the instance of the commonwealth, or, where justice requires, on its own motion, to order a severance without application by either party.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1380; Dec. Dig. § 622.*]

4. HOMICIDE (§ 158*)—EVIDENCE—THREATS BY THIRD PERSON.
Where there was evidence that a threat by defendant's wife that, if decedent did not release defendant's son, decedent's wife would be a widow before morning, was made in defendant's hearing but a few minutes before defendant intervened in the quarrel which ended in his killing decedent, such threat was admissible against him.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293–296; Dec. Dig. § 158.*]

5. HOMICIDE (§ 169*)—EVIDENCE—DECLARATIONS OF THIRD PERSONS.
Where, in a prosecution for homicide, defendant claimed that prior to the difficulty some persons had thrown rocks at him, evidence of F. that two of her sons, who might otherwise have been supposed to have rocked defendant, left her house a few minutes before the shooting, saying they were going to get some fodder for a mule, was inadmissible.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 350; Dec. Dig. § 169.*]

6. HOMICIDE (§ 338*)—APPEAL—PREJUDICE.
Such testimony was not prejudicial to defendant, in view of the witness' subsequent testimony that her sons had passed through the yard a few minutes later with the fodder.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 711; Dec. Dig. § 338.*]

7. CRIMINAL LAW (§ 1144*)—MISCONDUCT OF ATTORNEY—APPEAL—PRESUMPTION.
Where an objection to a statement by counsel for the commonwealth was sustained by the court, it would be presumed on appeal that the

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court at the time admonished the jury not to consider the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3028; Dec. Dig. § 1144.*]

8. CRIMINAL LAW (§ 600*) — CONTINUANCE — AFFIDAVIT—USE AS EVIDENCE.

Where an affidavit for a continuance for absence of certain witnesses did not allege the facts to which it was claimed they would testify, if present, accused's mere belief that, if present, they would give beneficial testimony, did not authorize the reading of what was said in the affidavit with respect to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342–1344; Dec. Dig. § 600.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Estill County.

"To be officially reported."

John Hoffman was convicted of murder, and he appeals. Affirmed.

Gourley, Redwine & Gourley, D. B. Redwine, and Clarence Miller, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, John Hoffman, with one shot from a musket loaded with leaden slugs, killed Simon Gross and Bert Flinchem. The double homicide occurred at night and near the homes of all the parties, in Estill county. Appellant and his wife, Ritta Hoffman, were jointly indicted for the killing of Gross; the crime charged being murder. Appellant, at the instance of the commonwealth's attorney, over his objection, had a separate trial, which resulted in his conviction; the jury returning a verdict finding him guilty of murder and fixing his punishment at confinement in the penitentiary for life, upon which verdict judgment was duly entered. Appellant was refused a new trial in the circuit court, and by this appeal seeks a reversal of the judgment of conviction.

It does not appear from the record whether appellant or his wife was indicted for killing Flinchem, or whether she has been tried under the joint indictment charging her and appellant with the murder of Gross. Appellant lived near and was on friendly terms with both Gross and Flinchem, had worked a good deal for the former, and was at the time of the killing in the employ of the latter as a hauler of railroad ties. According to appellant's own testimony, about a month before the homicide his house was rocked, and this indignity was followed down to the time of the homicide by repeated throwing of rocks at his person when he would be returned home at night after his work. The persons who thus assaulted his house and person were unknown to appellant, but when the rocks were thrown at his house he saw two men running from the premises, one of whom he thought was Gross; but, upon mentioning the matter to Gross the next day, the latter denied that he rocked his house, and claimed to know nothing about it. Appellant also testified that he informed Bert Flinchem of the rock throwing, and Flinchem gave him some powder and cartridges, and advised him to load his musket and shoot the wrongdoers, if again rocked. Whereupon appellant made slugs of some of the cartridge balls, and with them and the powder loaded his musket. According to all the evidence, on the day of the homicide, and shortly before its occurrence, appellant's wife sent their son, Algin Hoffman, a boy 12 years of age, to the house of Gross for the return of some coal oil which Mrs. Gross had borrowed of her. The boy failing to return to his own home, his mother about night went to Gross' house after him, but upon arriving there claimed to have discovered that Gross had the boy in his house and refused to let him go home. Thereupon Mrs. Hoffman became very angry, and got into an altercation of words with Gross and his wife, during which she said to Mrs. Gross that, if her husband did not release Algin and permit him to return with her, she (Mrs. Gross) would be a widow before morning. About that time appellant appeared on the scene, and at once demanded that Gross release his son and let him go home. This demand was ignored by Gross. At any rate, the boy did not leave his house. Mrs. Gross testified, however, that her husband did not detain appellant's son, but that the boy refused to leave the house, and gave as a reason therefor that he was afraid, if he returned home, his father would whip him. Finding that his demand for his son was not complied with, appellant claimed to have directed his wife to go home, and that he said to her he "would get him [meaning his son] if he had to remain until morning for that purpose." Mrs. Gross testified that appellant, after ordering his wife home, threatened to take the life of her husband, saying, if Gross did not release his son, he would shoot him; that, when this threat was made by appellant, her husband went to the house of David Flinchem, the father of Bert Flinchem, and there got a gun, with which, and in company with Bert Flinchem, he was returning to his own home when he was met in the road by appellant, who then fired the shot which killed both Gross and Flinchem.

Appellant admitted that while at Gross' home he had his gun with him, but said, when he heard the quarreling between his wife and Gross, he started toward them without the gun, but before getting to them rocks were thrown at him by persons whom he could not see; that one of the rocks struck and seriously wounded his leg, which caused him to return to his home and get the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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gun for his protection. His version of the killing was that, after directing his wife to go home, he again demanded of Gross the release of his son, at the same time telling him, if the boy had done anything that was wrong, he (appellant) would whip him, or, if Gross wished it, take him to Irvine next day for trial. This proposition doubtless had reference to the charge, later brought out by the evidence, that appellant's son had that day, or a short time previously, taken some corn (roasting ears) from the field of Gross. It was, however, claimed by appellant that Gross, instead of acceding to the proposition made him, threatened to kill appellant, and went at once to David Flinchem's and got a gun, with which he was returning to his own home in company with another person, one of them carrying a lantern, when they met appellant, who, seeing Gross had a gun pointed toward him, told them to stand back, that he was going to shoot; but, as they continued to advance, he fired the shot which resulted in their death. One of the younger Flinchems, standing a short distance from Gross and Bert Flinchem when they were killed, testified that Gross had his gun to his shoulder when appellant fired at him, and that he (the witness), upon seeing Gross and Bert Flinchem fall, shot twice at appellant with a pistol, and that the latter thereupon fled. Other witnesses testified, however, that Gross did not have the gun at his shoulder or pointed at appellant. When arrested by a deputy sheriff, appellant confessed he killed Gross, and that he intended to do so, believing it necessary to save his own life, for Gross was then pointing a gun at him and about to shoot, but that he (appellant) did not intend to shoot Bert Flinchem, or know that he was with Gross.

It is proper to say that Mrs. Gross was strongly corroborated as to what occurred before and at the time of the shooting, for at least three other witnesses introduced by the commonwealth heard appellant say to Gross, before the shooting, that if he did not let his son come home he would shoot or kill him, and no witness, other than appellant, heard Gross say he would not release the boy, or testified that he threatened appellant's life. However, the evidence all went to the jury, and we cannot say that it was not sufficient to justify the verdict returned. Although appellant entertained the belief, or it reasonably appeared to him, that his son was being wrongfully detained by Gross, that fact did not of itself excuse his taking of the life of Gross. If it should have been considered in mitigation of his punishment, who can say that it was not considered for that purpose by the jury, and that but for it the death penalty would have been the punishment inflicted, instead of imprisonment in the penitentiary for life?

It is insisted for appellant that numerous errors were committed by the trial court which entitled him to a reversal of the judgment complained of. One of the alleged errors consisted in the court's compelling appellant to undergo a separate trial in the face of his objection thereto. The order, which shows the ruling of the court referred to and appellant's objection to the same, also shows that the defendant, Ritta Hoffman, was "before the court, but not present." It does not appear from the record why appellant's wife was not present when the case was called for trial, or where she was. She may have been on bond and sick, in jail, or in the courthouse yard, or intentionally absenting herself, in the hope that it would obtain appellant a continuance of the case, even after the court had refused him a continuance upon his affidavit based on other grounds. The reasons for her absence from the court are not material.

The question of whether appellant should have had a separate trial at the instance of the commonwealth's attorney was a matter that rested in the discretion of the court. Section 237, Criminal Code of Practice, provides: "If two or more defendants be jointly indicted for a felony, any defendant is entitled to a separate trial." The language of this section is mandatory as to the right of a defendant, jointly indicted with another or others for a felony, to a separate trial. The court is without power to refuse it to him when demanded. The section is, however, silent as to the right of the commonwealth to separately try one of several defendants jointly indicted for a felony. But, in the absence of any statute denying the commonwealth the right to try separately one of several defendants so indicted, there is, in our opinion, no obstacle in the way of its exercise of such right. It must not be overlooked that at the common law the commonwealth, and not the defendant, in case of joint indictments, had the right of election, subject to the discretion of the court, whether to try defendants jointly or separately. The Code only changes the common law to the extent of also allowing a defendant, in cases of joint indictment for a felony, the right to demand and have a separate trial, but does not take away from the commonwealth the right to separately try each of several defendants, jointly indicted for a felony. In other words, the common law, in respect to this right of the commonwealth, has not been abrogated by the Code. It will further be observed that, although section 237, Cr. Code Prac., gives to a defendant, jointly indicted with another or others, the right of separate trial, it does not confer upon him the right to a joint trial, nor does such right exist at the common law. It follows, therefore, that a severance may be ordered at the instance of the commonwealth, as of the defendant; and, where justice so requires, the court may order separate trials of its own motion, without application therefor by either party. 19 Encyc.

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Pleading & Practice, 527; 12 Cyc. 506; Clark's Criminal Procedure, § 154; Barnes v. Commonwealth, 92 Va. 794, 23 S. E. 784; Gathings v. State, 44 Miss. 343; State v. Prater, 52 W. Va. 132, 43 S. E. 230; State v. Roberts, 50 W. Va. 422, 40 S. E. 484; State v. Thaden, 43 Minn. 325, 45 N. W. 614; Curran's Case, 7 Grat. (Va.) 619. If right in the above conclusion, it follows that the court did not err in ordering that appellant have a separate trial.

Appellant complains that the trial court also erred in admitting the testimony of Mrs. Gross and others regarding the statement made by appellant's wife to her, just before the killing, that if Gross did not release her son she (Mrs. Gross) would be a widow before morning. The statement in question was, it is claimed, incompetent; it being contended by counsel for appellant it was not proved that appellant was present or heard it. A careful reading of the evidence convinces us that this objection is not well taken. Mrs. Gross said the threat was made a few minutes before appellant intervened in the quarrel; but several other witnesses testified that it was made when or about the time appellant appeared on the scene, and the latter failed to deny that it was made in his presence or hearing. We therefore conclude that there was evidence which tended to show that the threat was made by his wife in his hearing. Consequently we cannot say its admission was improper.

We agree with appellant's counsel that the court should not have allowed Mrs. Ellen Flinchem to testify that two of her sons, who might otherwise have been supposed to have rocked appellant that night, left her house, a few minutes before the shooting, saying they were going to get some fodder for a mule. But her testimony as to what they said was not prejudicial to appellant, as she further stated that her sons passed through the yard a few minutes later with the fodder.

Appellant's complaint as to what was said by the commonwealth's attorney in argument is not well founded, for the record shows that the objection made by his counsel to the statement was sustained by the court, and we must take it for granted that the court at the time admonished the jury not to consider the excluded statement of the commonwealth's attorney.

The court did not err in excluding from the jury the testimony of Jesse Isaacs and Frank Hymer, contained in appellant's affidavit for a continuance. Statements attributed by the affidavit to three other absent witnesses were read as their depositions. But, as the affidavit did not set forth the alleged facts to which Isaacs and Hymer would testify, the mere belief of appellant that they would, if present, give beneficial testimony in his behalf, did not authorize the reading of what was said in the affidavit with respect to them.

The instructions are not open to the objections made to them by appellant's counsel. The instruction as to self-defense, as well as those relating to all other aspects of the case, are such as have repeatedly been approved by this court, and as a whole gave the jury all the law of the case.

Finding no cause for disagreeing with any material ruling of the trial court, the judgment is affirmed.

NUNN, C. J., dissents.

TAGGART'S EX'R et al. v. TAGGART et al.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. WILLS (§ 614*)—ESTATES DEVISED—LIFE ESTATES.

Testator gave household furniture and other personal property to his wife, and provided that after her death specific articles of furniture should go to a daughter, and gave the remainder of his estate to his wife and two children, to be divided equally, and provided that after the wife's death her share should be divided equally between the two children. *Held*, that the wife took only a life estate in the specific articles of furniture and in the third of the remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1394; Dec. Dig. § 614.*]

2. WILLS (§ 607*)—ESTATES TAIL—CONVERSION INTO FEE SIMPLE—"BODILY HEIRS."

Testator gave the remainder of his estate to his wife and two children, to be equally divided, and provided that on the death of either of the children leaving no bodily heirs the part should go to the remaining heir, or bodily heir or heirs, and declared that all heirs referred to were bodily heirs, unless bodily heirs became extinct. *Held* to create an estate tail in the children of two-thirds of the remainder, converted by Ky. St. 1909, § 2343 (Russell's St. § 2045), into a fee; the words "bodily heirs" not being used with reference to his children alone, but limited to his blood, no matter how far removed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1368–1371; Dec. Dig. § 607.*

For other definitions, see Words and Phrases, vol. 1, pp. 817, 818; vol. 8, p. 7591.]

3. WILLS (§ 607*)—ESTATES DEVISED—ESTATE IN FEE.

Testator gave the remainder of his estate to his wife and two children, to be divided equally, and provided that after the wife's death her share should be divided equally between the two children, or their bodily heirs. *Held*, that the children took the fee in the third devised to the wife for life, and any attempt by testator to entail it would be void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1368–1371; Dec. Dig. § 607.*]

Appeal from Circuit Court, Shelby County.

"Not to be officially reported."

Action between James Taggart's executor and others and Catharine A. Taggart and others for the construction of the will of James Taggart, deceased. From a judgment construing the will, the former appeal. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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J. C. Beckham & Son, for appellants. E. B. Beard, guardian ad litem, for appellees Pauline, Elizabeth, and Katherine Winlock.

NUNN, C. J. This appeal involves the construction of the will of James Taggart. That portion of the will necessary to be construed is as follows: "I give to my beloved wife, Susan E. Taggart, all of my household and kitchen furniture and furnishings, also a good suitable horse or mare and a good and suitable buggy. After the death of my wife the set of furniture consisting of one bed stead, one wardrobe, one dresser, one washstand and four chairs, all presented to me by my cousin Anna L. Liggett, shall go to my daughter, Lillie P. Winlock. After my just debts, if any, are paid, I give the remainder of my property, of whatever it may consist to my wife, Susan E. Taggart, my daughter Lillie P. Winlock, and my son, Wm. F. Taggart, to be divided equally between the three, share and share alike, and after my wife's death her share shall be divided equally between our two children above named, or their bodily heirs, all heirs herein referred to, are bodily heirs, unless bodily heirs have become extinct, then consider heirs at law. I require that my property shall not be held responsible for or liable for the debts or obligations of my heirs or others in case of death of either of my children above named, and leaving no bodily heirs, their part shall go to the remaining heir or bodily heir, or heirs. This will is intended to apply to any inheritance that may possibly come to my estate after my death, as well as present possessions."

On a trial of the case in the lower court the following judgment was rendered: "This cause being submitted on the pleadings and exhibits, and the answer of the guardian ad litem and of Susan E. Taggart, and the court being advised, it is now considered and adjudged that the defendant Susan E. Taggart have until the further orders of the court herein to elect whether she will accept the provisions of the will of James Taggart, her deceased husband, and take the estate therein devised and bequeathed to her, or whether she will take under the laws of the state of Kentucky. It is further adjudged that under said will said widow is entitled to and is the owner absolutely of all the testator's household and kitchen furniture, and also a good suitable horse or mare and buggy, except the one bedstead, one wardrobe and dresser, one washstand, and four chairs, all presented to testator by Anna L. Liggett, which furniture so presented shall go at the death of said Susan E. Taggart to testator's daughter, Lillie P. Winlock. Testator's gold watch is adjudged to testator's son, Wm. F. Taggart, absolutely. The remainder of testator's estate, after the payment of his debts and costs and expenses of administration, is adjudged to pass as follows, viz.: One-third thereof to his widow, the defendant Susan E. Taggart, during her natural life, and at her death equally to testator's two children, Wm. F. Taggart and Lillie P. Winlock. The remaining two-thirds of testator's estate is adjudged to pass under said will to said two children of testator for their natural lives, and at the death of either of said children to his or her child or children, and in the event of the death of either of said two children without leaving a child or children, the share of the one so dying shall go to the surviving child or his or her issue. Neither the widow of testator nor either of his said children take absolutely any part of his estate, except to the extent above adjudged."

It does not appear in the record whether Susan E. Taggart, the widow of testator, elected to take under the will or under the statute. The case was tried in the lower court before the 12 months in which she had to elect expired. We agree with the lower court in its construction of the will with reference to the interest devised to the widow; that is, she took only a life estate in the articles of personal property specifically named, and in one-third of the estate after the payment of the testator's debts. It appears that the lower court construed the will as giving Mrs. Winlock and Wm. F. Taggart, the only children of the testator, a life estate in the two-thirds of the estate devised to them and a fee in remainder in the one-third that was devised to their mother for life. In our opinion, the court was clearly in error in limiting their interest in a life estate in the two-thirds which they took at their father's death. By the will, the testator gave his estate to his wife, daughter, and son, to be divided equally among the three, and then said that after his wife's death her share would be divided equally between the two children or their bodily heirs. There is nothing in the will suggesting any limitation upon the two-thirds the daughter and son took, and under the well-known rules of construction they took a fee therein. He gave them the fee, but without words of inheritance. Section 2342, Ky. St. (Russell's St. § 2044), is as follows: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of."

But it is contended that the following words in the will, to wit: "In case of death of either of my children above named, and leaving no bodily heirs, their part shall go to the remaining heir or bodily heir, or heirs"—expressly or by necessary inference indicate that it was the intention of the testator to give his children only a life estate in the two-thirds devised to them. This language may be construed as referring to the death of one of his children in the lifetime of the testator. But, waiving this ques-

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tion, the words referred to, in our opinion, create an estate tail, which is prohibited by section 2343, Ky. St. (Russell's St. § 2045), which is as follows: "All estates heretofore or hereafter created, which, in former times, would have been deemed estates entailed, shall henceforth be held to be estates in fee simple," etc. A devise to one and the heirs of his body or bodily heirs would have, at common law, created an estate tail, which by this statute is converted into a fee. To show that he did not use the words "bodily heirs" with reference to his children alone, the testator states in his will what he meant by these words as follows: "All heirs herein referred to are bodily heirs, unless bodily heirs have become extinct"—showing clearly that he used the words advisedly, with the intention to limit and confine the estate to his blood, it mattered not how far removed, which is clearly prohibited by the statute. The authorities upon this point are so numerous that we deem it unnecessary to refer to any. The statute is sufficient.

The lower court was correct in determining that Mrs. Winlock and her brother took the fee in the one-third devised to their mother for life. The testator's attempt to entail it was void.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

JOHNSON v. SCOTT, Sheriff, et al.

(Court of Appeals of Kentucky. Oct. 12, 1909.)

1. EXECUTION (§ 436*)—WRITS—AMENDMENT.
Where a capias issued by the clerk of the circuit court or his deputy has been received by the sheriff or his deputy, neither the clerk nor his deputy may, without an order of court, correct any mistake as to the amount thereof, nor direct its return to the clerk's office.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1241; Dec. Dig. § 436.*]

2. EXECUTION (§ 97*)—WRITS—AMENDMENT.
In the absence of proof, it is presumed that the clerk of the circuit court issued an execution under the direction of the person who had control of it; and when once issued, and delivered to the officer to whom it is directed, the clerk loses control of it, and any mistake in its issue or terms may be corrected by consent of plaintiff in execution, or by order of the court in which the judgment was rendered.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 192; Dec. Dig. § 97.*]

3. SHERIFFS AND CONSTABLES (§ 98*)—EXECUTION OF WRITS.
A sheriff or other officer, to whom a writ of execution is directed and delivered, must execute it according to its terms; and, where the process is issued on a judgment which is not void, the officer executing it is protected by it.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–157; Dec. Dig. § 98.*]

4. FALSE IMPRISONMENT (§ 7*)—LIABILITY.
An action for false imprisonment does not lie for an arrest or imprisonment in due course or regular proceedings of a court having jurisdiction of the offense; and, where the order or process is valid, the person wrongfully detained must seek his remedy in another form of action.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 8; Dec. Dig. § 7.*]

5. EXECUTION (§ 440*)—AGAINST PERSON—ARREST.
The officer, in executing a precept commanding him to arrest an individual, may select such time of day as he thinks most expedient, and may make use of so much force as is necessary to accomplish the object.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1247; Dec. Dig. § 440.*]

6. EXECUTION (§ 441*)—EXECUTION AGAINST THE PERSON—CUSTODY OF DEBTOR.
The officer, to whom a writ for the arrest of a judgment debtor is directed, must, after arresting the debtor, retain him in custody until the judgment has been satisfied or the debtor has been discharged by due process of law.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1248–1253; Dec. Dig. § 441.*]

7. FALSE IMPRISONMENT (§ 7*)—EXECUTION OF PROCESS—LIABILITY.
An action for trespass lies where a person has been arrested on a process irregularly issued and void; but a process merely voidable is, until set aside, a justification for an arrest made thereunder.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 29–42; Dec. Dig. § 7.*]

8. COSTS (§ 321*)—CRIMINAL PROSECUTION—COLLECTION—EXECUTION AGAINST PERSON—PROCESS—SUFFICIENCY.
A capias pro fine for costs of a successful criminal prosecution, which erroneously includes therein the costs of accused, instead of only the costs of the commonwealth, justifies the arrest and detention of accused until the error is corrected by the court rendering the judgment or the capias is satisfied by its payment.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 321.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by John M. Johnson against Jas. A. Scott, as sheriff, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Roscoe Vanover, for appellant. P. B. Stratton, for appellees.

SETTLE, J. This is an appeal from a judgment of the Pike circuit court, entered upon a verdict in favor of appellees, returned by the jury in obedience to a peremptory instruction given by the court following the introduction of appellant's evidence. The action was brought by appellant against appellees to recover of them $1,000 damages for his alleged false arrest and imprisonment by them.

The facts, as presented by the pleadings and proof, were, in substance, that appellant was indicted, tried, and fined $200 in the Pike circuit court for an assault and battery committed by him upon a citizen of Pike county. Appellant paid the fine of $200, but did not pay the cost of the prosecution recovered by the commonwealth, amounting

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to $121.50, nor his own, amounting to $44. Following appellant's payment of the fine, the clerk of the Pike circuit court, by his deputy, Kline, issued against appellant a capias pro fine for the costs, but erroneously included therein, with the cost of $121.50 due the commonwealth, that of appellant for $44, making the full amount of the capias $165.50, instead of $121.50, the amount for which it should have been issued. The capias was properly directed to the appellee, Jas. A. Scott, sheriff of Pike county, and delivered by the clerk, or his deputy, Kline, to the appellee, Wm. Newsom, one of his deputies. After receiving the capias, Newsom executed it by arresting appellant and taking him in custody. The arrest was made at the court of a justice of the peace to which the deputy sheriff had gone with the capias in his possession. On the same day, and shortly after the arrest of appellant, his father, W. B. Johnson, appeared at the justice's court with the following letter from the deputy clerk, Kline, to the deputy sheriff: "Mr. Newsom: We made a mistake in capias, Commonwealth v. Johnnie Johnson, W. B.'s son, of $44. So return same by order A. D. Kline, D. C. Yours respectfully, J. B. Polly, Clerk, by A. D. Kline, D. C." Upon or soon after the delivery of Kline's letter to the deputy sheriff, W. B. Johnson offered to pay that officer what he supposed was the commonwealth's cost embraced in the capias; but the amount tendered was not accepted by the deputy sheriff, nor did he, as requested by Kline, return to the circuit clerk's office the capias, but instead retained custody of the appellant, kept him with him that night, and on the following morning delivered him, with the capias and the return upon it, to the appellee, J. A. Scott, sheriff of the county, who kept him under arrest two or three days longer, but did not incarcerate him in jail, or restrain him of his liberty, otherwise than by requiring him not to leave the county seat without his (the sheriff's) permission. Finally appellant or his father adjusted with the proper officer the amount of cost due the commonwealth, and appellant was thereupon released from arrest by the sheriff and at once returned to his home.

The above facts appearing wholly from appellant's evidence and being undisputed, the trial court came to the conclusion that they did not entitle him to recover; hence the jury were given a peremptory instruction to find for appellees. We concur in this conclusion. After the capias issued by the clerk of the Pike circuit court, or his deputy, was received by the sheriff, or his deputy, neither the clerk nor deputy clerk had authority to correct the mistake as to the amount thereof without an order of the court, or to direct its return to the clerk's office. The clerk of a court has no authority to issue executions, except upon a judgment which remains unsatisfied. In the absence of proof, it will be presumed that the clerk issued an execution under the direction of a person who had control of it; but, when once issued and delivered to the officer to whom it is directed, the clerk no longer has control of it. Any mistake or error in its issual or terms may be corrected by consent of the plaintiff in the execution, or by order of the court in which the judgment was rendered.

On the other hand, the sheriff, or other officer, to whom the writ is directed and delivered, is charged with the duty of executing it, and must do so according to its terms. If the writ be, as in this case, a capias for a fine or costs, it is no less the duty of the officer receiving it to execute it. If the process is valid—that is, issued upon a judgment which is not void—the officer executing it will be protected by it. In other words, the general rule is that "an action for false imprisonment does not lie for an arrest or imprisonment in due course or regular proceedings of a court having jurisdiction of the offense. If the order or process be valid, the person wrongfully detained must seek his remedy in some other form of action. It is a proper commandment of judicial authority which justifies. The form in which the sanctioning power of the law is manifested is not material. A legally correct and sufficient order of a superior having adequate authority, or a judgment or process properly sued out and issued by proper authority, so long as it remains in legal force and effect, is a full justification. * * * Valid judicial authority existing at the time of the detention is a full justification for proper conduct thereunder to the officer to whom it is addressed, in the absence of actionable wrong in its procurement on his part, even if he acts maliciously. * * *" 19 Cyc. pp. 339, 340. The above rule has been recognized by this court. Clay and Curley v. Caperton, 1 T. B. Mon. 10, 15 Am. Dec. 77.

It is also a well-known rule that, in executing a precept, where he is commanded to arrest the body of an individual, the officer has the right to select such particular time of day as he thinks most expedient under the circumstances, and is authorized to make use of so much force as is necessary to accomplish the object. It is likewise the duty of the officer to whom the writ is addressed, after arresting the judgment debtor, to incarcerate him and retain him in custody until the judgment has been satisfied or he has been discharged by due process of law. While an action for trespass will lie in cases where a person has been arrested on a process irregularly issued, and therefore void, if, however, the process is merely voidable, it is, until set aside, a justification for an arrest made thereunder. 17 Cyc. pp. 1512, 1513, 1571. It is patent, therefore, that appellant's arrest and detention were justified by the capias held by the deputy sheriff, notwithstanding the mistake as to the amount

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thereof. and the fact that the sheriff and his deputy allowed him, though under restraint, to go at large, instead of incarcerating him in jail. Under the circumstances it was their duty to detain him until the error in the capias was corrected by the court rendering the judgment under which it was issued, or the capias was satisfied by its payment.

If the deputy sheriff had, in obedience to the written direction of the deputy clerk, returned the capias to the clerk's office and released appellant from arrest, or had accepted in satisfaction of the capias the amount offered by appellant's father, and it had later developed there was no mistake in the amount of the capias, neither the sheriff nor his deputy could have excused, on those grounds, or either of them, the failure to collect the full amount of the capias. Under the facts presented, appellant had no right of action against the sheriff or his deputy. He was not, however, without a remedy, as he had the right to move in the proper court for a correction of the mistake made in the amount of the capias, or enjoin its execution.

For the reasons indicated, the judgment is affirmed.

NUNN, C. J., dissents.

ROWE et al. v. CHARLES.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACTS—TRANSFER OF TITLE—PAYMENT OF PRICE.

Under a contract for the sale of timber, the title did not pass immediately, where it was agreed between the parties that the contract should be void in case payment was not made by a certain date.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 9, 10; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACT.

Evidence *held* to sustain a finding that the parties to a timber contract agreed that it should be void unless payment was made by the purchasers by a certain date, and that such provision was by mistake omitted from the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. § 3.*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action between Green Charles and Jackson Rowe and others. Judgment for said Charles, and said Rowe and others appeal. Affirmed.

York & Johnson and F. W. Stowers, for appellants. Butler & Moore, J. M. Roberson, and Roscoe Vanover, for appellee.

CLAY, C. Colbert Hylton formerly lived on Feds creek, in Pike county, Ky. He afterwards removed to Knott county. He owned a tract of land in Pike county, and made a parol sale of all the ash, poplar, and cucumber saw log trees standing on his tract, which were 24 inches and up in diameter, at the price of $2 per tree. Appellants paid him $65 on the purchase price. Afterwards J. H. Thornsbury and John S. Jones purchased from Hylton, by title bond, the tract of land upon which the timber was standing. Thornsbury and Jones made a cash payment to Hylton of $250. The remainder of the purchase money was to be paid on April 1, 1901. On February 14, 1901, Thornsbury and Jones, by written contract, sold to appellants the same timber at the same price. The contract contains the following: "* * * Do agree to sell all of said timber on the Hylton lands, known as 'the Hen Roost,' or thereabout, all the poplar, ash, and cucumber from 24 inches up. Said Epperson Rowe and Jackson Rowe is to give $2 per tree for said timber when said timber is measured, or anyway by the 21st day of March, 1901." Appellants failed to pay for the timber by March 21, 1901. Thereafter Thornsbury and Jones sold all the timber on the land in question, 18 inches and up in diameter, to appellee, Green Charles. The price for the timber, excluding that sold to appellants, was $685.

This action involves the title to the timber 24 inches and up in diameter. Appellants claim to be the owners thereof under and by virtue of their contract with Hylton, and their written contract with Thornsbury and Jones; while appellee, Green Charles, asserts title under and by virtue of the written contract made to him by Thornsbury and Jones after March 21, 1901. The trial court rendered judgment in favor of appellee, and Jackson Rowe and W. A. Rowe appeal.

Appellee contended in the court below that the real contract between Thornsbury and Jones and appellants was that, if appellants failed to pay for the timber by March 21, 1901, the contract was null and void; that by mistake this provision was omitted from the contract. Upon whether or not there was such a mistake depends the whole controversy between appellants and appellee.

The testimony for appellants is to the effect that Thornsbury and Jones simply assumed the Hylton contract; that the timber in question was immediately measured and marked with the letter "R"; that the written contract expressed the whole contract between the parties; that no mention was made of the fact that the contract was to be null and void in the event the trees were not paid for by March 21, 1901. Appellants' failure to pay for the timber by March 21, 1901, was due solely to the fact that Thornsbury and Jones had not received the deed to the land in question, and appellants were unwilling to pay for the timber and take the chance of having to pay for it twice. Jackson Rowe, about the time the purchase money was due, made arrangements for the money. The party with whom the arrangement was made went to Thornsbury's house a few days

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after March 21, 1901, for the purpose of paying for the timber. Thornsbury was not there, and the tender was made to his wife. A day or two after that Thornsbury was seen passing along the road, and an offer was then made to pay him for the timber. When Thornsbury and Jones returned from Knott county with the deed to the land, they filed suit in the Pike circuit court for the purpose of enjoining appellants from cutting the timber. In that suit no mention was made of any mistake in the contract.

The testimony for appellee is as follows: Both Thornsbury and Jones, who sold the timber to appellants, swear that their purpose in making the sale was to get the money in time to pay for the land before April 1, 1901, when the balance of the purchase money was to be paid and the deed made. This was the only way they had to get the money. Jackson Rowe came to them, and had in his possession two rolls of bills. He took a roll of bills out of one pocket, and said, if that was not enough to pay for the land, the other roll, which he then removed from his other pocket, was enough. Upon the faith of the fact that Rowe had the money and agreed to make the payment by March 21, 1901, they agreed to sell the land, with the distinct understanding that unless payment was made by that date the contract was to be null and void. Moreover, Jackson Rowe, about the time the money was to become due, went to several parties in an effort to obtain the money. He stated to them he would lose a big deal unless he got the money at that time.

It is the contention of appellants that the title to the timber in question passed immediately upon the execution of the written contract. That would be true if there were no mistake in the contract; but if it was agreed between the parties that the contract was to be null and void in case payment was not made by March 21, 1901, and this provision was omitted from the contract by mistake, certainly then the title to the timber did not pass to appellants.

It is also insisted by appellants that Thornsbury and Jones sold the remainder of the timber for not quite enough to pay for the land, and this circumstance tends to rebut their statement that they were relying upon the payment by appellants of the purchase price in order to pay for the land. As the sale to Green Charles was made long after the contract in question was entered into, we are unable to see how the fact that he purchased the remainder at a price sufficient to pay for the land has any bearing upon the purpose or intention of the parties at the time the contract was made. Thornsbury and Jones at that time were relying upon their contract with appellants—not upon any contract they might subsequently make. In other words, they expected to pay for the land by a sale of the timber. The sale that they made for that purpose was to appellants. Any sale that they thereafter made to another party has no bearing upon the question at issue.

When we consider the fact that Thornsbury and Jones were to pay for the land by April 1, 1901, that they had no money with which to make the payment, that they were selling the timber for the express purpose of obtaining the money, that appellants, for the purpose of inducing the sale, exhibited a large sum of money, and said that they were ready to pay for the timber, that one of the appellants stated to several parties that unless the money was obtained he would lose a good deal, that Thornsbury and Jones swear that the provision that the contract was to be null and void was omitted from the contract by mistake, and, furthermore, that the language of the contract rather points to the same conclusion, it must be admitted that there is considerable evidence tending to sustain the finding of the chancellor. After a careful consideration of the whole case, we are unable to say that he erred in his conclusion.

Judgment affirmed.

HATTON v. ROGERS.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. COURTS (§ 135*) — JURISDICTION — CIRCUIT COURT.

Under Ky. St. 1909, § 966 (Russell's St. § 2813), providing that the circuit court shall have jurisdiction in all cases where title to land is in question, or in which it is sought to subject land by provisional remedy, though a note sued on was for less than $50, that an attachment was obtained and levied on the land gave the court jurisdiction, though otherwise, under the express provisions of Ky. St. 1909, § 1086 (Russell's St. § 3100), the justice's or quarterly court would have had exclusive jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 391; Dec. Dig. § 135.*]

2. VENUE (§ 30*)—DOMICILE OF PARTY.

Under Civ. Code Prac. § 79, providing that there shall be no judgment against defendant unless he be summoned in a county wherein the action is brought, or unless he reside in such county when the action is brought and be summoned elsewhere in the state, etc., service of summons on defendant in P. county did not authorize a judgment against him in E. county, where he did not reside in the latter county when the action was brought there.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 44; Dec. Dig. § 30.*]

3. VENUE (§ 5*) — "LIEN, OR OTHER INCUMBRANCE OR CHARGE."

Under Civ. Code Prac. § 62, subd. 3, requiring an action for the sale of real property under a mortgage lien, or other incumbrance or charge, etc., to be brought in the county in which the subject of the action, or some part thereof, is situated, the words "lien, or other incumbrance or charge," do not embrace an attachment lien, but refer to liens or charges created by contract or judgment.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 6; Dec. Dig. § 5.*]

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Appeal from Circuit Court, Estill County.
"To be officially reported."

Action by W. N. Rogers against Ben H. Hatton. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

J. B. White, for appellant. R. W. Smith, for appellee.

CARROLL, J. Rogers sued Hatton in the Estill circuit court upon a note for less than $50. Some two months afterwards he filed an affidavit and obtained an attachment against the property of Hatton, which was levied upon the land owned by him. Afterwards a judgment by default was rendered for the amount of the debt, the attachment sustained, and an order entered directing a sale of the attached land. Thereupon Hatton came into court, and moved the court to vacate the judgment as void, upon the ground that he was not before the court when it was rendered.

There are several errors in the record before us, among which we may mention the fact that no attachment bond was executed; but the only one that we need particularly notice is the question whether or not Hatton was before the court. If he was not, the judgment was void, and his motion to vacate it should have been sustained. Although the note sued on was for less than $50, the fact that an attachment was obtained and levied upon land gave the court jurisdiction of the subject-matter of the action, as provided in section 966 of the Kentucky Statutes (Russell's St. § 2813), which reads as follows: "The circuit court shall be a court of record, and shall have original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal, and shall have jurisdiction in all cases where the title to land is in question, or in which it is sought to enforce a lien upon, or to subject land by provisional remedy to the payment of debt." Except for the fact that jurisdiction was conferred upon the circuit court by virtue of the attachment, it would not have jurisdiction. The note was not secured by a lien on the land, and the justice's or quarterly court had exclusive jurisdiction, under section 1086 of the Kentucky Statutes (Russell's St. § 3100), as the amount was less than $50.

Hatton was the only party defendant to the action, and the summons was executed upon him in Powell county. The action was a transitory one, and section 79 of the Civil Code of Practice provides that: "In an action brought pursuant to section 78, against a single defendant, there shall be no judgment against him, unless he be summoned in the county wherein the action is brought, or unless he reside in such county when the action is brought and be summoned elsewhere in this state, or unless he make defense to the action before objecting to the jurisdiction of the court." There is nothing in the record to show that Hatton resided in Estill county when the action was brought, and so it is clear that the service of summons upon him in Powell county did not authorize a judgment against him in Estill county.

This was not an action, within the meaning of section 62 of the Civil Code of Practice, for the recovery or subjection of real property. This section reads: "Actions must be brought in the county in which the subject of the action, or some part thereof, is situated: (1) For the recovery of real property, or an estate or interest therein; (2) for the partition of real property, except as provided in section 66; (3) for the sale of real property under title 10, chapter 14, or under a mortgage, lien, or other incumbrance or charge, except for debts of a decedent; (4) for an injury to real property." Subdivision 3 is the only one that can have any bearing upon this question. In our opinion the words "lien, or other incumbrance or charge," in this subdivision, do not embrace a lien created by an attachment in an action like this, but refer to liens, incumbrances, or charges created by contract or the judgment of a court. In our opinion the judgment is void, and the motion to vacate should have been sustained.

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion; but on the return of the case Hatton, as often ruled, will be before the court.

NEW DOMAIN OIL & GAS CO. v. GAFFNEY OIL CO.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. ADVERSE POSSESSION (§ 70*)—TITLE ACQUIRED.

Though a parol sale of land is void under the statute of frauds, where the purchaser is put into possession and continues in actual adverse possession for 15 years, he acquires title by operation of the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394, 395, 399; Dec. Dig. § 70.*]

2. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION.

The intent of one entering on land in the exercise of ownership is an element in determining the legal effect of his act, for an entry within a boundary is a reduction of the whole boundary to possession, provided such is the intention, as actual possession embraces in meaning the occupancy of a part of a well-defined boundary, intending thereby to reduce the whole to possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 551; Dec. Dig. § 100.*]

3. ADVERSE POSSESSION (§ 100*)—ACQUISITION OF TITLE—EXTENT OF POSSESSION.

Where one enters under a deed, not from the true owner, and claims adversely, his deed

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is evidence of the extent and character of the possession, though not of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547, 560, 562; Dec. Dig. § 100.*]

4. ADVERSE POSSESSION (§§ 100, 103*)—ACQUISITION OF TITLE—EXTENT OF POSSESSION.

One entering without a deed on a boundary plainly marked, with the intention of reducing the whole to his possession, claiming all, and using it as he wills, reduces the whole to his actual possession, unless some part thereof is in the actual possession of another, or unless there is a conflict in the boundary with another which is older, or superior, and the owner of the latter has entered on the boundary.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547–574, 590–594; Dec. Dig. §§ 100, 103.*]

5. ADVERSE POSSESSION (§ 100*)—ACQUISITION OF TITLE.

The purchaser, under a parol contract, of 25 acres of a larger tract, was put into possession by the vendor, who was the owner, by parol purchase, of an additional 50 acres adjoining from a third person, which was also included in the sale to the purchaser. The purchaser was placed in possession of the whole boundary, which was marked, and he took up his residence on the 50-acre tract, claiming to the extent of the boundaries of the whole 75 acres, and continued in such possession for over 15 years. *Held*, that the purchaser acquired title to the whole 75 acres by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547–574; Dec. Dig. § 100.*]

6. ADVERSE POSSESSION (§ 63*)—ACQUISITION OF TITLE.

Where a grantee under an executory contract for the sale of land looks to his grantor for title, he cannot, as a general rule, claim that his possession was so adverse to his grantor as to defeat the latter's lien for the unpaid price; but, where the grantee has paid for the land, his possession is hostile to any claim of superior title by the grantor, and, though a deed is not executed, the grantee may use his possession, after the statutory period, to defeat the claim of his grantor, or any one else, to the right of possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333–357; Dec. Dig. § 63.*]

7. ADVERSE POSSESSION (§ 63*)—NATURE OF CLAIMS.

Where possession of real estate is hostile to any claim of right by a former owner, it sets the statute of limitation running, though the one in possession looks to the former owner for a conveyance.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333–357; Dec. Dig. § 63.*]

8. ESTOPPEL (§ 56*)—EQUITABLE ESTOPPEL—NATURE.

Estoppel operates only to protect the innocent, who are misled to change their condition in reliance on an appearance.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

9. ESTOPPEL (§ 94*)—TITLE BY ESTOPPEL.

A grantee, who knew that a third person was the owner of the land under a parol purchase, followed by actual adverse possession for 15 years, took nothing under the deed of a former owner, because the former owner had no title, and the third person was not estopped to deny that fact.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245–247, 276–284; Dec. Dig. § 94.*]

10. ESTOPPEL (§ 94*)—TITLE BY ESTOPPEL.

Where a lessee, taking an oil lease, had actual knowledge of the fact that his lessor did not own the land, but that a third person owned it under a parol purchase, followed by adverse possession for more than 15 years, the third person was not estopped to deny the validity of the lease.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245–247, 276–284; Dec. Dig. § 94.*]

11. MINES AND MINERALS (§ 77*)—OIL LEASE—FORFEITURE.

The right to declare an oil lease forfeited is a personal privilege of the lessor, and when he elects to waive it no one else may take advantage of it.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 77.*]

Appeal from Circuit Court, Wayne County.

"To be officially reported."

Action by the Gaffney Oil Company against the New Domain Oil & Gas Company and others. From a judgment for plaintiff, the New Domain Oil & Gas Company appeals. Affirmed.

O. H. Waddle & Son and Harrison & Harrison, for appellant. Stone & Wallace, for appellee.

O'REAR, J. Wm. Dobbs was the patentee of a tract of 63 acres of land in Wayne county in 1359. Some 50 years ago he sold 25 acres of this land to one Tom Smith, setting it apart by marked boundary. Smith sold the same tract to Davenport, and Davenport sold it back to Dobbs. Dobbs subsequently resold to Davenport, putting him in possession of it, and Davenport sold it to Henderson Foust some 30-odd years ago, putting Foust in possession. All these sales were by parol. Davenport was also the owner by parol purchase of an adjoining tract of 50 acres, which he had bought from Irwin Miller. This latter tract was included in the sale to Henderson Foust, who was placed in possession of the whole boundary, which was marked. He took up his residence on the 50-acre tract, claiming to the extent of the exterior lines of the whole 75 acres. In 1901 Henderson Foust executed an oil lease on his lands to one W. R. Cress. The written lease describes the property embraced as follows: "Being the property whereon the said Henderson Foust now resides, and was conveyed to him by Irwin Miller and bounded substantially as follows: On the north by the lands of Hence Foster; on the east by the lands of William Dobbs; on the south by the lands of Thomas Foster and James Burnett; on the west by the lands of William Bell and Noah Ball—containing 75 acres more or less." The parties regarded that the "deed lay in William Dobbs," as they expressed it, yet for more than 25 years Henderson Foust claimed the land as his own, exclusive of Dobbs and all others, and lived within the common boundary embracing the 25 acres now in question.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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In 1905 Henderson Foust caused William Dobbs to execute a deed to the 25-acre parcel to Bryant Foust and J. W. Foust, sons of Henderson. This was done by Dobbs, not upon any idea or claim that he owned the land, but to comply with his previous parol contract of sale; he admitting all the while that Henderson Foust owned the land, had paid for it, and was in the actual possession of it. In April, 1907, Bryant Foust and J. W. Foust executed a mineral lease upon this 25 acres to the appellant. The Cress lease (which had in the meantime been assigned to appellee) contained the stipulation that the lessee and his assigns should within one year from its date, July 30, 1901, begin the drilling of an oil well on the leased premises (the 75 acres), or in default thereof pay the lessor $7.50 a year, and, if oil was found in paying quantities, set over to the lessor one-tenth thereof. It was further stipulated in the lease that the payment of the annual rentals might be by deposit to the credit of the lessor in the Bank of Monticello. The lessees from Henderson did not begin drilling within a year from July 30, 1901. But they paid the rental of $7.50 each year as it became due until 1907. On July 30, 1907, appellee's manager, who was charged with the duty of paying the rental, was ill. He was on the opposite side of the river from the lessor and from Monticello. The river was swollen with sudden floods, so that he could not get across. But he did get across on the following day, when he deposited the $7.50 rent in the Bank of Monticello to the credit of the lessor, Henderson Foust. Learning on the following day that appellant was asserting claim to the property, he sent for Henderson Foust, who demanded $2.50 additional because of delay of one day in paying the rent, which appellees paid to him. Appellees did not then know that Henderson Foust had caused the deed to be made by Dobbs to Bryant and J. W. Foust, although the latter knew that their father had in 1901 leased the land to appellees' assignor, and that appellees had been paying him rent therefor regularly. Afterwards, but over the protest of appellees, appellant began drilling on the 25-acre tract for oil, and later brought in a paying well.

This suit was brought by appellees against appellant and J. W. and Bryant Foust to restrain them from taking the oil from the well, and to restrain them from asserting claim or title to the oil and mineral in the 25 acres. The judgment was for the plaintiffs. While a parol sale of land is void, under the statutes of frauds and perjuries, yet if the purchaser is put in possession of the land, and continues in the actual adverse possession of it for 15 years, he will have title to it, not by virtue of his purchase, but by operation of the statutes of limitations. Pope v. Brassfield, 110 Ky. 134, 61 S. W. 5, 22 Ky. Law Rep. 1613; Ogden v. Walker's Heirs, 36 Ky. 420; Chambers v. Pleak, 36 Ky. 426, 32 Am. Dec. 78; Morton v. Lawson, 40 Ky. 45; Turner v. Davis, 40 Ky. 151; Farrow v. Edmundson, 43 Ky. 605, 41 Am. Dec. 250. This much is admitted by appellant; but it is insisted that Henderson Foust had not either the actual or adverse possession of the 25-acre tract.

Where one enters upon land in the exercise of ownership, his intention is an essential element, as is his conduct, in determining the legal effect of his act. Early in the history of this state, and from the nature of the situation, those who entered upon their pre-emptions were not able to reduce at once the whole to an inclosed possession. There arose from that fact, and the necessities created by the situation in the country, the principle that an entry within the boundary was a reduction of the whole boundary to possession, if such were the entrant's intention. The boundaries were most frequently indicated by marked or blazed trees as monuments, and served to give notice to the world that the occupant's possession was coextensive with the boundary in which he resided, or upon which he made a physical inclosure. Any one concerned in knowing the extent or nature of the occupant's possession could, by following up the information gained from the latter's actual residence, learn where the exterior lines of the boundary so reduced to possession lay, as well as whether the possession was adverse to every other claimant. Therefore the law deemed that such adverse possession served to oust the true owner's constructive possession, and gave to the latter an action of ejectment. The principle, while denominated actual possession, has been differentiated from that actual possession which is the physical occupancy of a house, or the inclosure of a lot by a fence, by sometimes calling it "constructive actual possession." However, the legal definition of actual possession, as applied to lands, has now come to be recognized as embracing the character of possession outlined above. So, where one has a deed, but not from the true title holder, yet enters under it, claiming adversely, his deed is admitted as evidence, not of title, but of extent of possession, as well as character of possession. But a deed is not essential to enable one to enter upon a boundary of land and to hold it adversely. If the entrant enters upon a boundary, plainly marked, with the intention of reducing the whole to his possession, claiming it all, and using it as he wills, he by that act reduces the whole boundary to his actual possession, unless some part of the boundary be in the actual possession of another, or unless there is a conflict in the boundary with another which is older and superior, and the owner of the latter has entered upon his boundary.

Without following the exceptions into certain qualifying distinctions not necessary to be noticed in this opinion, it is affirmed that actual possession is now understood to em-

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brace in meaning the occupancy of a part of a well-defined, or marked, boundary of land, intending thereby to reduce the whole boundary to possession. By this test Henderson Foust had an actual possession of the whole 75 acres constituting his boundary for more than 15 years before he leased to appellee's assignor. Nor is it material that his common boundary was made up of two smaller parcels originally owned by different parties. When he bought he bargained for the common boundary, without reference to its artificial subdivision, and when he entered it was upon the entire boundary as one body of land. This was a reduction of the whole to his actual possession. The fact that he took a deed to a part of it from Miller did not affect the fact of his possession or the nature of his claim of the whole. He claimed it all adversely before that deed was executed, and did not change his possession or alter his claim after the deed.

But it is said that Henderson Foust's possession was not hostile to Dobbs' title; that, as Foust admitted that he was looking to Dobbs for a conveyance, his claim was amicable to Dobbs' title. Where a grantee under an executory contract for the sale of land looks to his grantor for title, it is generally held that he cannot at the same time claim that his possession was so adverse to his grantor as to defeat the latter's lien for unpaid purchase money. But where the vendee has paid for the land, and owes nothing to his vendor, his possession is hostile to any claim of superior title or right by the latter, and although a deed is not executed, the vendee could use his possession, after the statutory period, to defeat the claim of his vendor or any one else to right of possession because the paper title was vested in them. If the possession is hostile to any claim of right by the former owner, it is adverse to it, and sets the statute running, although the person in possession may be looking to the former owner for conveyance. Commonwealth v. Gibson, 85 Ky. 666, 4 S. W. 453, 9 Ky. Law Rep. 205; Thomson v. Thomson, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513; Owsley v. Owsley, 117 Ky. 47, 77 S. W. 397, 25 Ky. Law Rep. 1186; Spradlin v. Spradlin, 18 S. W. 14, 13 Ky. Law Rep. 723. It follows that Henderson Foust had, by operation of the statutes of limitation, become invested with the fee-simple title to the 25 acres before he leased the land to Cress. Dobbs' deed to Bryant and J. W. Foust conveyed them nothing, so far as the act of Dobbs is concerned.

It is sought to work out a conveyance of Henderson Foust's title to his sons by Dobbs' deed through estoppel. Estoppel operates only to protect the innocent. If Bryant and J. W. Foust, being in ignorance of the fact that Henderson Foust owned the land, but being induced by him to believe that William Dobbs owned it, had bought the land from Dobbs, Henderson Foust would be held thereafter estopped to deny what he had induced an innocent person to believe to be true to his hurt. But in this instance the Foust boys were not misled. They knew that their father, and not William Dobbs, owned the land. Hence they took nothing by the deed, first, because the grantor Dobbs had no title to convey; and, second, because the real owner was not estopped to deny that fact.

But it is urged that appellant was induced to take the lease and part with its money to the younger Fousts because of the deed from the patentee, Dobbs, to them, and of their apparent ownership, an appearance, it is argued, produced by the act of Henderson Foust, and which ought to estop him to deny it. We repeat it is only those who are misled to change their condition in reliance upon an appearance that can plead the fact in estoppel of the truth. Appellant was not so misled. It had notice and actual knowledge that Henderson Foust owned the land, and that his sons did not. The notice consisted in the information conveyed to appellant's agent who was attempting to obtain the lease, imparted by W. M. Powers and Henderson Foust, by the latter's occupancy and all the facts that prudent inquiry would have developed, being set in motion by the fact of his possession, instead of that of either of the boys or Dobbs.

As neither Bryant nor J. W. Foust, nor appellant, took anything under or by virtue of Dobbs' deed, it did not lie in their mouths to question the continuance of Cress' lease, or whether it had been forfeited. That was a personal privilege of Henderson Foust, and when he elected to waive it the incident is closed to the rest of the world.

We find that the description in the Cress lease included the land in controversy.

We conclude that the judgment should be affirmed.

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WOOTEN v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 20, 1909.)

1. CRIMINAL LAW (§ 1186*)—MOTION TO REVERSE AND REMAND—REVIEW.
A motion, not signed nor sworn to, to reverse and remand the case, without consideration, because accused was denied his bills of exceptions by the trial court, without fault on his part, cannot be considered.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

2. CRIMINAL LAW (§ 1092*)—BILLS OF EXCEPTIONS—OBJECTIONS.
Where the bills of exceptions are so modified by the court as to deprive accused of what he believes to be fair and correct, he must take the statutory steps to protect himself, and it is not sufficient to have the court certify that he signed the bills, with his explanations, without the knowledge of accused.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

3. INDICTMENT AND INFORMATION (§ 43*)—FILING OF INFORMATION.
Where the information and affidavit were fastened and folded together, and filed, as shown by an indorsement on the outside of the bundle made by the folding of the two papers, the information was sufficiently filed.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 154; Dec. Dig. § 43.*]

4. CRIMINAL LAW (§ 338*)—EVIDENCE—ADMISSIBILITY.
Where the complaint, charging a violation of the local option law, was made by the sheriff, who saw the sale made, and who brought the buyer to the courthouse before a justice of the peace, evidence as to why the buyer did not make the complaint was inadmissible.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

5. CRIMINAL LAW (§ 210*)—COMPLAINT—WHO MAY MAKE.
Any credible person, cognizant of the facts, may make the complaint charging a criminal offense.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 419; Dec. Dig. § 210.*]

6. INTOXICATING LIQUORS (§ 236*)—VIOLATION OF LOCAL OPTION LAW—IDENTITY OF OFFENSE—EVIDENCE.
Where, on a trial for violating the local option law, the sheriff, who made the complaint, testified as to the date thereof, and that he caught the buyer buying whisky, and brought him to the courthouse before a justice of the peace, and had him testify as to the matter, and the buyer was uncertain as to the date of the offense, but admitted that he was caught by the sheriff and brought to the courthouse, the date of the transaction was sufficiently fixed.
[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 303; Dec. Dig. § 236.*]

7. CRIMINAL LAW (§ 678*)—EVIDENCE OF SEPARATE TRANSACTIONS—ELECTION.
Where two transactions were proved, and each constituted a criminal offense, while the complaint charged but one transaction, accused must require the state to elect.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678.*]

Appeal from McCulloch County Court; Harvey Walker, Judge.

Buck Wooten was convicted of violating the local option law, and he appeals. Affirmed.

J. A. Adkins and A. G. Walker, for appellant. F. J. McCord, Asst. Atty. Gen., and J. E. Brown, Co. Atty., for the State.

DAVIDSON, P. J. There is filed a motion to reverse and remand the case without consideration of the record, because appellant was denied his bills of exception by the trial court without fault on his part, as shown by the certificate of the county judge. Following the certificate of the county judge is what purports to be an oath stating that appellant presented his bills of exception to the county judge for his approval, and setting out quite a lot of matters and things why the motion should be granted; but the motion is neither signed nor sworn to. Therefore it cannot be considered. In the transcript proper the county judge includes the following certificate: "I, Harvey Walker, county judge of said McCulloch county, do hereby certify that the bills of exceptions prepared by the defendant were presented to me for approval within a reasonable time after the adjournment of court; that the explanations of some and the rejection of one were made by me, without consulting defendant or his counsel, or calling their attention to such explanations and rejection; that I did not return said bills of exceptions to the defendant or his counsel, but I had them filed by the clerk before defendant or his counsel had an opportunity of seeing said explanations and rejections. I do this at the request of defendant's counsel, for the purpose, as he says, to show that defendant did not receive and have filed said bills, as explained and rejected, as his bills." There is nothing in the record to show there were any objections on the part of appellant to the bills of exception as explained and filed or the refusal of the court to approve the one he rejected, and there is nothing to show in any manner to this court that the bills were not fair and correct. If appellant was not satisfied with those bills, and the court had placed him in the attitude of not being able to prepare proper bills, this should have been made to appear. Where a party appealing has his bills of exceptions so modified or changed as to deprive him of what he believes to be fair and correct, he should take such steps as required by the statute to protect himself. It is not sufficient to have the court certify that he signed the bills, with his explanation and qualifications, without the knowledge of appellant. The correctness of the bills as signed and approved is not legally attacked, nor does it in any manner appear that the court was wrong in rejecting the bill that was rejected. So, as the matter is presented, we do not feel authorized to review this action of the court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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The first bill of exceptions recites that the information read to the jury had not been filed. Appellant urges, therefore, that the court was without jurisdiction. The court qualifies the bill by stating that there was no motion to quash, or written exceptions, or motion in arrest of judgment presented; that the county attorney read the information, called on the defendant to plead, and his counsel stated that they excepted to the information because it had not been filed by the clerk; that a plea of not guilty was entered, the court heard nothing about a plea to the jurisdiction, and therefore does not approve the statement in the bill that the information was not filed. He further states that the information and affidavit were fastened at the top and folded together and filed, as shown by indorsements on the back of the outside of the "bundle" made by the two papers being so folded. We omit the indorsements. It has been held that wherever the information and the complaint were fastened together, and the file mark placed upon either, this will be sufficient to show the filing of both papers. Stinson v. State, 5 Tex. App. 31; Schott v. State, 7 Tex. App. 616; Castleman v. State (Tex. Cr. App.) 43 S. W. 944.

Bills Nos. 2, 3, and 4 are reserved to the ruling of the court admitting entries upon the commissioners' court minutes in respect to the court ordering an election and putting it into operation. Without going into any details, the court explains this matter in such a way as that there is no error in any of the rulings, and it might be added that the objections cannot be so urged; that by an act of the Thirtieth Legislature (Laws 1907, p. 447, c. 8) such matters as those mentioned must be settled in a contest in the district court.

Bill No. 5 recites that the county attorney, while examining the witness Lewis, held in his hand a statement which had been reduced to writing, and which seems to have been that of the witness taken before a justice of the peace in a court of inquiry. This bill was refused by the court, in which refusal he states that the county attorney did not use the statement of the witness Lewis before the court of inquiry to refresh the memory of the witness.

Bill No. 6 was not approved by the court, on the ground that no such proceedings occurred.

Bill No. 7 recites that Lewis, on cross-examination, was asked why he did not sign the complaint against appellant. The complaint discloses that it was signed by T. L. Sansom, 11 days subsequent to the holding of the court of inquiry. Objection was urged by the state's counsel, because the matter was irrelevant and immaterial. The object and purpose of this testimony is not stated; but the court qualifies the bill by stating that counsel asked the witness Lewis, who was a negro, why he did not make the complaint against Buck Wooten, appellant, for selling the whisky to him, at the time he was before the court of inquiry. To this the county attorney objected, on the ground that same was incompetent, irrelevant, immaterial, and not tending to prove any issue before the jury, or shed any light on any issue in the case. The complaint was made by Sansom, who saw the sale made and arrested the negro with the whisky, and the matter of making the complaint was one over which the witness had no control. The court sustained the objection. We are of opinion that the court was correct. Any credible person could make the complaint who was cognizant of the facts.

Bill No. 8 recites that Lewis swore he purchased the whisky of appellant on the 28th of December, and not on the 18th. Sansom, the sheriff, who made the complaint, testified that he (Sansom) did not see Lewis and appellant on the 28th of December; but it was on the 18th. The objection urged was that the testimony showed different and separate transactions. The court qualifies this bill by stating that Lewis testified that he did not remember the date certainly, but it was some time in December, he thought about the 28th; that Sansom caught and brought the negro, Lewis, to the courthouse before the justice of the peace, and had him to testify about the matter, and that this was the only time he was ever caught by the sheriff and brought to the courthouse about a whisky transaction; that witness did not say he did not buy any whisky on the 18th of December, but, when asked about it, said he did not remember the day, but thought it was about the 28th. Sansom was positive in his recollection of the date, said it was December 18th, that he brought the negro immediately to the courthouse, and this was the only time he ever brought the negro, Lewis, to the courthouse on any such transaction; and that no other such transaction had ever occurred with the negro, Lewis. We think this transaction is sufficiently identified by the witness Sansom as being the 18th, and that the negro's testimony is uncertain as to the date; but, in any event, if there had been two transactions, and both proved, in the absence of appellant's motion to require the state to elect, there would be no error.

The affidavit appended to the motion for new trial, alleging newly discovered testimony, is, we think, without merit.

The judgment is affirmed.

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GRACY v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. On Motion for Rehearing, Oct. 20, 1909.)

1. CRIMINAL LAW (§ 424*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS AFTER ACCOMPLISHMENT OF OBJECT.

A conspiracy to set fire to a building, with the ultimate purpose of obtaining the insurance on a building of one of the conspirators adjoining it, did not terminate with the burning of the building, so as to render inadmissible a letter by one of the conspirators to the other, received the day after the fire, on the ground that the object of the conspiracy had then been accomplished.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. § 424.*]

2. CRIMINAL LAW (§ 424*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS AFTER ACCOMPLISHMENT OF OBJECT.

A conspirator to set fire to a building, with the object of obtaining the insurance on a building of his own adjoining it, wrote a letter to his co-conspirator before the fire, but not received until the day after, in regard to the conspiracy between them. *Held*, that the letter was not within the rule against the admission against a conspirator of acts or declarations of his co-conspirator, in his absence, after the accomplishment of the object of the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. § 424.*]

On Motion for Rehearing.

3. CRIMINAL LAW (§ 1056*)—APPEAL—EXCEPTIONS—NECESSITY.

Under Code Cr. Proc. 1895, art. 723, providing that a conviction shall not be reversed unless the error was calculated to injure accused, which error shall be excepted to at the trial or on motion for a new trial, to predicate error on the charge, it must have been excepted to either at the trial or in a motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

4. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS.

A charge on accomplice testimony and necessary corroboration was not authorized, where an accomplice was not a witness and did not testify on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1860; Dec. Dig. § 814.*]

Appeal from District Court, Coke County; J. W. Timmins, Judge.

R. F. Gracy was convicted of arson, and he appeals. Affirmed.

R. L. H. Williams, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was given a term of five years in the penitentiary for setting fire to and burning a house belonging to the Hickman Cumbie Company.

The fire occurred on the night of the 28th of January, 1908. M. R. Jones had previously bought the house situated by the side of and within 18 inches of the house mentioned in the indictment. Appellant had gone to the little town of Bronte, where the fire occurred, a few days before the burning, to occupy Jones' house as a pool room. On the night of the burning appellant was sleeping in the Jones house. He purchased coal oil a day or so before the burning, and was seen about the rear end of the house that was burned, looking under and into it. A few days prior to the burning Jones and appellant went from Bronte, where the burning occurred, to Ballinger, for the purpose of insuring Jones' house, which they did for $600. The house was estimated at a valuation of from $300 to $500. Without going into a detailed statement in regard to the immediate environments of the fire, it is shown by the testimony that the Hickman Cumbie Company's house was first on fire, and from this the Jones house caught and was burned. Alexander testified that in January, 1908, he lived in Ballinger, was acquainted with appellant, and saw him for the first time the day he wrote the insurance for Jones; that they were together in his office, appellant being present part of the time, and the conversation was confined to insurance. This witness says that Jones and appellant came to his office, and Jones said, "This is the man that is going to put in a pool and billiard hall," and Gracy said, "Yes," and it was the understanding at the time that appellant would put in the hall at once; that he accepted the application for insurance. In describing the building they gave a false description, and represented that it was either 60 or 80 feet long and either 24 or 26 feet wide—witness had forgotten exactly. It was much smaller in dimensions. The insurance was taken out on the building, but not on the contents. At the time it seems to have had no contents. At the time of the fire the town became aroused, and many went to the scene. Appellant was there, and had taken his bedding and things from the house at the time the first parties reached the place, and at which time some of the witnesses say Jones' house, or that occupied by appellant, had not caught on fire, but that the Hickman Cumbie house was fully on fire. Riley testified he was engaged in the banking business, and had seen appellant a few times. Along about the latter part of January appellant went into his bank and asked about a certain building and its location, etc. This was the Jones building. This witness also testified in regard to a conversation had with appellant in regard to expected money; that appellant asked him if money had come to the bank for him. After the fire the oil can, which appellant had purchased a day or two before the fire, was found outside and near by the burned building. The sheriff of Lampasas county testified that he knew appellant and Jones; that they lived at Lampasas.

Appellant reserved a bill of exceptions to

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the introduction of the following letter, which was received by appellant at Bronte, the place of the burning, on the 29th of January, 1908, which was the day following the burning the previous night. This letter is as follows:

"1—28—1908.

"Mr. Robert F. Dear Dad I received your letter asking why your tables did not come an I have went today to see about them he sad there was a morguag against Some of them and they belong to 2 Different People. I think Every thing will be all wright for you soon your pardner has Decided to order New Tables When your Pardner found out that you had secured a house that suited you and you rote him to Send the table he went to Close the Trade and found they was all tied up so he decided to order knew ones I am very buisy So of Course Id do any thing I can for you and him he thought best to order New ones and ask me and I thought So to any further Infermation refur to him Your friend M. R. J.

"P. S. your Mother is doing Nicely a wants to See you soon I see to her all the time I received your letter I was Surprised when I got it I thought Ever thing was over Your Proposition was all foolish if you have not let your head off at rong place You ought not told any one who you had ordered anything from I dont See why you Even told them you had ordered from R for I can Say with perfectly Safety that I am not going to Risk any one Else in the Pot If you have got the thing mixed up til Every body Knows more about the buisness than you do you had better let it alone I dont see why if you comense west of your house why it could be question by any one you have no Interest in the house west of you it is nothing to you of Course you now what you have told Il Pro seed to order Some Tables from Brunswick Brack Calender Co this Evening I will order in your Name Juast as though you ordered them your Self then we can Counter mand the order any Time in 20 days it takes 20 days to get them out you can Show the letter I have rote you if you See fit but if you do you must do it a way he will not Suspishion anything do your do and come a head I have Every thing all wright and in good shape Yours X Y Z

"P S Turn over over"

And the following is on the back of the last sheet:

"If you do what you Started do you Stay there and dont be rite off like a Jug handle Stay there about one day and try to get a nother house and find some objections to it and the next day you can come home all wright."

Written at the bottom of the last page, and crossways of the page as follows:

"I tried to send the money throug the Bank but they was closed So I will send it By Mail."

The bill of exceptions sets out several objections to the introduction of this letter: First, it was received at the post office at Bronte by appellant after the burning; second, that the letter and its contents purport to be and were the act of some person other than appellant; third, it was hearsay, and written in the absence of appellant, and that, independent of said letter and the statements therein contained, there was no testimony connecting the appellant with the letter, or the writing, or the contents thereof, or to show that he had any knowledge thereof or acquiesced in the same or any part or portion thereof, but it was the act and declaration of another for which appellant was in no wise responsible or bound. These constituted the grounds of objection enumerated in the bill. We are of opinion that this letter was properly admitted. Appellant relies upon a line of authorities to the effect that the acts and declarations of one co-conspirator cannot be used against another co-conspirator, if made in his absence after the commission of the crime or the termination of the conspiracy. There is no question of the soundness of appellant's proposition as a question of law or rule of evidence; but it is as equally well settled that the acts and declarations of one conspirator are admissible against another conspirator pending the conspiracy and until its final termination. As long as a conspiracy is pending, or the common purpose and design is not completed, all the acts and declarations of co-conspirators are admissible. This proposition includes anything that was within the contemplation of the conspiracy, such as dividing the spoils, or any of those matters that may be subsequent to, but included in the scope of, the conspiracy. Franks v. State, 36 Tex. Cr. R. 149, 35 S. W. 977; O'Neal v. State, 14 Tex. App. 582; Rix v. State, 33 Tex. Cr. R. 353, 26 S. W. 505. The facts introduced in connection with the letter are sufficiently strong to show that not only was the house to be burned, but obtaining the insurance money was equally contemplated. The facts sufficiently show the conspiracy. The letter in question discloses that Jones had failed to send appellant money through the bank as agreed, but had sent it in the letter introduced in evidence. It is evident from this letter that appellant was to set fire to the Hickman Cumbie house. This house was located by the witnesses at the point mentioned in the letter; the Jones house being situate between the bank building and the Hickman Cumbie building. We are of opinion this record shows that the burning of the house was one of the steps in the agreement or conspiracy, the ultimate design of which was to obtain the $600 insurance. The conspiracy had not ended. The ultimate design had not been accomplished.

Appellant's proposition is unsound that the evidence was inadmissible by reason of the ending of the conspiracy, and that the decla-

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ation or the writing was the act of one of he conspirators after the consummation of he conspiracy. The letter was written be'ore the burning, though received by appelant afterward. It was written on the 28th it Lampasas, and reached Bronte, Coke ounty, on the 29th. The house was burned n the night of the 28th. This was a comunication by one of the conspirators to anther in regard to the conspiracy, and in furtherance of that conspiracy, and the mere fact that appellant was not aware of the contents of the letter until subsequent to the burning would not render it inadmissible. This was not a statement by Jones to another party in the absence of appellant after the completion of the conspiracy. It was a communication directed from one of the conspirators to the other, received by that other, and in no way denied by the other, and referred to matters that seemed to be well understood and agreed to between them. It will be noted that appellant received the $10 from Jones, sent him from Lampasas, which had been expected through the bank prior to the burning. So we hold, first, the conspiracy had not terminated at the time of the reception of the letter by appellant; and, second, that it was a communication from one coconspirator to the other, and is not within the rule that the incompetent acts and declarations of co-conspirators, made or done in the absence of another, are excluded. See authorities cited above; 8 Cyc. 680; 12 Cyc. 435, 436, 440. In each volume of Cyc., supra, in the foot-notes will be found many authorities supporting the text. We are therefore of opinion that there was no error in the action of the court permitting the letter to go to the jury as evidence.

This being the only question urged for reversal, it is not well taken; and the judgment is therefore affirmed.

On Motion for Rehearing.

During the Austin term of this court last June the judgment herein was affirmed. Appellant now moves for a rehearing, alleging that the court made an incorrect statement of the facts in regard to matters occurring when Jones took out the insurance policy on the house that was alleged to have been burned, and which was situated in another county at the little village of Bronte. Special exception seems to have been taken to that particular part of the statement in the opinion which is as follows: "'A few days prior to the burning Jones and appellant went from Bronte, where the burning occurred, to Ballinger, for the purpose of insuring the Jones house, which they did for $600.' After a careful review of the statement of facts we are still of opinion, first, that the evidence would justify the statement; and, second, that whether it is exactly correct or not is a matter of small moment, and would not change the result. The evidence in this respect is, in substance, as follows: It is conclusively shown that appellant occupied the house the night of the burning, and had done so for one or more days. The witnesses differ somewhat as to the time that appellant had been in Bronte before the burning occurred, this evidence ranging from three or four days prior to said burning up to two or three weeks. The witness Keeney testifies as follows: "I suppose Mr. Gracy had been in Bronte two or three weeks prior to the fire. I had noticed the gentleman there something like that long. I don't know exactly to a day, but had noticed him around there during that time. He left the next morning, on the mail hack, for Ballinger. He made no statement with reference to insurance on the building. I didn't ask him anything about that." Some of the other witnesses testify that appellant had been there for a week, and some about three or four days, before the fire. Mr. Alexander, the insurance agent at Ballinger, testified that he lived at Ballinger, and was engaged in the insurance business, and was acquainted with appellant. He further states: "The day we wrote the insurance, I believe, is the first time I ever saw him. I saw him first the morning the policy was written. I have forgotten the date. The insurance has been taken up. The first I noticed of the burning of the Hickman Cumbie building at Bronte, I noticed it in the Banner Leader. The first time I saw this defendant was in my office in Ballinger. Mr. M. R. Jones was with him. I had the conversation mostly with Mr. Jones. The defendant was present a part of the time. That conversation was about insurance. * * * Mr. Jones and Mr. Gracy came to my office, and Mr. Jones said, 'This is the man that is going to put in a pool and billiard hall,' and Mr. Gracy said, 'Yes.' And it was with that understanding that he go and put in the hall at once that we accepted the application for insurance. They were speaking of the building next to the First National Bank at Bronte, as stated in the policy. It joined the bank on the west side. It was a wooden building. They said that building was owned by Mr. Jones. They described it as a wooden structure." Then follows a description of the building, and he further states: "Mr. Jones took out $600 insurance on the building, as well as I remember. He took out none on the contents of the building. * * * We took the application, and Mr. Gracy and Mr. Jones went down, and we wrote up the policy. Mr. Jones returned later, and we delivered the policy to him, and he paid for it." With reference to the time of the burning, after the issuance of the policy, the witness said: "It was on Saturday morning after the building burned we noticed it in the Banner Leader, and my brother called up the cashier of the First National Bank and asked him if it wasn't that building. That was the cashier of the First National Bank of Bronte. I have forgotten the exact date of the policy. It was on Saturday after the

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issuance of the policy. I have forgotten the date of the policy. As well as I remember, it was a little less than a week—probably a few days less than a week." Mr. Walton, testifying in regard to the presence of appellant at Bronte, says: "I think some few days or a week before that he came there. I think he slept in the Jones business house down there, and he came there about a week before the fire. The Jones house joined the Hickman Cumbie building, and on the west side of the bank."

In view of the criticism of appellant's counsel, we have made the above statements from the record, some of which we have placed in quotation marks. In the opinion of the court it was not very material whether Jones and appellant went from Bronte to Ballinger to secure the insurance, or went from some other point. The question at issue was their acting together in the matter, and the knowledge and co-operation of appellant with Jones in securing the policy, as viewed in the light of the burning which occurred shortly afterward. As well as the time can be located from this record, the burning occurred on Tuesday night. Mr. Alexander observed an account of it the following Saturday in the Banner Leader. So it was not farther remote from Saturday than a week as to the date of the issuance of the policy. We call attention to the fact that if appellant was at Bronte even a week before the burning, which was on Tuesday night, he must have gone from Bronte to Ballinger, and if he was there, as testified by the witness Keeney, for two or three weeks, this conclusion would be strengthened; but that, we say, is immaterial. The fact is certain that they were there together, and appellant was aiding, to some extent at least, with full knowledge on his part that Mr. Jones was taking out the insurance for the $600. The premises on which the house was burned was estimated at the value of $300 to $500. This includes the lot. The insurance on the house was $600. Appellant was to establish a pool and billiard hall in the house, but at the time of the fire had placed nothing in it except a bed and bed clothing, and on the night of the fire he managed to get all of this out of the house without the loss of any of it. The theory upon which appellant was convicted was that he was acting with Jones in order to obtain the insurance money, and these facts, taken in connection with the letter introduced in evidence, seem to place it beyond any reasonable doubt that such was the condition of the facts placed before the jury.

It is unnecessary to go into any detailed statement in regard to the letter, because there was no question, if the contents of that letter were to be credited at all, it showed that the parties had been acting together to accomplish what was accomplished. Appellant, in his motion for rehearing, and also in the original presentation of the case, fails to make any claim that he was not with Jones at Ballinger at the time that Jones took out the insurance on the house situate at Bronte, and there is no claim that he was not sleeping in the house on the night the house was burned, and the facts show he made ample preparation to burn the house.

There is another question presented, to wit: Appellant contends that it was fundamental error on the part of the court not to give in charge the law in reference to accomplice testimony and necessary corroboration. As stated in the original opinion, the only question presented for revision was the alleged error on the part of the court in admitting the letter in evidence, which is discussed in the opinion. On motion for rehearing no complaint is urged on this score. In reference to the failure of the court to charge the law in reference to accomplice testimony, it may be sufficient to state that for the first time that question is raised in the motion for rehearing. The question of fundamental error urged by appellant is not well taken, under the construction placed by this court on article 723 of the Code of Criminal Procedure of 1895. In order to suggest error on the part of the court in giving charges in criminal cases, it must be excepted to either on trial or in motion for a new trial; otherwise, it will not be noticed on appeal. This question has been so often reviewed and decided we deem it unnecessary to cite authorities. We think appellant is correct in assuming and stating that Jones was an accomplice to the offense of arson. We think the record makes it so, and the prosecution was based upon the theory that appellant burned the house to aid Jones in securing the insurance money; and, of course, if it is true that Jones had consulted with appellant in reference to the matter and agreed that the house should be so burned, and appellant executed the ends and purposes of that conspiracy, this would make him an accomplice. But the charge on accomplice testimony was not authorized in the case. Jones was not a witness, and did not testify on the trial. The facts showed him a party to the crime, under facts proved on the trial.

Finding no reason for changing the view heretofore expressed in regard to the affirmance of this case, the motion for rehearing is overruled.

BROOKS, J., absent.

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GREENVILLE WATER CO. v. BECKHAM.

(Court of Civil Appeals of Texas. Oct. 16, 1909.)

COSTS (§ 256*) — ON APPEAL — EXPENSES OF RECORD — UNNECESSARY MATTER — COPY OF STATEMENT OF FACTS.

Under Gen. Laws 1907, p. 510, c. 24, § 5, providing that when an appeal is taken it shall not be necessary to copy the statement of facts in the transcript, but that the original shall be sent up as part of the record, where appellant has the statement of facts so copied, it should be charged with the cost thereof, though it obtains a reversal of the judgment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968–971; Dec. Dig. § 256.*]

On motion for rehearing and to retax costs. Motion to retax costs granted.

For former opinion, see 118 S. W. 889.

BOOKHOUT, J. In the lower court the appellee, plaintiff, recovered a judgment. The Greenville Water Company, defendant, appealed, and filed a transcript in this court, in which the statement of facts is copied. Thereafter the appellant made a motion to be permitted to file the original statement of facts, which was granted, and the original statement of facts was also filed. Judgment was rendered in this court in favor of appellant, and the costs were taxed against appellee. A motion was timely made by appellee to retax the costs, and to tax the costs of copying the statement of facts in the transcript against the appellant. This motion was overruled, and the question as to the correctness of this holding is now raised in a motion for a rehearing on the motion to retax. A more careful consideration of the question leads us to the opinion that we erred in not granting the motion to retax the costs, and in failing to tax the costs of copying the statement of facts in the transcript against appellant. It was the duty of the appellant to file a proper transcript in this court, and it was unnecessary to include therein a copy of the statement of facts. The statute does not contemplate that the statement of facts shall be copied in the transcript, but prescribes that the original shall be sent up as a part of the record of the cause. Gen. Laws 1907, p. 510, c. 24, § 5. In this case appellant was only required to file the original statement of facts, and, having gone to the unnecessary expense of copying it in the record, it logically follows that the costs of doing so should be charged against it. Appellant contends that this opinion is contrary to our holding in the case of Watson v. Vansickle, 114 S. W. 1167, now pending on error in the Supreme Court. In that case, as in this, the statement of facts was copied in the record, and the original statement upon motion was filed in this court. The costs of copying the statement of facts in the transcript were taxed against Vansickle, the losing party in this court, but the costs of filing the motion to send up the original statement of facts and filing the same in this court were taxed against appellants. We there recognized that the losing party could not be held liable for the costs of copying both the statement of facts in the transcript and the costs of filing the original statement of facts in this court. However, if there is a conflict in these holdings, then we are of the opinion that our holding in the Vansickle Case was error, and that our holding in this case is correct.

The motion is granted, and the costs of copying the statement of facts in the transcript are ordered taxed against appellant, Greenville Water Company.

Motion granted.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. FORD.†

(Court of Civil Appeals of Texas. June 24, 1909. Rehearing Denied Oct. 7, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence in an action against a railroad company for injury to a brakeman, who, while switching cars and walking along the track to get on the pilot of engine to couple it to a car, got his foot caught between the ties and was struck by the engine, *held* sufficient to go to the jury on the question whether defendant used ordinary care, as was its duty, to keep the roadbed in a reasonably safe condition for the performance by brakemen of their duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1021; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 247*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A brakeman while switching cars walked on the track to get on the pilot of the engine, and, his foot being caught in a space between the ties negligently permitted by the company, and not known by or obvious to him, being concealed by grass growing on the track, he was struck by the engine. *Held* that, even if it was negligent for him to take position on the track in front of the engine to mount the pilot, this did not proximately cause the injury, which would not have happened but for the unforeseen fastening of his foot, and so did not preclude recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795–798; Dec. Dig. § 247.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

For a brakeman to be on the track to get on the pilot of the engine in switching was not negligence as matter of law, it being customary for brakemen in switching to stand and ride on the pilot, it having been impracticable for him to adjust the pilot coupling while walking, customary in such situations for brakemen to stand on the track and mount the pilot from the front while the engines were moving, and safer than attempting to mount it from the side.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1121–1124; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 295*)—INJURY TO SERVANT—ASSUMPTION OF RISK — INSTRUCTIONS — "INSPECTION" — "ORDINARY CIRCUMSPECTION."

The portion of the charge, "Plaintiff was not bound to inspect the track at the place in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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question to ascertain if it was reasonably safe to be used by him in the performance of his duties as brakeman," given after a portion, that though the track at the place was not reasonably safe, plaintiff assumed the risk from such unsafe condition, if any, of which he had actual knowledge, or would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment; and in an action for injury to a brakeman by being struck by an engine, while his foot was caught in an unfilled space between ties in the track, on evidence that the unfilled spaces directly causing the injury were covered and obscured by tall, thickly-growing grass, making it appear on casual inspection that the spaces were filled, and that plaintiff had never had an opportunity to be on the track before, and did not know that there were unfilled spaces there—was not calculated to confuse and mislead the jury; there being a difference between making a previous critical examination, which the word "inspection" means, of the track to ascertain if it was reasonably safe, and using reasonable care and caution, which is the meaning of "ordinary circumspection," to observe what was open and obvious, to discern whether it was unsafe.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.*

For other definitions, see Words and Phrases, vol. 4, pp. 3656–3658.]

5. TRIAL (§ 194*)—INSTRUCTION ON WEIGHT OF EVIDENCE.

Nor could such portion of the charge be reasonably construed as a charge on the weight of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439–441, 446–454, 456–466; Dec. Dig. § 194.*]

6. TRIAL (§ 295*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Nor, construing the charge as an entirety, could the jury have been misled by the further portion of it that plaintiff "only assumed the risk of injury resulting from a condition of the track, * * * of which he knew or of which he would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

7. TRIAL (§ 191*)—INSTRUCTIONS ASSUMING CONTROVERTED FACT.

Where, by previous portions of the charge, plaintiff's right to recover was conditioned on a finding that he was injured solely by his foot becoming fastened between the ties of a railroad track inside the rail, verdict being directed against him, if it was found that his foot became fastened between the ties outside the rail, the portion of the charge that plaintiff would be guilty of contributory negligence, if it be found that an ordinarily prudent person would not have attempted "to stand between the rails" and mount the pilot of the engine as plaintiff did, could not be fairly construed as assuming a controverted fact on conflicting evidence as to whether he when injured was standing in the middle of the track or astride one rail with one foot outside and the other inside such rail: but left the jury free to decide in which of said ways he was standing, and, on finding either of such positions to have been negligent, to return a verdict against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431; Dec. Dig. § 191.*]

8. TRIAL (§ 295*)—INSTRUCTIONS CONSIDERED AS A WHOLE—ASSUMPTION OF FACT.

A paragraph of a charge, though subject, when standing alone, to the objection of assuming negligence of defendant or an unsafe track, could not be considered as doing so, when the other paragraphs clearly left the fact for finding, untrammeled by any suggestion conditioning the right of recovery on an affirmative finding that the track was surfaced, and that its unsafe condition, if any, was negligence on defendant's part.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

9. MASTER AND SERVANT (§ 293*)—MISLEADING INSTRUCTIONS.

Where plaintiff's petition and evidence in an action for injury to an employé from getting his foot caught between two ties in defendant's railroad clearly undertook to describe situation on the ground at the place of injury as left through failure to properly surface the track, the use of the word "holes" in the charge, that if the jury found defendant's track was not surfaced, and the space between the ties was not filled, and on account of such failure there were "spaces and holes" between the ties where plaintiff's feet could and would be likely to be caught, etc., could not have misled the jury to understand a recovery was authorized for a different defect than alleged.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

10. MASTER AND SERVANT (§ 112*)—INJURY TO SERVANT.

Rank grass growing at the place and obscuring the unfilled space between ties of a railroad track into which a brakeman stepped, occasioning his injury, could operate to make the unfilled space a negligent omission of the master's duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213–223; Dec. Dig. § 112.*]

11. TRIAL (§ 260*) — INSTRUCTIONS — REPETITION.

Requested instructions fully and correctly covered by others given by the court need not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

12. DAMAGES (§ 132*) — PERSONAL INJURY — EXCESSIVE VERDICT.

A verdict of $20,000 for injury to a man 31 years old, the head of a family and earning $100 per month, whereby he permanently lost the use of both legs, and suffered excruciating pain and anguish, and will continue to suffer pain and anguish, will not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. § 132.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Will G. Ford against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed.

By his petition the appellee claimed that, while in the service of appellant as head brakeman of its local freight train, and performing his switching duties at the time, he sustained serious personal injuries occurring to him by being run against and upon by a locomotive then being operated by the appellant company on its track at Jester, Tex., alleged to have been directly caused by his foot becoming wedged and fastened between two of the ties in the main track near the switch stand through the negli-

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gence of appellant in having and permitting the said ties at the said place to be and remain exposed and protruding above the surface of the ground between the rails, and arranged on the ground at that place so irregularly spaced and not properly surfaced with dirt as that a man's foot would become wedged and fastened between the same. It was further alleged that appellant negligently caused and permitted quantities of grass to grow and remain in the track at that particular place in such manner as to prevent appellee and other trainmen from discerning the depth between the ties at that place or the spacing between them, which condition of the track at that place greatly imperiled the safety of appellee and other trainmen while they were engaged in the performance of their duties, and all of which was known to appellant.

The appellant answered by general denial, a plea of assumed risk, and contributory negligence. The case was tried to a jury and a verdict was returned in favor of the appellee for $20,000, and in accordance with the verdict judgment was entered for appellee.

The evidence in the record substantially shows, and we make the finding of fact, that at the time of his injury appellee was in the service of appellant as head brakeman of its west-bound local freight train. At Jester, a stopping station, appellant has and maintains a spur track on the south side of and extending west from its junction with its main track. The main track runs east and west. The switch stand for the spur was south of the track. In 12 feet east of the switch block for the side track is the west edge of a public road running north and south across the main line track. In the afternoon of the day that the appellee was injured his train arrived at Jester and stopped about a car length east of the public road crossing for the purpose of incorporating in the main train the loaded box car that stood on the spur about 90 feet west from the switch stand. It was the duty of appellee to operate the switch and couplers so that the engine could head in on the spur and couple to the car and bring it to the main line, when it was to be placed in the train to the rear of the engine. The appellee got off the engine where he was riding and went direct to the car on the spur and worked and arranged its automatic coupler so that it would operate, unlocked and threw the derailer located on the spur, then went directly to the switch stand and set the switch for the spur track. Upon setting the switch he gave the cut-off signal to the rear brakeman, which meant for the rear brakeman to cut the engine loose from the main train. Appellee then, after giving the signal, at once started east upon the main track to meet the engine as it moved toward the spur, and to mount the pilot of the engine for the purpose of opening and adjusting the knuckle of the coupler on the pilot so it would operate while riding to the car. The engine was old, and the knuckles of its front coupling operated badly; it had to be adjusted by hand in order to couple the car. About the time appellee started toward the engine, it, on signal by the rear brakeman, began to move toward him, and it was then appellee's duty, and it was customary in such situation, to meet the pilot upon the track, mount it in front by stepping upon a footrest or step kept on it for that purpose by appellant, and to ride it to the car, adjust the knuckle, and see that the coupling was properly made. When appellee reached a point between the rails about 4 feet west of the road crossing, or about 8 feet east of the switch block, his right foot went down into a space or hole between two ties; and by reason of the toe of his boot resting against one tie while the heel pressed against the other, his foot was clamped and fastened between the ties so that he could not extricate it before the pilot of the engine reached him. The engine was moving towards him at 3 or 4 miles per hour, and was at or about the road crossing when his foot became fastened. When his foot became fastened he holloed for the engine to stop, but it came on. When the pilot reached him he grabbed with both hands to an iron rod on top of the pilot beam and at the same time placed his left foot on the pilot step or footrest in an effort to pull his foot loose and get upon the pilot; but the edge of the pilot struck and crushed his right leg, his left foot slipped from the pilot step to the track, and that leg was crushed by the pilot. Both legs went back under the pilot of the moving engine; and holding to the iron rod with his hands, he was dragged in that position along the track about 50 feet before the engine was stopped. There was some conflict in the evidence as to whether appellee caught his foot in between the ties in the middle of the track or fastened it between the ties on the outside of the south rail. The appellant contended that the latter happened and the appellee that the former happened. The conflict was settled by the verdict of the jury in favor of appellee, and as the evidence fully warrants the finding, we assume the truth of the jury's finding. The evidence established that the appellant's main track was generally surfaced between the rails at stations and about switches; that the place in the main track where appellee's foot became fastened in the track, about 8 feet east of the switch block, the preponderance of the evidence shows was not surfaced between the rails, but that the spaces between the ties were about 3 inches deep and the ties were irregularly spaced and Bermuda grass thickly growing between them. The grass obscured the spaces and partly covered the ties. There is evidence that "some of the ties near that place

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were not straight, but seem to have slipped so that the ends were close together," and the intervening spaces were not filled to the top of the ties, but left the ties protruding above. Appellee was shown to have been an adult, and a brakeman in the service of the appellant for about 18 months, but had served principally on through trains. He had been on the local run which included Jester less than three weeks. It was shown that he had never had occasion to operate the switch or use the spur track at Jester before the time of the injury, excepting once when his crew "kicked" a car onto that track and left it to be loaded with wood. It was established that until his foot became fastened in the track appellee had never discovered or ascertained that there were unfilled spaces between the ties in the main track at that place. The Bermuda grass growing thickly in these spaces and partly covering the ties made it appear upon a casual observation that the spaces were filled. There was evidence by a witness who walked over the track that "the grass grew between the ties and concealed them. I could tell where the ties were by seeing the ends sticking out, but I could not tell where they were on the track. I could not tell the spaces between the ties without great difficulty, and the ties could not easily be seen on account of the tall grass." It clearly appears that appellee would not have been injured but for his foot becoming fastened between the unfilled ties in the track. Appellee's injuries were shown to be serious and permanent.

We, therefore, find and conclude that appellant was guilty of negligence proximately causing appellee's injuries, and that appellee was not guilty of contributory negligence, and did not assume the risk of injury, and has sustained damages in the amount awarded by the jury.

E. B. Perkins, Daniel Upthegrove, and Marsh & McIlwaine, for appellant. Johnson & Edwards, for appellee.

LEVY, J. (after stating the facts as above). By its first assignment of error, in complaining of overruling a motion for a new trial, the appellant contends that there was no evidence that the roadbed at the place of injury was in other than a reasonably safe condition for the purposes and uses for which it was intended. The evidence shows the maintenance of a switch by appellant at its stopping station, Jester, within 12 feet of a road crossing. To enter the spur track for the purpose of setting out a car or incorporating a car in the train, the engine doing the switching must, as it can only enter that way, come from the east by the road crossing. While the switch is being set the engine must either block the public crossing or stand to the east of the same. It thus appears, therefore, that it was necessary to use the roadbed from the switch to the crossing in the discharge of switching duties, and that it would be commonly done. In entering the spur track it is the head brakeman's duty, and it is customary, after setting the switch to mount the pilot of the engine and adjust its coupler so as to properly operate it in coupling to the cars. While appellee was going to the engine to mount the pilot in the discharge of his necessary switching duties he caught and hung his foot, and in consequence was injured by the locomotive doing the switching, in an unfilled space between the ties between the rails. The place of injury was within 4 feet of the edge of the crossing, or 8 feet of the switch block. There is no evidence that it was not necessary or not required in the proper discharge of switching duties to use the roadbed from the switch stand to the crossing, but it does appear that it was within proper limits of the switch for switching and operating duties. It is evident, therefore, that the roadbed of the main track for at least the distance in question must, as a necessary and common incident to operating trains and switching cars on its spur, at divers times necessarily be used by appellant's brakemen for the purposes of their duties at this place. To accomplish their work such brakemen would be required, as it appears, to walk on the roadbed and track about the place of injury in question. It was further shown that the main track for at least 50 feet west from this road crossing, and including the place of injury, was not surfaced up to the top of the ties, but that some of the ties protruded up about 3 inches above the surface of the earth, leaving an intervening space between the rails. There was evidence to show that some of the ties had slipped so that the ends were close together and the intervening space left unfilled. Rank Bermuda grass covered the spaces between the ties and obscured them. It was shown that as a general rule the appellant surfaced its main track and switches up to the top of the ties in the middle of the track, and it was so done on this part of the main line except for the 50 feet west from the crossing. It was shown that there were no bridle rods, switch points, or frogs at the point of injury making it impracticable to fill in between the ties. The testimony in the case quite certainly, we think, raises the issue, and it was properly a question for the decision of the jury, as to whether appellant used ordinary care, as was its duty in this case, to keep that part of its roadbed where the necessary work of switching and operating its cars was to be commonly done by its brakemen in a reasonably safe condition for the necessary performance of their duties. 4 Thompson on Neg. § 4332; Ry. Co. v. Redeker, 67 Tex. 181, 2 S. W. 513; Ry. Co. v. Ames (Tex. Civ. App.) 94 S. W. 1112; Ry. Co. v. Robbins, 57 Ark. 377, 21 S. W. 887; Ry. Co. v. Moore, 113 Fed. 269, 51 C. C. A. 226; Ry. Co. v. Cozby, 174 Ill. 109, 50 N. E. 1011.

By the second assignment, in complaining

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of the refusal of the court to give a peremptory instruction to find for appellant, it is in effect contended that the evidence established as a matter of law that appellee was guilty of contributory negligence. We do not think that it could be so held in this case. It was shown by much evidence that the appellant had negligently permitted spaces between the ties in its main track at a station near its switch and the same to be obscured by grass growing upon the track, and that appellee did not know of this condition, and same was not obvious to him, and further that he was injured by reason of his foot becoming fastened in these obscured spaces, and not by reason of his foot slipping off the pilot of the engine. He had his left foot on the pilot of the engine and both hands holding to the rod on the pilot beam, and would have mounted the pilot safely, it appears, if his foot had not become fastened between the ties in the track. In these circumstances he could not have foreseen that, because of appellant's negligence, his foot would be caught and fastened in the track. Therefore, if it was negligent for appellee to take position upon the track in front of the engine to mount the pilot, this act it appears did not proximately contribute to cause the injury, since he would not have been injured but for the unforeseen fastening of his foot in the track by appellant's negligence. In order to preclude a recovery the negligence of plaintiff, it is generally ruled, must proximately contribute to his injury. 1 Thompson on Neg. §§ 216–219; Ry. Co. v. Cleland (Tex. Civ. App.) 110 S. W. 122; Ry. Co. v. Ormond, 64 Tex. 489; Ry. Co. v. Culpepper, 19 Tex. Civ. App. 132, 46 S. W. 922. The evidence tended to show that it was customary for brakemen while engaged in switching to stand and ride on the pilot step, and that it was impracticable for appellee in this case to adjust the pilot coupling while walking, and that it was necessary for him to ride on the pilot to the car in question to adjust the pilot coupling so that it would operate, and that it was customary in such situations for brakemen to stand on the track and mount the pilot step from the front while engines were moving, and that this was safer than attempting to mount it from the side. Being on the track, in these circumstances, did not constitute negligence of itself or as a matter of law, and the care of the appellee in doing the act in question was properly for the jury. Lee v. Ry. Co., 89 Tex. 583, 36 S. W. 63.

The third assignment complains of the court's charge on assumed risk. The portion first complained of reads: "In this connection, you are charged, the plaintiff was not bound to inspect the track at the place in question to ascertain if it was reasonably safe to be used by him in the performance of his duties as brakeman." The court had just previously in the same paragraph instructed that: "And although you should find the track at the place in question was not reasonably safe, and that defendant was negligent in permitting its track to be in such condition, yet plaintiff assumed the risk resulting from such unsafe condition, if any, of the track at the place in question, of which he had actual knowledge, or such as he would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment in which he was then engaged." The objections to the portion of the charge complained of are that it was a charge on the weight of the evidence and was calculated to confuse and mislead the jury. We do not think the charge subject to the objections urged. The evidence to which the charge was applicable clearly showed that the unfilled spaces between the ties in the track directly causing the injury were covered and obscured by tall, thickly-growing Bermuda grass. This condition of the track made it appear upon casual observation that the spaces were filled. Appellee did not know, as it was clearly shown, that there were unfilled spaces on the track at the place, and had never had the opportunity to be upon this track before the moment of the injury. As applicable to these facts, explaining the duty of appellee, the charge as a whole undertakes to and does state the rules of law to be that appellee assumed the risks of which he actually knew, and of such hazards of which he would learn by the exercise of that ordinary circumspection which a reasonably prudent person would use in the same circumstances, but that he did not owe the duty of inspection to ascertain if the appellant had discharged the duty it owed him. This we understand to be the correct rule. Bonnet v. Ry. Co., 89 Tex. 72, 33 S. W. 334; Drake v. Ry. Co., 99 Tex. 240, 89 S. W. 407; Ry. Co. v. Brown, 33 Tex. Civ. App. 589, 77 S. W. 832. There could be no confusion to the jury in following the charge as given and applying it to the evidence. There is a difference between making a previous critical examination, which the word "inspection" means, of the track to ascertain whether it was reasonably safe, and using reasonable care and caution, which is the meaning of "ordinary circumspection," to observe what was open and obvious, to discern whether it was unsafe. The jury could reasonably interpret the charge and apply the same to the evidence, as meaning that if appellee knew that there were unfilled spaces in the track, or that same were open and obvious and which he ordinarily could see and know were unsafe, he assumed the risk; but if the same were not open and obvious and could only be discovered through means of a previous critical examination to ascertain such condition, that then and in that event he did not assume the risk. The intervening spaces could not have been discovered, it appears reasonably from the evidence, by "ordinary circum-

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spection," but might have been discovered by making a previous extended critical examination of the track, which it was not appellee's legal duty to do. The jury in appellee's right were entitled to be told the extent of his legal duty and the rule of law by which it was to be measured in the facts. We do not think it could reasonably be construed as a charge on the weight of evidence. The circumstances of the instant case clearly distinguish it from the case of Ry. Co. v. Hynson (Tex.) 109 S. W. 930, and Ry. Co. v. Williams (Tex. Civ. App.) 111 S. W. 196. We do not understand, however, that the principles of law announced in those cases are at variance with the principle applied to the facts and charge in this case. Construing the charge as an entirety, we do not think there was error, or that the jury were misled in the further portion of the charge complained of, where the jury were told that appellee "only assumed the risk of injury resulting from a condition of the track, whether brought about by the negligence of defendant or not, of which he knew or of which he would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment in which he was engaged."

By the fourth assignment it is complained that the court in the charge assumed a controverted fact as an established fact when the jury were instructed that appellee would be guilty of contributory negligence "if you shall find that an ordinarily cautious and prudent person would not have attempted to stand between the rails and mount the pilot of the locomotive in the manner and under the circumstances in which plaintiff did." The objection of appellant is that because the evidence was conflicting as to whether appellee, when injured, was standing in the middle of the track or astride the south rail with his right foot on the outside and his left foot on the inside of the rail, the words "to stand between the rails" assumed that the evidence sustained appellee's contention. We do not think the charge could reasonably and fairly be construed as assuming a controverted fact, or that the jury were apt so to construe it. The language "would not have attempted to stand between the rails * * * in the manner * * * in which plaintiff did," freely left the jury to decide whether appellee was standing between the rails with both feet, or with only one foot, and upon their finding either of such positions on the track to be negligence to return a verdict against appellee. By previous portions of the court's charge the appellee's right of recovery was conditioned upon a finding by the jury that he was injured solely by reason of his foot becoming fastened between the ties inside the rail, and directing a verdict against him if the jury found he was injured by reason of his foot becoming fastened between the ties outside the rail.

We do not think the court's charge, as complained of in the fifth assignment, subject to the objection that it assumed negligence or an unsafe track, and the assignment is overruled. If standing alone the paragraph complained of could be subject to the objection, yet, when read in connection with the other paragraphs of the charge, preceding and succeeding, it could not have misled the jury or have been considered by them an intimation from the court as to the weight of any fact. It clearly appears from the other paragraphs of the charge that the fact claimed to be apparently assumed was properly, and untrammeled by any intimation from the court, submitted to the jury for finding in the facts. These paragraphs all conditioned the appellee's right to recover on an affirmative finding in the evidence that the track at the place in question was not surfaced, and the space between the ties in the center of the track was not filled in, and that the unsafe condition, if any, of the track was negligence on appellant's part. Ry. Co. v. Scott, 30 Tex. Civ. App. 496, 71 S. W. 26; Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 839; Ry. Co. v. Waldo (Tex. Civ. App.) 32 S. W. 783. The charge should be viewed as a whole and from the standpoint of the jury. Teleg. Co. v. Motley, 87 Tex. 38, 27 S. W. 52. We are inclined to the opinion that even if it should be held that the charge complained of assumed that appellant's track at the place in question was not surfaced, and that it had failed to exercise ordinary care to keep it in reasonably safe condition, the evidence might probably authorize such assumption by the court, as it appears very meagerly to the contrary, if not on the border line of being no evidence at all on the question.

By the sixth assignment it is contended that there is no evidence showing that there were "holes" in appellant's track at the place where appellee was injured, and that it was error for the court to submit the fact as an issue to be determined by the jury. The court charged: "If you shall find that the track of defendant * * * was not surfaced, and that the space between the ties in the center of the track was not filled in, and that on account of such failure there were spaces and holes in between the ties where the feet of plaintiff and other brakemen could and would likely be caught in the discharge of their duties in the usual and ordinary way. * * *" The petition alleged: "And thereupon plaintiff's foot became wedged and fastened in between two of the ties in the main track, the same being exposed and protruding above the surface of the ground, and being arranged so as that a man's foot would become fastened and wedged between the same." The evidence of the appellee in the case shows that he hung his foot "in a space not quite as wide as the length of the foot, and that my heel and

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toe was caught, and when I went to lift up my foot it was caught and held. My foot went down into some space, and the heel and toe were caught when I went to pull them out." It is obvious that the pleading and evidence of the appellee undertook to describe the situation on the ground at the place of injury as left by reason of the failure to properly surface the track. That the court, in referring to the failure to properly surface and fill in the space between the ties in the center of the track, described the situation in respect to the unfilled space between the ties as "spaces and holes," did not and could not have misled the jury, or worked any injury, or authorized a recovery for a different specific defect than alleged. The jury could only have understood, as the charge intended, that the described situation alluded to the particular unfilled space between the ties in the center of the track where appellee was injured and causing his injury. The other proposition under this assignment is overruled. We think the evidence fully authorized the court to submit to the jury conjunctively as one of the proximate causes of the injury, "And that such condition was obscured by grass which was permitted to grow on the track at such place." The rank grass shown to be growing at the place and obscuring the unfilled space between the ties might and did in this case operate as a cause to make the unfilled space a negligent omission of duty.

The seventh assignment complains of the refusal to give a requested charge on contributory negligence. The main charge of the court affirmatively presented the issue of contributory negligence included in the special charge, and the assignment is overruled.

The court's main charge fully, correctly, and affirmatively submitted the issue presented in the special charge complained of in the eighth assignment, and it is overruled.

There was no error in refusing the special charge complained of in the ninth assignment. The substance of the same was fully and correctly stated in the instructions given by the court, and fully authorized a finding in favor of appellee at the hands of the jury, if they found no negligence in the particular stated in the requested charge.

The tenth assignment claims that the amount of the verdict is excessive. In the light of the record and under the decisions of this state we do not feel warranted in disturbing the judgment and finding of the jury as to the amount awarded, which was their province, and which appears to have been calmly and without passion arrived at. Appellee was a young man 31 years old, the head of a family and earning $100 per month, and has suffered the loss of the use, it appears, of both legs for life. It appears that his pain and anguish from the injuries was excruciating, and that he will continue to suffer pain and anguish. Both his legs, it appears, sustained a compound comminuted fracture of both bones of both legs, and it reasonably appears, and the jury would be warranted in finding, that neither nature nor an operation will relieve the injuries from being permanent. One of the physicians testifying that the injuries were permanent, and that no radical operation could restore to appellee the use of his legs, says: "He can never walk at all on the legs he has. * * * I think he would be better off with a cork leg on both."

The judgment was ordered affirmed.

THORN v. LANIER.

(Court of Civil Appeals of Texas. Oct. 9, 1909.)

1. APPEAL AND ERROR (§ 1127*)—AFFIRMANCE ON CERTIFICATE—RECORD.

A properly certified copy of the judgment must accompany a motion to affirm on certificate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4434; Dec. Dig. § 1127.*]

2. APPEAL AND ERROR (§ 1127*)—MOTION TO AFFIRM ON CERTIFICATE—TIME FOR FILING CERTIFICATE.

Under Rev. St. 1895, art. 1016, providing that if appellant, or plaintiff in error, fail to file a transcript as required, appellee, or defendant in error, may file the certificate of the trial court as to the time of perfecting the appeal, and obtain a judgment of affirmance, the certificate must be filed at the term of the appellate court to which the appeal or writ of error is returnable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4437; Dec. Dig. § 1127.*]

Appeal from District Court, Leon County; S. W. Dean, Judge.

Action between J. L. Thorn and G. T. Lanier. From the judgment, Thorn appealed. Lanier moved to affirm on certificate. Motion overruled.

Wm. Watson, for appellee.

REESE, J. Appellee, by this motion, seeks to have affirmed on certificate a certain judgment procured by him against appellant in the district court. The transcript accompanying the motion contains what purports to be a copy of the judgment sought to have affirmed, but such copy is not certified by the district clerk to be a copy of such judgment. It seems to be settled law in this state that a properly certified copy of the judgment must accompany the motion to affirm; otherwise, the motion will be refused. House v. Williams, 40 Tex. 347; Sloan v. McMillin (Tex. Civ. App.) 113 S. W. 587.

There is another objection to the motion. The appeal was perfected by filing of appeal bond March 27, 1909. The time for filing the record here expired June 25th. The term of this court continued by law until the first Monday in July. So the appeal was returnable to that term. The motion to affirm and

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certificate were filed in this court September 23, 1909. Under article 1016, Rev. St. 1895, the appellee or defendant in error is required to file the certificate for affirmance at the term of the appellate court to which the appeal is returnable. Laughlin v. Dabney, 86 Tex. 120, 24 S. W. 259; Pickett v. Mead (Tex. Civ. App.) 25 S. W. 654.

The motion to affirm must be refused.

JEFF CHAISON TOWN-SITE CO. v. McFADDIN, WIESS & KYLE LAND CO.

(Court of Civil Appeals of Texas. June 28, 1909. Rehearing Denied Oct. 14, 1909.)

1. APPEAL AND ERROR (§ 165*)—RIGHT OF REVIEW—INJUNCTION—MOTION TO DISSOLVE—EFFECT.

Parties against whom an injunction has been granted, by filing a motion to dissolve, which was overruled, did not lose their right to appeal from the order granting the injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 998; Dec. Dig. § 165.*]

2. APPEAL AND ERROR (§ 71*)—DECISIONS REVIEWABLE—REFUSAL TO DISSOLVE INJUNCTION.

The statute gives no appeal from an order refusing to dissolve an injunction once granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 395; Dec. Dig. § 71.*]

3. INJUNCTION (§ 5*)—MANDATORY INJUNCTION—SCOPE OF REMEDY.

Many of the restrictions upon the use of mandatory injunctions have in modern times given way to a more liberal construction of the powers of a court of equity, and the right of the court generally to issue a mandatory injunction before hearing and without notice, in a proper case, is as unquestioned as the right to issue a merely prohibitive injunction; the only limitation on such power being that the complainant must show "a strong and mischievous case of pressing necessity."

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. § 5.*]

4. INJUNCTION (§ 163*)—INJUNCTION WITHOUT NOTICE — REFORMATION OF ORDER GRANTING PERPETUAL INJUNCTION.

Where an order granting an injunction without notice in terms grants a permanent injunction, but the writ issued is in form a temporary injunction until the hearing, the order of the court will be reformed so as to operate as a temporary injunction merely, disposing of none of the questions, but only preserving the status of the property until further order in the case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.*]

5. INJUNCTION (§ 132*) — PRELIMINARY INJUNCTION — TRANSFER OF POSSESSION OF LAND PENDING ADJUDICATION OF TITLE.

The doctrine that it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title does not apply, where the effect of the injunction is only to restore plaintiff's possession, which had been forcibly invaded, and preserve the status until the party's rights could be determined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

6. INJUNCTION (§ 134*)—TEMPORARY INJUNCTION — WHERE RIGHTS OF PARTIES ARE DOUBTFUL.

Where the rights of the parties in an action for an injunction are doubtful, the court should look at the balance of convenience, and act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 303; Dec. Dig. § 134.*]

7. INJUNCTION (§ 136*)—TEMPORARY INJUNCTION—GROUNDS.

A canal was constructed by plaintiffs in 1906 to furnish water to rice farmers over a large area. It had been constructed through defendant's five-acre tract without objection from the then owners, and with the actual knowledge of the present officers of the corporation owning the tract, and it had been extended some distance beyond, at great expense. Plaintiffs had been in undisturbed possession of the canal easement for three years. A number of farmers had planted their lands with rice, trusting to the canal for the water essential to the crops. Plaintiffs had made contracts with the farmers to supply them with water for the present crops, all without any objection from defendants. In May, 1909, a time the most critical to a rice crop, and when a delay of a few days in procuring the necessary water would entirely destroy the crop, defendants suddenly, and without the knowledge of plaintiffs, took forcible possession of the portion of the canal running through the 5-acre tract, cut the banks, and filled up the canal, making inevitable loss of the rice crops and numerous law suits against plaintiffs for failure to carry out their contracts for water. Damages to defendants from the granting of a temporary injunction wrongfully granted would be trivial and easily estimated and compensated. *Held*, that plaintiffs were entitled to a prohibitive temporary injunction forbidding interference with the free use and possession of the canal through the 5-acre tract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 306; Dec. Dig. § 136.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by the McFaddin, Wiess & Kyle Land Company against Jeff Chaison Town-Site Company. From an order granting an injunction against defendants, they appeal. Reformed and affirmed.

Watts & Wheat and Dougherty, Conley & Gordon, for appellants. F. J. & R. C. Duff and McDowell & Davidson, for appellees.

REESE, J. This is an appeal from an order, in chambers, of the judge of the Fifty-Eighth judicial district, granting an injunction against appellants at the suit of appellees. The petition was filed May 14, 1909, upon which the injunction prayed for was on the same day granted without notice. On May 17th defendants filed their answer under oath, upon which they predicated a motion to dissolve the injunction. Thereupon plaintiffs, on May 25th, filed their first supplemental and first amended petitions. The motion to dissolve coming on to be heard, on May 27th, was overruled. This action would appear to have been had by the court, in session, from the terms of the order. From this order notice of appeal was given to this

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court. This appeal, however, is prosecuted, not from this order of the court refusing to dissolve the injunction, but from the original order granting the same, and the contention is made, in limine, by appellees that appellants, by filing their motion to dissolve in the district court, have lost their right to appeal from the original order granting the injunction.

The statute gives no right to an appeal from an order refusing to dissolve an injunction once granted, which is a serious defect in the law, and is probably due to an unintentional oversight. We are inclined to the latter view by a consideration of the various defects in the act in question, which bears the marks of crudeness. Unquestionably it is, or should be, the policy of the law to encourage parties litigant to seek to have errors corrected, so far as this may be done in the cheapest and most expeditious way, and in view of this we do not think it was the purpose of the statute to penalize a litigant, by depriving him of the remedy of appeal to this court from an order granting an injunction, if he should seek, at the source of the injunction, to have the supposed error corrected by a dissolution. It would have been better if the act in question had in fact given the right of appeal from an order refusing to dissolve, instead of from the order granting the injunction, which would have allowed a presentation of the case on appeal upon the petition, answer, and such evidence in addition as was heard on the motion to dissolve, instead of the naked allegations of the petition. We overrule appellees' contention as to the effect of the motion to dissolve on this appeal, which has been perfected within 15 days of the date of the granting of the injunction. Appellees have had sent up their supplemental and first amended petition in which the grounds for injunction are more fully and clearly stated, and we find in the record also an answer of appellants, with their motion to dissolve, and the order refusing the same. In an appeal from the naked order of the judge granting an injunction upon the allegations of the petition alone, we doubt whether the pleadings referred to, filed some days afterwards, can be properly considered over the objection of appellant, and we therefore have not considered them. This applies as well to the answer of appellants as to the other pleadings of appellees.

The allegations of the petition upon which the injunction was granted are as follows:

"Plaintiff shows unto the court that on or about the ——— day of February, 1906, it constructed a lateral canal from its main canal upon and across a portion of the Pelham Humphries and J. Douthitt surveys, for the purpose of furnishing water to different parties, and, among others, to parties cultivating lands upon the Grange survey; that at the time of constructing its canals, the plaintiff contracted and agreed with C. J. Chaison, who represented the American Oil & Refining Company, in consideration of the American Oil & Refining Company granting unto it a right of way for its canals over the lands of said American Oil & Refining Company, that it would water the lands of American Oil & Refining Company at the prices to be charged other people for the same service; that at the time of construction of the lateral hereinbefore referred to, which crosses a portion of the said Pelham Humphries survey, plaintiff had no knowledge of any objection thereto by any person owning the same or having an interest therein, believing that, if the same belonged to the said American Oil & Refining Company, the stock of which was owned very largely by the defendant C. J. Chaison and his family, or if it belonged to the defendant the Jeff Chaison Town-Site Company, of which the said C. J. Chaison was president, and the said lateral being constructed in a large measure to furnish water to tenants of the said American Oil & Refining Company, on the said Grange survey, there could be no objection thereto, and as a matter of fact there has been no objection thereto or complaint made of the situation of said lateral until now; that at the time of the construction of said canal, it was so constructed, laid out, and built on and across 5 acres of the Pelham Humphries survey situated west of the Sabine & East Texas Railroad and south of J. Douthitt survey, fronting the public road, which said five acres at that time was owned by the Favorite Oil Company, and which said Favorite Oil Company had made no objection to the consideration of the said canal; that after the construction of said canal at the June Term, 1907, of the Sixtieth judicial district court the Jeff Chaison Town-Site Company recovered 10 acres of the Pelham Humphries survey from the said Favorite Oil Company, which said 10 acres includes the five acres across which the said lateral was so constructed and is now situate.

"Plaintiff shows unto the court that said lateral was not constructed and run across said land with the intention or purpose of injuring any one, and especially not any of the defendants herein, but solely for the purpose of conveying water for the purposes of irrigation to different farmers, and especially those upon the Grange survey for the purpose of irrigating rice grown upon the lands of the said different parties, as herein alleged. It is further shown the court that the plaintiff had contracted and agreed to furnish water for irrigation for 300 acres of land now planted in rice upon the Grange survey for tenants of the said American Oil & Refining Company, of which C. J. Chaison, one of the defendants, is president, and also for 500 acres for Baird Bros., 100 acres for Winsor & Head, and 200 acres for Winsor & Head, which is also on the American Oil & Refining Company's property, and 100 acres for Huffman on the property of the said American Oil & Refining Company.

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"It further shows to the court that, unless it is permitted to use its canal as now constructed, it will be impossible to furnish the said farmers water, as it has agreed to do, and they will thereby be unable to make a crop and suffer irreparable damage, and that this plaintiff will suffer the loss of its rental for water agreed to be so furnished said different rice farmers, and subject this plaintiff to numerous damage suits. Plaintiff shows that the said defendant C. J. Chaison, acting for himself and for the said Jeff Chaison Town-Site Company, did on or about the 12th day of May, 1909, go upon the said 5 acres of land hereinbefore described, the title to which came into the said Jeff Chaison Town-Site Company at the June term, 1907, of the district court of this county, and long after the construction of the said lateral, and did dam up the said lateral and cut same so as to let the water out of it, and fenced the same up so that the plaintiff could not use the said canal for the purpose of furnishing water to the rice farmers hereinbefore mentioned, and with whom he had agreed to furnish water, and at the same time did employ his codefendants, O. S. McCullough and John Baldwin, and put them in charge of the said 5 acres of land and of the said lateral canal across same, so dammed and fenced up as aforesaid, for the purpose of keeping plaintiff and its agents and employés from going upon the same or interfering therewith, or to place same in a condition to convey water along the same or to remove the dam therefrom, or to in any way interfere with the possession of the said Town-Site Company or the said C. J. Chaison, that by said acts of the said Chaison, acting for himself and said Town-Site Company, this plaintiff has been entirely cut off and prohibited from furnishing water for irrigation purposes to the said farmers hereinbefore referred to, and to any others that may be along the said lateral canal, and has thus rendered it impossible for the said rice farmers so mentioned from getting water to irrigate their said rice crops, for this entire year, unless this court shall grant the relief hereinafter prayed for.

"Plaintiff shows further unto the court that the rice crops of the said farmers hereinbefore mentioned have all been planted, and that they are now calling upon this plaintiff for water, and that this plaintiff is now ready, able, and willing to furnish said water if it can have the use and advantage of its said canal, constructed as heretofore shown. It is further shown the court that the said farmers hereinbefore referred to prepared and planted their lands with a view to getting the water from this plaintiff, and through the said lateral as now constructed, and which has been so constructed since 1906, and this plaintiff agreed to furnish them with the water because of the fact that it had for three years past been allowed to furnish water through said lateral unmolested in any way whatever, believing, at the time of the construction of the same and at all times since, that it had a right to so construct its canal, and that there was no objection thereto, and being confirmed in its belief by a continued acquiescence by the owners of said land for more than three years.

"It is further shown the court that the said 5 acres of land, 2 acres of which is so fenced up by the defendants herein and across which said lateral runs, is not planted to anything, nor is the same in cultivation, and the said canal or lateral across same does not damage the same to any appreciable extent, but is a positive and direct benefit to all of the parties hereinbefore mentioned as a means of procuring water for the purpose of irrigating their rice, as well as to all other persons along said lateral who need water for irrigating purposes. It is further shown the court that this plaintiff is amply solvent and able to pay any damage it may cause defendants, or either of them, by virtue of the said laterals crossing the said 5 acres of land, and that if any damage shall be caused by said lateral, then this plaintiff can be made to respond in damages for whatever loss or diminution in value the said 5 acres shall sustain by reason of said lateral, but it is shown the court that, unless said lateral is opened up, and this plaintiff allowed to furnish water for the purposes of irrigation, the farmers hereinbefore mentioned will be denied the power and privilege of watering their lands at all, and thus be cut off from making a crop during this year, and that the said lands amount to between 800 and 1,000 acres.

"It is further shown that the said parties above mentioned are now asking and demanding from this plaintiff that it furnish water to them upon their farms, and it is anxious and ready and would furnish said water as now desired by said farmers except for the fact that the said defendants have cut his said lateral, and dammed the same up and fenced the same, so that plaintiff cannot flow its water along said canal, nor have access to same, nor go upon the ground for the purpose of fixing said canal and furnishing said water. It is further shown the court that it would be inequitable and unjust to cause this plaintiff and its patrons, the said rice farmers as aforesaid, to suffer the irreparable damage herein set out because of the acts of the defendants in stopping up said ditch because it crosses 5 acres of its land, and for which damage to said 5 acres, if any, the defendants have a complete and adequate remedy at law by suit against this plaintiff, who is amply solvent to respond in whatever damages it has or may have caused, or may hereafter cause, the said defendants, or either of them. It is further shown the court that growing of rice requires a great deal of water, and in order that it be successfully grown must be watered at the very time it is needed, and

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it is shown that the water is now needed and demanded by the rice farmers hereinbefore referred to for the purpose of watering their crops."

Upon these allegations appellees prayed for an injunction restraining appellants, their agents, and servants from further interfering with the appellees' possession of said lateral canal, and commanding them to remove all obstructions placed by them in and upon said canal, including the fence, and further giving appellees the power to remove such obstructions, and to fill up the gap cut by appellants in the banks of the canal, and prohibiting appellants from interfering with their so doing. The injunction was granted in the terms of the prayer.

Under their third and fifth assignments of error appellants present the following proposition: "A mandatory writ of injunction should never issue without notice; and, where the effect of a mandatory writ of injunction is to grant to the complainant all the relief that he could obtain on a final hearing, and where such writ is issued without a hearing and without notice, it is taking property without due process of law, and contravenes section 19, art. 1, of the Constitution of the state of Texas and section 1 of the fourteenth amendment to the Constitution of the United States, and is therefore void." These assignments of error, as is shown by the proposition, are leveled only at the mandatory provisions of the writ of injunction. Many of the restrictions upon the use of mandatory injunctions have, in modern times, given way to a more liberal construction of the powers of a court of equity in the use of such form of injunctions.

In Joyce on Injunctions, with reference to such injunctions, it is said: "In support of the modern view before noticed that a mandatory remedial injunction should be granted in a proper case as readily as in a preventive one, and as a further illustration of the plasticity of the injunctive process, when required to be used in a new and unfamiliar environment, the Supreme Court of Oklahoma has held that, on proceedings by a homestead claimant to enjoin one claiming adversely to him from interfering with his possession, the court may on defendant's answer and cross-complaint enjoin plaintiff from interfering with defendant's possession, and that in such case the court may give its mandatory injunction the force and effect of a writ of possession, as there is no adequate remedy at law, and as defendant should not be compelled to wait for possession pending the settlement of title in the land department. Mandatory injunctions which require of a party the performance of some act always to some extent anticipate the judgment of the court, and therefore should be granted with caution, and only when the necessity is great. But not only is the power to grant them undoubted, but the remedial and restraining power of a court of equity would be greatly impaired if such was not the rule." 2 Joyce on Inj. §§ 101–103, 1392; 1 High on Inj. § 2; 6 Pom. Eq. Juris. §§ 554–556; 5 Pom. Eq. § 510; Lumber Co. v. Lumber Co. (C. C.) 86 Fed. 528–533; New Iberia Rice Milling Co. v. Romero, 105 La. 439, 29 South. 876; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1228.

Investigation of the foregoing authorities will show that the right of a court of equity generally to issue a mandatory injunction before hearing and without notice, in a proper case, is as unquestioned as the right to issue a merely prohibitive injunction, the only limitation upon such power being, as sometimes stated, that the complainant must show "a strong and mischievous case of pressing necessity." The result of an indiscriminate refusal of such right and power in the court would be that, in case of trespass to the irreparable injury of complainant, clearly entitling him to a restraining writ, he would be remediless if the trespasser by superior diligence succeeded in installing himself upon the premises before the sheriff could reach him with the prohibitive writ. This is not the kind of diligence that will be rewarded or protected by a court of equity. It will not do to look alone to the fact that the defendant is in possession without regard to how he acquired such possession. As to the objection that the writ issued without notice grants to complainant all the relief he could obtain on a final hearing, the prayer of plaintiff's petition and the terms of the judge's order are subject to this criticism: No reference is made in the prayer, nor in the judge's order, to any future proceedings in the case, but, as the result either of inadvertence or design, the injunction prayed for and granted is in terms permanent and perpetual. The writ of injunction issued is, however, not subject to this criticism, but is only in form a temporary injunction until the hearing. The order of the court will be reformed so as to operate as a temporary injunction merely, disposing of none of the questions, but only preserving the status of the property until further order made in the case in the trial court, and this, we think, will remove the objection of appellants last referred to. The third and fifth assignments referred to are overruled.

Under the fourth assignment of error appellants advance the proposition: That it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title. This doctrine, as generally stated in the proposition, is correct, and is supported by the authorities cited in appellants' brief. Railway Company v. Railway Company, 61 Mich. 9, 27 N. W. 715; Calvert v. State, 34 Neb. 616, 52 N. W. 687; Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144; Arnold v. Bright, 41 Mich. 207, 2 N. W. 16. But, in our opinion, the doctrine of these

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cases has no application to the case here presented. In Railway Company v. Railway Company, supra, one railway company secured an injunction, without hearing and in advance of a trial, to restrain another railway company from interfering with the complaining company in laying its track across the right of way and tracks of defendant company. The defendant company was, and had been, in quiet and peaceable possession of its track and roadbed. The effect of the injunction was to transfer permanently, without a trial, to a qualified extent, this possession to the complainant. Calvert v. State, supra, was a similar case; a street railway company securing an injunction, without a hearing, restraining a railway company from interfering to prevent the street railway company from laying its track across the track of the railway company. The following extract from the opinion fully explains the case, and emphasizes the distinction between that and similar cases and the case here presented: "The sum of the answer of the Chicago, Burlington & Quincy Railroad is that for over 20 years it had been in possession of this property; that it was within the limits of its yards at Lincoln, and necessary for the transaction of its business; that the plaintiff's railway was not a lawful corporation, and had no right to use the property in question for its track; that the location and use of said street railway would cause great injury and danger to the company and its employés; that the plaintiff had paid nothing for the right to use said streets, etc. These facts stand admitted, yet the plaintiff was given full authority to proceed and construct the street railway, while the defendant was enjoined from defending its possession."

In State ex rel. Reynolds v. Graves, supra, defendant was in possession of land under a lease, and had planted crops, which were then growing on the premises. Plaintiffs claimed that the lease was void. The effect of the injunction granted, in advance of the trial, was to transfer the possession of the land and crops growing thereon to plaintiff. The court says: "Phillips was, it is true, claiming the land, but he did not occupy it; and the injunctions were therefore not granted for the purpose of preventing a threatened invasion of a present actual possession." Now it is true that appellants were in possession, but such possession was acquired by a forcible and violent invasion of appellees' previous possession, and the effect of the injunction was to restore and maintain the status as it existed before this trespass. Arnold v. Bright, supra, is a very similar case to the preceding one. A tenant in peaceable possession, who had planted crops which were growing on the land, was by a preliminary injunction, in advance of a trial, turned out of possession, and the land and growing crops turned over absolutely to the plaintiff. The court says: "The most striking feature of this case is that on the filing of the bill, by an ex parte order, the court adjudged the whole merits of the controversy by means of an injunction, turned the defendants out of possession of premises of which they were prima facie lawful occupants, under complainants' lease, and allowed the complainants to have the immediate benefits of a final decree in his favor by entering and occupying."

If the complainants here were seeking by injunction to prevent defendants from interfering with their entry upon the land, and to secure possession of it for the purpose of opening a canal through the same, there would be some analogy between the case thus presented and those cited. But, according to the allegations of the petition, appellees had opened their canal through the 5-acre tract with the consent, or at least with the acquiescence of, the then owner, had extended the same some distance beyond, and had been in the quiet and undisturbed use and enjoyment of the easement thus acquired for three years when, without their knowledge or consent, appellants took forcible possession of the same, fenced up the land, including that portion of the canal running through it, cut the banks, and filled up the canal. The effect of the injunction, as modified by the court, is only to restore the possession thus forcibly invaded, and preserve the status until the question of appellees' right can be determined. The authorities heretofore cited by us, under the third and fifth assignments, support our conclusion that preliminary writ of injunction may issue for this purpose.

The case presented by the petition is one of peculiar hardship. The canal was constructed by appellees in 1906 for the purpose of furnishing water to rice farmers, over a large area. It had been so constructed through the 5-acre tract of appellants, who are a corporation, with the actual knowledge of the present officers of such corporation, and with the knowledge, and, if not with the actual consent of, without objection from, the then owners of the 5-acre tract, and had been extended some distance beyond at great expense. Appellees had been in the quiet and undisturbed possession of the easement thus acquired for three years. A number of rice farmers had planted their lands in rice, trusting to this canal for their supply of water, without which such crops cannot be raised. Appellees had made contracts with such rice farmers to supply them with water for the present crops. All this had been done without a whisper of objection from appellants, who were bound to know what had been, and was being, done. In May, 1909, at a time the most critical in the making of a rice crop, and when a delay of a few days in procuring the necessary water would entirely destroy the crop, appellants suddenly, and without the knowledge of appellees, took forcible

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possession of that portion of the canal, running through their 5-acre tract, cut the banks, filled up the canal, and fenced up the land. The consequences in the loss of rice crops, and the plentiful crop of lawsuits against appellees for failure to carry out their present contracts for water, are inevitable. The damages to appellants from the granting of the temporary injunction, if wrongfully granted, are trivial and easily estimated and compensated. We quote from Joyce on Injunctions (volume 1, § 25): "Where the rights of the parties are at all doubtful, the court applied to for an injunction should look at the balance of convenience, and act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction. In this connection it is said in a recent case: 'In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where in a doubtful case the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such a doubt may relate either to the facts or to the law of the case, or to both.'" And it has been held in this connection that damage to others, not parties to the suit, may be considered in a doubtful case.

It was stated in argument at the bar by counsel for appellees that appellees only required that appellants be restrained from interfering with their possession, and that the mandatory injunction requiring appellants to remove the obstruction to the canal, fill up the gaps, cut, etc., was not needed. It seems to us that a prohibitive injunction enjoining and restraining appellants from in any way interfering with the free use and possession of the canal through the land claimed by them will afford appellees all the relief required, and the injunction will be so modified, and the order of the judge will also be modified so as to operate only temporarily until further order is made in the trial court in the cause, and, as so modified, the order will be affirmed at the cost of appellees.

Our conclusion is that the office and effect of the injunction is only to restore and maintain the status of the property, as it existed before appellants' forcible trespass, until the final hearing or until further order made in the cause by the trial court. As to the merits of the controversy to be adjudicated on the final hearing, involving the right of appellees to continue in the use and operation of the canal through appellants' land, that question is entirely open, and is not in any way affected by our decision of the questions presented on this appeal.

The order for the injunction will be reformed, as herein indicated, and as so reformed will be affirmed, but appellees should pay the costs of the appeal, and it is so ordered.

Reformed and affirmed.

MANNING et al. v. GREEN et al.†

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 16, 1909.)

1. SUBROGATION (§ 27*)—PAYMENT OF PURCHASE-MONEY NOTE.

Where third parties, at the request of the maker of a note given for the price of land and retaining a lien thereon, such maker being in possession of the land, furnish money to take up the note, with the understanding that such third parties are to become the owners of the note and to be subrogated to all the rights of the former owner, it is immaterial whether the subsequent purchaser of the land or the owner of the note either knew of such arrangement or consented thereto.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 27.*]

2. JUDGMENT (§ 725*)—RES JUDICATA.

A former judgment is only conclusive of such matters as were essential to be determined before the judgment could be rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1255; Dec. Dig. § 725.*]

3. JUDGMENT (§ 725*)—RES JUDICATA.

Judgments for title and possession of land only were not conclusive as to the rights of defendants as holders of a purchase-money note reserving a lien on the land.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 723.*]

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by Y. T. Manning and others against S. L. Green and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This suit was brought by appellants, Y. T. Manning and the First National Bank of Leonard, against appellees, S. L. Green, Walter Pierce, D. L. Hemsell, sheriff, B. H. Zauk, and J. P. Pierce, and the issues as made by the pleadings of the parties, respectively, are as follows, substantially: The plaintiffs alleged that appellant Y. T. Manning holds in trust for the use and benefit of appellant First National Bank of Leonard 75 acres of land in Hunt county, Tex., of the William Aiken survey, fully describing said lands by metes and bounds; that on the 3d day of April, 1908, an order

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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of sale was issued by the clerk of the district court of Hunt county in cause No. 5,882, B. H. Zauk v. J. P. Pierce, directing and authorizing the sale of the above-described land in order to satisfy a judgment rendered in said cause for the sum of $818, together with interest and costs; and that D. L. Hemsell, sheriff, pursuant to said order of sale, had levied upon and had advertised for sale the above-described land, said sale to be made at the courthouse door in Greenville on Tuesday, May 5, 1908. Plaintiffs alleged that said judgment had been fully satisfied, and that it could not support and justify said order of sale, for the following reasons:

1. That at the time said judgment was rendered it was for a balance claimed to be due upon a certain promissory note given by defendant J. P. Pierce, in favor of B. F. Pierce, and which note had been transferred by said B. F. Pierce to defendant B. H. Zauk; said note bearing date October 1, 1889, and due January 1, 1895, and being for the sum of $1,000, and which note was given for a part of the purchase money for the above-described land. That prior to the date of the rendition of said judgment, and during the pendency of the suit in which same was rendered, to wit, on the 4th day of February, 1907, the defendant Walter Pierce, together with W. R. Roach and Tom Roach, paid to the Greenville National Bank, which bank held the above-described note for collection, the sum of money due upon said note, which sum of money was thereafter paid over to the said B. H. Zauk. That the said payment made by the said defendant Walter Pierce, W. R. Roach, and Tom Roach was entirely voluntary on their part, and there was no agreement or understanding at the time between said last-named parties and said B. H. Zauk, or with the plaintiff the First National Bank, who was the legal owner of said land at said time, for any transfer of said note, or that they, the said Walter Pierce, W. R. Roach, and Tom Roach, should succeed to the rights and benefits belonging to the said B. H. Zauk as the owner and payee of said note; but that the said act of said Walter Pierce, W. R. Roach, and Tom Roach in paying off said note was wholly voluntary, and was at the time without the knowledge of either the said B. H. Zauk or the plaintiff the First National Bank. That the act of the said Walter Pierce, W. R. Roach, and Tom Roach was at the instance and request of J. P. Pierce, the father of said Walter Pierce, and the father-in-law of said W. R. Roach and Tom Roach, and that he, the said J. P. Pierce, at said time had no title or interest in the said land, but by this method was seeking to extend his illegal possession of the same. That at the time the judgment was rendered in said cause No. 5,882, above mentioned, plaintiff the First National Bank did not know that said note had been paid as above explained, but believed that the same was still held and owned by the said B. H. Zauk. That after said judgment had been obtained, as above explained, the said defendant Walter Pierce, together with W. R. Roach and Tom Roach, applied to the said B. H. Zauk for a transfer of same, and the said Zauk refused to give said transfer unless he was paid the sum of $50, and which sum was accordingly paid and said transfer executed, of date November 29, 1907, whereby the said B. H. Zauk transferred all of his rights by virtue of said judgment to the said Walter Pierce, W. R. Roach, and Tom Roach. That on the 7th day of January, 1908, the said W. R. Roach and Tom Roach by an instrument in writing transferred their interest in said judgment to the defendant S. L. Green.

(2) That on March 13, 1907, a judgment was rendered in the district court of Hunt county, Sixty-Second judicial district, in cause No. 6,329, wherein Walter Pierce, W. R. Roach, Tom Roach, and others were plaintiffs and the First National Bank of Leonard and J. P. Pierce were defendants, it being a suit in trespass to try title, and wherein the said bank upon its cross-bill set up title to the land herein above described, which plea or cross-bill was by said court sustained, and a decree rendered awarding the title and possession to said land to said defendant bank.

(3) That on August 13, 1906, the plaintiff the First National Bank of Leonard filed suit in trespass to try title in the district court of Hunt county against Walter Pierce, W. R. Roach, Tom Roach, and others as defendants to recover the land embraced herein and other lands, and by a judgment rendered in said cause on March 3, 1908, said above-described land was awarded to the said First National Bank.

Plaintiffs alleged that by reason of the premises the said judgment in cause No. 5,882 was illegally and fraudulently rendered, the said note upon which same was based having been previously paid and satisfied, as above explained; that plaintiff bank had no knowledge of the act of said Walter Pierce, W. R. Roach, and Tom Roach in paying off and satisfying said note at the time said last-named judgment was rendered, and plaintiffs did not know of such payment until it was too late to appeal from said judgment. Plaintiffs alleged that defendant S. L. Green purchased an interest in the judgment rendered in said cause No. 5,882 during the pendency of said above-mentioned cause No. 6,298, and that he is concluded in all of his rights by reason of the judgment rendered in said last-mentioned cause; that the said judgment rendered in favor of plaintiff the First National Bank in said causes Nos. 6,298 and 6,329 mentioned above forever concluded and extinguished any and all rights or claims which defendants Walter Pierce, S. L. Green, and W. R.

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Roach and Tom Roach had in way of lien or claim upon the land above described, if any such rights or claims they had, and plaintiffs specially plead said judgments as res adjudicata of all matters and things involved in this controversy. Plaintiffs alleged that they have no adequate remedy at law for their protection against the injury threatened by said sheriff in the pending sale of their land above described, and that unless sale is restrained they will suffer irreparable injury, and a cloud will be placed upon the title to their land. Plaintiffs prayed for citation, for injunction restraining defendants from selling said land, and upon final hearing that said judgment in cause No. 5,882 be set aside, canceled, and held for naught, for perpetual injunction restraining said sale, and for relief, general and special. Temporary injunction was granted as prayed for.

The defendants answered by a general exception, general denial, and defendant Zauk set up a transfer of the judgment in his favor to Walter Pierce, W. R. Roach, and Tom Roach. All the defendants answered specially, at length, in terms which need not be set out. A judgment was rendered for defendants generally, dissolving the injunction, and that they go hence, and recover of plaintiffs their costs. Plaintiffs excepted, and perfected an appeal.

Thompson & Mead, for appellants. J. T. Jones, for appellees.

BOOKHOUT, J. (after stating the facts as above). The first assignment assails as error the court's conclusion of law wherein he held the transaction as to the Zauk note, with the Greenville National Bank representing Zauk, amounted simply to a transfer of the note to Will Roach, Tom Roach, and Walter Pierce, which carried with it the vendor's lien. The proposition is presented that, "in order that one having no interest to protect, who pays the debt of another, or advances money for that purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there must be a convention or agreement to that effect. This convention or agreement may be made with either the debtor or creditor at the time or prior to such payment, but cannot be made afterwards; but, if made with the debtor who has parted with title to the security held, it cannot give the person so paying any claim to such security as against a subsequent lienholder, who has become the owner of the equity of redemption without such owner's sanction." The cause was tried before the court without a jury, and the court filed conclusions of fact wherein he found that B. H. Zauk was the owner and holder of a vendor's lien note given by J. P. Pierce in favor of B. F. Pierce. This note was given for the purchase money of the 75 acres of land, and was recited in the deed to said land made by B. F. Pierce to J. P. Pierce, which deed was of record in the office of the county clerk of Hunt county, and a lien was retained in said note to secure the payment of the same. Zauk sent this note to the Greenville National Bank for collection, without his indorsement thereon, and without any other instructions. The First National Bank of Leonard, by a foreclosure of a trust deed executed by J. P. Pierce of subsequent date to the said note, had become the owner of the land for which the note was given. The debt secured by said trust deed amounted to $7,193.21, with interest, and said bank purchased the said land on foreclosure of said trust deed, for which it paid the sum of $5,000, which was credited on its debt. While said note was at said bank for collection, at the request of J. P. Pierce, his son, Walter Pierce, and his sons-in-law, W. R. Roach and Tom Roach, went to the said Greenville National Bank, and on the 4th day of February, 1907, after having an agreement with the said bank and J. P. Pierce, they, the said Walter Pierce, W. R. Roach, and Tom Roach, paid off said Zauk note with money said last-named parties borrowed at the time from said bank, for which money so borrowed they gave said bank their note, and said Zauk note was attached thereto as collateral security. It was agreed by the said Greenville National Bank and J. P. Pierce and Walter Pierce, W. R. Roach, and Tom Roach, at the time that the said three last-named persons were purchasing said note, that they should succeed to all of the rights of B. H. Zauk as the owners and holders of said note. We do not sustain this contention. Zauk had sent the note to the bank for collection. J. P. Pierce, the maker of the note, having requested his son, Walter Pierce, and his sons-in-law, W. R. Roach and Tom Roach, to pay off the note, their act in borrowing the money from the bank on their own note, attaching the Zauk note to their note as collateral security, was in effect a transfer of the Zauk note to Will Roach, Tom Roach, and Walter Pierce. The bank immediately forwarded the money borrowed to Zauk in satisfaction of the note. He did not at that time transfer the note to Walter Pierce and the Roaches; but he received and accepted the money due on the note, and thereafter fully ratified and confirmed the action of all parties.

Again, the findings of fact show that J. P. Pierce, the maker of the note, was still in possession of the property for which it was given, claiming and using the same as a homestead, and that he remained in possession for something over a year after the transaction at the Greenville National Bank; that at his request Walter Pierce and Will and Tom Roach borrowed the money from said bank to pay Zauk the balance due on the note, and that it was agreed and understood between them all, including the bank which had the note for collection, that Walter Pierce and Will and Tom Roach were to be-

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come the owners of the note, and, so understanding it, they left the note with the bank as collateral to secure the note which they made for the money to pay Zauk with; that they, Walter Pierce and Will and Tom Roach, did not rely upon J. P. Pierce's credit, but upon the vendor's lien; that at this time appellant bank had two suits pending against J. P. Pierce for the title and possession of the land; that by agreement between Zauk's attorney and Walter Pierce and Will and Tom Roach judgment was rendered in cause No. 5,882 in Zauk's name for them, and Zauk afterwards, upon the payment of attorney's fees, transferred the judgment to them. Where third parties, at the request of the maker of the note, who is yet in possession of the property for which it was given and claiming the same, furnishes money to take up or pay off the note with an express understanding, between the maker and the bank having said note for collection, that they are to become the owners of the note and are to become subrogated to all the rights and remedies of the owner of the note, it is immaterial whether the subsequent purchaser of the land or the owner of the note either knew of such arrangement or consented thereto; for if the maker accepts the money on the note he cannot be injured, and the owner of the land, having bought the same subject to the lien, cannot be heard to say that he prefers to have the owner of the note, rather than the third parties, foreclose on same. Whether the transaction between the third parties, the maker of the note, and the bank be considered a transfer of the note, carrying with it the lien, or a payment of the note, equity, disregarding formalities and technicalities, to do full justice, will preserve the lien in favor of such third parties. In other words, equity will subrogate the lender, who advances money to pay a lien creditor, to his rights under the lien as effectually as if he had become the assignee of the purchase-money notes. Hicks v. Morris, 57 Tex. 659; Dillon v. Kauffman & Runge, 58 Tex. 696; Warhmund v. Merritt & Metcalf, 60 Tex. 24; Fears v. Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

It is contended that the court erred in his conclusion of law in holding that the judgment entered in cause No. 6,329, wherein the First National Bank of Leonard recovered the land involved in this suit as against Will and Tom Roach, Walter Pierce, and others, was not conclusive of all their rights. The same contention is made as to cause No. 6,298, wherein the First National Bank, as plaintiff, recovered a judgment against Will and Tom Roach, Walter Pierce, and others, as defendants. The proposition presented is that a judgment of a court of competent jurisdiction, delivered upon the merits of a cause, is final and conclusive between the parties, in a subsequent action upon the same cause, not only as to the matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein, and that this rule is applied both in law and in equity.

On the 20th day of September, 1906, Walter Pierce, W. R. Roach, Tom Roach, and others filed suit in trespass to try title in the district court of Hunt county, being cause No. 6,329 on the docket of said court, wherein they sought to recover of J. P. Pierce and the First National Bank of Leonard 75 acres of land of the A. Ogden survey, and in said suit the said bank, in addition to the plea of not guilty, answered by a plea in the nature of a cross-bill, wherein it set up title to the land involved in this suit, No. 6,807, specially setting out its said title, being a note given by J. P. Pierce, a trust deed to secure the same, the foreclosure of said trust deed, and the purchase of the land by said bank; and the court in said cause (No. 6,329) on March 13, 1907, rendered judgment awarding the land in controversy herein to the said First National Bank of Leonard against all of the parties to said suit, said judgment bearing date March 13, 1907. At the time this judgment was rendered the said Walter Pierce and Will and Tom Roach claim to have been the owners of the Zauk note by virtue of the transaction had at the Greenville National Bank on February 4, 1907.

The facts in reference to suit No. 6,298, as found by the trial judge, are that on August 13, 1906, the First National Bank of Leonard filed suit in trespass to try title for the land involved in this suit in the district court of Hunt county, and, in addition to said above plea, said bank further, by special plea, set out its title, being a note executed by J. P. Pierce, a trust deed to secure the said note upon land embraced in this suit, the foreclosure of said trust deed by the trustee therein named, and the purchase thereunder by said bank; and in this suit J. P. Pierce, Walter Pierce, W. R. Roach, and Tom Roach, with other parties, were parties defendant. On February 5, 1907, the said defendants Walter Pierce and Will and Tom Roach, with other defendants in said suit, filed in said cause, which was No. 6,298 on the docket of said court, their answer, wherein they disclaimed having any interest in or to the lands involved in this suit. This cause was tried by the court upon the pleadings as above set out on the 3d day of March, 1908, and judgment was rendered by the court in favor of the First National Bank of Leonard as against J. P. Pierce, Walter Pierce, W. R. Roach, and Tom Roach, and the other defendants named in said petition, awarding the land in question to the First National Bank, except a one-sixth interest awarded to J. W. Pierce. The said bank has since acquired the said one-sixth interest of said J. W. Pierce. Appellee S. L. Green purchased the interest of W. R. and Tom Roach in the Zauk judgment on January 15, 1908, which was during the pendency of the above cause.

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We do not concur in the contention of appellant as to either of said suits. A former judgment is only conclusive of such matters as were essential to be determined before the judgment could be rendered. Moore v. Snowball, 98 Tex. 16, 81 S. W. 5, 66 L. R. A. 745, 107 Am. St. Rep. 596. As stated in the opinion in James v. James, 81 Tex. 381, 16 S. W. 1089: "It is a general rule, having its foundation in sound reason, that the former judgment or litigation relied on as having adjudicated the matter, and as a bar to further proceedings, should have involved and determined the same vital issue, or that such issue or question should have been fairly within the scope of the pleadings. The 'matter in issue' is that upon which the plaintiff's cause of action is based, and which the defendant denies by his pleadings. Vaughan v. Morrison, 55 N. H. 582. It can only be conclusive of such matters as were essential to be 'determined before the judgment could be rendered' (Philipowski v. Spencer, 63 Tex. 607), and is not conclusive as to collateral issues or any matter which must be inferred from it. Id.; Oldham v. McIver, 49 Tex. 572. Although the rule is familiar that all matters put in litigation in a prior suit which could have been decided are concluded, it does not obtain where the decree itself shows that the issue was not passed on by the court. Teal v. Terrell, 48 Tex. 491."

The court's findings of fact show that in causes Nos. 6,298 and 6,329 the issues of title and possession were raised and adjudicated. The judgments were for title and possession, and nothing more. The trial court did not err in holding that the appellees Walter Pierce and W. R. and Tom Roach were not concluded from a recovery by the said judgments.

Appellees contend that this appeal was taken for delay, and they ask that the judgment be affirmed, with damages. We are not prepared to hold, under the evidence, that the appeal was taken for delay. We are of the opinion that no error is pointed out in the record, and that the judgment should be affirmed; and it is so ordered.

Affirmed.

LEWRIGHT et al. v. TRAVIS COUNTY.

(Court of Civil Appeals of Texas. Oct. 20, 1909.)

On motion for rehearing. Motion for rehearing and motion to certify to the Supreme Court overruled.

For former opinion, see 118 S. W. 725.

FISHER, C. J. At the last term of this court we set aside the order overruling the motion for rehearing filed by the appellants, and also the order refusing to grant the request to certify to the Supreme Court. Since then we have re-examined the questions raised in the motion for rehearing and in the request to certify, and have definitely reached the conclusion that we correctly construed the decision of the Supreme Court upon which we based our disposition of the case. Therefore, the motion for rehearing will be overruled, as well as the motion to certify.

McCRACKEN et al. v. SISK.

(Supreme Court of Arkansas. July 12, 1909.)

1. PUBLIC LANDS (§ 143*)—DONATION LANDS—ACQUISITION OF TITLE.

To acquire title to land under the donation laws of the state, all the requirements of the statute must be fulfilled.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 389; Dec. Dig. § 143.*]

2. PUBLIC LANDS (§ 143*)—DONATION LANDS—TITLE OF DONEE.

A donee of land under the donation laws of the state cannot alienate, or in any way dispose of, the land, and no greater right is given him than that of possession.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 389; Dec. Dig. § 143.*]

3. PUBLIC LANDS (§ 143*)—DONATION LANDS—DEATH OF ORIGINAL DONEE—TITLE OF DONEE.

Under Kirby's Dig. § 4815, providing that the donee of donation land shall actually reside on the land for a specified period, and shall make improvements before he is entitled to make final proof and receive a deed, and section 4832, providing that on the death of the donee before the expiration of the time to submit final proof, the right shall extend first to his widow, and if no widow, then to his children, etc., the right to perfect the donation and submit final proof on the death of the donee is extended to the widow in her own right as an original donee; and, on her making final proof, she is entitled to a deed in her own right and as her individual property, which she may alienate as her separate estate.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 389; Dec. Dig. § 143.*]

Appeal from Clay Chancery Court; Eugene Schoonover, Special Chancellor.

Suit by Joe McCracken, administrator, and others against A. P. Sisk. From a decree for defendant, plaintiffs appeal. Affirmed.

F. G. Taylor and J. L. Taylor, for appellants. G. B. Oliver, for appellee.

FRAUENTHAL, J. The appellants, who were the plaintiffs below, instituted an ejectment suit against the defendant, A. P. Sisk, which was subsequently transferred without objection to the chancery court. The plaintiffs claimed title to the land as the collateral heirs of one George McCracken, deceased, and the defendant claimed title thereto under a deed executed by the State Land Commissioner to Celia Sisk, who was the widow of said George McCracken, and a conveyance by Celia Sisk to defendant. On February 24, 1888, an application was made

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to the Commissioner of State Lands for the donation of the land by George McCracken; and, after receiving a certificate of donation therefor, he, with his wife, Celia McCracken, established his residence thereon, and remained in possession thereof until his death, which occurred in October, 1889. He died without issue and without other living heirs, and left surviving him his widow, the said Celia McCracken, and his mother, Jane McCracken. The said Celia McCracken afterwards married defendant, A. P. Sisk. On June 6, 1891, having completed the necessary improvements and period of residence on said land, and being the widow of said George McCracken, she submitted final proof under the donation laws of the state, and received a deed from the state for the land. The deed was executed to Celia Sisk, widow of George McCracken. In 1899 the said Celia Sisk conveyed the land to defendant, and she died in 1900. In October, 1905, the mother of George McCracken died, leaving the plaintiffs as her only heirs at law. The chancellor rendered a decree in favor of the defendant, and the plaintiffs prosecute this appeal from that decree.

The question thus presented for determination is whether a donee under the donation laws of Arkansas has an heritable interest in the land before he has completed the term of residence, and other conditions required by the statute to entitle him to make final proof, or whether the right to the land under the donation law goes by designation of person in the statute, upon the death of the donee. Section 4832, Kirby's Dig., provides: "In case the donee should die before the expiration of the time herein required to submit final proof of the right to perfect, the same shall extend, first, to the widow of the donee, and if she be dead, then to the children of such donee, and should they be minors their duly appointed guardian or administrator of the estate of the deceased donee, may make such final proof for the benefit of such minor heirs, and should there be neither widow nor children surviving such donee, such right shall in such case descend to the father of the donee, and if he be dead, then to the mother of such donee; and if she be dead then to the brothers and sisters of the deceased donee, any adult of which shall be competent to make such final proof, and in the event of the death of the donee it shall not be necessary that residence on the lands shall be maintained thereafter, but the cultivation of the land must be continuously maintained, and no donation shall be liable for any debt contracted by the prior donee prior to the execution of the deed therefor, nor shall any alienation of the same be binding against the title of the state." By section 4815, Kirby's Dig., it is provided that the "donee shall actually reside upon the land for a period of three years," and shall make certain improvements before he will be entitled to make final proof and to receive a deed to the land. So that in this case the donee died before the expiration of the time required to submit final proof. The exact nature of the right which the donee has in the land when he dies prior to the performance by him of the requirements of the statute has never been directly announced by this court. But this court has uniformly held that no title can be acquired under the donation laws of the state until all the requirements of the statute have been fulfilled. In the case of McCauley v. Six, 40 Ark. 244, it is said: "It has been several times held by this court that these donations are matters of grace. The donee is not required to pay any taxes for which the land was forfeited, and he must comply with all the statutory conditions of the grant, without any regard to their policy or necessity." Surginer v. Paddock, 31 Ark. 528; Simpson v. Robinson, 37 Ark. 142.

The donee under the statute cannot alienate or in any way dispose of the land, and no greater right is given him by any express term of the statute than that of possession. The provisions of the homestead law of the United States, designating the persons who have the right to complete the requirements of the statute, and to receive patent after the death of the homestead settler, and prior to the expiration of the term required to entitle him to make final proof, are in many respects similar to the above provision of our donation law in that particular. Section 2291 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1390) provides: "No certificate, however, shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if at the expiration of such time, or any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisees * * * proves by two credible witnesses that he, she or they have resided upon or cultivated the same * * * then in such case, he, she or they * * * shall be entitled to a patent as in other cases provided by law." And section 2296 of the Revised Statutes of the United States provides: "No lands required under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." In construing these provisions of the homestead law the federal courts have held that a homestead settler has no devisable interest in the land until he has completed the term of residence required to entitle him to make final proof. And upon his death the right to complete such term and receive the patent passes to his widow. In the case of McCune v. Essig, 122 Fed. 538, 59 C. C. A. 429, the court said: "The estate granted to a homestead settler is granted on conditions precedent. These conditions are residence for the required time, cultivation, and required proof.

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Until all of these conditions are complied with, the law gives him no more than the right to possession. It provides that in case of his death before the completion of the conditions, his widow should have all the rights which he would have had. His right is extinguished by his death, and she, in virtue of the fact that she is his widow, is designated as the donee of the land. The statute provides for the rights of the children only in case of death of both father and mother before final proof." This case was affirmed by the Supreme Court of the United States in McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237. In the case of Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829, the court, in construing a donation act making a grant to the donee much stronger than our statute, said: "Until the settler was qualified to take there was no actual grant of the land, and if such settler should die after residence thereon of less than the required period prescribed by the statute, he had no devisable interest therein." In the case of Bernier v. Bernier, 72 Mich. 43, 40 N. W. 50, that court, in construing the above statute of the United States, said that it "does not treat the land as heritable, but makes the estate go by designation of person." That case was carried to the Supreme Court of the United States, and was affirmed in this particular. Bernier v. Bernier, 147 U. S. 246, 13 Sup. Ct. 244, 37 L. Ed. 152. In the case of Perry v. Ashby, 5 Neb. 291, that court, in construing this provision of the homestead law, held that the widow by completing the period of residence "was entitled to patent in her own right to the exclusion of the heirs of the settler." In the case of Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679, it is said: "Before a homesteader has earned a right to a patent he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the federal statute is issued to them, not as the heirs of the decedent, who have inherited his title, but as original parties preferred by the statute." Chapman v. Price, 32 Kan. 446, 4 Pac. 807; Jarvis v. Hoffman, 43 Cal. 314.

There is a great analogy between the above provision of our donation law and the homestead law of the United States. The construction placed upon the above provision of the homestead law by the above decisions seems to us sound and reasonable; and we are of opinion that the same construction should be given to the above provision of our statute. The state has determined who shall be the beneficiary of its bounty under the donation laws. It has first named a qualified donee; and after his death, and before the requirements of the statute have been fulfilled, it then has named his widow, as the person entitled to complete the requirements and to receive the title, not by any law of descent, but as an original party and in her own right. In the case at hand the donee died before the expiration of the time required by the statute to submit final proof of the right to perfect the donation. In that event the right to perfect the donation and submit final proof thereof was by the statute extended to the widow in her own right as an original donee, and to the exclusion of all children, if there had been any, and to the exclusion of all other persons. Upon making the final proof the widow was entitled to, and did, receive a deed to the land from the state in her own right and as her individual property, and which she could thereafter alienate as her separate estate.

It follows that the decree of the lower court is correct, and it is in all things affirmed.

GREEN v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. HOMICIDE (§ 255*) — INVOLUNTARY MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Evidence that accused came on decedent in a field of weeds, while attempting to rape accused's 12 year old niece; that decedent sprang up and ran away; that accused shouted to him to stop, without avail; that he fired a shot, which struck decedent in the head, causing death, together with the testimony of accused that he did not take deliberate aim, and that he fired only to stop decedent and bring him to justice—warranted a verdict of involuntary manslaughter, on the ground that the killing was unnecessary, for the jury could apply their judgment to the facts, and determine whether the killing was reasonably necessary to prevent decedent's escape.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 540; Dec. Dig. § 255.*]

2. HOMICIDE (§ 105*) — KILLING ESCAPING FELON—OFFENSE.

An officer, or a private citizen, seeking to prevent a felon's escape, must exercise reasonable care to prevent the escape of the felon without doing personal violence; and it is only where killing him is necessary to prevent his escape, that the killing is justified.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

3. CRIMINAL LAW (§ 823*)—ERRONEOUS INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The error in an instruction that if accused, seeing decedent committing a felony, shot decedent, who attempted to escape, without intending to kill, but to make him stop, and the shooting was done in a careless manner, the jury could find accused guilty of involuntary manslaughter, because leading the jury to believe that though it was necessary to kill decedent to prevent his escape, yet if accused fired the shot carelessly, he was not justified, was cured by an instruction that where a felony is committed, and the felon flees from justice, every man must use his best endeavors to prevent the escape, and where in the pursuit the felon is killed, when he cannot be otherwise overtaken, the homicide is justifiable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823;* Homicide, Cent. Dig. §§ 718, 719.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Appeal from Circuit Court, Union County; George W. Hays, Judge.

Ben Green was convicted of involuntary manslaughter, and he appeals. Affirmed.

Patterson & Green, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was tried on an indictment charging him with the crime of murder, and was convicted of involuntary manslaughter, and sentenced to the penitentiary for a period of one year. He killed one Minor Killgore, and admits the killing, but seeks to justify it.

The evidence tends to establish the following circumstances attending the homicide: Appellant came upon Killgore in a field of weeds, attempting to have carnal intercouse forcibly with his (decedent's) niece, a little girl about 12 years of age. Appellant was first attracted by the child's screams, and when he came upon the couple, Killgore sprang up and ran away. Appellant hallooed several times for him to halt, and when at a distance of about 40 yards he fired a shot, which struck Killgore in the back of the head, immediately producing death. This is appellant's own version of the tragedy, and it is supported by other testimony corroborating him as to the attempt, on the part of deceased, to ravish the child. He stated on the witness stand that he did not take deliberate aim, and that it was not his intention to kill Killgore at the time he fired the shot, but that he fired only to stop him and bring him to justice. It is earnestly insisted by counsel for appellant that the evidence is not sufficient to sustain the verdict; but, after careful consideration, we are of the opinion that the verdict should not be disturbed on that account. The evidence warranted a finding by the jury that, though the deceased had committed a felony, and appellant was within the line of his duty as a private citizen in attempting to arrest him, yet the killing was unnecessary. The jury had a right to apply their judgment to the facts presented, and say by their verdict whether it was reasonably necessary for appellant to shoot in order to prevent Killgore's escape. A felon's flight does not justify his pursuer in killing him, unless that is necessary to prevent escape. Reasonable care should be exercised by one placed in such a situation, either as an officer or a private citizen, to prevent the escape of a felon without doing personal violence; and it is only where killing is necessary to prevent the escape of the felon that the slayer is held in law to be justified. Carr v. State, 43 Ark. 99.

It is insisted that the court erred in giving the following instruction: "(11) The court tells the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, Ben Green, shot Minor Killgore with a pistol as alleged in the indictment, and killed him, but at the time he fired the pistol shot he had no intention of killing the deceased, but shot only to make the deceased stop, and the shooting was done in a careless and reckless manner, the jury will find him guilty of involuntary manslaughter, and assess his punishment at imprisonment in the State Penitentiary for a period of not exceeding 12 months." This instruction is criticised on the alleged ground that the jury might have understood it to mean that, even if the circumstances were such that it was necessary to slay the fleeing felon in order to prevent his escape, and appellant had a right to do so, yet if appellant fired the shot without any intention to inflict a death wound, and did so carelessly, then he would not be justifiable, but would be guilty of involuntary manslaughter. In other words, the contention is that this instruction is susceptible of the meaning that, even if it was necessary to kill the felon in order to prevent his escape, yet, if appellant fired the shot without any intention of killing him, but did so carelessly, he was not justifiable. We do not think that this instruction is open to that construction. But if there were any doubt as to its true meaning, the same must have been, in the minds of intelligent jurors, completely removed by the following instruction, which was given at appellant's request: "(3) The jury are instructed that if a felony be committed, and the felon fly from justice, it is the duty of every man to use his best endeavors for preventing the felon's escape; and, if in the pursuit the felon be killed, when he cannot be otherwise overtaken, the homicide is justifiable. And if you find from the evidence in this case that Minor Killgore, the deceased, had committed rape upon Odie May Killgore, or had assaulted said Odie May Killgore, with the intent to commit rape, and that defendant, Ben Green, detected said Minor Killgore in the commission of said rape, or the attempt thereof, and that said defendant then and there killed said Minor Killgore in an attempt to arrest him, you will acquit the defendant, provided you further find from the evidence that said killing was necessary to prevent the escape of said Minor Killgore."

We find nothing in the record that would justify us in disturbing the verdict.

Judgment affirmed.

MALONEY v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. FORGERY (§ 16*)—UTTERING—ELEMENTS.

The crime of uttering a forged instrument consists in offering to another as genuine a forged instrument capable of injury, with knowl-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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edge of the forgery and with intent to defraud; and it is not necessary that the instrument should have been actually received by the party to whom offered, or that the attempt to defraud should be successful.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 51; Dec. Dig. § 16.*]

2. FORGERY (§ 32*)—UTTERING—INDICTMENT.

An indictment for uttering a forged check which alleges that accused feloniously offered as true to prosecutor a forged bank check payable to a third person, and not assigned with intent to obtain possession of the property of prosecutor, and that accused knew that the check was forged, and which sets forth the check, is sufficient.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 64; Dec. Dig. § 32.*]

3. FORGERY (§ 12*)—UTTERING FORGED CHECK—INDORSEMENT OF CHECK—NECESSITY.

A check, payable to the order of an alleged payee, though not indorsed by him, has legal efficacy, and is capable of working injury within the law punishing the uttering of forged instruments, for one may obtain a right or an equitable title to the check without a written assignment thereof.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28–47; Dec. Dig. § 12.*]

4. BILLS AND NOTES (§ 200*)—CHECKS—TRANSFERS.

A check, payable to the order of a person named, may be transferred without a written assignment thereof, so as to make the transferee the true owner thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423–427, 497–501; Dec. Dig. § 209.*]

5. FORGERY (§ 8*)—ELEMENTS—FORGERY OF FICTITIOUS NAME.

To constitute forgery, the name alleged to be forged may be fictitious.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 26; Dec. Dig. § 8.*]

6. FORGERY (§ 35*)—UTTERING—EVIDENCE.

The jury, on a trial for uttering a forged instrument, must determine whether the person whose name appears signed to the instrument is real or fictitious; and, where they find that the name is fictitious, the inference arises that accused either forged the instrument, or knew that it was forged.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 103; Dec. Dig. § 35.*]

7. FORGERY (§ 40*)—UTTERING—EVIDENCE—ADMISSIBILITY.

On a trial for uttering a forged check, it is competent to show that the person whose name is affixed to the check as drawer is fictitious, by the evidence of the proper officers of the bank on which the check is drawn that no person bearing such name had an account with the bank, or was a customer thereof.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 113; Dec. Dig. § 40.*]

8. FORGERY (§ 44*)—UTTERING—EVIDENCE—ADMISSIBILITY.

On a trial for uttering a forged check on a designated bank, the testimony of the cashier of a new bank, which had succeeded to the former bank, that the names of the depositors of the designated bank, with balances, were transferred to the books of the new bank, and that the name affixed to the check as drawer did not appear on such books, did not show that such name was fictitious, and the inference could not be raised that the check was forged, and so known to accused.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 119; Dec. Dig. § 44.*]

9. CRIMINAL LAW (§ 407*)—DECLARATIONS OF THIRD PERSONS—ADMISSIBILITY AGAINST ACCUSED.

To render a damaging statement of a third person, made in the presence of accused, who did not deny it, competent against accused, it must be shown that accused heard the statement, and that the circumstances naturally called for a reply on his part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898–900, 968; Dec. Dig. § 407.*]

10. CRIMINAL LAW (§ 407*)—DECLARATIONS OF THIRD PERSONS—ADMISSIBILITY AGAINST ACCUSED.

A damaging statement of a witness at the examining trial, made when testifying in the presence of accused, is not made under circumstances calling on accused to deny it, or make a reply thereto, and hence proof of such statement is not admissible at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898–900, 968; Dec. Dig. § 407.*]

11. CRIMINAL LAW (§ 541*)—TESTIMONY AT FORMER TRIAL—ADMISSIBILITY—GROUNDS.

To render proof of the testimony of an absent witness at a former trial admissible, it must be shown that the absent witness is dead, or beyond the jurisdiction of the court, or on diligent inquiry cannot be found, and where the record fails to show that the whereabouts of a witness at a former trial was unknown, or that he was out of the jurisdiction of the court, or that any inquiry had been made for him, it was error to permit proof of his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1231; Dec. Dig. § 541.*]

Appeal frim Circuit Court, Ouachita County; George W. Hays, Judge.

Frank Maloney was convicted of uttering a forged check, and he appeals. Reversed and remanded.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. The defendant, Frank Maloney, was convicted of the crime of uttering a forged writing, and sentenced to the penitentiary for a term of two years; and from the judgment of conviction he prosecutes this appeal.

The indictment upon which he was tried, with the caption omitted, was as follows: "The grand jury of Ouachita county, in the name and by the authority of the state of Arkansas, on oath, accuse the defendant, Frank Maloney, of the crime of uttering a forged writing, committed, as follows, to wit: The said defendant, on the 9th day of April, 1909, in Ouachita county, Ark., did unlawfully, willfully, and feloniously utter and publish as true to Spencer Wooley, a certain forged and counterfeit writing on paper purporting to be a check on the Bank & Trust Company of Walnut Ridge, Ark., in words and figures as follows, to wit: 'Walnut Ridge, Ark., April 8, 1909, No. 614. Bank & Trust Company, pay to the order of George Collins, $6.17, six seventeen (6.17) dollars. C. B. McDonald.' The said forged writing being then and there passed, uttered, and published by the said Frank Maloney to the

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said Spence Wooley, with intent then and there feloniously to obtain possession of money, the property of said Spence Wooley, he, the said Frank Maloney, then and there well knowing the said paper to be forged and counterfeited, against the peace and dignity of the state of Arkansas."

The evidence tended to establish the following facts: On April 9, 1909, the defendant, in company with a party named Harris, entered the restaurant of one Spence Wooley in the city of Camden, Ark., and ordered supper. After finishing the meal he gave to Spence Wooley the written instrument or check set out in the above indictment and requested him to cash same, and to take therefrom the amount necessary to pay for the supper. Not having sufficient money to cash same, Wooley carried it to Mr. Hasper, and requested him to cash it, which he declined to do. He then showed the check to a policeman, who suggested that he see if the party had the money at the bank. Wooley then returned to defendant, and told him that he was unable to get the check cashed. The defendant then stated that he only had 15 cents, and asked his companion, Harris, for some money, who did not have it. About that time the policeman appeared and arrested the defendant. Wooley was not acquainted with defendant, nor with his companion, and had not seen either of them before. The cashier of the First National Bank of Walnut Ridge testified that his said bank became the successor of the Bank & Trust Company of Walnut Ridge, Ark., in February, 1909, a short time before the alleged commission of this offense, and that the balances of deposits due all parties as appeared on the books of the Bank & Trust Company were transferred to the books of the First National Bank, and that his said bank had no deposit in the name of C. B. McDonald, and had no customer by that name. There was no other testimony relative to C. B. McDonald, the alleged drawer of the check, or as to his alleged signature, and no testimony whatever as to George Collins, the alleged payee in the check.

It would appear from the testimony that there had been an examining trial of the defendant before a justice of the peace, and at that trial the party called Harris had been a witness. At the trial of the defendant in the circuit court the policeman, W. N. Ketchum, testified, over the objection of the defendant, duly saved, that he had taken from the possession of Harris, on said April 9th, a little book, which book had been exhibited to the cashier of said First National Bank, and who stated that it was the kind used by the Bank & Trust Company. Over the objection of the defendant this witness Ketchum also testified that at the examining trial of defendant, the party Harris testified that defendant signed a check while sitting in a hotel in Camden. There was no testimony as to where the party Harris was at the time of the trial in the circuit court; there was no testimony that any inquiry had been made for him, or any effort to obtain his presence at the trial.

The defendant filed a motion in arrest of judgment on the ground that the indictment does not allege facts sufficient to constitute an offense. The crime of uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing, and with the intent to defraud. Those essential elements of the crime are well charged in the indictment. To constitute the offense it is not necessary that the writing should have been actually received as genuine by the party to whom the same is offered, or that the attempt to defraud be successful; the uttering is complete if the forged instrument is offered as genuine, or declared or asserted, either directly or indirectly, by words or by actions as good. Wharton's Criminal Law (10th Ed.) § 708; 5 Ency. of Evidence, 865; Elsey v. State, 47 Ark. 572, 2 S. W. 337; People v. Canton, 25 Mich. 390; State v. Horner, 48 Mo. 520; Smith v. State, 20 Neb. 285, 29 N. W. 923, 57 Am. Rep. 832; 13 Am. & Eng. Ency. Law (2d Ed.) 1102; 19 Cyc. 1388; Holloway v. State (Ark.) 118 S. W. 256.

The instrument set out in the indictment was capable of working a legal injury. Although not indorsed by the alleged payee in the instrument, it had legal efficacy. The gravamen of the offense is the guilty intent which accompanies the attempt to defraud. As is said by Mr. Bishop: "Since the offense of uttering is an attempt, it is complete when the forged instrument is offered; an acceptance of it is unnecessary, while yet it does not take away or diminish the crime." 2 Bish. New Crim. Law, § 605. If one with intent to defraud offers a forged instrument to another which is capable of injury, he has committed this offense although the person to whom it is offered might not accept it without a written assignment. But in the instrument set out in the indictment one might obtain a right or an equitable title without a written assignment (Smith v. State, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832; Lawless v. State, 114 Wis. 189, 89 N. W. 891; Brazil v. State, 117 Ga. 32, 43 S. E. 460), and the check could be transferred without a written assignment thereof so as to make the transferee the true owner thereof (Heartman v. Franks, 36 Ark. 501; Lanigan v. North, 69 Ark. 62, 63 S. W. 62).

It is urged by the defendant that there is not sufficient evidence to sustain the verdict for the reason that it is not proved that the name of C. B. McDonald affixed to the check as the alleged drawer was a forgery. In a prosecution for uttering a forged writing, before there can be a conviction, the state must prove that the instrument offered was forged, and that the defendant knew it was forged. It is true that no witness testified that this was not the signature of C.

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B. McDonald; but, if C. B. McDonald was a fictitious person, and such name was signed to the instrument, then it would be a forged writing. "To constitute forgery the name alleged to be forged need not be that of any person in existence; it may be wholly fictitious." 13 Am. & Eng. Ency. Law (2d Ed.) 1088. It is for the jury to determine under the evidence whether the person whose name appears signed to the instrument is a real or fictitious person. If they should find upon evidence that the name was of a fictitious person, then the inference arises that the person who utters and publishes such instrument as true either forged the same, or knew it to be forged. Williams v. State, 126 Ala. 50, 28 South. 632; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Davis v. State, 34 Tex. Cr. R. 117, 29 S. W. 478; State v. Vineyard, 16 Mont. 138, 40 Pac. 173. And it is competent to show that the person whose name is affixed to a check as drawer is fictitious by the evidence of the proper officer of the bank upon which such check is drawn that no person bearing such name kept or had an account with such bank, or was a customer of such bank. 3 Greenleaf on Evidence, § 109; Barnwell v. State, 1 Tex. App. 745; Williams v. State, 126 Ala. 50, 28 South. 632. But in the case at bar the official of the bank did not testify that the name of C. B. McDonald did not appear on the books of the Bank & Trust Company, the bank upon which the check was drawn, or that that bank never had such a customer. The witness C. W. White testified that he was cashier of the First National Bank, which had succeeded the Bank & Trust Company; and, while he also testified that the names of all depositors of the Bank & Trust Company, with balances, were transferred to the books of the First National Bank, and that the name of C. B. McDonald did not appear on these latter books, still this would not necessarily prove that such person had not been a depositor of the Bank & Trust Company, for there may have been such a customer of that company who, though not having a balance to his credit, may have issued this check either in ignorance of the exact condition of his account, or by way of overdraft. Nor was there any testimony introduced that diligent inquiry or search had been made for such person in that community and within the territory in which the Bank & Trust Company had business relations, and that such person was not known, in order to show that the name was of a fictitious person. It, therefore, follows that the above testimony of the cashier was not sufficient to show that the name affixed to this check was fictitious, and thereby to raise the inference that it was forged and so known by the defendant who uttered it.

At the trial of the cause the court permitted the witness W. N. Ketchum to testify that at the examining trial of the defendant a party by the name of Harris was a witness, and that said Harris testified in the presence of defendant that the defendant signed a check in a hotel in the city of Camden, and also to other statements of Harris made at the examining trial, tending to incriminate the defendant. Now this testimony was admissible only on one of two grounds: (1) On the ground that this was a damaging statement made in the presence of the defendant, who not having then and there denied same, his silence can be used as evidence against him. But as is said in the case of Bloomer v. State, 75 Ark. 297, 87 S. W. 438, "to render such evidence competent it must be shown that the accused heard the remark, and that the circumstances in proof naturally called for a reply on his part." The statements made by Harris were in the course of giving testimony in a court. The circumstances did not call upon the defendant to deny them, and there in the presence of the court make a reply; and, under the statute of our state, he was not even required to afterwards take the stand as a witness and deny the statements. This testimony was not, therefore, under the circumstances of this case admissible on the ground that the statements were made in the hearing of the defendant without reply or denial from him. (2) And this testimony was not admissible on the ground that it was proof of the testimony of an absent witness given on a former trial. Before such testimony can be heard, a sufficient foundation must be laid for its admission. It must be first shown that such absent witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found. Pope v. State, 22 Ark. 372; Shackelford v. State, 33 Ark. 539; Green v. State, 38 Ark. 305; Vaughan v. State, 58 Ark. 353, 24 S. W. 885; Harwood v. State, 63 Ark. 130, 37 S. W. 304. The record in this case fails wholly to show that the whereabouts of Harris were unknown, or that he was out of the jurisdiction of the court, or that any inquiry whatever had been made for him. It follows, therefore, that this evidence as to the testimony and statements made by the party Harris was inadmissible. That its admission was highly prejudicial follows from the character of this alleged testimony by which the essential element of the charge against the defendant would be established. By this incompetent testimony the state attempted to prove that the defendant himself wrote the check, and himself forged the name of C. B. McDonald thereto, and which he thereafter uttered. The admission of this evidence was therefore erroneous.

The judgment of the Ouachita circuit court herein is reversed, and this cause is remanded for a new trial.

BATTLE, J., absent, and not participating.

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ENO v. STATE.

(Supreme Court of Arkansas. June 21, 1909.)

1. CRIMINAL LAW (§ 564*) — VENUE — EVIDENCE.

Evidence on a prosecution for malicious mischief, committed by shooting horses, *held* sufficient to prove the venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277–1284; Dec. Dig. § 564.*]

2. MALICIOUS MISCHIEF (§ 9*) — EVIDENCE — SUFFICIENCY.

Evidence on prosecution for malicious mischief, based on alleged shooting of horses, *held* sufficient for a conviction.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. § 15; Dec. Dig. § 9.*]

3. CRIMINAL LAW (§ 1064*)—APPEAL—WAIVER OF EXCEPTIONS.

Exceptions to introduction of evidence are waived by not being brought forward in the motion for new trial, and will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2679; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Jackson County; Chas. Coffin, Judge.

Albert Eno was convicted of malicious mischief, and appeals. Affirmed.

Gustave Jones and Ira J. Mack, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. Albert Eno was arrested and tried before a justice of the peace for the crime of malicious mischief, charged to have been committed by willfully and maliciously shooting five horses in Jackson county, Ark., belonging to J. R. Hawley. He was convicted, and duly appealed to the circuit court. On a trial de novo in the circuit court the jury returned the following verdict: "We, the jury, find the defendant guilty and assess his fine at ($20.00) twenty dollars, and the damages at ($50.00) fifty dollars." Judgment was entered on the verdict in favor of the state of Arkansas for the amount of the fine and in favor of the owner of the horses for triple damages, in accordance with the provisions of section 1893 of Kirby's Digest. From the judgment the defendant has duly prosecuted an appeal to this court.

Counsel for the defendant insists that the venue was not proved, and also that there is not sufficient evidence to sustain the verdict. The undisputed evidence shows that three horses and two colts belonging to J. R. Hawley were shot in August, 1907, that both he and defendant lived near the Hart field, and that the father of the defendant made a crop in the Hart field in 1907. The undisputed evidence also shows that the Hart field is situated in Jackson county, Ark. The evidence on the part of the state showed that the defendant admitted to several witnesses that he had shot the horses of J. R. Hawley in the Hart field. One of them stated that defendant pointed out to him the horses he had shot, and stated that he had shot them in the lower Hart field. Witness stated that he knew the horses were the horses of J. R. Hawley, and that the Hart field was in Jackson county, Ark. Other witnesses testified that, shortly after the horses were shot, they saw the tracks of some horses and colts, and also an empty shotgun shell in the Hart field. The testimony tended to show that the wounds were inflicted with a shotgun. The defendant denied having shot the horses, and evidence was introduced in his behalf tending to corroborate his testimony; but it has always been the settled rule in this state that the weight of the evidence is a question for the jury, and its verdict is binding on us, if there is sufficient evidence to sustain it. We are of the opinion that there was sufficient evidence to warrant the verdict, and therefore we will not disturb it.

Counsel for defendant also contends that the court erred in permitting the following question and answer: "Q. How much were the horses damaged by reason of having been shot? A. They were damaged something like a hundred dollars worth." Counsel for defendant objected to the question, but did not assign it as a ground of his motion for a new trial. Exceptions to the introduction of evidence are waived, where they were not brought forward in the motion for a new trial, and will not be considered on appeal. Planters' Mut. Ins. Association v. Hamilton, 77 Ark. 27, 90 S. W. 283; St. L., I. M. & So. Ry. Co. v. Baker, 67 Ark. 531, 55 S. W. 941; Young v. Stevenson, 75 Ark. 181, 86 S. W. 1000; Allen v. State, 70 Ark. 337, 68 S. W. 28; Ince v. State, 77 Ark. 418, 88 S. W. 818; Choctaw & Memphis Ry. Co. v. Goset, 70 Ark. 427, 68 S. W. 879; Mt. Nebo Anthracite Coal Co. v. Williamson, 73 Ark. 530, 84 S. W. 779.

Finding no prejudicial error in the record, the judgment is affirmed.

PICKETT et al. v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. CRIMINAL LAW (§ 795*) — INSTRUCTIONS — LESSER GRADES OF OFFENSE.

Where there is evidence justifying a conviction of a lesser grade of the offense included in the indictment, it is proper to submit the question of accused's guilt of the lesser grade.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1923; Dec. Dig. § 795.*]

2. HOMICIDE (§ 309*)—MANSLAUGHTER—EVIDENCE.

Where the jury could find that accused shot first under the belief, negligently formed, or that a companion of decedent was reaching for his pistol, when in fact he was only coming to have a settlement of an account with accused, so that the jury could find accused guilty of man-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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slaughter, the failure to charge on manslaughter was reversible error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. § 309.*]

3. HOMICIDE (§ 300*) — SELF-DEFENSE — INSTRUCTIONS.

An instruction on self-defense which makes the guilt or innocence of accused dependent on the existence of reasonable grounds of belief that he was in danger, regardless of how the danger appeared to him, is erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

4. WITNESSES (§ 317*)—WEIGHT OF TESTIMONY —QUESTION FOR JURY.

The jury, believing that a witness had sworn falsely in part and truthfully in part, should reject the portion which they believe to be false, and accept the portion they believe to be true.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1080; Dec. Dig. § 317.*]

5. HOMICIDE (§ 234*) — EVIDENCE — SUFFICIENCY.

Evidence *held* to sufficiently connect one with the killing of another, so as to justify his conviction of some degree of homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482–493; Dec. Dig. § 234.*]

Appeal from Circuit Court, Union County; George W. Hays, Judge.

Henry Pickett and another were convicted of murder in the second degree, and they appeal. Reversed, and remanded for new trial.

Thornton & Thornton, for appellants. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. The appellants, Henry Pickett and Wilson Pickett, were indicted in the Calhoun circuit court for murder in the first degree, committed by killing Charles Abbott, and on change of venue to Union county they were tried and convicted of murder in the second degree. Their sentence was fixed at a period of 21 years in the state penitentiary. An appeal has been duly prosecuted to this court.

The evidence on the part of the state is correctly abstracted by the Attorney General as follows: On the 8th day of December, 1908, Henry Pickett went to the store of Bunk Abbott, and told him that he had a bale of cotton at the gin for him. Bunk Abbott told Henry Pickett that it was all right; that he would go down there and get the cotton, and Abbott asked Pickett what did he do with the seed, and when Pickett replied that the seed were at the house, Abbott told him that he owed him the cotton and the seed, and that it would not pay his account. Bunk Abbott told his brother, the deceased, Charlie Abbott, to go down and tag the cotton. Henry Pickett, Charlie Abbott, and Wilson Pickett, a brother of Henry Pickett, left the store together. Bunk Abbott knew the reputation of the two negroes, and when he saw Wilson Pickett leave with them, he went down to where they were to load the cotton. After the cotton was loaded, the two Pickett negroes went to the house. In a very short time a conversation took place between Henry Pickett, who was sitting at the time on the porch at his house, and Bunk Abbott, who was at or near the gate. According to the testimony of Bunk Abbott and Hard Green, a negro boy who was there at the time Bunk Abbott told Henry Pickett to go down and unload the cotton, Henry said he was not going. Bunk told him they would have to have a settlement. He told Bunk to go off, that he did not want to talk with a drunk man. Bunk asked him if he thought he was drunk, and he told him that he had his account, and put his hand in his pocket to get the account. Henry replied, "To hell with you," and immediately stepped into the house and came back and commenced shooting. Bunk and Charlie Abbott then approached the house, and also began firing. Hard Green saw Wilson Pickett in the house during the shooting, and Ira Newton, who was about 100 yards away, testified that he saw "the darkey" at the corner of the room at the "L" of the house run into the house immediately after he had heard some shots. A little bit later Newton saw both negroes come from around the house. One was carrying a single-barreled shotgun, and the other a rifle. As they passed Newton, they were asked if any one got hurt. Henry said that he was shot in the leg, and Wilson said they come and got our cotton. The negroes fled the country, and were finally captured at Monroe, La. Bunk Abbott was shot in the arm and in the chin. The shot struck the back of his arm near the wrist bone, and came out on the inside of his arm near the elbow. Charlie Abbott was shot in the left arm, and a load of squirrel shot penetrated his breast over the heart. There were 44 squirrel shot holes in his breast covering a space of about six inches.

The circumstances in regard to the killing as testified to by the defendant Henry Pickett is as follows: "I am one of the defendants. We had been to town that day, and did not have any dinner, and I was hungry, and I went in the kitchen and asked my wife how near supper was ready, and she replied that it would be ready in a few moments, and I went back and sat down on the porch, and Mr. Abbott says, 'Henry, come out here and get in this wagon and go back to town with me.' I said, 'Mr. Abbot, you have plenty of help without me.' He says: 'Damn that; this is your cotton, and I want you to go back to town and unload it.' I started to tell him something, and he said again, 'Come out here.' I started to go out there, and then concluded I had better stay where I was, and said to him that I had better stay where I was, as he did not look right. He says, 'You damn son of a bitch, come out of there,' and I

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told him I was not coming, and he said, 'If you don't come out of there, I am coming in there.' He said, 'You may think I have no right to come in there, but I will show you.' I said, 'I have got nothing to say about that.' He then pulled his gun out and started in. He got about halfway between the gate and the doorsteps where I was sitting. I was still sitting there, and he had the gun in his hand. I did not think he was going to shoot me, and I just stayed there. I stayed there until he stepped up to me, and when he gets up to me, he says 'B—— G——, you get up and come out of here.' I set there just a second, and then I gets up and whirls right quick in the house. He then shoots at me three or four times, maybe five, and then he started in the house. Mr. Bunk was running in this way shooting, and Mr. Charlie was shooting this way [indicating]. My children and my wife were scared nearly to death. My children was running around after me hollering and screaming. And they were just shooting every way. My wife had been cleaning up and scrubbing that day. I ran to the corner where I generally kept my gun, and I did not find it, and I ran to the bed and found my gun where they had put it while they were cleaning up. I grabbed my gun and began shooting at them. I did not have but one shell, and I shot it, and then I ran back and got my rifle and began shooting at them. I shot both the shotgun and rifle. My brother did not shoot at all. He had nothing to do with the difficulty. I did not have any pistol that day—never owned one in my life. After the shooting I ran out of the back door and into the field where we saw Mr. Porter. We then went off into Louisiana. My family consists of a wife and three children, the oldest is 14 years, the middle one 2 years, and the youngest 10 months old. They were all in the house running around scared to death. The reason I did not go back to town with the wagon was that my wife's mother was about to die." The testimony of Wilson Pickett is substantially the same as that of Henry Pickett.

Counsel for appellant correctly contends that the court erred in refusing to instruct the jury on voluntary manslaughter. The facts in the present case bring it squarely within the principle announced in the case of Allison v. State, 74 Ark. 444, 86 S. W. 409. Mr. Justice Riddick, speaking for the court, said: "In each case, then, the question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense. In this case there was evidence that tended to show that the defendant shot Baldwin because Baldwin cursed him, and then attempted to draw a pistol upon him in a threatening manner. The presiding judge may have concluded that if the jury believed this evidence, they should acquit, and that therefore this evidence did not justify an instruction in reference to manslaughter. But the jury may have accepted a part of this evidence as true, and rejected other portions of it as untrue. They may have concluded that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances. It is not always necessary to show that the killing was done in the heat of passion to reduce the crime to manslaughter; for, where the killing was done because the slayer believes that he is in great danger, but the facts do not warrant such belief, it may be murder or manslaughter, according to the circumstances, even though there be no passion. Or, when the slayer, though acting in self-defense, was not himself free from blame, the crime may be only manslaughter. Wallace v. United States, 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039. The mere fact that a man believes that he is in great and immediate danger of life or great bodily harm does not of itself justify him in taking life. There must be some grounds for such belief, or the law will not excuse him for taking the life of another. But if the slayer acts from an honest belief that it is necessary to protect himself, and not from malice or revenge, even though he formed such conclusion hastily and without due care, and when the facts did not justify it, still under such a case, although such a belief on his part will not fully justify him, it may go in mitigation of the crime and reduce the homicide to manslaughter. Stevenson v. United States, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980." So in the present case the jury, exercising its right to accept such portions of the testimony as it believed to be true, and to reject that believed to be false, might have found that there was not only provocation by words, but that there was an overt act on the part of the deceased and his brother. In short the jury might have found that the defendants shot first, but that they did so under the belief, formed too hastily and negligently, that Bunk Abbott was reaching for his pistol when in reality he was only coming in for the purpose of having a settlement with the defendants. As there was at least some substantial evidence upon which the jury might have found the defendants guilty of voluntary manslaughter, the defendants had a right to an instruction on that question.

Inasmuch as there must be a reversal on account of the failure to instruct on manslaughter, we shall take occasion to caution the court in regard to the form of instruction No. 4. To say the least of it, the instruction was ambiguous. It might be construed to make the guilt or innocence of the defendants dependent upon the existence of reasonable grounds of belief that they were in danger,

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regardless of how the danger appeared to them. Burton v. State, 85 Ark. 48, 106 S. W. 942; Hoard v. State, 80 Ark. 87, 95 S. W. 1002; Magness v. State, 67 Ark. 599, 50 S. W. 554, 59 S. W. 529; Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

Counsel for appellants also insists that the oral instruction given in regard to the credibility of witnesses was erroneous because it warranted the jury in disregarding testimony which it believed to be true, if it came from a witness whom the jury believed had sworn falsely to some other material fact. While the instruction might have been couched in clearer language, we do not think it susceptible of that construction. It, in effect, told the jury that, if they believed a witness had sworn falsely in part and truthfully in part, they should reject that portion which they believed to be false and accept that part they believed to be true. It is therefore not in conflict with the rule announced in the cases of Bloom v. State, 68 Ark. 336, 58 S. W. 41, and of Frazier v. State, 56 Ark. 242, 19 S. W. 838.

Counsel for appellants next contend that there is no evidence connecting Wilson Pickett with the killing. We cannot agree with their contention in this respect. There was evidence tending to show that both defendants were in the house during the time of the shooting, and that two guns were used. Both the defendants left immediately after the shooting, each carrying a gun.

For the error in refusing to instruct the jury on manslaughter, the judgment is reversed, and the cause remanded for a new trial.

CHOWNING v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. HOMICIDE (§ 86*)—ASSAULT WITH INTENT TO KILL—ELEMENTS.

A specific intent to take the life of the person assaulted is an essential element of assault to kill, defined by Kirby's Dig. § 1588.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. § 86.*]

2. HOMICIDE (§ 94*)—ASSAULT WITH INTENT TO KILL—DRUNKENNESS.

In defense of a prosecution for assault with intent to kill, it may be shown that at the time of the assault accused was so drunk that he could not have entertained the intent necessary to constitute the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 122; Dec. Dig. § 94.*]

3. HOMICIDE (§ 294*)—ASSAULT TO KILL—INSTRUCTION—INTOXICATION.

In a prosecution for assault to kill, a request to charge that if defendant was so intoxicated that he was not conscious of what he was doing at the time, being drunk to the extent that he could have had no specific intent to kill, he could not then be guilty of an assault to kill, was improperly refused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 294.*]

Appeal from Circuit Court, Cross County; Frank Smith, Judge.

Guy Chowning was convicted of assault to kill, and he appeals. Reversed and remanded.

The appellant was convicted of the crime of an assault with intent to kill one Joe Lewellen. The evidence for the state tended to support the verdict. The evidence for appellant tended to show that at the time of the assault appellant was under the influence of intoxicating liquor to such an extent as to be incapable of forming the specific intent to take the life of Lewellen. Appellant testified that he remembered getting drunk, but lost consciousness, and knew nothing about his fight with Lewellen.

The court, among other instructions, gave the following:

"(2) The crime of assault to kill is committed when one person assaults another under such circumstances that, had death resulted from the assault, the person committing the assault would have been guilty of the crime of murder in either the first or murder in the second degree. It becomes necessary, therefore, that the crime of murder and its degrees be defined to you."

"(8) A specific intent to kill is not necessary to constitute the crime of murder in the second degree; under our statute the law being that the intention to drink may fully supply the place of malice aforethought, so that, if one voluntarily becomes too drunk to know what he is about, and then, without provocation, assaults and beats another to death, he commits murder, the same as if he was sober."

The court refused the following:

"If you find and believe from the evidence that the defendant was intoxicated to that extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, that under the law he would not be guilty of murder in either the first or second degree, he, therefore, could not be guilty of an assault to kill."

The appellant duly excepted to the ruling of the court in giving and refusing the above prayers.

J. C. Brookfield and J. T. Patterson, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). The instructions were misleading. To constitute the crime of an assault "with intent to murder or kill" under the statute (section 1588, Kirby's Dig.) a specific intent to take the life of the person assaulted must be shown. See Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; Scott v. State, 49 Ark. 156, 4 S. W. 750; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44. It takes both

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the "evil intent and the simultaneous resulting act" to complete a crime of this nature. 1 Bish. Crim. Law, §§ 729, 730, 731, 735. Where offenses can be committed only by doing "a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the crime." Chrisman v. State, supra; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13.

In Byrd v. State, 76 Ark. 286, 88 S. W. 974, which the Attorney General cites to sustain the ruling of the court, we held that "if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder in the second degree just as if he was sober." But the case is not applicable here, for the reason that it was a case of murder in the second degree, and there may be cases of murder in the second degree where no specific intent to kill is shown. As Judge Riddick says: "No specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute." "To commit murder" in the second degree "one need not intend to take life, but to be guilty of an attempt to murder he must so intend. It is not sufficient that his act, had it proved fatal, would have been murder." 1 Bishop, Cr. Law, § 730.

The court erred in its charge. The judgment is therefore reversed, and the cause is remanded for new trial.

HANSON v. ANDERSON.

(Supreme Court of Arkansas. June 28, 1909.)

1. APPEAL AND ERROR (§ 671*) — REVIEW — RECORD.

Only such assignments of error as appear on the record can be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2867; Dec. Dig. § 671.*]

2. APPEAL AND ERROR (§ 516*)—"RECORD."

The "record" in a case at law consists of the record proper and the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2332; Dec. Dig. § 516.*

For other definitions, see Words and Phrases, vol. 7, pp. 6008–6014; vol. 8, p. 7781.]

3. APPEAL AND ERROR (§ 653*)—BILL OF EXCEPTIONS—CORRECTION.

A skeleton bill of exceptions, containing no evidence and no instructions, but a notation, "None furnished the clerk," cannot be corrected by the appellate court, though appellant states that the trial court stenographer left no report with the clerk, and claims to have no record of the case or recollection of having taken a stenographic report thereof; but all the appellate court can do in regard to the record, which is made when the bill is allowed by the judge and filed by the clerk, is to compel the clerk to transmit it properly transcribed and certified, so that appellant's remedy was by seasonable application to the trial court to compel action by the stenographer, or by preparing and submitting to the trial court a bill of exceptions as though there had been no stenographer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2818; Dec. Dig. § 653.*]

4. EXCEPTIONS, BILL OF (§ 1*) — OFFICE OF BILL OF EXCEPTIONS.

The office of a bill of exceptions is to bring on the record such matters as are not already a part of the record in the case.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Action by Reuben Anderson against R. H. Hanson. From a judgment for plaintiff, on appeal from a justice of the peace, defendant appeals. Affirmed.

D. L. King, for appellant.

HART, J. This is an appeal by R. H. Hanson from a judgment rendered against him in the Lafayette circuit court in favor of Reuben Anderson for $82.60. The suit was originally brought by Anderson against Hanson in a justice of the peace court for $82.60, alleged to be due him for work done on a levee. On appeal, this court can only consider such assignments of error as appear upon the record. In cases at law, the record consists of what is generally called the record proper and the bill of exceptions. In the present case what counsel for appellant calls a skeleton bill of exceptions was filed. None of the evidence adduced at the trial and none of the instructions given by the court are contained in it. There is no direction to the clerk to copy the stenographer's report. The bill of exceptions, after reciting the term of the court at which the case was tried and the presiding judge, continues as follows: "The plaintiff, to maintain the issues on his part, introduced the following testimony. (None furnished the clerk.)" The same notation is made concerning the testimony of the defendant and the instructions of the court. At a subsequent term of the court, appellant, Hanson, filed a motion to correct the record, in which he states that Mr. Paul Cella was the stenographer of the court, and that he left no stenographic report of the evidence with the clerk. He further states that said stenographer claims to have no record of the case, and no recollection of having taken a stenographic report of the same.

The record is made when the bill is allowed by the judge and filed by the clerk. This court has nothing to do with making or directing to be made the record of the trial court. It can only compel the clerk to transmit to this tribunal the record of the trial court, properly transcribed and certified to by him. If the stenographer failed to do the duty required of him by the statutes, appellant should either have taken some appropriate action before the

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trial judge to have compelled him to perform it, or should have himself prepared and tendered to the presiding judge his bill of exceptions, before the time for so doing had expired. In short, he should in apt time either have applied to the presiding judge to compel the stenographer to furnish his report of the trial, or he should have himself or by his counsel have prepared and submitted to the presiding judge his bill of exceptions, just as if there had been no stenographer present at the trial to report the proceedings thereof.

The office of a bill of exceptions is to bring on the record such matters as are not already a part of the record in the case. Berger v. Houghton, 84 Ark. 342, 105 S. W. 582, and cases cited; Lesser, as Assignee, v. Banks et al., 46 Ark. 482; St. L., I. M. & S. Ry. Co. v. Godby, 45 Ark. 485. The state of the record as presented does not warrant a reversal.

Judgment stands affirmed.

TATE v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

WITNESSES (§ 389*)—IMPEACHMENT—CONTRADICTORY STATEMENTS—COLLATERAL MATTERS.

Evidence, on a prosecution for stealing pigs, which defendant and his witness T. shot, but which defendant claimed belonged to him, that immediately after the shooting, which was seen by D., D. asked T. why he and defendant ran off when D. fired a gun, and T. replied that they heard some turkeys in the woods, and thought they would go down there and try to shoot one, was, on foundation being laid by T. being asked if, and denying that, he made the statement, admissible to impeach T., who had testified to a contradictory account of what they did immediately after the killing, by saying that they put the pigs in sacks and rode to defendant's home; such evidence not being an attempt to contradict T. on a collateral matter, the conduct of T. and defendant bearing on the question of intent whether they killed the pigs in good faith, believing they belonged to defendant, or whether they did so with the criminal intent to deprive the true owner of his property.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243–1245; Dec. Dig. § 389.*]

Error to Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Mose Tate appeals from a conviction. Affirmed.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Defendant, Mose Tate, was convicted of hog stealing, and appeals to this court. He and Willis Tillman, Will Lasky, and George Robinson were jointly indicted for the crime, and he was tried separately and convicted. The evidence shows that the parties named killed several pigs, owned by one Bannister Tate, and carried them to defendant's home, and converted them to their own use. The pigs were killed in the woods near Bannister Tate's home. There is no controversy about the fact of these parties killing and carrying away the pigs; but defendant contends that he owned them. The evidence was conflicting on this issue; but it was sufficient to sustain the finding of the jury that Bannister Tate owned the hogs, and that these parties killed them with the knowledge that they did not belong to defendant, Mose Tate, and with the felonious intent to deprive the owner of his property.

Aside from the question as to the sufficiency of the evidence raised in the motion for new trial, the only assignment of error is as to the ruling of the court in permitting witness Kelly, in rebuttal, to testify concerning a conversation between Willis Tillman, some time after the pigs were stolen, and Will Durden, a state's witness, who was near by in the woods and saw these parties shoot the pigs. Witness Kelly testified that Will Durden asked Tillman why they ran off when they (Durden and one Golden) fired a gun, and that Tillman replied: "We heard some turkeys in the woods, and thought that we would go down there and see if we could kill one."

The foundation for the contradiction of Tillman was properly laid. He was asked, while on the witness stand, if he had not made that statement to Will Durden, and denied that he had done so. He was accused of this crime in the same indictment, and was a witness in behalf of the defendant. He gave a contradictory account of the conduct of the parties immediately after the hogs were killed, by saying that they put the pigs in sacks and rode over to defendant Mose Tate's home. This statement made to Durden gives another account as to what they did, and was admissible for the purpose of impeaching the credibility of Tillman as a witness. It is not an attempt to contradict the witness on a collateral matter, as the conduct of these parties immediately after shooting the pigs, when they discovered Durden and Golden in the woods, was under investigation, for the purpose of ascertaining the intent with which they killed the pigs—whether they killed them in good faith, believing them to be the property of defendant Mose Tate, or whether they did so with the criminal intent to deprive the true owner of his property.

Judgment affirmed.

HARPER et al. v. STATE.

(Supreme Court of Arkansas. June 28, 1909.)

1. INTOXICATING LIQUORS (§ 159*)—SALE OF LIQUORS TO MINORS—OFFENSE.

The offense of selling liquor to a minor, in violation of the statute making it a misdemeanor to sell liquor to any minor, is complete when

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the sale is made to a minor; the guilty intent of the seller being immaterial, so that the seller is liable, though he honestly believes that the buyer is of full age.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 172; Dec. Dig. § 159.*]

2. INTOXICATING LIQUORS (§ 159*)—SALE OF LIQUORS TO MINORS—OFFENSE.

A wholesale and retail liquor dealer, who, on receiving from a minor in another state an order for whisky to be shipped by a carrier to him, filled the order and delivered the whisky to the carrier, was guilty of selling liquor to a minor, though he was ignorant of the minority of the buyer.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 172; Dec. Dig. § 159.*]

3. SALES (§ 1*)—CONTRACTS—ELEMENTS.

A contract of sale, like all other contracts, consists of an agreement between the parties, and in addition thereto a delivery of the chattel.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 3; Dec. Dig. § 1.*]

4. SALES (§ 161*)—DELIVERY—PASSING OF TITLE.

A delivery of goods by a seller to a carrier in pursuance of an order from the buyer to ship is a delivery to the buyer, especially where the title as evidenced by the bill of lading is made in the name of the buyer as consignee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377–379; Dec. Dig. § 161.*]

5. SALES (§ 201*)—DELIVERY—PASSING OF TITLE.

Where a contract of sale is silent as to the particular carrier by whom the goods are to be transported, a delivery by the seller to a carrier in the usual and ordinary course of business transfers the property to the buyer, though the latter may in the first instance designate the particular carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 535; Dec. Dig. § 201.*]

6. INTOXICATING LIQUORS (§ 147*)—SALES—PLACE OF SALE.

A liquor dealer received at his place of business an order for whisky from a minor residing in a distant city, the order inclosing the price, and requesting the sending of the whisky on the evening train of that day. The dealer accepted the offer, and segregated from his stock the whisky, and delivered the same to a carrier, addressed to the minor, and obtained a bill of lading for the minor, in which the latter was named as consignee. *Held*, that the title to the whisky passed to the minor at the dealer's place, rendering the dealer liable for selling liquor there to a minor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.*]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Daniel Hon, Judge.

George W. Harper and another were convicted of selling liquors to a minor, and they appeal. Affirmed.

Brizzolara & Fitzhugh, for appellants. Hal. L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen. (June P. Wooten, of counsel), for the State.

FRAUENTHAL, J. The defendants, George W. Harper and C. P. Wilson, were convicted of the offense of selling ardent liquors to a minor in the Ft. Smith district of Sebastian county, and they have taken an appeal from that conviction to this court.

The evidence tended to establish the following facts: The defendants are licensed wholesale and retail liquor dealers doing business in the city of Ft. Smith, Ark. Christopher Russell is a minor, about 15 years old, residing at Warner, in the state of Oklahoma, a station on the Midland Valley Railway, 85 miles west of Ft. Smith. On September 17, 1908, Christopher Russell, seeing a circular advertisement of defendants, sent to defendants a letter, in which he made an order for one gallon of whisky. The letter is as follows: "Warner, Okla., September 17, 1908. Harper & Wilson: Enclosed you will find $3.00, for which please send me one (1) gallon of rock and rye whisky. I want 8 shorts. Be sure and send on the evening train to-day. Your customer, Christy Russell, Warner, Okla. Don't fail to send on evening train." The $3 sent in the letter was a sufficient amount to pay for the whisky and the charges for carriage from Ft. Smith to Warner. The defendants did not know Christopher Russell, and did not know that he was a minor. But they accepted the order, and on September 18, 1908, they delivered to the Midland Valley Railway, a common carrier, at Ft. Smith, Ark., the gallon of whisky duly addressed to Christopher Russell at Warner, Okl.; and at their request the carrier executed a bill of lading for the whisky, in which Christopher Russell was named as consignee. The whisky was shipped by freight train, and the defendants paid the freight. It appears that there is a passenger train leaving Ft. Smith on this railroad in the afternoon, and which arrives at Warner about 7 o'clock p. m., and that express packages are carried on this train, but ordinarily no freight. Christopher Russell got the whisky at the depot at Warner.

It is contended by defendants that they cannot be convicted of this offense of selling intoxicating liquors to a minor, for the reason that they did not know that Christopher Russell was a minor; that on this account they had no criminal intent, and therefore could not be guilty of a criminal offense. The statute under which the defendants were convicted provides that "any person who shall sell or give away either for himself or another, or be interested in the sale or giving away of any ardent, vinous, malt or fermented liquors * * * to any minor," shall be guilty of a misdemeanor. The words "knowingly or willfully," or words of like import, do not appear in this statute. The offense is complete when the sale is made to a minor, and the guilty intent is wholly immaterial. There are some courts that hold that in prosecutions of this nature the absolute good faith of the seller and his ignorance of the minority of the buyer is a good defense. But the principle adopted by this court and enunciated by Chief Justice English is that venders

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of intoxicating liquors are bound to "determine for themselves at their peril whether or not the purchaser is a minor; for, if they sell to one who is a minor, they are criminally liable notwithstanding they are actually ignorant of the fact and honestly believe that the person is of full age." Redmond v. State, 36 Ark. 58, 38 Am. Rep. 24; Black on Intoxicating Liquors, § 418. In the opinion delivered by Chief Justice English some of the reasons are given for that ruling and that determination of the effect of this statute. Those reasons appear to us manifest and sound, and the result of such ruling is to effect a proper enforcement of a public policy announced by this statute against the selling or giving away of intoxicating liquors to a minor. This decision has been followed by this court in a number of cases, and we can see no good or wholesome reason for changing it. Crampton v. State, 37 Ark. 108; Edgar v. State, 37 Ark. 219; Pounders v. State, 37 Ark. 399.

It is urged that inasmuch as the common carrier was the agent of the minor, and the liquor was purchased through such agent, in such event the defendants would not be guilty if they did not know, or have any reasonable grounds of knowing, that they were selling to a minor; and they cite Gillan v. State, 47 Ark. 555, 2 S. W. 185, to sustain that contention. But in that case the vender sold directly to a negro and made no contract with the minor. It subsequently developed that the minor had sent the negro to purchase the whisky for him. But there was no actual agreement on the part of the vender to sell to the party who was the minor, and as far as the vender was concerned the sale was made by him to the negro. In this case the defendants actually sold and intended to sell the liquor to Christopher Russell, the minor, and they simply were ignorant at the time of the fact that he was a minor.

It is contended that the sale in this case did not take place at Ft. Smith, but at Warner, Okl.; that this is true because the delivery of the whisky was made to Russell at Warner, and not at Ft. Smith. The sale occurred at the place where the contract and delivery were actually made. The contract of sale, like all other contracts, consists of an agreement between the parties, and in addition thereto a delivery of the chattel. In this case the minor sent a letter to the defendants, making an offer to buy the liquor, and this letter was received by the defendants at Ft. Smith, and at that place the offer was accepted by them. When they accepted the offer the contract was entered into, and the place of the agreement was therefore at Ft. Smith. The defendants thereupon at Ft. Smith appropriated and segregated from their stock the gallon of whisky, and delivered same to a common carrier at Ft. Smith duly addressed to the minor, and went further and obtained a bill of lading for the whisky from the carrier for the minor, in which the minor was named as the consignee. Now it is uniformly held that the delivery of goods to a common carrier, when made in pursuance of an order to ship, is in effect a delivery to the consignee; and more especially is this true when the title to the shipment, as evidenced by the bill of lading, is made in the name of the consignee. State v. Carl & Tober, 43 Ark. 353, 51 Am. Rep. 565; Burton v. Baird, 44 Ark. 556; Berger v. State, 50 Ark. 20, 6 S. W. 15; Gottlieb v. Rinaldo, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273; Templeton v. Equitable Mfg. Co., 79 Ark. 456, 96 S. W. 188, 116 Am. St. Rep. 88; 1 Mechem on Sales, §§ 736, 739; Tiedeman on Sales, § 95. The buyer in the first instance may designate the particular carrier by whom the goods are to be transported; but, in event the contract of purchase is silent as to the particular carrier, then a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Templeton v. Equitable Mfg. Co., 79 Ark. 456, 96 S. W. 188, 116 Am. St. Rep. 88.

It is urged that the buyer in this case by said letter directed that the whisky be sent by an express company, and not by the Midland Valley Railway. But this does not follow from the terms of the letter. The Midland Valley Railway, so far as the evidence shows, was the only common carrier of goods from Ft. Smith to Warner; and, even if the request in the letter to send on evening train could be considered to be a direction to send by express, there is no evidence that the railway company did not itself carry express packages on its trains, or that there was a separate and distinct carrier that transported goods on the evening train. But we are of the opinion that the request in the letter that the whisky be sent on the evening train of the same day was only made and intended by the buyer for the purpose of obtaining the whisky as speedily as possible, and was not made as a designation of a particular carrier to transport the goods. The defendants by their actions showed that they understood it in that way, for they proceeded in the ordinary and usual course of their business and delivered the whisky to the Midland Valley Railway within a reasonable time after receiving the order; and this is what in fact and in law the request in the letter amounted to. 24 Am. & Eng. Ency. Law (2d Ed.) 1075. In this case the seller accepted the order in Ft. Smith, and at that place received the money and delivered the goods to a common carrier, whom it selected in good faith and in the ordinary course of business, and not contrary to any direction made by the buyer. It not only delivered the goods to the carrier without any qualifications or restrictions, but in the bill of lading had the carrier name the buyer as the consignee. The delivery thus became complete, and the title to the whisky thereupon passed to the minor, and that took place at Ft. Smith, and

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therefore the sale was completed at that place.

The rulings of the court in giving and refusing instructions were based upon the law as above announced. We find no error in these rulings of the court. The evidence sustains the verdict.

The judgment is accordingly affirmed.

BROOKS et al. v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. PERJURY (§ 36*)—INSTRUCTIONS—MATERIALITY OF FALSE TESTIMONY—QUESTION FOR COURT.

Where the undisputed evidence, on a trial for perjury, shows that the alleged false matters sworn to were material, the failure to instruct that the matters must be material to the issue is not error, for the question of materiality is for the court.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 133; Dec. Dig. § 36.*]

2. PERJURY (§ 34*)—EVIDENCE—CORROBORATION.

To justify a conviction for perjury, where there is only one accusing witness, his testimony must be corroborated as to the falsity of some particular statement, though one witness is sufficient to prove what accused swore to.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 125–132; Dec. Dig. § 34.*]

3. CRIMINAL LAW (§ 1173*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where the uncontradicted testimony, on a trial for perjury, shows that there was corroborating evidence as to some particular false statement, the failure to instruct that there must be corroborating evidence to justify a conviction is not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1173.*]

4. PERJURY (§ 34*)—EVIDENCE—CORROBORATION.

On a trial for perjury, based on accused having, on her trial for using a room for immoral purposes, falsely testified that G. was not in the room, and had not seen B. and accused together in the room, the testimony of B. that he was at accused's room and that G. came there, uncorroborated except by the statement of G., made to another in the absence of accused, and hence not admissible against accused, is not sufficiently corroborated to justify a conviction.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 34.*]

5. PERJURY (§ 34*)—EVIDENCE—CORROBORATION.

On a trial for perjury, based on the false testimony of accused, on the trial of H. for using a room for immoral purposes, that he was not in the room and did not see B. and H. there, the testimony of B. that he was at the room and that accused came there is sufficiently corroborated to justify a conviction by another witness testifying that accused admitted having been at the room at the time and having seen B. and H. there.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 34.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Grant Brooks and Hallie Stewart were convicted of perjury, and they appeal. Reversed as to Hallie Stewart, and affirmed as to Grant Brooks.

Appellants were convicted on separate indictments in the Sebastian circuit court of the crime of perjury. The indictments charged in apt language that Hallie Stewart was on trial before the police court of the city of Ft. Smith for the offense of using a room for immoral purposes—i. e., with having used the room with one Wm. Brent for purposes of prostitution—and that the police court had jurisdiction. It was alleged that the perjury consisted in appellants swearing falsely that Grant Brooks was not at the room on the night when it was alleged that Hallie Stewart and Wm. Brent used the same for immoral purposes, that Grant Brooks did not see Wm. Brent and Hallie Stewart together in the room, that Grant Brooks did not knock Hallie Stewart down at her room on that night, and that Grant Brooks did not have a difficulty with Wm. Brent at her room that night.

The testimony of L. F. Fishback, the police judge, shows that appellants were witnesses in the case against Hallie Stewart pending before him, and that they were duly sworn and testified to the facts as alleged in the indictments. He further testified that Hallie Stewart had a wound on the bridge of her nose just between the eyes and that her eyes were swollen and discolored. Eliza Brent testified: "I am the wife of Wm. Brent. On Monday morning, March 20, 1909, I heard that my husband and Grant Brooks had had some kind of a difficulty on the Saturday night before. I went to Schulte's stable, and got one of the men to show me Grant Brooks. Brooks told me the trouble between him and my husband was over a crap game. I insisted that it was not over a crap game, but over Hallie Stewart, and he said that if I wanted him to tell me the truth he would do so; that my husband was at Hallie Stewart's house on Saturday night, and she sent for him; that when he got there she had on a gauze shirt and a pair of drawers, and Wm. Brent was just putting on his clothes." Wm. Brent testified as follows: "I was at Hallie Stewart's room on Saturday night, March 19, 1909. Grant Brooks came into the room where we were. At the time Grant Brooks came into the room, Hallie Stewart was putting on her clothes. Brooks knocked Hallie Stewart down and took a swing at me, but did not hit me."

The appellants were each witnesses in their own behalf. Hallie Stewart testified: "I know Wm. Brent and Grant Brooks. I was arrested on the 21st of March, 1909, upon the charge of having used a room for immoral purposes with Wm. Brent. I was charged with using it on the night of March 19th. I was tried in police court on March 23d, and testified in my own behalf. I said.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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in the police court, that Wm. Brent was not at my room on the night we were charged with having used the room for the purpose of prostitution; that Grant Brooks did not knock me down on that night; that Grant Brooks and Wm. Brent did not have a difficulty at my room on that night over me. Wm. Brent was not at my room on the night in question, nor was Grant Brooks. Grant Brooks did not see us in my room together. They did not have any difficulty there over me, and Grant Brooks did not knock me down that night. I wore smoked glasses on the day of my trial, and had been wearing them a few days before. I had fallen over some material that was being used in building the new cracker factory, and received the cut where this scar is (indicating). The cut was on my nose and nearly between the eyes. My eyes were discolored from my fall, and not from a blow given me by Grant Brooks, nor any one else." Grant Brooks testified: "I was summoned as a witness, and was sworn and testified, in the police court of Ft. Smith on the 23d of March, 1909, in a cause against Hallie Stewart, charged with using a room for the purpose of prostitution. I said I was not at Hallie Stewart's room on the night she was charged with using it for the purpose of prostitution with Wm. Brent; that I did not see Hallie Stewart and Wm. Brent in her room together; that I did not knock her down that night in her room; that I did not have a difficulty with Wm. Brent over her that night in her room; that I had not been in her room for two months before the time I was testifying; that I had had no trouble with Wm. Brent for about four years."

The court read to the jury section 1968, Kirby's Digest, which provides: "Perjury is the willful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter or proceeding, before any court, tribunal, body corporate or other officer having by law authority to administer oaths"—and gave the following: "(2) If the jury finds from the evidence beyond a reasonable doubt that the defendant, in the Ft. Smith district of Sebastian county, within three years next before the finding of the indictment, was sworn as a witness in the police court of the city of Ft. Smith, and after being sworn gave the evidence set out in the indictment, and that said evidence was false, and that the defendant at the time of giving said evidence knew it to be false, and testified to same willfully and corruptly, knowing that it was false, you will find the defendant guilty. (3) You are further instructed that, if you find that the defendant gave the testimony set out in the indictment which is alleged to be false, the same is to be taken and considered by the jury as true until overturned by evidence which shows it to be false, and which satisfies your minds of its falsity beyond a reasonable doubt."

The causes for convenience were on the motion of the parties and by consent consolidated and tried at the same time, and are so presented here.

Edwin Hiner, for appellants. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). There was no error in the instructions. The first instruction was a definition of perjury in the language of the statute. The second instruction did not tell the jury that the alleged false evidence must not only be shown to be false, but also material to the issue. This, however, was not necessary upon the undisputed facts of this record; for, if the alleged false evidence was given, it follows as matter of law that at least a part of it was material to the issue. The charge against appellants in the police court was using a room for prostitution. It was therefore material as to whether Wm. Brent was occupying the room with Hallie Stewart on the night alleged. Where the undisputed evidence shows that the alleged false matters sworn to were material, it is not error to fail to instruct that such matters must be material to the issue. See State v. Nees, 47 Ark. 553, 2 S. W. 184. There being no dispute about the facts sworn to, the question of materiality was for the court. Grissom v. State, 88 Ark. 115, 113 S. W. 1011.

Appellants' counsel contends that the third instruction is erroneous, because it fails to tell the jury that appellants could not be convicted upon the uncorroborated testimony of one witness. In Thomas v. State, 51 Ark. 138, 10 S. W. 193, this court announced the rule as follows: "On a trial for perjury, the oath of the defendant which is charged to have been false is to be considered equal to that of a credible witness. One witness is sufficient to prove what he swore, but not to establish its falsity; and where there is only one accusing witness his testimony must be corroborated, not merely as to slight or immaterial circumstances, but as to some particular false statement. See Grissom v. State, supra. But, where the uncontradicted testimony shows that there was corroborating evidence as to some particular false statement, the failure of the court to tell the jury that there must be corroborating evidence is not prejudicial error.

It is also urged that the evidence is not sufficient to sustain the verdict. This contention is well taken as to appellant Hallie Stewart, but not as to Grant Brooks. We have set forth the evidence in detail in the statement, and a close scrutiny of it fails to disclose any corroboration of the testimony of the witness William Brent to the effect that he was with Hallie Stewart in the room on the night that it was alleged that the room was used for immoral purposes. The testimony of Brent was the only evidence that he

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was in the room of Hallie Stewart that night, except the statement of Grant Brooks. But the statement of Grant Brooks cannot be taken as evidence against Hallie Stewart. As to appellant Brooks, however, the testimony of Eliza Brent tending to prove that he admitted being at Hallie Stewart's on the night alleged, and admitted seeing Wm. Brent there and having a fight with him, is sufficient corroboration of the testimony of Wm. Brent that he saw Grant Brooks at the room of Hallie Stewart on the night mentioned, and is sufficient corroboration of the testimony of Wm. Brent as to the falsity of the testimony of Brooks to the effect that he was not at the room of Hallie Stewart on the alleged night and did not see Brent there.

The judgment as to Hallie Stewart is therefore reversed, and the cause as to her is remanded for new trial. The judgment as to Grant Brooks is affirmed.

PITCOCK v. STATE.

(Supreme Court of Arkansas. July 12, 1909.)

1. INJUNCTION (§ 221*)—VIOLATION—NOTICE.

Under Kirby's Dig. § 3984, providing that an injunction binds the party from the time he is informed thereof, actual notice of the issuance of an injunction, without formal service of the writ, is sufficient to put one in contempt of court for violating its terms.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 446; Dec. Dig. § 221.*]

2. INJUNCTION (§ 219*)—VIOLATION—ERRONEOUS ORDER.

Where the court had jurisdiction of the parties and subject-matter of the cause of action in which the injunction was issued, the fact that it was erroneously or improvidently issued does not excuse disobedience by those bound by it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 440; Dec. Dig. § 219.*]

3. INJUNCTION (§ 219*)—VIOLATION—JUSTIFICATION—WANT OF JURISDICTION.

A final decree rendered by a court without jurisdiction may be disobeyed with impunity, for a void decree is in effect no decree.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 439; Dec. Dig. § 219.*]

4. INJUNCTION (§ 219*)—VIOLATION—JUSTIFICATION.

A court possesses the power of determining its jurisdiction, and may, while so doing, require the parties to preserve the existing status of the subject-matter; but, where the pleadings show on their face that the court is wholly without jurisdiction of the subject-matter, any preliminary injunction is void, and may be violated with impunity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 439; Dec. Dig. § 219.*]

5. STATES (§ 191*)—ACTIONS—"SUIT AGAINST THE STATE."

The question whether a suit is one against the state within Const. art. 5, § 19, providing that the state shall never be made defendant in any of her courts, is not necessarily determined by reference to the parties to the record; but where the state is the real party in interest, though only its officers and agents are parties, it is a "suit against the state" within the prohibition.

[Ed. Note.—For other cases, see States, Cent. Dig. § 181; Dec. Dig. § 191.*

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.]

6. STATES (§ 191*)—ACTIONS—SUIT AGAINST THE STATE.

A suit against a state officer to prevent him from doing an unlawful act to the injury of complainant, such as the taking of or trespassing on the property of complainant, or a suit against an officer to compel the performance of a purely ministerial act imposed by statute, is not a suit against the state within the prohibition in Const. art. 5, § 19.

[Ed. Note.—For other cases, see States, Cent. Dig. § 181; Dec. Dig. § 191.*]

7. INJUNCTION (§ 57*)—RESTRAINING BREACH OF CONTRACT—WHEN AUTHORIZED.

An injunction restraining the breach of a contract is a negative specific enforcement thereof, and the jurisdiction of equity to grant it is substantially coincident with the jurisdiction to compel specific performance; and, where a contract may be specifically enforced, equity will restrain its breach by injunction, if this is the only practicable mode of enforcement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 113; Dec. Dig. § 57.*]

8. STATES (§ 191*)—ACTIONS AGAINST STATE.

A suit to restrain the state penitentiary board from violating a contract for convict labor is a suit against the state, within the prohibition in Const. art. 5, § 19, for the board is created by statute as the agent of the state to manage and provide for working the convicts, and the fact that the contract is valid does not justify the suit.

[Ed. Note.—For other cases, see States, Cent. Dig. § 181; Dec. Dig. § 191.*]

9. COURTS (§§ 89, 93*)—STARE DECISIS.

Decisions which become rules of property should not be overruled, whether right or wrong, but where no rule of property is disturbed, and the dignity and sovereignty of the state is involved, the court must overrule erroneous decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 336; Dec. Dig. §§ 89, 93.*]

10. CONSTITUTIONAL LAW (§ 105*) — VESTED RIGHTS—RIGHT TO SUE STATE.

One contracting with the state must do so with knowledge that he must rely solely on the legislative branch for performance of the contract and for satisfaction of the state's just obligations, though the privilege of suing the state is extended to him, as the right to sue the state is not a vested right, and may be withdrawn at any time.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 228–235; Dec. Dig. § 105.*]

11. COURTS (§ 89*)—RIGHT TO OVERRULE DECISIONS.

One suing the state penitentiary board to restrain its breach of a contract for convict labor cannot complain because the court determines that the suit is against the state, within the prohibition in Const. art. 5, § 19, thereby overruling a prior decision authorizing the maintenance of a suit on the same contract against the same board.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 311; Dec. Dig. § 89.*]

Battle, J., dissenting.

Certiorari to Pulaski Chancery Court; John E. Martineau, Chancellor.

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Certiorari by J. A. Pitcock to review a judgment of the chancery court of Pulaski county, adjudging petitioner guilty of contempt of court. Judgment of chancery court quashed, and proceedings against petitioner dismissed.

Hal L. Norwood, Atty. Gen., and James H. Harrod, for petitioner. Murphy, Coleman & Lewis, for the State.

McCULLOCH, C. J. On January 14, 1909, the Arkansas Brick & Manufacturing Company, a corporation, instituted suit in the Pulaski chancery court against appellants, J. A. Pitcock, superintendent of the Arkansas State Penitentiary, and Geo. W. Donaghey, Governor of the State, O. C. Ludwig, Secretary of State, Hal L. Norwood, Attorney General, Jno. R. Jobe, Auditor of State, and Guy B. Tucker, State Commissioner of Mines and Agriculture, composing the Board of Commissioners of the Arkansas State Penitentiary, to restrain them from violating an alleged contract which had been entered into between them and the plaintiff for the furnishing to the latter of the labor of state convicts.

It is alleged in the complaint that on February 3, 1899, a written contract was duly entered into between the Arkansas Chair Factory, a corporation, and the superintendent and financial agent of the State Penitentiary, with the approval of said Board of Commissioners, whereby the convicts of the state were hired to said corporation at the price of 50 cents per day for each man worked, for a period commencing on that day and ending January 1, 1909; that according to the terms of said contract it was agreed that 40 able-bodied convicts were hired for the first year, and as many thereafter as needed, not exceeding 200; that the board should furnish all necessary buildings to be used under the contract (except certain ones specified), and also clothe and feed the convicts; that prior to July 31, 1899, said Arkansas Chair Factory, with the consent of said board, assigned said contract to plaintiff; that on the last-named date said contract was by mutual consent of the parties amended so as to permit the working of convicts by plaintiff outside of the walls of the penitentiary in manufacturing, agriculture, railway building, and other pursuits, and that said board should furnish to plaintiff 300 able-bodied men on demand of the plaintiff, after January 1, 1900, and that plaintiff should work not less than 100 men at all times; that the plaintiff complied with its part of the contract, and at great expense prepared to work said convicts; that the Board of Commissioners complied with said contract, except that after January 1, 1901, they failed to furnish the number of convicts required by the contract, and only furnished a far less number; that since the 1st day of January, 1900, and up to the time of the commencement of this suit, the plaintiff has continuously demanded from said board the amount of convict labor called for by said contract, but that the board and superintendent at various times, and under various pretexts, failed to furnish the amount of labor so demanded, but that in each instance, when the requisite number were not furnished on demand, said Board of Commissioners represented to the plaintiff that it would subsequently make good the deficit thus caused by furnishing to said plaintiff such an amount of convict labor as to make it receive eventually the aggregate number of convicts called for by said contract, and that "in each instance the said superintendent and board expressly promised to make good said deficit, and adopted resolutions to this effect, which were spread at length upon the minutes of said board, and the plaintiff could not other than rely upon said representations and said promises, and for this reason it accepted same"; that "in reliance upon said representations and promises of the board, and believing that the state would carry out its contract with it in all respects, it was induced to make the large expenditures hereinbefore stated, which were absolutely necessary in order to prepare the proper facilities for making it profitable to the plaintiff to use the amount of labor due it under said contract, and which it fully expected would eventually be furnished to it"; that the said members of the Board of Commissioners, pretending to act as the Board of Penitentiary Commissioners, had on the 14th day of January, 1909, made, and were about to enforce, a resolution, in substance, declaring said contract to be at an end, and directing the superintendent of the penitentiary to withdraw all convicts from the premises and works of the plaintiff, and place them on the state farm or within the walls of the penitentiary. It is further alleged in the complaint "that the board had no authority in law to make said pretended order, and that the same is null and void; that the said board had no authority to take the said convicts from the plaintiff until the balance of the convict labor due to the plaintiff, as aforesaid, has been furnished to the plaintiff in full; that the said resolution was passed, not because of any default on the part of the plaintiff in carrying out the terms of the said contract, and not because the board does not acknowledge the violation of said contract on its part as herein alleged, but solely on the ground that the board pretends to possess the arbitrary power of withholding said labor from the plaintiff on the theory that the state is not amenable to any legal proceeding against it, and that the members of the board can shield themselves by this protection in favor of the state."

The prayer of the complaint is as follows: "Premises considered, the plaintiff prays that a temporary restraining order be made,

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restraining the defendants, and each of them, from taking any action looking to the withdrawal of the convicts now in its possession, and particularly from taking from plaintiff's brickworks any of the men now engaged in labor therein, and requiring said Board of Penitentiary Commissioners, and the superintendent of said penitentiary, to carry out the terms of the agreement hereinbefore set forth; that is, to require said board and superintendent of the penitentiary to furnish the plaintiff a sufficient number of able-bodied convicts to repay it for the labor of the convicts so withheld, withdrawn, and taken from it by the Board of Commissioners as set forth herein. Plaintiff prays that upon the final hearing a decree be entered as above prayed, and that the said order of the board directing the superintendent to take away from the plaintiff the convicts now held by it, and refusing to carry out the terms of the agreements before stated, be declared null and void."

It will be seen from the foregoing statement of facts that the contract, dated February 3, 1899, as amended on July 31, 1899, is the same contract which was the subject of litigation in the case of McConnell v. Ark. Brick & Mfg. Co., 70 Ark. 568, 69 S. W. 559, and it is so pleaded in this action; it being alleged that the contract had, by the Pulaski Chancery Court, and by the Supreme Court on appeal, been adjudged to be valid and enforceable. Upon the filing of said complaint, the same was presented to the chancellor at chambers, and he at once granted a temporary injunction in accordance with the prayer of the complaint, restraining said members of the Board of Commissioners and the superintendent of the penitentiary from withdrawing said convicts. The injunction was duly issued by the clerk after execution of a bond by the plaintiff, in accordance with the statute and the order of the chancellor, and immediately served on all the members of the board; but the sheriff was unable to serve same upon appellant, Pitcock, until Monday morning, January 18, 1909. He was, however, duly notified of the issuance of the injunction by the sheriff, and by one of the attorneys for the plaintiff in a conversation over the telephone, immediately after the issuance of the injunction, and before he removed the convicts. Immediately after the adoption of the resolution by the Board of Penitentiary Commissioners, and regardless of the notice to him of the issuance of the injunction, Pitcock set about complying with the resolution, and within the succeeding three days withdrew all convicts from the plaintiff's works and premises, and returned same to the state convict farm and to the walls of the penitentiary. Upon an affidavit filed by the plaintiff, setting forth the issuance and violation of said injunction, Pitcock was cited by the chancellor to appear and show cause why he should not be punished for contempt, and upon a hearing he was adjudged by the chancery court to be in contempt on account of having violated said injunction, and a fine of $500 was imposed upon him. The record has been brought here by writ of certiorari to review the action of the chancery court in adjudging Pitcock to be in contempt and in imposing the fine upon him.

It is earnestly insisted on behalf of appellant that the evidence introduced at the hearing does not sustain the finding of the chancellor that appellant was informed of the issuance of the writ of injunction prior to the service on him on January 18, 1909, or that he had violated the injunction after being notified thereof. We are convinced, however, from a careful consideration of the testimony adduced at the hearing, that Pitcock, after receiving actual notice of the issuance of the injunction, evaded the service of the writ by the sheriff, and intentionally violated its terms by withdrawing the convicts from the premises and works of said plaintiff, pursuant to the resolution adopted by the Board of Penitentiary Commissioners. Actual notice of the issuance of the injunction, without formal service of the writ upon him, was sufficient to put him in contempt of the court by violating the terms of the writ, if the court possessed jurisdiction of the cause. Kirby's Dig. § 3984; 1 Joyce on Injunctions, §§ 247–249, 251; High on Injunctions, §§ 352, 353. We, therefore, treat as settled the fact that appellant, Pitcock, intentionally violated the injunction; and the only remaining question is whether or not the court had jurisdiction, for it is well settled that errors of the court in issuing an injunction cannot be taken advantage of by one who has violated the injunction.

If the court had jurisdiction of the parties and subject-matter of the cause of action in which the injunction was issued, the fact that it was erroneously and improvidently issued does not excuse disobedience on the part of those who were bound by its terms. Meeks v. State, 80 Ark. 579, 98 S. W. 378. In considering this question the distinction must not be overlooked between the violation of a preliminary injunction preserving the status quo of the subject-matter of the litigation during the pendency thereof and final decrees of courts requiring the parties to do or not to do the things enjoined upon them by such decrees. In the latter class of cases, if the decree was rendered without jurisdiction, it can be disobeyed with impunity, for no one owes obedience to a void decree, as it is without any force whatever. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as tres-

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passers." Rankin v. Schofield, 81 Ark. 463, 98 S. W. 674. On the other hand, a court possesses the power of hearing and determining the question of its jurisdiction, and may, while so doing, require the parties to preserve the status of the subject-matter. U. S. v. De la Maza Arrendondo, 6 Pet. 709, 8 L. Ed. 547; United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319. However, when the pleadings show on their face that the court is wholly without jurisdiction of the subject-matter set forth therein, any preliminary order made or final judgment rendered is void. Willeford v. State, 43 Ark. 62. It becomes necessary, therefore, to inquire as to the alleged cause of action set forth in the complaint—whether any cause of action is stated at all, and, if so, whether or not it falls within the jurisdiction of the chancery court.

The complaint alleges, in substance, that the state of Arkansas, acting through its authorized officers and agents, entered into a written contract with the plaintiff's assignor for the hire of convicts; that the said contract was subsequently assigned to plaintiff, and amended in writing, and also was subsequently amended by a verbal promise and undertaking of the Board of Penitentiary Commissioners, which was duly entered in writing on the minutes of the board, to the effect that the deficit in the number of convicts called for in the contract to be furnished to the plaintiff should be made good, so that the plaintiff should receive the aggregate amount of convict labor specified in the contract. In other words, the complaint sets forth an alleged contract entered into with the Penitentiary Board, evidenced partly by the original and amended writings, and partly by the minutes of the board, to furnish the aggregate amount of convict labor provided for in the written contract. These allegations can only be construed to mean that the board agreed to continue to furnish convict labor to plaintiff until the aggregate amount specified in the contract should be supplied. The only difference between this case and that of McConnell v. Ark. Brick & Mfg. Co., supra, is that the latter was a suit to prevent an attempted rescission and breach of the written contract of February 3, 1899, as amended in writing on July 31, 1899, while the present suit is one to restrain an attempted breach of said amended written contract as further amended subsequently by the alleged additional agreement of the Penitentiary Board, entered on the minutes thereof, to make good the deficit in the aggregate amount of convict labor agreed to be furnished. The contract and each of the alleged amendments thereto were based on the same character of consideration, viz., the mutual undertakings of the contracting parties. The present suit, as was the McConnell Case, is plainly one to restrain an attempted breach by the Penitentiary Board of a contract alleged to have been entered into by that board for the state of Arkansas, whereby convict labor should be furnished to the plaintiff; the question at issue in each of the cases being whether or not the contract was a valid and subsisting one, and whether such suit was one against the state.

The first and only question necessary for us to determine in this case is whether or not this is a suit against the state; for, if it is, then the chancery court was wholly without jurisdiction to proceed, and all orders and judgments attempted to be rendered therein were void. In the Matter of Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. A sovereign state cannot be sued except by its own consent, and such consent is expressly withheld by the Constitution of this state. Article 5, § 19. The question whether a suit is one against a state is not necessarily determined by reference to the parties to the record. If the state is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the state, and falls within the rule of prohibition. Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; In the Matter of Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; Fitts v. McGehee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; Farmers' Nat. Bank v. Jones (C. C.) 105 Fed. 459; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448. In Fitts v. McGehee, supra, Mr. Justice Harlan, speaking for the court, said: "As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession, or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held, or were entitled to hold, the property in their capacity as officers of the state." In Farmers' Nat. Bank v. Jones, supra, Judge Caldwell said: "As a state can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the state were liable to be sued and coerced to comply with the judgments and decrees of a federal court, the whole scope and purpose of the amendment would be nullified. * * * It is now settled that the jurisdiction in such cases is dependent upon the real, and not upon the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a state

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to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state, though the state itself is not named as a party on the record." In the Ayers' Case, supra, Mr. Justice Matthews, speaking for the Supreme Court of the United States, said: "A bill, the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state." And again, in the same case, it is said: "Where the contract is between the individual and the state, no action will lie against the state; and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution."

In actions against officers of the United States the same principle has been announced. Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134; Naganab v. Hitchcock, 202 U. S. 473, 26 Sup. Ct. 667, 50 L. Ed. 1113. In Belknap v. Schild, supra, which was a suit filed against Belknap, a commodore in the United States Navy and commandant of the United States Navy Yards at Mare Island, California, to restrain him from using caisson gates, which, it was charged, were an infringement of letters patent granted by the United States to the plaintiff. The court held that it was a suit against the United States, and could not be maintained. In discussing the question the court said: "No injunction can be issued against officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced, or to compel the state to perform its obligations, or where the state has otherwise such an interest in the object of the suit as to be a necessary party." The doctrine of these cases is reaffirmed by the Supreme Court of the United States in the recent case of Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 54 L. Ed. ——. The only distinction found in these cases is that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, such as the taking or trespass upon property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the state; and also where the officer refuses to perform a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases, a suit against such an officer is not a suit against the state.

In determining whether a suit is against the state it is unimportant whether the contract sought to be enforced, or the breach of which is sought to be enjoined, is or is not a valid one. The fact that it is a valid contract does not justify a suit against the state, and that question has no place in an inquiry as to whether or not a suit is against the state. "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit." 4 Pomeroy, Eq. Jur. § 1341; McDaniel v. Orner (Ark.) 120 S. W. 829.

This court in the McConnell Case, supra, held that that was not a suit against the state, because the Penitentiary Board had executed a valid and then subsisting contract with the plaintiff, but was attempting, without legal authority, to break it by a refusal to perform it. That distinction is untenable. The Penitentiary Board is created by statute as the agent of the state to manage and provide for working the convicts of the state. That board has the power to make contracts for the state, and it is the sole agent of the state in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does is for the state. The state can under the present statute, make and perform contracts with reference to the management of convicts only through the agency of this board. Therefore an injunction against the board restraining it from violating a contract necessarily results in requiring the board, and through it the state, to specifically perform its contract. The alleged contract was one merely to furnish the labor of convicts. The board, acting for the state, retained custody and control of the convicts, and were to permit them to labor for plaintiff for a stipulated price. A withdrawal of the convicts from the premises of plaintiff was not a taking of or a trespass upon the latter's prop-

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erty. It was only a refusal to perform the alleged contract which plaintiff seeks to restrain.

It is with great reluctance that we have concluded to review the McConnell Case, and overrule the doctrine therein announced, but a majority of the judges are of the opinion that the decision was wrong, and contrary to the great weight of authority. The overruling of a decision has the unfortunate tendency of rendering the laws of the state less certain. Decisions which become rules of property should never be overruled, whether they are right or wrong. But where, as in this instance, no rule of property is disturbed, and the dignity and sovereignty of the state is involved, we conceive it to be our duty to correct the mistake of the court as speedily as possible by overruling a former decision which we become thoroughly satisfied is erroneous and contrary to the recognized rules established by the other courts of the country. No one can have a vested right to sue the state. The state can either extend or withhold the right. All who contract with the state must do so with full knowledge that they must rely solely upon the legislative branch for performance of the contract and for satisfaction of the state's just obligations. Even the privilege of suing the state, when once extended, does not afford the basis of a vested right to sue or to prosecute to termination a suit once commenced; and such privilege may be withdrawn without disturbing any vested right, even after suit has been commenced. Beers v. State of Arkansas, 20 How. 527, 15 L. Ed. 991. The plaintiff cannot complain because the court overrules its former decision, even though that decision permitted the plaintiff to maintain its suit similar to the one now before us.

The judgment of the chancery court, adjudging the petitioner to be in contempt of that court, is therefore quashed, and said proceedings against the petitioner are dismissed.

HART, J. (concurring). A majority of the judges think that the allegations of the complaint, which was the basis of the injunction for a disobedience of which Pitcock was fined, bring this case squarely within the principles of McConnell v. Arkansas Brick & Manufacturing Company, 70 Ark. 568, 69 S. W. 559, and that the decision here, if that case is to stand, must be an affirmance. I do not think so. In the McConnell Case there was a valid contract, made pursuant to our statutes regulating the hiring out of convicts, between the Board of Penitentiary Commissioners, as the agents and representatives of the state, and the Arkansas Brick & Mfg. Company. The effect of the holding in the McConnell Case was that the board could not abrogate that contract; such power being vested alone in the Legislature, and they were enjoined from so doing. The instant case to my mind is plainly distinguishable. The same contract which was the foundation of the action in the McConnell Case is made an exhibit to the complaint in this case, and thereby becomes a part thereof. The contract shows by its terms that it has expired. The allegations of the complaint amount to no more than an attempt by judicial construction to extend the terms of the contract exhibited with it. In short the things asked to be done and performed by the Penitentiary Board are the very things which, when done and performed, would constitute a performance of the contract as its terms are construed by the successors to the Arkansas Brick & Mfg. Co. In other words, the case resolves itself into a suit for specific performance against the state. My attention has been called to no case, and I have been unable to find any, which gives the courts jurisdiction to entertain such a suit. Such a view is contrary to the principles of state sovereignty upon which our government is founded, and which must endure as long as the state itself. Because the expression of a majority of the judges, as above indicated, as to the effect of the McConnell Case is in my judgment an unwarranted extension of the principles at issue in that case, and because I believe the McConnell Case to be wrong in principle, I have voted to overrule it.

WOOD, J. I concur in the opinion of Mr. Justice HART, except that I am of the opinion that the law as announced in the McConnell Case is correct, and I do not think that case should be overruled.

BATTLE, J. (dissenting). The contract involved in this case is the same as that held to be valid in McConnell v. Arkansas Brick & Manufacturing Company, 70 Ark. 568, 69 S. W. 559. But this is denied by saying that the contract adjudged to be valid in the McConnell Case has expired. I do not think so. The Board of Commissioners of Arkansas State Penitentiary failed often to comply with that contract by furnishing the Arkansas Brick & Manufacturing Company with the labor of convicts as it had agreed to do, and upon each of such failures, and during the life of the contract, promised to furnish the company with such labor until it had furnished all it had contracted to do, and adopted resolutions to that effect, and caused them to be spread at length upon its minutes. These promises were based upon valuable considerations, and did not constitute new contracts, but a continuation of the old by an extension of the time of its performance. The labor to be furnished under the promises was to be in performance of the original contract, which could not expire until it was performed in the manner promised. If I am correct in this conclusion, the board is enjoined and restrained by the decree in the McConnell Case from in any manner can-

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celing or annulling the contract as thus extended, and "from refusing and failing to execute and carry out" its terms. The board in this case is the same as in that; the membership being different.

I dissented in the McConnell Case on the ground that that suit was, in effect, a suit against the state, which could not be sued. But the court held differently, and its judgment in that case has passed beyond its control, and become final, and I think should be enforced in this case. The parties have rightly acted upon the faith of it, and should not suffer on account of confidence in the judgment of the court.

WOOD, J. (concurring). I concur in the judgment, but dissent from the opinion. Why should the McConnell Case be overruled? The doctrine of that case is sound "to the core." That case is not only unlike this, but it is not even of kin. In that case the contract was in existence, having yet seven years to run. In the present case the contract had expired. The allegations of the complaint do not disclose any new contract, but only set up the old, and certain promises by the board to carry out its provisions which were never fulfilled. And now, after the contract has expired, this effort is made to have the time for its performance extended by judicial construction, and to have the various promises that were made to fulfill the old contract carried out. The allegations do not show any contractual relations between the state and the Brick Company. In my opinion, time was of the essence of the old contract, and any promises made on the part of the board to comply with its provisions which remained unfulfilled when that contract expired died with it, and the officers in withdrawing the convicts after the contract had expired were but discharging their duty according to law, and, of course, were representing the state. The chancery court, therefore, so far as the enforcement of the provisions of that contract is concerned, is wholly without jurisdiction to "hear, determine, and decree in reference to such matter," and any decree it might make would be void, and could not legally operate on any one, nor could anybody be punished for disobeying it. Willeford et al. v. State ex rel., 43 Ark. 62. See, also, Rankin v. Schofield, 81 Ark. 463, 98 S. W. 674. The court was without jurisdiction of the state, a necessary party. One of the essentials of jurisdiction is that the court have before it the proper parties. Therefore, I have concurred in the judgment because the allegations of the complaint do not state a cause of action to give the chancery court jurisdiction. But on the contrary, the complaint, on its face, shows that the court had no jurisdiction of the state, the real party in interest. But if it be true that the present case cannot be distinguished from the McConnell Case, then the decree of the chancellor was clearly right, and should be affirmed. As the only living member of this court who concurred fully in the views so well expressed in the McConnell Case, I challenge the statement of the opinion in the present case that the decision in the McConnell Case is erroneous and contrary to the recognized rules established by the other courts of the country.

Let us see. In the McConnell Case the Board of Penitentiary Commissioners, under a statute expressly authorizing it (sections 5855, 5856, Kirby's Dig.) on July 31, 1899, entered into a contract with the Brick Company whereby the board was to furnish the company, after January 1, 1900, and until January 1, 1909, 300 able-bodied convicts. The parties had entered upon the performance of the contract. The Brick Company, as alleged in its complaint, and, as confessed by the demurrer, "had expended for buildings, machinery, etc., for the purpose of equipping said plants so that it might comply with the terms of its contract, about $300,000." The board had furnished the convicts. On the 18th day of August, 1901, after the contract had been in force about 20 months, the state officers constituting the Board of Penitentiary Commissioners passed a resolution annulling and setting aside the contract, and ordering the superintendent of the penitentiary "to withdraw from said Brick Company all convicts in their employ, and to turn them back into the walls of the penitentiary, subject to the further orders of the board." It was confessed by the demurrer that the Brick Company had fully carried out the contract on its part. The statute, under which the board was authorized to make the contract did not give it power to rescind it, and there was no other statute giving it such power. So the action of the board in setting aside the contract, and its order directing the superintendent "to withdraw all convicts in the employ" of the Brick Company, was purely arbitrary.

The Brick Company brought suit against the members of the board, and against the superintendent and the financial agent of the penitentiary, to have the resolution attempting to set aside the contract declared null and void, and to restrain them from taking any action to prevent the due performance of the contract under the void order, and "particularly from taking from the Arkansas Brick & Mfg. Co. any of the men then engaged in labor therein, and to require the superintendent, McConnell, to proceed with the execution of the contracts and the furnishing of labor as therein agreed upon." The appellants (defendants in that case) contended that, in passing the resolution setting aside the contract, and in making the order directing the superintendent to withdraw the convicts, the board was acting for and representing the state, and that the state was therefore a necessary party. In response to that contention we said: "The power and

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authority to make a contract is one thing, but the power to abrogate it is quite another thing, and the latter power is, in this government, possessed by neither the state nor any of her citizens. The state can only speak through the legislative department, which is the mouthpiece of the sovereign; and the Legislature can lawfully pass no law impairing the obligation of contracts. It is and has been the law from time immemorial that a public agent, acting without the scope of his authority without authority of law, cannot shield himself behind the sovereign, the state; but, where injury is thereby done to private citizens, the officer or agent is a trespasser, and personally liable in damages." We further said, quoting from the Supreme Court of the United States: "Such a defendant sued as a wrongdoer who seeks to substitute the state in his place, or to justify by authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense, but is bound to establish it; and as the state is a political corporate body, which can act only through agents and command only by laws, in order to complete his defense, he must produce a valid law of the state which constitutes his commission as its agent and a warrant for his act." Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.

The judges who rendered the decision in the McConnell Case were of the opinion that the Board of Penitentiary Commissioners exceeded its powers in attempting to set aside the contract, and that their acts in so doing were wrongful, and such as to render them liable as individuals for any damages directly resulting to others from such acts. Nicks v. Rector, 4 Ark. 284; Rice v. Harrell, 24 Ark. 402; O'Conner v. Auditor, 27 Ark. 242; Simpson v. Robinson, 37 Ark. 142; Parham v. McMurray, 32 Ark. 269; State v. Newton, 33 Ark. 276; De Yampert v. Johnson, 54 Ark. 165, 15 S. W. 363; Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105. See, also, Hawkins v. U. S., 96 U. S. 692, 24 L. Ed. 607; Whiteside v. U. S., 93 U. S. 257, 23 L. Ed. 882. The Legislature itself could not rescind or set aside the contract and deprive the Brick Company of the benefits thereof, unless that power was expressly reserved in the act conferring upon the board the authority to make the contract. Woodruff v. Berry, 40 Ark. 256; Berry v. Mitchell, 42 Ark. 244. The board certainly had no authority except what the Legislature had given them. The Legislature had not even attempted to vest them with power to destroy or to impair the obligations of the contract which they were authorized to make. The Supreme Court of the United States has quite recently decided that: "The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign or governmental capacity and is an illegal act, and the officer is stripped of his official character, and is subjected in his person to the consequences of his individual conduct." Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932.

In the McConnell Case we were of the opinion that the facts brought the case strictly within the general doctrine announced by Chief Justice Marshall, in Osborn v. United States Bank, 9 Wheat. 738, 6 L. Ed. 204, to the effect that a state officer will be restrained from executing an unconstitutional statute of the state when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him. In Pennoyer v. McConnaughy, 140 U. S. 1, 10, 11 Sup. Ct. 699, 701, 35 L. Ed. 363, complainant sought to restrain the defendants, officials of the state, from violating, under an unconstitutional act, the complainant's contract with the state, and thereby working irreparable damage to the property rights of the complainant. The court held that such a proceeding was not a suit against the state, and said that the general doctrine of the "great and leading case of Osborn v. Bank of United States," as above stated, "has never been departed from." If officers acting under an unconstitutional statute can be restrained from committing acts of wrong and injury to the vested rights of a complainant under a contract with the state, for a much stronger reason will officers be restrained from invading and destroying the rights of another under a contract with the state where such officers are acting without any color of authority whatever. This they were doing in the McConnell Case. The withdrawal of the convicts which the Brick Company had in its possession, and which the board were attempting to do under their void resolution and order, would have meant an irreparable loss to the Brick Company as the facts show, of many thousands of dollars. The Brick Company had a property right in the labor of the convicts. It would make this opinion too long to review all the cases in this country supporting the doctrine announced in the McConnell Case. It had long been an established doctrine in this state before that case was decided. In Crawford, Auditor, v. Carson et al., 35 Ark. 565, 578, we said: "The prohibition against suing the state, or any officer representing her, in chancery, must be confined to such suits as seek to charge the state with some liability or duty, or to hold her or her officers as trustees of effects in their hands. Such, and such only, was the object of the statute. It would open the way to intolerable tyranny to exempt officers of the state from injunctions to restrain them from illegal, though colorable, acts of authority."

The suit in the McConnell Case was not, as the court now holds, a suit against the

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state to enforce the specific performance of her contract. Not at all; but it was a suit against the officers to restrain them from illegal and unauthorized acts to the injury of the rights of the Brick Company under the contracts, acts which were not only wrongful, but without even any color of authority. "The injunction," says the court in the McConnell Case, "is not against the state, but against the defendants, to restrain them from going beyond their powers. No order of the court can be against the state, nor against the defendants to compel them to perform those duties as officers and agents of the state." Mr. Rose, in his Code of Federal Procedure, says: "The distinction running through all the cases is between preventive and affirmative relief; between those cases in which state action is sought to be restrained by proceedings against state officers, and those in which some affirmative, though legal and proper, act of the state is sought to be compelled. The eleventh amendment does not shield state officers in the performance of unlawful acts though prescribed by state law; but it protects the state against compulsion in the performance of its sovereign functions, against the enforcement of a liability ex contractu or ex delicto, against direct proceedings for the recovery of property held by the state through its officer." "The cases" says he, "in which by mandamus or other writ state officers have been compelled to perform certain acts at the suit of individuals injured are no exception to this rule, since the foundation of the relief is the wrong of the officers in disobeying or maladministering the state law, and not a wrong committed by the state." 1 Rose, Code Fed. Procedure, pp. 50, 51, and numerous cases cited. This is precisely the distinction we made in the McConnell Case, and the failure of my Brother Judges to observe it in the present case has caused the court to fall into the error of overruling the McConnell Case, and the case of Auditor v. Carson on the same point, although the latter is not expressly mentioned.

The Chief Justice in his opinion says: "The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does is for the state." I can never subscribe to that doctrine. The board was not representing the state at all when they passed the resolution annulling the contract and ordering the convicts taken away from the Brick Company. No principle is more firmly established than that when an officer exceeds his authority, his acts are individual acts only, and do not bind the state. The state is liable only to the extent of the power actually given to its officers, and not to the extent of their apparent authority. Woodward v. Campbell, 39 Ark. 583; Woodruff v. Berry, 40 Ark. 256; Pulaski County v. State, 42 Ark. 118; St. Louis Co. v. Langley, 66 Ark. 52, 51 S. W. 68; Mechem, Pub. Off. §§ 511, 663; Throop on Pub. Officers, §§ 121, 551, 576. The board had the discretion to make or not to make the contract. They had discretion in fixing the terms of the contract. But after these terms were defined and agreed upon between the board and the Brick Company, and the contract was entered into, the board no longer had any discretion in the matter of furnishing the number of convicts called for by the contract. The duty of the board to furnish the number of convicts named in the contract, and of the superintendent, who was the subordinate to the board, was purely ministerial in character.

Suppose the Legislature had provided that when the board makes a contract to let convict labor, they shall furnish the labor of not less than 300 able-bodied convicts. Would any one contend that after the board had made a contract for the number of convicts as prescribed by the statute the duty of the board to furnish the number of convicts named would be a matter of judgment and discretion? Well, the Legislature, instead of prescribing the number of convicts to be let by the contract, has left the matter of designating the number open to the discretion of the board. But after the board has exercised that discretion and designated the number in the contract they make, then the Legislature did not leave it to their discretion and judgment to withhold all or any part of the number called for in the contract. After the board had designated 300 as the number to be let by contract, under the statute authorizing them to make the contract, the legal effect was precisely the same as if the Legislature itself had designated that as the number that the board should furnish. And the simple act of furnishing the number of convicts called for by the contract was a ministerial duty imposed by law. So the litigation in the McConnell Case was "with the officers, not the state." Rolston v. Missouri Fund Com'rs, 120 U. S. 390, 411, 7 Sup. Ct. 599, 610, 30 L. Ed. 721. Chief Justice Chase, in Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437, has given a definition of a ministerial duty that has never since been improved. He says: "A ministerial duty, the performance of which may, in proper cases, be required by judicial process, is one in regard to which nothing is left to discretion. It is a simple, definite duty, arising under conditions, admitted, or proved to exist, and imposed by law." Our own court, through Mr. Justice Smith, defines a ministerial act as follows: "One which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done." Ex parte Batesville & Brinkley R. Co., 39 Ark. 82; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; See Throop Pub. Officers, § 535, and cases cited in note.

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Since the contract fixed the precise terms, as to the number of convicts to be furnished, and this duty under the statute was purely ministerial, it follows that from any and every view point, the doctrine of the McConnell Case is right, and should not have been overruled. The doctrine conforms to that class of cases which hold that: "Where a suit is brought against defendants, who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the state, or for compensation in damages, or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state." Mr. Justice Lamar in Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, and citing Osborn v. Bank, supra, Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Litchfield v. Webster County, 101 U. S. 773, 25 L. Ed. 925; Allen v. Baltimore & Ohio Ry. Co., 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623; and Poindexter v. Greenhow, supra, from which we have quoted. Other more recent cases are Scott v. Donald, 165 U. S. 112, 17 Sup. Ct. 262, 41 L. Ed. 648; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; In re Tyler, 149 U. S. 164, 190, 13 Sup. Ct. 785, 37 L. Ed. 689; Tindal v. Wesley, 167 U. S. 204, 220, 17 Sup. Ct. 770, 42 L. Ed. 137; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; and Ex parte Young, supra. The facts in the McConnell Case do not fit the doctrine of In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, and that line of cases, but they do fit the line of cases followed by us as above indicated.

I am unable to see how the "dignity and sovereignty of the state are involved" in a suit to restrain her officers from exceeding their powers and arbitrarily setting aside a contract, and destroying valuable rights thereunder. Nor do I think that the dignity and sovereignty of the state are involved in a suit to compel an officer to perform merely ministerial duties under a contract made under the authority of the statute. Such is the McConnell Case, as the judges who rendered the decision viewed the facts and the law. The doctrine there announced erects the same high standard for honesty and good faith in the conduct of public officers as that required by the law of private individuals in their dealings with each other. If I am correct in my views, this doctrine should remain the law in Arkansas forever.

PINSON v. STATE.

(Supreme Court of Arkansas. July 12, 1900.)

1. BURGLARY (§ 9*)—ELEMENTS OF OFFENSE—STATUTES.

Kirby's Dig. §§ 1603–1605, defining burglary as the unlawful entering a building at night with intent to commit a felony, and providing that the manner of breaking or entering is not material, except to show intent, etc., and that one with force entering a building in the nighttime with intent to commit a felony is guilty of burglary, retains the elements of common-law burglary, consisting of the unlawful breaking and entering in the nighttime of another's dwelling with intent to commit a felony, and enlarges the offense, so that an unlawful entry without breaking of a building in the nighttime, with intent to commit a felony, is burglary, and one who in the nighttime enters through the open door during business hours a saloon, with intent formed before or at the moment he enters to commit a felony, is guilty of burglary, though fraud or deception was not practiced on the owner in making the entry.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 6–12; Dec. Dig. § 9.*]

2. BURGLARY (§ 9*)—STATUTORY OFFENSE—"UNLAWFUL ENTRY."

"Unlawful entry," within Kirby's Dig. §§ 1603–1605, defining burglary as the unlawful entering a building in the nighttime with intent to commit a felony, and declaring that the manner of breaking or entering is not material, etc., is going into the building with the intention, formed at the time the entry is made, to commit a felony.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 8, pp. 7189–7190.]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Daniel Hon, Judge.

George Pinson was convicted of burglary, and he appeals. Affirmed.

Appellant was convicted on an indictment which charged that he, "on the 23d day of February, 1909, about the hour of 2 o'clock in the nighttime of said day, unlawfully, feloniously, and burglariously, and with force, did enter the storehouse of J. D. Broyles, with the intent then and there to commit a felony, to wit, grand larceny of the goods and property of J. D. Broyles." There was testimony tending to prove that appellant, in company with two others, went into the saloon of Broyles after midnight on the night alleged, and that appellant called the bartender to the cigar stand and engaged him in conversation. In the meantime the other two parties who entered the saloon with appellant went behind the screen or partition where there was whisky, and stole same. Eleven quarts of rye whisky were stolen from the saloon that night. Without going into detail it is sufficient to state that the evidence tended to prove that there was a conspiracy

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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between appellant and others who entered the saloon with him on the night alleged to steal the whisky, and that they did steal whisky on that night which had a market value in Ft. Smith of over $10.

There was evidence to warrant a finding that appellant intended, when he entered the saloon, to steal the whisky. The court instructed the jury as follows, by reading sections 1603 and 1604 of Kirby's Digest, and then declaring the law to be: "(1) To constitute burglary a house or other building must be broken into or entered in the nighttime with the intent to commit a felony, but one who enters or breaks into a house in the nighttime with the intent to steal more than $10 worth of goods, or other personal property, is guilty of burglary, whether he steals that amount or not, if it his intention in entering to steal more than $10 in value. If after entering the store he formed the intent to steal, and did steal, more than $10 in value, he would not be guilty of burglary. The intent must have existed before or at the time of entering. (2) If the jury find from the evidence, beyond a reasonable doubt, that the defendant, in the Ft. Smith district of Sebastian county, within three years next before March 4, 1909—the date of the indictment—unlawfully entered the storehouse of J. D. Broyles in the nighttime, either by himself, or with other persons, with the intent to commit grand larceny of the goods or personal property of J. D. Broyles to steal from his store goods or other personal property of more than the value of $10, you will find the defendant guilty. (3) If the business house and goods therein were in the possession of J. D. Broyles, and held and controlled by him, he would be held under the law to be the owner of the same. (4) You are instructed that the market value of an article is the price for which it would sell in the regular way where one person desires to sell and another person desires to buy, and has the means or ability with which to pay. No isolated sale is the market value of an article, but it is what it would sell for on the market in the regular way." The appellant objected to each of these instructions, and duly excepted to the ruling of the court in giving them.

Appellant asked the court to instruct the jury as follows: "(1) Gentlemen of the Jury: You are instructed to acquit the defendant; the state having failed to make out a case against him. (2) You are instructed that, though the defendant entered the saloon in the nighttime, the said saloon being open during business hours, lights burning, bartender or bartenders on duty, and the business running in the regular way, the defendant entering at the regular door, as did other customers, under those conditions the crime of taking goods therefrom could not, as a matter of law, amount to burglary, and you should acquit the defendant. (3) If you find that the defendant did break and enter or did enter the said saloon as charged with the intent to commit the crime of petit larceny only, he is not guilty of burglary, and you are instructed to acquit him. (4) The defendant pleads former conviction of petit larceny upon the identical facts as taken to establish this charge, and you are therefore instructed that if that plea is established, you cannot convict the defendant upon any degree of larceny." "(6) If you fail to find from the evidence that the defendant prior to entering the saloon formed an intent to commit a felony therein, he is not guilty of burglary, and your verdict should be acquittal. (7) One of the elements of burglary, under our statute, is an unlawful entry, and if you find from the evidence that the said saloon was open, and the defendant entered during business hours in the regular way, the lights burning, and the bartender present, the business running in the usual course, as a matter of law the defendant entered by invitation, and is not guilty of burglary, and you should acquit him. (8) You are instructed, as a matter of law, the presumption is in favor of innocence, and the burden to establish a felonious intent is upon the state, and if such an intent is not clearly proven beyond a reasonable doubt, you should find for the defendant." "(10) If you find from the evidence that there were other cases of liquor besides the one taken and carried away, to which the defendant had access, and which he refused to take, this is to be regarded as evidence in his favor. (11) Each juror should feel the responsibility resting on him as a member of the body, and realize that his own mind must be convinced of the guilt of the defendant beyond a reasonable doubt before he can consent to a verdict of guilty; and if any one of the jury, after having considered all the evidence, and after having consulted with his fellow jurors, entertain such reasonable doubt, you cannot in such case find the defendant guilty. (12) If the business house and goods therein were in the exclusive possession of J. D. Broyles, and held and controlled by him, he would be held, under the law, to be the owner of the same. (13) Unlawful entering, as employed in our statutes, in the definition of burglary, signifies the violation of some prohibitory law." Of these the court gave 3 and 6, but refused the others. The court modified prayers numbered 7 and 8, and gave them as modified as follows: "No. 7. One of the elements of burglary, under our statute, is an unlawful entry, and if you find from the evidence that the said saloon was open, and the defendant entered during business hours in the regular way, the lights burning and the bartender present, the business running in the usual course, as a matter of law the defendant entered by invitation, and is not guilty of burglary, and you should acquit him, unless you find that at the time of entering he did so with the

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intent to commit grand larceny, to steal from the storehouse goods of the value of more than $10. No. 8. You are instructed as a matter of law the presumption is in favor of innocence, and the burden to establish a felonious intent is upon the state, and if such intent is not established from the evidence, the jury should acquit." Appellant objected to the rulings of the court in refusing its prayers, and to the giving of prayers 7 and 8 as modified, and duly excepted to the rulings. Appellant in his motion for new trial assigned as error the various rulings to which he had saved exceptions. His motion was overruled, and he duly prosecutes this appeal.

J. D. Chastain, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). It is unnecessary to discuss seriatim the objections of appellant to the rulings of the court. It suffices to say we find no reversible error in any of them. The most important question in the case, as conceded by appellant's counsel, is whether one who enters a storehouse, occupied as a saloon, in the nighttime, with intent formed in his mind, before or at the very time he enters, to commit a felony, can be guilty of burglary, where the house he enters is open for business, and the entry is through the open door during business hours, and without any apparent fraud or deception practiced on the owner in making the entry. The sections of our statute pertinent to the inquiry are as follows: Section 1603: "Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel, or water craft, in the nighttime, with the intent to commit a felony." Section 1604: "The manner of breaking or entering is not material, further than it may show the intent of the offender." Section 1605, Kirby's Dig., provides: "If any person shall, in the nighttime, willfully and maliciously, and with force, break or enter any house, tenement, boat or other vessel, or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary."

At the common law burglary was the unlawful breaking and entering in the night of another's dwelling with intent to commit a felony therein. 1 Bish. New Cr. Law, § 559; Russell on Crimes, p. 785. As will be seen, our statute, while retaining the elements of common-law burglary, has also greatly enlarged upon these, so that under the statute supra the unlawful entering, without breaking, of the house, etc., in the nighttime with intent to commit a felony is burglary. The unlawful entering in the sense of the statute is going into the house, etc., with the intention, formed in the mind at the time the entry is made, to commit a felony. No one has the right to enter upon the premises of another with the intent at the time he does so to commit a felony. No one is invited or has permission to do any such thing as that. A saloon keeper even extends to the public no such invitation as that, and one who enters a saloon with the predetermined purpose to commit some felony therein, whether by day or night, goes there in invitum, and were such purpose known to the owner beforehand, he could prevent such person from entering his place of business. Therefore one who enters with such evil design perpetrates a fraud and deception upon the owner, for the owner invites only those who come for lawful purposes. Section 459 of the Penal Code of California provides: "Every person who enters any house, room, store * * * with intent to commit grand or petit larceny, or any felony is guilty of burglary."

In People v. Barry, 94 Cal. 481, 29 Pac. 1026, the Supreme Court, construing the section, says: "As to the acts which shall constitute burglary, that is a matter left entirely to the policy of the Legislature, within its constitutional powers; and, when that body has said that every person who enters a store with the intent to commit a larceny is guilty of burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted—the meaning is patent upon the face of the statute. No words are found in the statute qualifying the character, kind, time, or manner of the entry, save that such entry must be accompanied with certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the Code." The court then proceeds to reason upon facts which showed that one had entered a grocery store during business hours, and had attempted to commit larceny, and concludes that the entry was unlawful, saying: "He is not one of the public invited, nor is he entitled to enter. Such a party could be refused admission at the threshold, or ejected from the premises after the entry was accomplished." The court adds: "If the presence of such party in the store is lawful, the fact that he gained ingress openly and publicly through the front door, rather than clandestinely by way of the skylight or the cellar, is not material, and the result would be that no burglary could be committed in a store during business hours, regardless of the nature of the entry." We adopt the reasoning of this case. See, also, People v. Brittain, 142 Cal. 8, 75 Pac. 314, 100 Am. St. Rep. 95, and cases cited. Of course, in states where the common-law rule prevails requiring both the breaking and entry to constitute burglary, decisions based upon such rule could not be authority for construing a statute where the unlawful entry without breaking is sufficient. Such are State v. Newbegin,

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speaking of State v. Moore, 12 N. H. 42: "The primary question involved," in the latter case, "was as to the sufficiency of the evidence to show a criminal intent in entering the building, and did not reach the matter as to the character of the entry." We can readily see that there may be great difficulty oftentimes in proving that the entry was with the felonious intent at the time of such entry to commit a felony. But that is no reason for saying that a party who enters during business hours through the open door in the regular way could not be guilty of an unlawful entry, and thus practically annul the statute. That is matter for the Legislature. As the law now stands, where the unlawful entry is shown, or where the evidence in each particular case as it may arise is sufficient to warrant the jury in finding that there was an unlawful entry, as it does in this case, it must be held, other conditions prescribed existing, that the party so entering is guilty of burglary.

There is no error for which to reverse the judgment, and it is affirmed.

BRIGGS v. STEEL.

(Supreme Court of Arkansas. June 28, 1909. On Rehearing, Oct. 11, 1909.)

1. USURY (§ 1*)—WHAT CONSTITUTES.

To constitute usury, there must either be an agreement whereby the borrower promises to pay and the lender knowingly receives a higher rate of interest than that allowed, or such higher rate must be knowingly "reserved, taken, or secured."

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 7246–7249.]

2. USURY (§ 113*)—PRESUMPTION AGAINST.

Usury will not be inferred, where an opposite conclusion can be reasonably and fairly reached.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 308–323; Dec. Dig. § 113.*]

3. USURY (§ 30*)—SALE OF GOODS.

A purchase of goods at wholesale, and sale at a profit of from 10 to 20 per cent., if made in good faith to secure a profit on the goods, and not to evade the usury law, is not in itself usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 74; Dec. Dig. § 30.*]

4. MORTGAGES (§ 114*)—INDEBTEDNESS SECURED.

A mortgage, expressly stating that it is security for an indebtedness specifically named in amount and kind, cannot be made to cover other obligations.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 233; Dec. Dig. § 114.*]

tailed allegation, if he desires it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1375; Dec. Dig. § 409.*]

6. PAYMENT (§ 38*)—APPROPRIATION BY DEBTOR.

A debtor, when making a payment, has the primary right to direct its application to such debt as he may choose, whether secured or unsecured.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 99; Dec. Dig. § 38.*]

7. PAYMENT (§ 39*)—APPROPRIATION BY CREDITOR.

Where a debtor does not, when making a payment, direct its application, the creditor may appropriate it to such debt as he may choose.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 104; Dec. Dig. § 39.*]

8. PAYMENT (§ 43*) — APPLICATION IN ABSENCE OF APPROPRIATION BY PARTIES.

Where neither the debtor nor creditor appropriates a payment to a particular debt, and it is entered generally as a credit on a running account as of the date of payment, the law applies it to the oldest item.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

9. PAYMENT (§ 43*) — APPLICATION IN ABSENCE OF APPROPRIATION BY PARTIES — PRIORITY OF MATURITY OF DEBTS.

An item of an account not due at the time of a payment by the debtor is not in contemplation of law the oldest item of the account to which the payment will be applied in the absence of appropriation by either debtor or creditor; but it must be first in the date of its charge and also payable at the time of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 122; Dec. Dig. § 43.*]

10. PAYMENT (§ 68*)—APPLICATION.

It will be presumed that the parties intended that a payment made should be applied on notes, though none of them had then matured, where that was the only debt then owing by the debtor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 195, 202; Dec. Dig. § 68.*]

Appeal from Lonoke Chancery Court; John E. Martineau, Chancellor.

Mortgage foreclosure by T. W. Steel against A. B. Briggs. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

T. C. Trimble, Joe T. Robinson, and T. C. Trimble, Jr., for appellant. F. T. Vaughan and Palmer Danaher, for appellee.

FRAUENTHAL, J. This was a suit brought by the plaintiff, T. W. Steel, against the defendant, A. B. Briggs, for the foreclosure of a real estate mortgage. The complaint alleged that on January 2, 1905, the defendant executed to plaintiff three notes, aggregating $500, for merchandise and moneys which were thereafter to be furnished; that plaintiff made such advances to the

amount of said notes, and also additional advances, upon which was a balance due of $901.16; that on the day of the execution of the notes defendant and his wife duly executed to plaintiff a mortgage upon certain land to secure the above indebtedness. He sought a recovery for the above alleged balance and a foreclosure of the mortgage. The defendant filed an answer, in which he admitted the execution of the notes and mortgage, but in general terms denied that he was indebted to plaintiff and pleaded payment. Subsequently, by way of amendment to his answer, he interposed a plea of usury.

The clause in the mortgage which described the indebtedness which it secured is as follows: "The foregoing conveyance is on condition that, whereas, the said A. B. Briggs is justly indebted to the said T. W. Steel in the sum of five hundred dollars for money loaned the said Briggs, as evidenced by three certain promissory notes, of date of Jan. 2, 1905, as follows, to wit: One note for two hundred dollars, due and payable Jan. 1, 1906; one note for two hundred dollars, due and payable on or before Jan. 1, 1907; and one note for one hundred dollars, due and payable on or before Jan. 1, 1908—each note bearing interest at the rate of ten per cent. per annum from date until paid: Now, if the said A. B. Briggs shall pay or cause the said notes to be paid, with interest, according to the tenor and effect thereof, then this instrument shall be null and void."

The only evidence adduced in the trial of the case was the testimony of the plaintiff and his bookkeeper. They testified to the correctness of the indebtedness claimed by plaintiff, and that some time before the institution of the suit the defendant examined with them each item of the indebtedness, and admitted and agreed to its correctness, and that defendant promised to arrange the matter by executing to plaintiff a deed to the land and receiving from the plaintiff a bond for title therefor, which in effect would have given defendant time in which to make redemption from such conveyance; and they testified that instruments of writing were drafted in accordance with that promise, but that afterwards defendant failed and refused to comply with that promise.

It would appear from the testimony that at the time of the execution of said notes and mortgage the defendant was only indebted to the plaintiff in the sum of $30.69, and that the notes and mortgage were given to cover merchandise and moneys which plaintiff would thereafter advance. The three notes were executed, respectively, for $100, $200, and $200, and matured, respectively, on January 1, 1906, 1907, and 1908, and each of the notes bore 10 per cent. interest from date. The plaintiff furnished to defendant from time to time during the above years merchandise and moneys upon the consideration of said notes, and also furnished merchandise and moneys in addition thereto, and this additional indebtedness, together with the advancements made on the notes, amounted to the aggregate sum of $1,192.65. In addition to the claims for indebtedness for the said merchandise and moneys, the plaintiff testified that defendant owed for two notes, which had been executed by defendant to the father of plaintiff on January 1, 1900, and which notes were then the property of plaintiff. These last two notes, with interest, amounted at the time of the trial to $322. Plaintiff also testified that defendant owed him $5 for drafting the written documents in 1906.

It appears from the testimony that the plaintiff was to charge interest on all moneys advanced at the rate of 10 per cent. per annum, and that upon all merchandise furnished he should charge in the way of profit a commission upon the price paid by him to jobbers and wholesale dealers; the commission to be 10 per cent. for the first year and 20 per cent. for the second year. The defendant made several payments from time to time, which aggregated $634.12. The chancellor rendered a judgment in favor of the plaintiff for the total sum of $901.16, in which were included all said notes, and decreed the same a lien upon the land by virtue of said mortgage and a foreclosure thereof.

It is urged by the defendant that by virtue of the above agreement, providing for a charge for interest and commissions, the indebtedness and mortgage were tainted with usury, and are therefore void. To constitute usury there must either be an agreement between the parties by which the borrower promises to pay, and the lender knowingly receives, a higher rate of interest than the statute allows for the loan or forbearance of money, or such greater rate of interest must be knowingly and intentionally "reserved, taken, or secured" for such loan or forbearance. It is essential, in order to establish the plea of usury, that there was a loan or forbearance of money, and that for such forbearance there was an intent or agreement to take unlawful interest, and that such unlawful interest was actually taken or reserved. The wrongful act of usury will never be imputed to the parties, and it will not be inferred when the opposite conclusion can be reasonably and fairly reached. Scruggs v. Scottish Mortgage Co., 54 Ark. 566, 16 S. W. 563; Garvin v. Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; Leonhard v. Flood, 68 Ark. 162, 56 S. W. 781; First National Bank v. Waddell, 74 Ark. 241, 85 S. W. 417; Citizens' Bank v. Murphy, 83 Ark. 31, 102 S. W. 697; Eldred v. Hart, 87 Ark. 534, 113 S. W. 213.

In this case there is no evidence that there

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was any agreement to charge for the loan of the money a greater rate of interest than 10 per cent. per annum; and the commission that was charged on the goods was for the purpose of securing a profit on the goods, and not a usurious rate of interest on money loaned. The plaintiff purchased the goods from jobbers and wholesale dealers, and he sold them to the defendant at a profit of from 10 to 20 per cent. on the cost price to him. Such a transaction, if made in good faith, for the purpose of securing a profit on the goods sold, and not for the purpose of evading the usury law, is not itself usurious and invalid. Brakefield v. Halpern, 55 Ark. 265, 15 S. W. 190. In addition to this the charges do not exceed the rate of 10 per cent. per annum, when the interest is calculated upon the moneys for the actual time that had run. The chancellor made a finding that the transaction was not usurious, and we are of opinion that his finding is well sustained by the evidence.

But the mortgage in this case was executed to secure the payment of $500 evidenced by three notes, which are described therein, and the mortgage does not provide for the security of any other indebtedness. A mortgage which expressly states that it is given as security for an indebtedness which is specifically named in amount and kind cannot be made to cover other obligations and liabilities. It cannot be made to cover other debts, or a larger amount of indebtedness, than that which is expressly stated therein. It cannot be enlarged by parol agreement made at the time of its execution, and a parol agreement made subsequently to enlarge the indebtedness which it is to secure will be inoperative. Whiting v. Beebe, 12 Ark. 428; Johnson v. Anderson, 30 Ark. 745; Martin v. Halbrooks, 55 Ark. 509, 18 S. W. 1046; Moore v. Terry, 66 Ark. 393, 50 S. W. 998; Hughes v. Johnson, 38 Ark. 285. When a mortgage is executed for the express purpose of securing a particular indebtedness therein named, the holder of the mortgage cannot "tack" to that indebtedness any other debt or demand he has against the mortgagor, so as to stretch the security of the mortgage to cover that also. It therefore follows that the mortgage herein did not cover the two notes executed by defendant to T. W. Steel on January 1, 1900, nor the charge of $5 for the drafting of the deed and instruments in 1908.

The defendant in his answer also pleaded payment, but generally, and without stating in what manner payments were made or the amounts thereof. He introduced no testimony whatever. In their reply brief, counsel for appellant for the first time refer to this issue, and attempt to sustain it upon the testimony of the plaintiff. But in his testimony the plaintiff denied that the indebtedness was paid. The burden of proof to show and establish payment was on the defendant. This has not been done. The total amount of all the debts, including interest, as represented by all the notes and account to the date of the decree below, was $1,519.65. The payments of $634.12, applied to the debts not represented by notes, reduces that total to $885.53. In this balance are included the two notes executed in 1900, and the charge of $5 for the drafting of papers in 1908, and these, with the interest calculated thereon, amounted to $327; and this being deducted from the last above sum leaves $558.53, which is the amount due upon the notes described in and covered by the mortgage, with interest to the date of the decree. To that extent only should a lien be declared upon the land by virtue of the mortgage. For the said sum of $327 the plaintiff should have a personal judgment only against the defendant.

The decree is reversed, and the cause is remanded, with instructions to enter a decree in accordance with this opinion.

On Rehearing.

The appellant has filed a motion for a rehearing of this cause, and bases his motion upon the ground that his answer sufficiently sets forth a plea of payment, and that the testimony of the plaintiff sufficiently establishes a payment of all that portion of the indebtedness which is secured by the mortgage. Upon further examination we are of the opinion that the plea of payment is sufficiently made. If the plea was too indefinite or uncertain, it was the duty of appellee to request a more definite and detailed allegation, if he desired it. And we are also of the opinion that the testimony of the plaintiff and the account which he has introduced presents sufficient evidence to determine the issue made on the plea of payment. From this testimony it appears that when the defendant, on January 2, 1905, executed the three notes, aggregating $500, and the mortgage to secure that amount of indebtedness, he had then only received $33.69 of merchandise, and was actually indebted to plaintiff in no larger amount. These notes were really executed to cover that debt, and also merchandise and moneys which the plaintiff had agreed to furnish to the defendant in the future.

According to the agreement of the parties, the sole consideration of these notes and of this mortgage was the merchandise which had been and would thereafter be furnished to the defendant. In accordance with that understanding, the plaintiff did furnish to the defendant during the year of 1905 merchandise and moneys to the amount of $500, and then, without further understanding as to security, continued to furnish additional items of merchandise on the account. All the items thus furnished were kept by plaintiff

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first item of that account is the item of $69 above referred to, and in the regular order of their dates all the other items furnished to the defendant upon these notes and mortgage are charged upon this account. And thus the plaintiff continued to furnish to the defendant merchandise and moneys during the years of 1905, 1906, and 1907, all of which were entered upon this running account and aggregated $1,187.65. So that the first items of the account to the amount of $500 were the consideration of and represented the above three notes, and constituted the indebtedness that was actually secured by the mortgage, and these items, being thus charged upon the running account, were in truth and effect the three notes; and the legal result of thus charging these items, which represented these notes, upon the account, was in effect to charge the notes themselves upon the account as of the date when the items so furnished and charged would equal the amount of the notes, and the account was one continuous running account. At the time the payments were made no direction was made by the defendant as to the application thereof, and there was no agreement as to any special application of any of the payments. The plaintiff did not apply any of the payments to any special indebtedness. But the payments were entered generally as credits upon the running account. All the payments aggregated $634.12, and the items and dates thereof were as follows:

Oct. 28, 1905.	By cotton, 2,325 lb., at 10½.....	$244	12
Jan. 29, 1906.	By cash.....	25	00
Feb. 10, 1907.	By deposit Ger. Nat. Bank	225	00
Feb. 28, 1907.	By cash.....	40	00
July 1, 1907.	By cash.....	100	00

At the date of the first above payment all the items charged on the account amounted to $574.35. Of these items $500 were represented by the said three notes, aggregating the same amount. At the date of the last payment the total of the items charged on the account amounted largely in excess of $1,000.

The rule relating to the application of payments is that the debtor, at the time of making payment to his creditor, has the primary and paramount right to direct the application thereof to such debt or demand as he may choose, whether same is secured or unsecured. If the debtor does not, at the time of making the payment, direct its application, then the creditor has the right to make the application. But in event such application is made by neither, and the payment is entered generally as a credit on a running account as of the date of payment, then the law makes the application, and applies the payment in liquidation of the oldest items of the account. Cross v. Johnson, 30 Ark. 396; Johnson v. Anderson, 30 Ark. 745; [illegible] 111, 14 S. W. 474; Lazarus v. Freidheim, 51 Ark. 371, 11 S. W. 513; Dunnington v. Kirk, 57 Ark. 598, 22 S. W. 430; Fort v. Black, 50 Ark. 256, 7 S. W. 131; Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308.

This rule is founded upon the reason that this manner of application of the payments more surely represents the intention of the parties. But under such circumstances, before there can be an application of a payment to one of the debts or to any item of debt, should there be several, such debt should be due and payable; otherwise, it would be presumed to be the intention of the parties to apply the payments to that debt only which is actually due and payable at the time of the payment. If the debt is not due at the date of such payment, then it is not in contemplation of law the oldest item of the account, although it is the oldest item of charge. In such case the determination of the oldest item of the account is not fixed by the date of the charge alone; but it must be first in the date of its charge, and also payable at the date of the payment, before application of such payment shall be made to such debt. 30 Cyc. 1243; Frazier v. Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. Rep. 516; Wolford v. Andrews, 29 Minn. 250, 13 N. W. 167, 43 Am. Rep. 201; McMillin v. Grayston, 83 Mo. App. 425.

In this case the items of the account, which represented and went to make up the notes, matured when the notes matured. The maturity of the notes fixed the time when, according to the agreement of the parties, the items represented by and the consideration of the notes should be paid, and until then no action could have been brought for their recovery. Therefore these items in the account were in truth and effect payable as of the date of the maturity of each note of which it was the consideration. On October 28, 1905, when the first payment was made, of $244.12, the account amounted to $574.35. Of this account $500 was represented by the three notes, and was therefore not payable on the date of the said first payment. But the balance of the account, to wit, $74.35, was then payable; and therefore the payment should be applied to that part of the account. When so done, it would leave a balance of $169.77 of the payment. The only debt that the defendant then owed to the plaintiff were these three notes, and, inasmuch as defendant then made a payment, it will be presumed that the parties intended that it should be applied on these notes, although none of them had then matured, because that was the only indebtedness then owed by defendant. Applying this balance of the payment of $169.77 on the first note leaves a balance thereof of $40.23, and this became payable January 1, 1906. On January 1, 1907, the second note for $200 ma-

account to the amount of $240.23, represented by the two notes, became payable, and were therefore the oldest items subject to payment on the account on that date. The payments made thereafter should therefore be applied to these items, representing the amount due on the two notes. The payments after January 1, 1907, amounted to $365, and were more than enough to pay those items of the account, amounting to $240.23, which represented the balance due on the two notes, and when so applied the said two notes were fully paid.

But at the date of the last item of payment—July 1, 1907—the last note for $100 had not matured; that note maturing January 1, 1908. At the time of this last payment there were other items of charge on the account greatly in excess of all the payments. Inasmuch as this last note matured subsequent to the last payment, it was not at the date of these payments in legal contemplation the oldest item on the account, and therefore these payments should be applied to those were actually payable, and, inasmuch as these other items exceeded all payments, the note for $100 was not paid. This note bore interest from its date at the rate of 10 per cent. per annum. But the consideration thereof was not furnished until August 16, 1905. It should bear interest at the above rate only from that date. It follows, therefore, that the two notes for $200 each have been paid, and that the third note for $100, with interest as above indicated, has not been paid. To that extent only should a lien be declared upon the land by virtue of said mortgage. For the balance of the indebtedness, to wit, $787.53, the plaintiff should have a personal judgment only against the defendant.

The motion for the rehearing of this cause is granted, and the former judgment of this court is modified, so as to conform to this opinion. The decree of the Lonoke chancery court is reversed, and this cause is remanded, with directions to enter a decree in accordance with this additional and modified opinion.

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12. CONTRACTS (§ 346*)—ACTIONS—VARIANCE.
In an action on a special contract plaintiff can only recover on the contract alleged, and not on a different contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1737–1751; Dec. Dig. § 346.*]

13. APPEAL AND ERROR (§ 882*)—PARTIES ENTITLED TO ALLEGE ERROR—ESTOPPEL—INVITED ERROR—INSTRUCTIONS.
Defendant cannot complain that an issue made by the answer was submitted to the jury, even if it was not within the allegations of the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

14. TENDER (§ 24*)—SUFFICIENCY—NECESSITY OF KEEPING GOOD—EFFECT.
The fact that defendant tendered to plaintiffs half of the funds collected for them is no defense to an action therefor if plaintiffs did not accept the money tendered, such tender not amounting to payment, especially where not kept good by payment into court; and hence an instruction for defendant, if he paid over the money less 50 per cent. thereof, and such amount was a reasonable compensation, was properly refused.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 79; Dec. Dig. § 24.*]

15. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.
Where the action was to recover, as for money received, funds collected by defendant for plaintiff in which defendant claimed he was entitled to 50 per cent. as reasonable compensation in absence of an express agreement, but plaintiff claimed that there was an express agreement for a 10 per cent. compensation, a requested instruction for defendant that any contract for 10 per cent. compensation must have been made between plaintiff and defendant before the suit was not so relevant to the issues as to make its refusal reversible error, the action not being on the contract; especially in view of the fact that the question of an agreement for 10 per cent. compensation was sufficiently covered by other instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

16. PAYMENT (§ 73*)—EVIDENCE—MAILING LETTERS.
While the sending of money orders through the mail may be prima facie evidence that they were received, and of payment, it was not evidence of payment where the letter containing them was improperly addressed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 236; Dec. Dig. § 73.*]

17. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—IGNORING ISSUES.
Instructions requested for defendant, which ignored a fact essential to a finding for him, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

18. APPEAL AND ERROR (§ 999*)—JURY FINDINGS—CONCLUSIVENESS.
Questions of fact are peculiarly within the province of the trial jury, and the appellate court cannot interfere with the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3924; Dec. Dig. § 999.*]

plaintiff, defendant appeals. Affirmed.

W. H. Clopton, pro se. George D. Harris, for respondent.

NORTONI, J. This is a suit for money had and received. Plaintiff recovered, and defendant appeals. The petition contains thirteen counts, one of which was dismissed. The case was referred to the jury on the other twelve. The first count of the petition asserts the claim of plaintiff in his own right. The other eleven counts assert the claims of as many separate individual heirs to the fund involved, which claims have been duly assigned to the present plaintiff. The defendant is an attorney at law, practicing his profession in the city of St. Louis, and the controversy arises from his employment by a number of persons to collect their several interests in a certain trust fund in the possession of the St. Louis Union Trust Company as trustee. The theory of the plaintiff and his assigns, who employed defendant for the purpose of collecting their interests, is that they were to pay him 10 per cent. of the amount recovered for his services; while the theory of the defendant is that he was employed to perform the services without any special contract for compensation, and that therefore he should receive reasonable compensation for the services rendered.

It appears that by the provision of his last will, probated in the probate court of the city and county of St. Louis, in the year 1861, William Wise, deceased, devised to one French Reyburn the sum of $6,000 in trust for the following purposes, to wit: First, to pay to his sister, Mary Ann Wise, during her natural life, the interest and profits of such sum of $6,000; and, second, at the death of Mary Ann Wise, said sum to be equally divided between the brothers and sisters of the said William Wise named in his will, and the children of any deceased brother or sister, the child or children of any deceased brother or sister to take the proportion or share that their father or mother would be entitled to if living. The trustee accepted the appointment and acted thereunder for a considerable period, when he resigned. Under a decree of the circuit court, another trustee was duly appointed to execute the trust, and qualified. In due time, this trustee became insolvent, failed in business, and litigation followed against him and his bondsmen to the end of preserving the trust fund intact. Through the failure of the trustee and the insolvency of his bond, together with the litigation entailed, the trust fund was diminished to some-

thing like $1,000. About 1900, Mary Ann Wise, to the use of whom the trust was originally created, departed this life. The fund, in the meantime, through subsequent appointments in execution of the trust, had found its way into the possession of the St. Louis Union Trust Company and amounted to about $1,100.

A short time after the death of Mary Ann Wise, the defendant received a communication from J. F. Wise of Columbus, Ga., a nephew of the original donor, William Wise, calling his attention to the matter and requesting him for some information touching the rights of the heirs at law who would succeed to the fund at the death of his aunt, Mary Ann Wise. The defendant answered the communication under date of September 25, 1900. In this letter he informed J. F. Wise of the essential facts pertaining to the creation of the trust, the subsequent resignation of the trustee, the appointment of his successor, his subsequent failure, the litigation which ensued, and that there was recovered out of the same and preserved, about $1,000, which, with interest, amounted at that time (September 25, 1900) to $1,169.10; and that this fund should rightfully be distributed among the devisees of William Wise, the original donor. The defendant further suggested a general outline of the proceedings necessary to establish the rights of the several heirs or devisees to the fund, and concluded the letter by saying: "I will be glad to serve you and your relatives in this matter." J. F. Wise wrote defendant a second time on October 9, 1900. This letter the defendant answered under date of October 25, 1900, in which he more fully detailed the history of the trust fund and the vicissitudes which attended it, the litigation, etc., and said there was now available the $1,000 and some accumulated interest for distribution. The defendant concluded the letter as follows: "But there is no reason why you should not collect the $1,000 now in the trust company. Write to your relatives and get them to join you in applying to the court for distribution of the $1,000. I will take pleasure in representing them." On January 23, 1901, the defendant again wrote to J. F. Wise to the effect that the trust company "would require strict proof of heirship. * * * Write to all of the heirs you know and ask them to co-operate with you, because the expense of proving heirship will be too expensive for any one individual, as the interests are so small." Thereafter, on February 16, 1901, Joseph F. Wise, on behalf of himself, his brother George L. Wise, and his sister, Mary I. Wise, wrote the defendant inquiring what his charges would be for the necessary services rendered to them touching the matter of their interests. On February 18, 1901, the defendant replied to this communication as follows: "I received your favor of the 16th inst. to-day. My charge will be 10 per cent. of the amount; evidence will have to be taken to prove heirship. I will be very glad to serve you and your relatives, and will take the matter up at once, after hearing from you."

This letter of defendant to Joseph F. Wise was forwarded by Mr. Wise to his sister, Mrs. Mary A. Black at New Castle, Ohio, and it seems, on the basis of the proposition therein contained, she consented to the employment. Mr. Joseph F. Wise instructed the defendant on behalf of himself and his brother and sister residing at Columbus, Ga., to proceed and represent their interests in the matter. While it does not appear that Joseph Wise represented any person other than himself, his brother and sister, it does appear that several heirs residing in different parts of the country had more or less correspondence touching the matter of the fund, and others were informed that defendant was looking after the interests of those mentioned. It seems that several of the heirs wrote to defendant voluntarily about the matter, and he wrote to others informing them of their interests, and that he was employed in the matter. The purport of this correspondence was to the effect that defendant suggested the several heirs might come into the case, or at least that they should consent to the use of their names in the matter. In all there were about 40 interested parties. It does not appear that defendant made any proposition directly to represent any of these parties other than Joseph Wise and his brother and sister residing at Columbus, Ga., on a 10 per cent. basis. No such fact appears in proof, unless his requests for Joseph F. Wise to communicate with his relatives and the statement that defendant would be pleased to serve him and his relatives, would authorize an inference to that effect.

There is proof in the record that others of the heirs knew of the 10 per cent. proposition made to Joseph F. Wise. In fact, Joseph F. Wise sent the defendant's letter to one sister, Mrs. Black, residing in Ohio. Several of those interested notified the defendant to represent their interests as well. William Wise, of Medway, Ohio, testified that, representing himself and his sister, Mrs. Black, he wrote the defendant to the effect that he and Mrs. Black would come in on the 10 per cent. basis proposed to Joseph F. Wise, and requested the defendant to represent them in the matter. This witness said: "I had no agreement other than that proposed by him (defendant) in his letter to J. F. Wise, where he says his charges will be 10 per cent. and that he would be glad to serve J. F. Wise and his relatives," etc. It appears, too, this witness obtained a list of the heirs, 40 or more in number, and furnished the same to the defendant for use in the case.

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Plaintiff Jenkins testified that his uncle Mr. Sturgeon, an interested party, informed him of defendant's proposition to J. F. Wise to represent him and his relatives on a 10 per cent. basis, and that he, Sturgeon, also contracted with defendant to that effect. The witness said: "I told him that was our understanding of the contract, and that the contract was satisfactory to us." This testimony in the main, was, of course, hearsay. It was admitted, however, and no exception preserved thereto. About February, 1902, the defendant filed a bill in the circuit court of St. Louis county in which he set out the facts touching the trust fund and the death of Mary A. Wise, in whose favor the trust was originally declared, representing that the petitioner in that case, William Wise, of Ohio, was an heir and prayed the court to order proof of heirship to be made to the end that the fund should be distributed. The court declined to grant the relief upon the bill thus filed, and dismissed the same. Plaintiff's bill having been dismissed by the court, the next move in the matter was had in August of that year.

On August 29, 1902, Messrs. McNeill & Levy, attorneys at law at Columbus, Ga., wrote the defendant representing Joseph F. Wise and his brother and sister there, inquiring about the status of the matter. This is a long letter and reviews the facts pertaining to the trust, etc., as detailed by the Wise heirs, whom counsel represented at Columbus, Ga. It is stated therein that the Wise heirs residing at Columbus, Ga., requested their counsel there to co-operate with the defendant in making such proofs as were necessary to obtain their share of the fund. This letter concludes as follows: "If the fund is only $1,000 or $1,100 there will hardly be enough coming to either branch of the family to make it very profitable to the attorneys, but it may be that a number of the persons entitled will unite, in which case there would be a fund sufficient to authorize a reasonable compensation to the attorneys employed by them. Please let me hear from you at your earliest convenience, and oblige." Defendant insists this letter was the beginning of his employment in respect of the suit subsequently filed which resulted in the distribution of the fund. He points to the words "reasonable compensation" to the attorneys in the latter part of the letter as supporting his theory that his employment should be reasonably compensated instead of on the basis of 10 per cent. under a special contract.

It appears the defendant answered this letter saying he had had the matter referred to therein under consideration for some time. The defendant's letter is of date September 16, 1902, and addressed to Messrs. McNeill & Levy, in which he says: "Your letter of August 29th was forwarded while I was absent on my vacation. I have just returned. I have had the matter of the distribution of the fund remaining in the trust company belonging to the Wise estate under consideration for some time."

During the same autumn the defendant filed the petition of all of the heirs, 40 or more in number, against the St. Louis Union Trust Company. This case was returnable to the December term, 1902. The petition sets out in full the history of the trust fund, its amount, etc., and such facts as were essential, showing the rights of the parties to participate therein. The petition sets out the interests of the several plaintiffs with great care and precision. The defendant performed much painstaking labor in and about proving the claims of the numerous parties to that suit. Depositions were taken in several parts of the country and the proper proofs were made. The court decreed a distribution of the fund among all of the parties to the petition. The amounts awarded ranged from a very few dollars to as high as $60. It seems the fund was afterwards paid to the defendant as attorney for the several heirs. He remitted to them by post office money order 50 per cent. of the amount received—that is to say, defendant, proceeding upon the theory that he should have reasonable compensation for his services, deducted 50 per cent. of the entire amount received as his compensation, and remitted the remaining 50 per cent. to the heirs. Plaintiff and 12 others who have assigned their interests to him, declined to accept 50 per cent. of the fund as their portion. They insist that the defendant should have remitted to them 90 per cent. instead, and retained therefrom 10 per cent. for his compensation. Eleven of the heirs assigned their claims against the defendant for the amount claimed by them to the present plaintiff. Plaintiff himself being one of the interested parties, instituted the present action seeking to recover from the defendant as for money had and received.

The petition is in 12 counts, each declaring upon the interests of a separate, individual heir, and in all the counts, except that pertaining to the plaintiff's claim, it is alleged that the claim of the individual heir therein referred to has been duly assigned to the plaintiff. In his answer defendant pleaded that he was employed to render the services referred to under an arrangement by which he was to receive reasonable compensation therefor; that he performed the services, collected the moneys and remitted the same to the several parties interested. He pleaded, too, that in his investigation of this matter, he discovered these same heirs had interests as well in the estate of one David Wise, who departed this life about 1902. David Wise was a brother of William Wise, who was the original donor of the trust fund, and of course stood in the same relation to all of the heirs interested in the

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in his estate than the identical collateral heirs interested in the trust fund. The defendant set up in his answer that, representing the interests of the identical heirs, he had caused Gerrard Strode, public administrator of the city of St. Louis, to take charge of the estate of David Wise, deceased, and had instituted a suit in the name of the administrator against the McBurneys and the Lincoln Trust Company. The purpose of this suit was to recover from the McBurneys a considerable amount of money which was claimed to belong to the deceased, David Wise, and had, through the influence of the McBurneys, gotten into the possession of the trust company prior to the death of David Wise, as the money of the McBurneys. It is alleged that although no recovery of money was had in that suit, for it was afterwards dismissed for want of prosecution, it operated in fact to induce the McBurneys to turn over to the administrator of David Wise about $2,500 in bonds and $200 in cash, which rightfully belonged to the estate of David Wise. That this fund, so indirectly recovered for the estate of David Wise, inured to the benefit of all of the heirs interested in the trust fund, and that because of the fact defendant was at the same time representing these several heirs in the matter pertaining to the trust fund, he had charged the administrator of David Wise's estate a nominal fee only for his services therein, to wit, $175.

It is asserted that, because of these facts, plaintiffs ought not to recover in this cause for the reason defendant had thus indirectly rendered them a great service in inducing a considerable sum, nearly $3,000, into the estate of David Wise, which would otherwise have been lost to them. It seems this portion of the answer is somewhat irrelevant to the issues in the present action for money had and received on account of the defendant's employment as attorney for the heirs in respect of their rights in the trust fund. Nevertheless it was not challenged by the plaintiff, and the cause was tried as though it were a proper matter of defense. Evidence was received thereon without objection and the matter is treated with more or less throughout the instructions.

The proof on the part of defendant tended to show that, without notifying any of the parties to that effect, he had in fact abandoned his employment under the agreement with Joseph Wise on a 10 per cent. basis after the circuit court dismissed the petition of William Wise, filed February 12, 1902, and that he had taken up the matter anew on the basis of reasonable compensation as a result of the letter from McNeill & Levy of date August 29, 1902. There seems to be no correspondence in the record what-

have reasonable compensation is the concluding part thereof, as follows: "If the fund is only $1,000 or $1,100 there will hardly be enough coming to either branch of the family to make it very profitable to the attorneys. But it may be that a number of persons entitled will unite, in which case there will be a fund sufficient to authorize reasonable compensation to the attorneys employed by them. Please let us hear from you at your earliest convenience and greatly oblige." As stated, after receiving this letter, defendant instituted a suit in the name of all the heirs against the St. Louis Union Trust Company which finally resulted in a decree of distribution. It does not appear that he notified any of the parties, however, that he would not render the services for 10 per cent.; nor does it appear that any of the heirs inquired after this date what compensation defendant would expect. It may be inferred that such heirs as knew of the 10 per cent. proposition, expected the services to be rendered on that basis for compensation. The record discloses that Colonel Clopton performed proper service in the matter. The employment, first and last, entailed much correspondence, and a careful investigation of records. A number of depositions were taken; that is, as counsel, defendant prepared appropriate questions in his office for the proof of interest, procured waiver of dedimus, notice, etc., and forwarded the same to different parts of the country to different notaries public for the purpose of taking proof. The bill and decree prepared by counsel in this case are works of art, and evince much careful thought and painstaking labor.

A former judge of this court and other members of the bar of high standing gave testimony to the effect that 50 per cent. of the amount recovered was a very reasonable compensation for the services rendered by Colonel Clopton. And indeed, it seems to us, from a reading of the record, that 10 per cent. is a most meager compensation for the very accurate and painstaking labor bestowed. The proof touching the matter of the suit of Gerrard Strode, administrator of the estate of David Wise against the McBurneys and the Lincoln Trust Company, is not entirely consistent with the averments in the answer heretofore referred to respecting this matter. On this score, there was testimony on the part of defendant that, while that suit was for the purpose of recovering certain moneys said to belong to the estate of David Wise, it turned out that the money sought to be recovered actually belonged to the McBurneys. Nevertheless, the effect of the suit operated indirectly to recover for the estate of David Wise $2,500 in bonds and $200 in money from the McBurneys. On the other

hand, proof touching this question introduced by plaintiff tended to show that the suit of Strode against the trust company and the McBurneys was predicated upon a mistaken idea that the moneys on deposit in the trust company in the name of the McBurneys rightfully belonged to David Wise in his lifetime; that upon taking the depositions of certain persons, it appeared these moneys were never the property of David Wise, and the suit was therefore dismissed. Evidence on behalf of plaintiff also tended to prove that at about the time this suit was filed, the McBurneys delivered to Strode $2,500 in school bonds and about $200 in cash, which they conceded to belong to the estate of David Wise, and that the suit referred to had nothing whatever to do with influencing the conduct of the McBurneys in this behalf, or recovering to the estate of David Wise the bonds and money referred to.

It is argued the court erred in refusing to direct a verdict for the defendant on several of the counts contained in the petition. This argument proceeds from the fact that it does not appear all of the heirs, whose claims are asserted in the petition, entered into a contract with the defendant to represent them on a basis of 10 per cent. of the amount recovered. It may be the evidence fails to show that each individual heir, whose claim is asserted in the petition, had a separate understanding with the defendant touching the amount of his compensation. There is no doubt the evidence for plaintiff tended to prove that defendant proffered to perform the services for Joseph F. Wise and his sister and brother on a basis of 10 per cent., and suggested to him to communicate with his relatives saying that he would be pleased to represent all of them. The evidence further tends to prove that a number of relatives at least had information of this proposition, and it may be that the jury were authorized to infer a contract of 10 per cent. with all of those parties who had knowledge of the 10 per cent. proposition made to Joseph F. Wise. However this may be, we believe this matter to be entirely immaterial in this action for money had and received.

The argument of defendant proceeds as though this were a suit for the breach of a contract wherein the defendant had agreed to render services for a compensation of 10 per cent. This we believe to be an erroneous view, for the action is for money had and received, and the contract between the parties in itself is important only as a matter of inducement. It appearing that as a result of the employment, defendant obtained moneys of the plaintiff and his assignors, and still retains the same against their will after demand, the matter as to whether the employment was for 10 per cent. or 50 per cent. is entirely immaterial in respect of the question as to whether the case should be referred to the jury. If the defendant, as agent of the several heirs, became possessed of their moneys, he may not withhold the same against their consent after demand, and the action for money had and received to plaintiff's use will lie on the principle which inheres in the maxim, "ex aequo et bono." Of course the defendant may show in defense that under the arrangement or contract 50 per cent. of the amount belongs to him as compensation for his services. But this affords no reason why the question of fact involved as to what portion of the moneys in his hands belongs to him, and what portion belongs to the plaintiff, should not be referred to the jury for determination.

Now, the proof shows that defendant recovered the moneys for this plaintiff and his assignors under some kind of an arrangement; he says, under an arrangement whereby he should have reasonable compensation for his services. Plaintiff says the arrangement was that he should have 10 per cent. of the amount recovered for those services. By the testimony of both plaintiff and defendant, it appears, nevertheless, that the defendant recovered the moneys as agent of this plaintiff and the several parties who have assigned their claims to him, and still has the same in his possession.

It is true it appears the defendant mailed to each of them a post office money order for 50 per cent. of the amount recovered. These money orders the individual heirs represented in this action, declined to accept, and returned the same to defendant. It appears, too, that the defendant, before the institution of this suit, tendered to the attorney for the plaintiff the same amount—50 per cent. of the amount recovered for each individual heir whose claim is now asserted, in cash—and this was likewise refused.

The result of the whole matter is, then, that it appears the defendant has in his possession moneys, some portion of which belong to the plaintiff, and some portion of which belong to him; that he declines to accede to plaintiff's request to pay over the portion thereof which plaintiff asserts belongs to him, for the reason the defendant claims he, in fact, owns a larger portion thereof than plaintiff concedes. Under these circumstances, it is certainly for the jury to determine the question of fact as to what portion of the moneys the respective parties should have; or in other words, the amount to which plaintiff is entitled. It is said that the contract asserted by which defendant was to have 10 per cent. of the amount recovered as his compensation is the very crux of the action, and that the plaintiff and his associates who have assigned their claims to him predicate their suit thereon. Now, we are not impressed with this argument. The suit is neither upon the contract, nor does it seek a recovery for a breach of contract; but on the contrary, it is for money had and received. It is true the contract for 10 per cent. is in some respects relied upon as matter of inducement. Be this as it may, in this form

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of action the plaintiff does not predicate the suit upon the contract, but instead, he predicates it upon the right or ownership in himself of the moneys retained by defendant from him and his assignors. In this form of action the plaintiff may have the opinion of the jury on his right to recover 90 per cent. of the moneys retained by defendant, even though it does not appear that all of the heirs represented by him had a special contract for 10 per cent. compensation with the defendant.

It appears that through some arrangement the defendant became the agent of the several parties whose interests are asserted in this suit, and, as such agent, he became possessed of moneys, a portion of which at least belongs to them, and a portion to himself. Under these circumstances, an action for money had and received will lie on the just principle that one man shall not withhold that which rightfully belongs to another. It is the rule that an action for money had and received will lie in lieu of an action on a contract whenever the defendant has received money which is the property of plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to pay him. For numerous authorities supporting the principle, see Moses v. Macferlan, 2 Burr. 1005; Crigler v. Duncan, 121 Mo. App. 381, 392, 99 S. W. 61; Winningham v. Fancher, 52 Mo. App. 458; Mansur v. Botts, 80 Mo. 651; Cary v. Curtis, 3 How. (44 U. S.) 236, 11 L. Ed. 576; Chesapeake, etc., Canal Co. v. Knapp, 9 Pet. (34 U. S.) 541, 564, 565, 9 L. Ed. 222. The question as to what portion of the moneys retained by defendant, the ties of natural justice and equity require he should pay to the plaintiff in the circumstances of this case, is one of fact for the jury.

At his instance, the court gave plaintiff's instruction No. 1 as follows: "The court instructs the jury that if they find and believe from the evidence that defendant was employed to secure a distribution of a fund held by the St. Louis Union Trust Company as trustee under the will of William Wise, deceased, and that defendant accepted said employment and agreed to perform the necessary legal services for a charge or commission of 10 per cent. of the amount secured for distribution, and if you further find and believe from the evidence that defendant acted under such agreement for compensation, if you find such agreement was made, and that he thereafter instituted suit in the circuit court of the city of St. Louis on behalf of Wilber S. Jenkins, Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William W. Sturgeon, Douglas R. Sturgeon, James L. Wise, George W. Wise, William Wise, Franklin Wise, Mary C. Beveridge, Anna Wise Emmons, and others against the St. Louis Union Trust Company to secure a distribution of the fund held by it as trustee under the will of William Wise, deceased, and that each of said parties was entitled to a share of said fund, and that the court in its decree in said cause ascertained and determined the several shares of said parties to be as follows, to wit: Wilber S. Jenkins, $11.53; Laura Fisher, $11.53; Clifford Jenkins, $11.53; Glenn Rust, $11.53; Ross Rust, $11.53; William W. Sturgeon, $34.57; Douglas R. Sturgeon, $34.57; James L. Wise, $27.67; George W. Wise, $27.67; William Wise, $27.67; Franklin Wise, $27.67; Anna Wise Emmons, $69.16; and if the jury further find and believe from the evidence that defendant collected from the St. Louis Union Trust Company the said several sums of money as attorney for said parties, and has not paid to them the amounts collected on their behalf, or any part thereof, and that said Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William W. Sturgeon, Douglas R. Sturgeon, James L. Wise, George W. Wise, William Wise, Franklin Wise, and Anna Wise Emmons, have assigned to plaintiff their several shares in said fund, and their claims, if any, against defendant on account of the collection thereof, if the jury find that defendant did so collect said money, and that plaintiff as the assignee of said claims, if any, has demanded payment thereof from defendant, and that such payment has been refused, and if you further find and believe from the evidence that the suit of Gerrard Strode, administrator of the estate of David Wise, deceased, against Lincoln Trust Company et al., referred to in the evidence, did not result in the recovery of any money, or that defendant's employment therein was not connected with and dependent upon his employment to secure a distribution of the William Wise estate, then you will find in favor of plaintiff and against the defendant, and assess the plaintiff's damages on the first count at the sum of $10.38; on the second count at the sum of $10.38; on the third count at the sum of $10.38; on the fourth count at the sum of $10.38; on the fifth count at the sum of $10.38; on the sixth count at the sum of $31.11; on the seventh count at the sum of $31.11; on the eighth count at the sum of $24.90; on the ninth count at the sum of $24.90; on the tenth count at the sum of $24.90; on the eleventh count at the sum of $24.90; and on the twelfth count at the sum of $62.25."

It is said this instruction is erroneous, first, for the reason it permitted a recovery against the defendant if he agreed to perform the services on a 10 per cent. basis without indicating with whom or for whom he agreed to perform. We believe this criticism to be unsound for the reason it is entirely immaterial as to whom the contract for 10 per cent. was made with, if it was made at all. If the jury found as a fact, as therein directed, that defendant made a contract to collect the fund for 10 per cent. and afterwards made the collection and retained 50 per cent. thereof for

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his services, then he retained 40 per cent. of that amount without any right whatever to do so. And this is true without regard to whom the defendant contracted with. The criticism of this instruction proceeds, indeed, upon the same theory heretofore discussed—that is, as though the suit is for a breach of contract—and it is important for the jury to find the precise terms of the contract. This matter is immaterial if it appears that defendant became the agent of these parties, collected the money, and retained a greater portion thereof than he was entitled to retain under the arrangement. As stated before, the contract for 10 per cent. compensation referred to in this instruction is not the gist of the action, but, on the contrary, the action predicates upon the right of the plaintiff in the moneys which he asserts the defendant wrongfully withholds from him.

The second criticism of this instruction relates to the reference therein to the case of Strode, Adm'r, against the McBurneys and the Lincoln Trust Company. It is said the court erred in its reference to that case in the instruction. Now, it seems, the defendant ought not to make this criticism, for it was he who injected the case of Strode against the McBurneys and the Lincoln Trust Company into the present controversy. The defendant set out the facts pertaining to that transaction in his answer, and was permitted without objection to give testimony tending to prove that he performed services in that case which inured to the benefit of the several heirs. It is true it did not appear that he was employed therein by the heirs; nevertheless the theory advanced by defendant at the trial on the proof made was that that suit indirectly resulted in turning about $2,700 in bonds and money into the estate of David Wise, and that he made a charge of only $175 against the administrator therefor, for the reason he intended to charge 50 per cent. against the heirs to whom his services inured for services rendered to them in procuring the distribution of the trust fund; that this furnished an additional reason why his charge of 50 per cent. for procuring the distribution of the trust fund among the heirs was reasonable.

Evidence introduced by plaintiff touching this matter, however, tended to prove that this suit served no purpose whatever toward recovering any fund for the estate of David Wise, and that the $2,500 in bonds and $200 in cash received by the administrator from the McBurneys was wholly independent of the suit mentioned. This matter having been introduced into the case by defendant in both his answer and proof, it was certainly not reversible error for the court to treat with it in the instruction, as it did. The instruction required that before the jury could find for the plaintiff in the present action, it should find not only that defendant had collected the money on a 10 per cent. basis and retained the same, but that it should further find the suit of Strode, administrator, against the McBurneys and the Lincoln Trust Company referred to in the evidence did not result in the recovery of any money, or that defendant's employment therein was not connected with and dependent upon his employment to secure a distribution of the William Wise estate. This operated only to require the jury to find the additional facts in favor of plaintiff's right to affix his claim against the defendant, and was certainly not prejudicial to the defendant. We agree that the matter was wholly unimportant to the issues involved in the present controversy. However, the defendant himself is responsible for the matter of that case being presented in this record, and should not be permitted to complain even if it did tend to confuse the issue.

The next criticism leveled against this instruction is that it undertook to cover the entire case on plaintiff's theory, and entirely ignored the defense of quantum meruit; that is, it ignores the defense that the defendant should receive reasonable compensation for his services. Now, it is very true this instruction submitted the theory of the case relied upon by the plaintiff. That was entirely proper, however, if another theory of the case was submitted in other instructions which would allow the jury to award defendant reasonable compensation for his services if it saw fit to do so; that is, if other instructions permitted the jury to allow defendant compensation without regard to the alleged 10 per cent. agreement and permitted a finding of reasonable compensation for him. Now, it is very true the court gave no instructions on behalf of the defendant—that is, the court refused all of the instructions requested by the defendant—and therefore, from defendant's standpoint, his theory of the case was probably not presented in instructions as he might choose to have it. This we believe resulted from the fact that the instructions requested by him were not entirely accurate, and the court was justified in their refusal. It was not incumbent on the court to instruct the jury from the defendant's standpoint unless properly requested so to do. Sowders v. Railway Co., 127 Mo. App. 119, 104 S. W. 1122. Be this as it may, in plaintiff's third instruction the court instructed in substance that if they believed from the evidence defendant was employed to secure the distribution of the fund and had no agreement as to his charge or pay for the services, etc.; that he collected the fund and had the amount then in his possession, and had failed and refused to pay the same to the parties, then they might find for the plaintiff such amount as he should receive after deducting whatever the jury may find from the evidence the defendant's services were reasonably worth. It, therefore, appears, that by proper instruction

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the contrary, to award him reasonable compensation for his services.

At the instance of plaintiff, the court instructed the jury as follows: "The court instructs the jury that if they find and believe from the evidence that defendant was employed to secure a distribution of the fund held by the St. Louis Union Trust Company as trustee under the will of William Wise, deceased, and that defendant accepted said employment and agreed to perform the necessary legal services for a charge or commission of 10 per cent. of the amount secured for distribution, defendant cannot charge more than the amount agreed upon, unless, before the rendition of the services mentioned in the evidence, he notified the person or persons so employing him or his agent or attorney that he would not perform said services for the amount agreed upon, if you find any such agreement was made, and such person or persons, or his agent or attorney, either consented to his rendering such services for a different compensation, or did not object to his rendering such services after receipt of such notice."

This instruction is criticised for the same reason that it fails to require the jury to find by whom the defendant was employed, and with whom he agreed to a compensation on a 10 per cent. basis. The reference therein to the case of Strode, etc., against the McBurneys et al. is also criticised as before. What has been said above touching these matters applies as well to this instruction, and they will not be further noticed.

At the instance of plaintiff the court instructed the jury as follows: "If the jury believe from the evidence that the defendant, Wm. H. Clopton, was employed to secure a distribution of a fund held by the St. Louis Union Trust Co. as trustee, under the will of William Wise, deceased, and that the defendant accepted said employment and that he had no agreement as to his charge or fee for such services at the time of such employment; and if you further find from the evidence that he thereafter instituted a suit in the St. Louis circuit court on behalf of Wilber S. Jenkins, Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William W. Sturgeon, Douglas R. Sturgeon, James L. Wise, George W. Wise, William Wise, Franklin Wise, Mary C. Beveridge, Anna Wise Emmons, and others, against the said trust company, to secure such distribution, and that each of said parties was entitled to a share of said fund, and that said court in its decree in said cause ascertained and determined the several shares of said parties to be as follows, to wit: Wilber S. Jenkins, $11.53; Laura Fisher, $11.53; Clifford Jenkins, $11.53; Glenn Rust, $11.53; Ross Rust, $11.53; William W. Sturgeon, $34.57; Douglas R. Sturgeon, $34.57; James L. Wise, $34.57; George W. Wise, $34.57; William Wise, $34.57; Franklin Wise, $34.57; Mary C. Beveridge, $34.57; Anna Wise Emmons, $34.57; and that said trust company has paid said several sums to said parties, and that defendant has collected from said trust company said several sums of money as attorney for said parties, and that he has not paid to them the amounts so collected, or any part thereof, and that said Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William W. Sturgeon, Douglas R. Sturgeon, James L. Wise, George W. Wise, William Wise, Franklin Wise, and Anna Wise Emmons have assigned to the plaintiff their several shares in said fund, and their claims, if any, against the defendant on account of the collection thereof (if the jury find from the evidence that the defendant did so collect said money), and that the defendant has failed and refused to pay over the same; and if you further believe from the evidence that the suit of Gerrard Strode, administrator of the estate of David W. Wise, deceased, against the Lincoln Trust Company et al., referred to in the evidence, did not result in the recovery of any money, or that the defendant's employment therein was not connected with and dependent upon his employment in said suit of plaintiff and others against the St. Louis Union Trust Company—then you will find in favor of the plaintiff and against the defendant on each of the twelve counts or claims mentioned in the evidence and assess his damages upon each claim at the amount so received by the defendant, after deducting whatever the jury may find from the evidence the defendant's services were reasonably worth."

This instruction is criticised, first, for the identical reasons leveled against the plaintiff's first instruction heretofore discussed. What has been said with respect to those matters obtains alike to the present criticism of the third instruction. They will not be repeated. The instruction, however, is further criticised for the reason it authorized a recovery for the plaintiff, even though there was no special 10 per cent. contract for the services. This criticism proceeds also upon the theory that the suit is for a breach of contract to collect moneys for 10 per cent. compensation. It overlooks the fact that the suit is for money had and received. This question has been fully discussed heretofore, and it is unnecessary to again advert to it. It is said though the instruction is a clear departure from the pleadings and submitted to the jury on a theory of the case not authorized; that is, the jury were authorized under this instruction to find for the plaintiff, even though it appeared the defendant had not contracted to perform the services for 10 per cent. Under these circumstances, the jury were told that if they found the defendant collected the money, retained the same, and refused to pay it over to the parties, then the finding should be for the plaintiff for such sum as was proper after allow-

ing defendant reasonable compensation for his services.

Now, we believe this instruction was entirely proper in this case for money had and received. Of course, if the action were on a special contract, the plaintiff could recover only on the contract pleaded, and not on a different cause of action. Laclede Co. v. Tudor Iron Works, 169 Mo. 137, 69 S. W. 384; Crigler v. Duncan, 121 Mo. App. 381, 392, 99 S. W. 61. However, this rule does not preclude one for whom money has been collected by another, pursuant to some contract, from recovering his portion in an action for money had and received. As before stated, the arrangement for 10 per cent. asserted by the plaintiff is certainly not the essence of the case, although it may be material in developing the facts and disclosing the true interests the respective parties had in the moneys retained by defendant. The gist of the action being for money had and received, it was entirely proper to submit the case to the jury in this form. Crigler v. Duncan, 121 Mo. App. 381, 99 S. W. 61. This instruction did not submit to the jury an issue not presented in the case for the reason the issue was not on a breach of a contract for 10 per cent. compensation, but, on the contrary, was whether the defendant had, under the authority of some sort of contract, collected and retained the moneys which rightfully belonged to the plaintiff. Besides, it submits the very issue tendered by defendant, and is within the pleadings. The defendant may certainly not complain that the issue tendered by him was submitted. Even if the issue thus submitted was not within the allegations of the petition, it is within the issues defined in the pleadings as defendant's answer tendered it, and plaintiff joined issue thereon.

Defendant requested and the court refused the following instruction with respect to each and every count of the petition: "The court instructs the jury to find for the defendant on the first count of the petition, unless the jury believe from the evidence in the case that prior to the 15th day of November, 1902, the date of filing the petition in the case of Sarah Miller and others against the St. Louis Union Trust Company, defendant Clopton agreed with plaintiff, W. F. Jenkins, that he, said Clopton, would perform the necessary services to secure the distribution of the fund then in the hands of the said trust company for a charge of ten (10) per cent. of the amount secured for distribution, and that the said suit was instituted and prosecuted to a judgment under such agreement. And the court instructs the jury that the burden of proof is on the plaintiff to prove by a preponderance of evidence that defendant agreed with said Jenkins to render said services for ten (10) per cent. of the amount collected."

Defendant complains that the court erred in refusing this instruction with respect to each count. We are not so persuaded. This instruction again presents a theory of the case as though the contract for 10 per cent. was the gist of the action, and ignores the fact that under all of the evidence defendant collected and still has possession of the moneys referred to. The theory presented by this instruction is that, unless plaintiff proved a contract for 10 per cent. compensation with all of the heirs, the suit should fail. This cannot be the law of the case, for if the defendant collected the moneys under his employment and retains them, he should account to the plaintiff therefor in some manner—that is to say, the jury should either award plaintiff 90 per cent. and to the defendant 10 per cent. in affirmance of the contract asserted, or contra thereto—award to the plaintiff such portion as would be proper, and to the defendant such portion as amounted to reasonable compensation for his services.

The defendant requested and the court refused his instruction No. 2 as follows: "The court instructs the jury that if they believe from the evidence defendant rendered services as attorney at law in the circuit court of the city of St. Louis in procuring the evidence, preparing the petition, and obtaining a decree of court to distribute the fund held by the St. Louis Trust Company among the heirs of Mary Wise under the will of William Wise, and that defendant distributed and paid over to the parties named in the petition, their respective shares of said estate, less the charge of 50 per cent. for collecting and distributing said fund retained by defendant as his attorney's fees, they will find for the defendant if they believe from all the evidence in the case the charge of 50 per cent. was a reasonable charge as shown by the evidence for the services rendered by defendant."

It is said the court erred in refusing this instruction. In substance this instruction tells the jury that they should find for the defendant if they believed he performed the services and collected the money and paid the same over to the parties named, less his charge of 50 per cent. for collecting, if they believed the charge of 50 per cent. was reasonable. Now, we believe this instruction was properly refused for the reason it ignores the fact that such moneys as were turned over to the parties mentioned were returned to the defendant by them and are still in his possession. The money was not paid into court, and, if a tender was made, it was not kept up in the case. Had the tender been kept up it may be in view of the fact defendant made the tender of 50 per cent. that the costs should therefore fall on plaintiff if a recovery was not for a greater amount than that tendered. However, this is unimportant for the reason the recovery allowed by the jury was for 90 per cent. of the fund collected—that is, the jury awarded the defendant 10 per cent. only, as though it found in affirmance of the contract of employment as-

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of the fund, is no defense to this action unless they retained or accepted that amount, and the evidence shows they declined to accept it. The instruction was properly refused.

Defendant requested instruction No. 3 as follows: "The court instructs the jury that before they can find by their verdict that there was a contract between plaintiff and his assigns and the defendant that the defendant would prosecute the suit of the heirs of Mary Wise, deceased, against the St. Louis Union Trust Company, and distribute the proceeds of such suit for a fee of 10 per cent. on the amount collected, they must find from the evidence that there was an agreement between plaintiff and his assignors, entered into with defendant before the institution of the said suit, that defendant was to charge only 10 per cent. for his services, and that the parties on both sides fully understood that such was the contract."

This the court refused. It is argued the court erred in so doing. This instruction seems to be abstractly correct in so far as it asserts the doctrine that before the jury could find a contract to collect and distribute the fund for 10 per cent., that there must appear an agreement between plaintiff and his assignors before the institution of the suit, and the defendant, or that both parties so understood it. However, it is not so relevant to the issues in the present controversy as to constitute its refusal reversible error, for, as said before, the suit does not predicate on the contract, and the question of the 10 per cent. agreement between the parties was sufficiently covered by several other instructions in the case. In view of the other instructions, the refusal of this one does not constitute error against appellant materially affecting the merits. Unless such error appears, we are commanded by the statute not to reverse a judgment. See section 865, Rev. St. 1899 (Mo. Ann. St. 1906, p. 812).

Defendant requested its instruction No. 4 as follows: "The court instructs the jury that in the petition in this case plaintiff alleges that James L. Wise was entitled by the decree in the case of the heirs of Mary Wise, deceased, against the St. Louis Union Trust Company to the sum of $27.67; Geo. W. Wise to $27.67; Wm. Wise to $27.67; Franklin Wise, to $27.67. If the jury believe from the evidence that prior to the bringing of this suit defendant had sent to said James L. Wise, George W. Wise, William Wise, and Franklin Wise, post office money orders or money of the United States, for 50 per cent. of said sums, then the jury will find for the defendant on the 8th, 9th, 10th, and 11th counts in said petition, if they believe from the evidence that defendant's services were reasonably worth fifty (50) per cent. of said services agreed with the said James L. Wise, Geo. W. Wise, Wm. Wise, Franklin Wise, and Anna Wise Emmons to prosecute said suit for a fee of ten (10) per cent. and the burden of proof is on plaintiff to prove such agreement by a preponderance of evidence."

This instruction the court refused. Defendant complains of error in respect of this matter. This instruction was properly refused for the reason it treated the mere sending of the money orders therein named as tantamount to an acceptance of the same by the parties to whom sent. It ignores the fact that, although the defendant sent the money orders to these parties, the orders were returned to him, and he still has possession of the money. Of course the mere sending of the orders, which were not accepted, was not equivalent to payment. Although the mere sending of the orders to the parties through the mail may be prima facie evidence tending to show they received them, it is certainly not such unless they were properly addressed. Now, the testimony of defendant in respect of James L. Wise is to the effect that through mistake he sent the money order for his share to Columbus, Ga., when in fact James L. Wise resided in Ohio. Defendant testified touching this matter as follows: "I sent that to Columbus, Ga. I should have sent it elsewhere, but it never came back to me." This instruction, among other things, submitted to the jury the sending of an order to James L. Wise as equivalent to a payment to him. This cannot be true in view of the fact that such order was mailed to Columbus, Ga., when the party resided in Ohio. Besides, the question as to whether or not all of these parties did receive payment from defendant or accepted payment from him, was submitted by the court in the several instructions on behalf of plaintiff which required the jury to find that the defendant had both failed and refused to pay them.

Defendant requested his instruction No. 5 as follows: "The court instructs the jury that in the petition in this case plaintiff alleges that he was entitled by the decree in the case of the heirs of Mary Wise, deceased, against the St. Louis Union Trust Company, to $11.53; that Laura Fisher was entitled under said decree to $11.53; that Clifford Jenkins was entitled to $11.53; that Glenn Rust was entitled to $11.53; that Ross Rust was entitled to $11.53; that William Sturgeon was entitled to $34.37; that Douglas R. Sturgeon was entitled to $34.37; and Anna W. Emmons was entitled to $69.16. If the jury believe that prior to the bringing of this suit defendant had sent to said Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William Sturgeon, Douglas Stur-

money orders for one-half of their several respective sums as stated in the petition, and that said parties had received said post office orders, and that they returned to defendant said post office orders through Geo. D. Harris, their attorney, and that thereafter defendant tendered to such attorney cash money of the United States for one-half of said several sums, and that said Harris refused to accept said money, then the jury will find for the defendant on the first, second, third, fourth, fifth, sixth, seventh and thirteenth counts of plaintiff's petition, if they believe from the evidence that defendant's services were reasonably worth 50 per cent. of said sums for the legal services rendered by him. Unless the jury further find from the evidence that before the institution of the said suit of the heirs of Mary Wise to recover said money defendant agreed with the said F. W. Jenkins, Laura Fisher, Clifford Jenkins, Glenn Rust, Ross Rust, William W. Sturgeon, Douglas Sturgeon, and Anna Emmons to prosecute said suit for a fee of ten (10) per cent. of the amount collected. And the jury are instructed that the burden of proof is on plaintiff to prove such agreement by a preponderance of the evidence."

This instruction the court refused to grant, and error is predicated on such refusal. This instruction was properly refused for the reason it directed the jury, in effect, that the tender of 50 per cent. of the amount of money collected by the defendant to the plaintiff's attorney was equivalent to payment thereof. It ignored the fact that this tender was not accepted, and that the defendant still retains the amount. It may be that had the defendant kept up the tender by a deposit in court, and the plaintiff had not recovered more than 50 per cent., the costs would have fallen on the plaintiff. Be this as it may, the tender in and of itself did not amount to a payment to the parties entitled thereto, and the jury would certainly not be authorized to find the issue for defendant on a mere tender of 50 per cent. of the amount to the parties, even though it should find that such an amount was all they were entitled to, and that the other 50 per cent. was reasonable compensation only for defendant's services.

Because of the earnestness with which the several questions mentioned were pressed upon the court, we have unduly prolonged the opinion by discussing separately each and every suggestion of error to be found in the briefs, even though we would be justified in not so doing. After having given the matter the most careful and thoughtful attention, we are persuaded that none of the errors of law complained of merit a reversal of the judgment. It is true the defendant performed much painstaking labor for the very meager compensation allowed by the verdict of the jury, and it may be the result is unjust to him. If so, it is a matter with which the appellate court is not concerned, as under our system of practice the questions of fact are peculiarly within the province of the tribunal awarding the verdict.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

SHAMP v. LAMBERT.

(St. Louis Court of Appeals. Missouri. Oct. 2, 1909.)

1. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—NEGLIGENT USE.

It is negligence to back an automobile suddenly without warning, or without looking out for the safety of pedestrians, across a public street crossing, where persons are almost constantly getting on and off street cars.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

2. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where more than one inference can be fairly drawn from the facts as to the care, or want of care, of one suing for a personal injury, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–346; Dec. Dig. § 136.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a pedestrian struck by an automobile backing onto a public street crossing was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

4. NEGLIGENCE (§ 68*)—ORDINARY CARE.

One acting with that care usually exercised by a person of ordinary prudence exercises sufficient care for his protection, and he need not anticipate negligence on the part of others which may result in injury to him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 92; Dec. Dig. § 68.*]

5. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT.

The court may declare one guilty of contributory negligence precluding a recovery for a personal injury only where he voluntarily encountered dangers and assumed a situation fraught with imminent peril to his safety, when considered apart from and without the intervention of the negligence of the actor causing the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–346; Dec. Dig. § 136.*]

6. MASTER AND SERVANT (§ 302*)—INJURIES CAUSED BY SERVANT—LIABILITY OF MASTER.

A master is liable for injuries to person and property caused by the negligence of his servant, where the act resulting in the injury is done while the servant is acting within the scope of his employment, though the act is not necessary to the performance of the servant's duties.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. MASTER AND SERVANT (§ 302*) — INJURIES CAUSED BY SERVANT — LIABILITY OF MASTER—EVIDENCE.

That a tortious act is committed by a servant in the performance of the master's service, though not sufficient to render the master liable therefor, but it is sufficient prima facie to show that at the time the servant was actually engaged in the performance of the particular duties for which he was employed; and the test for the prima facie responsibility of the master is not whether the particular service performed was specially authorized, but whether the act occasioning the injury was within the scope of the servant's authority in prosecuting the business for which he was employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217–1229; Dec. Dig. § 302.*]

8. MASTER AND SERVANT (§ 330*) — INJURIES CAUSED BY SERVANT — LIABILITY OF MASTER—EVIDENCE—"CHAUFFEUR."

In an action for injuries to a pedestrian struck by an automobile, proof that defendant admitted his ownership of the automobile, and that the chauffeur in charge thereof was his chauffeur, was prima facie proof that plaintiff received injury through the negligence of defendant's servant while acting within the scope of his employment, and the burden of proof was shifted on defendant to show that the chauffeur was not acting for him at the time; the word "chauffeur" involving the idea of one having charge of or operating an automobile.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 330.*]

9. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS — INJURIES TO PEDESTRIANS — EVIDENCE—ISSUES.

In an action for injuries to a pedestrian struck by an automobile, the testimony of plaintiff that defendant told her that it was his automobile and his chauffeur authorized submission to the jury of the issue whether defendant owned the automobile, and whether his servant operated it at the time of the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

10. DAMAGES (§ 206*) — PHYSICAL EXAMINATION OF PERSON INJURED—POWER OF COURT TO REQUIRE EXAMINATION.

The court, in an action for personal injuries, may make an order for the personal examination of plaintiff, and enforce it by affixing the proper penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 92–98, 531; Dec. Dig. § 206.*]

11. APPEAL AND ERROR (§ 969*)—DISCRETION OF TRIAL COURT—APPLICATION FOR PHYSICAL EXAMINATION OF PLAINTIFF.

The ordering of a personal examination of plaintiff in a personal injury action is within the discretion of the trial court, and its exercise thereof will not be interfered with on appeal, unless manifestly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845–3848; Dec. Dig. § 969.*]

12. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—REFUSAL TO COMPEL EXAMINATION OF PLAINTIFF.

Where, in an action for personal injuries, it was undisputed that an automobile ran over plaintiff, breaking several bones in one of her limbs, and several physicians testified that she possessed no such power, was harmless, within Rev. St. 1899, § 865 (Ann. St. 1906, p. 812), providing that a judgment shall not be reversed unless error was committed against appellant materially affecting the merits.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Myrtle Shamp against Albert Bond Lambert. From a judgment for plaintiff, defendant appeals. Affirmed.

McKeighan & Watts and Wm. R. Gentry, for appellant. A. R. & Howard Taylor, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through personal injuries occasioned by the negligence of the defendant. Plaintiff recovered, and defendant appeals. It appears plaintiff was injured, while standing in the street in order to board a street car, by the defendant's servant negligently backing his automobile against and upon her. Plaintiff had visited Union Station on business, and walked therefrom to the north side of Market street adjacent to the pavement, and at the usual stopping place for street cars, near the center of the station. Her purpose was to take the first west-bound street car homeward. Defendant's automobile in charge of his chauffeur was standing at the time near the pavement on the north side of Market street, and within about 8 feet of the point where passengers are admitted and discharged from west-bound street cars. Upon the street car approaching from the east, and as it neared the usual stopping place, plaintiff stepped into the street, intending to enter the same when it stopped. While she was thus standing, and before the car stopped, defendant's chauffeur, without warning to plaintiff, and without looking around to see whether or not his act would endanger her or others, moved defendant's automobile backwards and upon her with great force. The automobile passed over her limbs and upon her body. This act resulted in breaking several bones in one of plaintiff's limbs between the ankle and knee, and inflicting internal injuries as well. Upon a trial before a jury plaintiff recovered a verdict for $5,000. Thereafter, upon consideration of the motion for a new trial, the court indicated that unless a portion of the damages recovered were remitted, a new trial would be awarded. Thereupon plaintiff entered a remittitur of $1,500, and judgment was given for the plaintiff in the amount of $3,500.

Neither defendant nor his chauffeur gave testimony at the trial. In fact there was no

to prove a case of negligence on the part of defendant. It was certainly gross negligence for defendant's chauffeur to suddenly move the automobile backward with great force, at least without warning that he was about to do so, or looking out for the safety of persons about the same at the crossing of a public street. It must be remembered that the place of the injury was in the public street near the Union Station in a large city, where persons are almost constantly getting on and off the street cars. These circumstances of themselves should enjoin care and vigilance for the safety of others upon persons operating dangerous conveyances thereabout.

It is argued, first, that the court should have declared plaintiff guilty of negligence as a matter of law, and directed a verdict for the defendant. That is to say, it is argued that plaintiff's careless conduct directly contributed to her injury in such a manner as to justify the court in declaring, as a matter of law, that she ought not recover. This argument is without merit. When more than one inference can be fairly drawn from the facts as to the care, or want of care, on the part of the plaintiff, the question of contributory negligence, is for the jury. 7 Amer. & Eng. Ency. Law (2d Ed.) 456; Dougherty v. Mo. Pac. Ry. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251. It was certainly proper in this instance to refer the question to the jury. It may be remarked in this connection, however, that the facts present a case where the plaintiff is about as nearly without fault as any which we have had occasion to review. It appears that plaintiff, a lady about 30 years of age, was on her road from Union Station to her home. She had taken her position only a moment before at the usual stopping place of the street cars, in order to enter the car when it stopped. The street car was then approaching and in near proximity to her. Plaintiff's attention was directed to the approaching car, as was entirely proper. The automobile was not coming toward her, but on the contrary, was standing at rest against the pavement, 8 or 10 feet away. Plaintiff had certainly no reason to suppose that it would be run backwards upon her without warning, by the careless act of defendant's servant. The law is satisfied if individuals conduct themselves with the degree of care usually exercised by a person of ordinary prudence; and, in thus conducting themselves, they are not required to anticipate negligence on the part of others which may result in entailing injury upon them. The court is authorized to declare a plaintiff guilty of contributory negligence, and thus preclude a recovery as a matter of law, only when it appears that he or she

the negligence of the actor who injury. Mitchell v. C. & A. Ry. App. 143, 153, 112 S. W. 291.

It is argued the court should h a verdict for the defendant bec not appear the chauffeur was a line of his duty as a servant of t at the time the injury was inflict ing this assignment of error coun tainly overlooked the fact that p fied the defendant told her that bile was his automobile, and tha feur operating the same was h in other words, his servant. It the defendant called upon plaint injury, and had some conversat respecting the same, etc. He su that he would furnish a physici her. This she declined, however ployed a physician on her o Plaintiff testified that during th tion defendant told her that it v mobile which inflicted the inju the chauffeur operating the sa chauffeur. This testimony is not for, as stated, neither defendan feur, nor any other witness in fendant gave testimony in the master is liable for all injuries property caused by the negli servant if the act which result jury is done while the servant is in the scope of his employment ter's service, though the act wa sary to the performance of the ties, and it was not expressly a the master or known to him. Eng. Ency. Law (2d Ed.) 163, Railway Transfer Co., 56 Mo. Ap land v. Mo. Pac. Ry. Co., 57 M Streett v. Laumier, 34 Mo. 469 Railway, 59 Mo. App. 354; Garr enckel, 50 Mo. 104, 11 Am. Re der v. Railway, 60 Mo. 413. It that the mere fact a tortious act by the servant while he is eng performance of the master's se sufficient to render the master for, but it is certainly sufficient to show that at the time the actually engaged in the per the particular duties for which ployed.

In Garretzen v. Duenckel, 50 11 Am. Rep. 405, our Supreme "When the servant acts in the employment, although outside o tions, the master will be held for his acts." See, also, Snyde Co., 60 Mo. 413, 419. Now in appears the defendant admitte the automobile, and that the charge of the same at the time

ceived her injury was his chauffeur; that is to say, the chauffeur was his servant, employed for the purpose of managing and operating the automobile. These facts tended to prove the plaintiff received her injury through the negligence of defendant's servant while acting within the scope of his employment. And even though it does not appear that the chauffeur was present at the particular time and place in question by instruction from his master, the defendant, or perchance in the performance of his duties in conveying his master either to or from the Union Station, it does appear that he was acting within the scope of his authority as defendant's chauffeur; that is to say, he was operating defendant's automobile, the very act for which he was employed. We believe this to be sufficient, prima facie at least, to shift the burden of proof upon the defendant if the chauffeur was not acting for him at the time. The test for the prima facie responsibility of the master in such cases is not whether the particular service being performed was specially authorized, but it is whether the act which occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master. If such is not the test, it ought to be sufficient for a prima facie showing; for how may the injured person prove more? Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Canfield v. Railway, 59 Mo. App. 354, 363; Evansville, etc., Ry. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; 20 Amer. & Eng. Ency. Law (2d Ed.) 167. The word "chauffeur" involves the idea of a person having charge of or operating an automobile. The admission of the defendant to the effect that it was his automobile, and that his chauffeur was in charge of the same at the time of the injury, of course tends to prove that the chauffeur was acting in the line of his employment; for if he was defendant's chauffeur, then his duties were to operate defendant's automobile. We believe this testimony is sufficient for the prima facie purposes of the case; for how could plaintiff prove the particular trip to the station by the chauffeur and automobile was authorized by defendant? If, as a matter of fact, the chauffeur was not acting for the defendant at the time, the burden rested with him to show to the contrary, after plaintiff had shown so much.

Defendant complains of plaintiff's instruction No. 1, and says it submitted facts to the jury not in evidence. The portion of the instruction complained of is as follows: "And if the jury find from the evidence that on said day defendant owned, and by his servant was operating, the automobile mentioned in the evidence," etc. The criticism leveled against this portion of the instruction is to the effect that there is no proof in the record tending to show the automobile belonged to the defendant, or that it was being operated by his chauffeur. The following quotation from plaintiff's testimony clearly dispels the predicate for this criticism, and shows it to rest on a false premise: "Q. Did you see the defendant, Mr. Lambert, there, after you were hurt? A. Yes, sir. Q. Did he come to your house to see you? A. Yes, sir. Q. What did he say about its being his automobile and chauffeur? A. He told me it was his automobile and his chauffeur." This testimony is sufficient in that behalf, and it was properly submitted to the jury by the instruction referred to.

At a prior term of court, and before a judge other than the one presiding at the trial of the cause, defendant moved the court to appoint one or more competent physicians to examine the extent of plaintiff's injuries under an order of the court. The court overruled this motion, and defendant excepted thereto. At the time the court overruled the motion, the judge then presiding remarked: "I do not believe this court has any power to make such an order, and I will never do it." It is argued here that the judgment should be reversed for the reason the court erred in overruling the motion referred to, and in not appointing a commission of surgeons to examine the extent of plaintiff's injuries. The power of the court to make and enforce an order for the personal examination of the injured party by affixing a proper penalty must be taken as established in this state, as it is in many others. The question of the power of the court in this behalf is no longer open to controversy in Missouri. Owens v. Railway, 95 Mo. 169, 178, 8 S. W. 350, 6 Am. St. Rep. 39; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516. However, such an examination is a matter of discretion with the trial court, and an exercise of its discretion thereabout will not be interfered with on appeal, unless it is manifestly abused. Owens v. Railway, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516. Although the judge then presiding entertained an erroneous view of the law in respect to the power of the court to order an examination, we are not inclined to reverse the judgment because of this, in view of the subsequent developments on the trial. If the judge then presiding had not indicated his view of the law on the subject, the judgment should be reversed on that account only upon a manifest abuse of discretion appearing. From the subsequent proceedings, and the testimony of the several physicians who attended the plaintiff in respect of her injuries, it is clear that the judgment should not be reversed on the ground that the court abused its discretion in denying the motion for a commission of surgeons. The fact is undis-

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puted that a heavy automobile ran over and upon this plaintiff, who was a lady of about 30 years of age. That it broke several bones in one of her limbs is also clear. No one disputes it. Several physicians gave testimony to that effect. It is clear also from the medical testimony that she received painful internal injuries. That she suffered much pain, and is permanently injured from the broken limb is also undisputed in the case. She walks with a limp and one foot turns outward. The jury awarded her $5,000. Upon an intimation from the court to the effect that the verdict was excessive, plaintiff voluntarily remitted $1,500. It appears, too, that had the defendant so desired, he might have renewed his application for the appointment of a commission of physicians to examine the extent of the injury at a subsequent term of court before Judge Kinsey, who presided at the trial. If the original application at the prior term was denied solely upon the ground that the judge then presiding did not believe the power to appoint such commission was lodged in the court, then defendant might have renewed the motion at a subsequent term before Judge Kinsey, who may or may not have entertained the same view of the law on the subject. It is sufficient to say no further effort was made in that behalf, and while the defendant, of course, did not thereby waive his right to have the matter of the ruling made at the prior term reviewed on appeal, he nevertheless contributed the fact of his failure to move a second time before a different judge to the same end for consideration on appeal, and this fact should be considered along with the other facts and circumstances of the case when giving judgment under the statute on the question as to whether or not the judgment should be reversed. Our statute (section 865, Rev. St. 1899, Ann. St. 1906, § 865) commands that judgments shall not be reversed unless the Court of Appeals believes that error was committed against the appellant, and materially affecting the merits of the action or defense. Now from the facts stated, and the developments at the trial, we believe that the denial of the order appointing a commission to examine the plaintiff did not introduce error into the case which materially affected the merits of the defense. Indeed, as we view it, the cause, in and of itself, was almost defenseless, for the negligence was gross, and the plaintiff's injuries severe, painful, and permanent. Had the ruling denying the motion been placed upon discretionary grounds, the assignment of error relating thereto should certainly be overruled on appeal, in view of all the facts and circumstances attending the case. It seems that the present judgment of $3,500 is a most conservative estimate of the plaintiff's damages, and if another trial were to be had, no doubt a larger award would be given and affirmed.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

BARRETT v. KERN.

(St. Louis Court of Appeals. Missouri. May 11, 1909.)

1. PAYMENT (§ 65*) — PROOF OF PAYMENT — BURDEN OF PROOF.

The burden of proving payment is on the party alleging it.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 196; Dec. Dig. § 65.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding supported by the positive testimony of a party, and merely contradicted by the uncertain testimony of the adverse party having the burden of proof, is binding on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. ACCORD AND SATISFACTION (§ 26*)—ESTABLISHMENT—BURDEN OF PROOF.

The burden of establishing accord and satisfaction rests on the party alleging it.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 162; Dec. Dig. § 26.*]

4. ACCORD AND SATISFACTION (§ 27*)—EVIDENCE.

Whether there has been an accord and satisfaction is a question of fact.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 59, 83, 97, 110, 135, 150; Dec. Dig. § 27.*]

5. ACCORD AND SATISFACTION (§ 1*)—NATURE OF "ACCORD AND SATISFACTION."

"Accord and satisfaction" is a new contract founded on a new consideration, possessing all the elements of a contract, and finally closes the matter covered by it; and, unless there is a well-understood compromise of any and all demands arising out of the transaction between the parties, there is no valid accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 1–13; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 81–84; vol. 8, p. 7561.]

6. ACCORD AND SATISFACTION (§ 1*)—MUTUAL AGREEMENT—ACCEPTANCE.

An accord and satisfaction, to be binding, must be mutually agreed to and accepted.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 1–13; Dec. Dig. § 1.*]

7. ACCORD AND SATISFACTION (§ 7*)—PARTIAL PAYMENT OF LIQUIDATED DEMAND—EFFECT.

A payment of a smaller sum than is unquestionably due is not a satisfaction of the sum due, though accepted by the creditor.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 46–59, 66; Dec. Dig. § 7.*]

8. ACCORD AND SATISFACTION (§ 11*)—EVIDENCE.

A vendor received $200 as interest, but claimed that there was a balance of $83.02 due. The purchaser sent a check for that amount,

with the words "Full all demands," and wrote a letter stating that he assumed that the money would be returned if he was right. The vendor replied by acknowledging receipt of the check, and stating that he thought the amount would be found correct, but that in all events it was open for correction. Subsequently the vendor claimed that $1,000 was due on the contract. *Held*, to justify a finding that there was no accord and satisfaction, and the vendor could sue for the $1,000 due on the contract.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–83; Dec. Dig. § 11.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by M. L. Barrett against Robert H. Kern. From a judgment for plaintiff, defendant appeals. Affirmed.

In the years 1900 and 1902, by two several contracts, defendant bargained for the purchase of two tracts of land in Macon county, one comprising 120 and the other 180 acres. The total price to be paid for the two tracts, so far as concerns this case, was $8,200; $2,200 for the one, $6,000 for the other. Both tracts were incumbered by mortgages, and under the terms of the contracts of sale and agreements of the parties, $2,715.58 of the total price was to be paid to one Compton, and $5,484.42 was to be paid to the plaintiff. Pending the payment of the mortgages and of the purchase price, deeds were executed and placed in escrow, and defendant commenced payment on the purchase price. There is no question that he paid $1,000 due Compton on the 120 acres, and $1,715.58 due him on the 180 acres, and that he paid plaintiff $4,484.42 on the two tracts, paying him $1,000 March 12, 1902, $1,200 on July 14, 1902, and $2,284.42 on December 28, 1904, all these exclusive of interest. The dispute arises over the question of whether he had paid plaintiff $1,000 more; the contracts, beyond room for doubt, requiring payment to plaintiff of a total of $5,484.42, exclusive of interest. It is over this $1,000 that the present controversy has arisen. Defendant refusing to pay, plaintiff brought suit against him for the $1,000 and interest thereon, at the rate of 7 per cent. per annum, from March 1, 1902, that being the date payment of the whole of the $8,200 fell due; it being agreed that if payment was not then made in full, the amounts then unpaid were to bear interest at the rate of 7 per cent. per annum. Defendant pleaded in answer to the petition of plaintiff, which set up the above facts in detail, first, a denial of indebtedness in any sum whatever; second, that before action brought he had discharged and satisfied plaintiff's claims by payment; third, that in September, 1903, he and plaintiff had an accounting, and entered into an agreement as to the amount which remained due on the contract sued on by plaintiff; that it was then agreed between them that the amount remaining due on the contracts was $1,200, with interest; that about December, 1904, he offered to pay plaintiff this $1,200, with interest, "as had been agreed was due to plaintiff, but that at said time plaintiff contended that defendant owed him in addition thereto the sum of $1,000 and interest thereon, amounting in all to $2.284.42, with interest"; that he and plaintiff then and there agreed "that if defendant would pay plaintiff said sum of $2,284.42 and interest, defendant should have a reasonable time to examine his papers, to see if he could find a check as receipt showing that he had paid said additional $1,000 demanded by plaintiff, and if defendant found that he had paid said additional $1,000 then plaintiff would repay the said $1,000 and interest, and if defendant did not find said check or receipt, then said sum of $2,284.42, with interest, should be accepted as the full settlement of all indebtedness due plaintiff from defendant under said contracts now sued on by plaintiff." Pleading payment of the $2,284.42, defendant avers that the interest claimed due thereon from defendant was $283.02; that he was unable to find the check or receipt, and paid the interest as follows: $200, April 8, 1905; $83.02, May 19, 1905, "as agreed in full settlement of all of plaintiff's demands and of all moneys claimed by plaintiff as aforesaid. And defendant states that said sum was so accepted by plaintiff in full settlement and in full payment of all his demands and claims against defendant." The reply was a general denial.

The trial was before the court, each party waiving a jury. At the trial of the cause the contracts above referred to being in evidence, as before stated, there was no controversy over the fact that they called for the payment of $8,200, and that up to about December 29, 1904, $2,715.58 had been paid to Compton, and $4,484.42 had been paid to plaintiff under the two contracts. It was also practically beyond dispute that in September, 1903, both parties assumed that there was only $1,200 still due plaintiff, although there was no evidence tending to prove that there was then any such agreement as to that amount as to bind either, and that impression apparently was in the minds of both parties up to December 20, 1904. The real contention and clash of testimony occurred over what took place at and after December 20, 1904. It appears from the testimony in the case that along toward the middle of the year 1904 the defendant, having made arrangements to borrow money on the two tracts, desired to close up the transaction with plaintiff, and have the tracts released from the mortgages which still remained unsatisfied of record, and to secure the delivery of the deeds to him by plaintiff. There was a good deal of delay over this, and finally defendant, on December 20, 1904, went to Chicago from St. Louis, and there met plaintiff, and appeared to have then

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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learned for the first time that, instead of plaintiff claiming $1,200 as still due, he claimed that considerably more remained unpaid under the contracts. Right here the conflict in testimony arose, between the defendant on the one side, and plaintiff and a Mr. Aldrich, a young man, who was acting as his bookkeeper or cashier, on the other. When the defendant reached Chicago and went to the office of plaintiff, he was introduced to Aldrich by plaintiff as the one who would go over with defendant the accounts between plaintiff and defendant, whereupon the defendant and Aldrich sat down in a room of the office of plaintiff, and went over the contracts and account which Aldrich had kept himself; covering the payments to February, 1903, the account from that date down being shown on the books of plaintiff's firm, with which Aldrich seems to have been familiar.

It is impossible to reconcile the versions, given by plaintiff and Mr. Aldrich on the one hand and defendant on the other, as to exactly what took place, and what was agreed on at this interview in Chicago, further than that it is very evident that at the time all of the parties proceeded upon the assumption that up to that date $5,915.58 had been paid on the $8,200, and the question between them was whether defendant then owed plaintiff $2,284.42 or $1,284.42. After a good deal of contention, and, as defendant was compelled to have the delivery of the deeds in order to carry out contracts he had made for borrowing money on the tracts, it was agreed substantially between the parties that defendant was to pay this $2,284.42, leaving it open for him to find or produce receipts or checks, if he could, showing the payment of the difference between that amount and $1,200, which he admitted owing, and also leaving open for further calculation the interest to be figured up later; the plaintiff on his part agreeing that if it was found that $1,200 was the correct amount, he would refund to plaintiff whatever difference there was between that and the amount plaintiff paid him. That defendant at that time owed plaintiff more than this $2,284.42 does not appear to have been then in the minds of either party as far as the evidence in the case shows. At the close of their conference in Chicago the defendant, while in the office of plaintiff in Chicago, dictated this letter, addressed to the cashier of the bank at Macon, and delivered it to plaintiff to be sent on by plaintiff with the papers; the letter being dated December 20, 1904: "John Scovern, Macon, Mo.—Dear Sir: Mr. M. L. Barrett of Chicago holds certain notes secured by deeds of trust on certain lands of mine in Macon county, Missouri. In computing to-day, he and I are uncertain as to whether the amount is exactly $2,284.42 or not, but he and I have agreed that this amount shall be paid him through you, and should it develop that $1,000 of this amount has been paid by me, Mr. Barrett and I will settle this between ourselves. These three notes Mr. Barrett will mail to you and Mr. Hicks is authorized to pay you that sum of money on account of Mr. Barrett, that is, $2284.42, upon payment of which Mr. Barrett I assume will direct you to acknowledge satisfaction of the record. Please do this. I give this letter to Mr. Barrett to mail to you with his papers. Yours respectfully, R. H. Kern." On his return to St. Louis, the papers evidently not having been sent on to Macon by plaintiff, defendant wrote him this letter: "St. Louis, Mo., December 23, 1904. Dear Mr. Barrett: I inclose letter from which you can see my position at Macon. Candidly I don't see why you don't do what you agreed with me Tuesday. You can bet your life I would keep my word with you. If you owe me a thousand or vice versa I won't worry, either is perfectly good. My rheumatic ankle holds me here. Have asked Mr. Murison to see you for me Saturday a. m. Now, Mr. Barrett, just hold this as my obligation to pay you any sum we find on final investigation I owe you, but please send the notes Saturday. I hope to be able to go to farm Tuesday and look into it. If you won't do anything at least please notify me by phone at my expense. No. Main 4825. Respectfully, R. H. Kern." Plaintiff does not appear to have answered this letter until December 29th, when he wrote defendant as follows: "Mr. R. H. Kern, St. Louis, Mo.—Dear Sir: Yours of the 23d came to hand a little late, and after the documents in the matter mentioned had been forwarded by express to Macon. I have the bank's receipt for them and their remittance as well. The young man you met has not yet reached a point where he is satisfied that our figuring is correct. There is no doubt as to the $1,000, but it appears that in his computation he left out the interest on the $1,000, which has been running for several years. In a few days, if we find it has not been computed, we will send you a statement of the interest, and of course if you find we are correct, you will send me your check. Yours truly," etc.

It was admitted that the remittance referred to was the $2,234.42. This amount of $2,284.42, therefore, was not received until this 29th of December, 1904, on which date plaintiff's firm also wrote defendant as follows: "We have this day charged your account as per memorandum below. Yours respectfully, M. L. Barrett & Co." The memorandum reads as follows (of date December 29, 1904):

To interest on $2284.42 at 7 per cent. from 3—1—04....	$451 02	
Less interest on $1200 at 7 per cent. from 6—1—02 to 6—1—04	168 00	283 02

In accordance with agreements of May 12, 1900, and March 1, 1902.

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plaintiff a check, payable to his order, for $200, evidently on this interest account as set out in the memorandum of December 29th. On April 26th plaintiff wrote defendant this letter: "Just because in the hurry of business I assume you have forgotten it, I inclose a statement for the balance of the interest. I shall be glad to receive your check for the amount of it"—and along with this letter was inclosed a statement as follows:

Chicago, 4—26—05.

R. H. Kern, St. Louis, Mo., in Account with, M. L. Barrett, 219 Lake St.

Dec. 29—04	Int. due	$283 02
Apr. 2	By ck.	200 00
	Bal.	83 02

On May 19th defendant sent plaintiff a check as follows:

St. Louis, 5—19—1905. No.....

The National Bank of Commerce in St. Louis
Full all demands.

Pay to the order of M. L. Barrett.... $83.02
Eighty-three .....02/100 Dollars.
R. H. Kern.

This check was inclosed in a letter from defendant to plaintiff, dated May 18, 1905, reading as follows: "Dear Sir: Have never yet gotten report from banks. I inclose check for $83.02, assuming if eventually I am right you will return to me. I thank you. If you are right, how on earth were we so mistaken for years. Yours, R. H. Kern." On receipt of this letter plaintiff wrote defendant the following: "May 22, 1905. Mr. R. H. Kern, St. Louis, Mo. Dear Sir: I have yours of the 19th with check for $83.02, which amount I think will be found correct. At all events, it is open for correction. I am obliged to plead guilty to an inability to read the last two lines of your letter. I can get as far as 'if you are right how on earth.' The next sentence I cannot read and do not know whether it is Greek or Hebrew. Try it again, that I may learn the thought in your letter. Yours truly," etc.

The plaintiff testified, referring to this check of May 19th, that he had no recollection of it, and had certainly not noticed the words on it "Full all demands." He admitted it had been cashed through his bank. It was in evidence in the case that it was not until about June or July, 1905, that plaintiff discovered, as he claims, that there was $1,000 still due on the land contracts, which he testifies was first called to his attention by his brother-in-law, Mr. Potts, who was the original owner of the two tracts purchased by defendant. Whereupon he had the accounts gone over again by Mr. Aldrich, and, as the result of that, appears to have called the matter to the attention of the defendant. Defendant testified that he first heard from plaintiff that he claimed $1,000 still due, July 29, 1905. The letters which plaintiff and Aldrich wrote to defendant were all excluded by the court under the objection that they were "self-serving," but the only letter defendant appears to have written, whether to Aldrich or to plaintiff is not very clear, was introduced and read in evidence, and is as follows: "Oct. 8, 1905. Dear Sir: In answer to your several letters I have simply to say that I have paid the amount you claim. You have now rendered me two statements, and when acting on the first one, I wanted to take up what you said was due and you claimed that you had made a mistake and you went over the accounts very thoroughly, and I paid you the amount you then claimed was due. Several months afterward you come claiming a mistake. I never felt but what the original statement you gave me two years ago was correct, but inasmuch as I could not place my hands on my memoranda at that time, and had negotiated a loan on the property, I simply paid it because of my inability to get reports from the several banks with which I had done business. I infer from your letters that you have no memory about it at all, but are dependent upon the statements made you from time to time by your bookkeeper. Yours truly, R. H. Kern."

This is substantially all the testimony on the issue of accord and satisfaction. On the issue of what amount had been actually paid plaintiff testified, in the most positive and unequivocal terms, that the only amounts paid to him on account of the $5,484.42 due him was the $1,000 paid March 12, 1902, the $1,200 paid July 14, 1902, the $2,284.42 paid December 28, 1904, together with interest paid at various dates. That left owing him on account of the $5,484.42 due him under the contracts $1,000 and interest. Aldrich, who had been bookkeeper for plaintiff's firm during the period of the payments and until February, 1903, and had kept the private books of plaintiff, testified that there was no entry whatever on the books showing the payment of this $1,000, and that while he was with plaintiff, he had entered up all payments made by defendant on this account of which he had any knowledge.

On the part of defendant his testimony as to the payment of the full amount of $5,484.42, due plaintiff, was substantially as follows: Asked if he had made the payments called for under the contracts up to the 20th of December, 1904, he answered: "Yes, sir; I paid on these matters, as I thought, all but $1,200." Asked how he made the payments, he said: "Well, it is impossible—I had made them by checks or drafts one or the other. Sometimes it may have been a check. Sometimes it may have been a draft, as far as I recollect"; had paid Compton his $2,700 and interest. Asked to state what he had paid prior to the meeting in Chicago on December 20, 1904, he answered: "My recollection is I have paid something over $4,000 to Mr. Barrett. I have forgotten just the amounts in excess of that, $4,200, perhaps." His counsel, suggesting to him that he had made the payments by

checks, asked him what had become of the checks. He answered: "That I don't know, sir. They have become mislaid. I never had a bookkeeper in my life on anything, and these checks, as far as I know, are lost. I haven't been able to find them. I can't find the checks for the payments mentioned, except the $2,284.42." This, of course, referring to the $2,284.42 paid December 29, 1904, and this latter, as he afterwards stated, was paid, not by check, but by draft on the Macon bank. Asked how he accounted for the fact that he did not produce the checks which he had sent, he answered that it was simply because he had no system of keeping them. Some of the papers in the case are lost, and in that way, he said, he had no memorandum in reference to this, nor, would he suppose, in reference to anything; is not in the habit of keeping his checks very long; has no system about it; keeps no books; sometimes makes a memorandum; sometimes jots down something as payments being made, and things like that. Asked if he had been in the habit of drawing checks from a checkbook in his office, and keeping stubs to show the checks issued, he answered that he did both ways; sometimes drew from a checkbook, and kept a stub and marked what it was for; time and again would go to the bank, pick up a random check there, or draw a draft for whatever the amount might be, and hand it to the bank payable to the bearer; has no rule about the time for keeping checks; sometimes finds one that is 10 years old, and sometimes looks for one that is a year old and cannot find it; has made search for the checks covering this matter, and has not been able to find a single one of them, except a few produced at the trial (these are all interest checks); during the time covered by the transaction did business with four banks in Macon and three banks in St. Louis. Asked by his counsel how much money he had paid Mr. Barrett on these transactions, he answered: "My impression is that I have paid ———." Counsel for plaintiff interposing the objection that they wanted facts and not impressions, the court, over the objection of that counsel, allowed witness to proceed with his answer, which he did as follows: "Well, I felt sure I paid Mr. Barrett all that was due him except this thousand dollars that was due him when we met in Chicago. I was very confident at that time that I paid him that sum, but I have searched my records; and, being unable to find any memorandum of having paid him that, I, of course, am not willing to swear that I had paid Mr. Barrett that positively. It is only my impression that I had." That is, up to that time, but as he testified, he had since paid the $1,000, which was in dispute at Chicago, and that was not controverted; this $1,000 being included in the $2,284.42 then arranged for. Defendant further testifies that he had not kept with any regularity, or pretended that he had, copies of all the correspondence between himself and Mr. Barrett, and had produced all he could find.

On cross-examination plaintiff states that under the contracts he had agreed to pay $2,200 for one, and $6,000 for the other, of the two farms, making a total of $8,200; that the incumbrances on them were held by a Mr. Compton and by Mr. Barrett, Compton's amounting to $2,700, the balance going to Mr. Barrett. That is to say, the amount he stated as going to Barrett was $5,484.42, with interest added. Defendant testified that all this was in writing. Asked when he had made the first payment on this $5,484.42 to Barrett, he answered: "That I do not recollect." Asked how much the first payment was, he answered: "Well, my recollection is that it was something like a thousand dollars. I am not sure about that." Asked about the date that it was paid, he answered: "I think I made a payment in the spring of 1902. That is my recollection." That was the first payment, as he recollects it, and it was $1,000, and, according to a paper which is produced, his recollection is that it was made during the month of March, 1902; doesn't know whether that was paid by check or draft; has neither and no record of it; has looked for it, but cannot find it. Asked when he made the second payment, he answered: "Well, my recollection is that I made another payment of something like $1,200 during that summer; I don't remember what time." Reminded that other witnesses had said that it was made in July, 1902, he answered that he assumed that was correct. Asked if he did not have a check for that, he said that he did not recollect; might have it at his office, but did not have it with him in the courtroom. This $1,200 was the second payment. Asked when he made the third payment, he answered: "That I do not remember." Asked, "Do you remember to have made a third payment?" he answered, "Yes, sir; it is my recollection that I made a third payment." Asked when that was made, he answered: "Well, I don't know when it was made." Asked how he knew it was made, he answered: "I don't know it was made, any more than looking through my memorandum from time to time I find I have charged myself with having paid a thousand dollars additional some time between that payment in July and a year afterwards." Asked if he had the memorandum with him, he answered that he had not, whereupon, on motion of counsel for plaintiff, all the part of the answer about looking through his memorandum was stricken out. Asked if he had with him any evidence whatever of a payment made between the time that he paid the $1,200 and the time he paid the $2,284.42, he answered: "No, sir; I have nothing except a memorandum, which I have not been able to place my hands on, and which the court has ordered stricken out. I have nothing; I can't find that." Asked if he could, of his own knowledge and memory, independent of the memo-

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randum which he had not produced, testify that he made any payment between these times, he answered: "I am satisfied I made the payment. * * * Yes, sir; my memory is I did make the payment. You asked me how I knew it, as I understood you." Asked when he made it, he answered: "I don't know just what time. Some time between this payment of July, 1902, and 1903, as I recall it." Reminded that the next payment was in December, 1904, he answered that he understood that, and asked again to state when he paid any other sum than the three sums already mentioned, he answered: "I have told you that I cannot fix the time only as between July, 1902, and the year following." Asked how much it was he answered: "A thousand dollars, as I recall it." Asked how it was paid, he answered: "That I do not remember. By draft or check, as I usually paid them. I don't know. I can't find the check." Asked if he had any memorandum or books in which he had made the payments, he said: "Yes, sir; I had one, and I told you that I lost that; I am not able to find it"; was not able to produce it at the trial. Asked when he had last seen this memorandum, said: "I don't remember that"; recalls running over papers when he and Mr. Barrett had agreed on the $1,000 in September, 1903, and recognized the fact that he had made these payments. He was asked if he was willing to swear absolutely that he had paid that $1,000. He answered: "Yes, sir; I am willing to swear that I paid that $1,000," but repeats that he doesn't know when he paid it; doesn't remember how he paid it; doesn't remember whether he sent it by letter; doesn't remember whether he took it personally. Asked, since plaintiff in the case had testified positively that he had not received any other than the three payments, one for $1,000, another for $1,200 and the last for $2,284.42, whether it might not be possible that he was mistaken about having paid that other $1,000 he answered: "I don't think it would be rendered impossible, because Mr. Barrett might not remember it, if that is what you are asking." Asked if Mr. Barrett did not receive it—it might have been possible that he mailed it and Mr. Barrett had not received it—he answered that that might be possible; he didn't know about that. Asked if he had any receipt from Mr. Barrett for that $1,000, he answered: "No, sir; nor have I any receipt for the thousand dollars, or any receipt for the $1,200 that I know of"; has no letter from Mr. Barrett acknowledging the receipt of any payment made him on the principal sums; has no check or evidence whatever of the payment of that $1,000; had paid the $2,284.42 through the bank at Macon, and that was the last payment he made. The $1,000 was due Mr. Barrett, and not to any one else, and if he did not receive it, "it is still due him, of course" (said defendant); did not recall being in Chicago with $1,000 in money, although he may have been. Asked if he had gone to the various banks with which he was doing business at the time, and checked over with them to see whether or not he had paid out $1,000 that he was not able to account for along about the time he said he had paid this $1,000, he said he had not.

On redirect examination, defendant being asked as to what thousand dollars he meant in the letter to Barrett of December 23, 1904, by the expression, "If you owe me a thousand or vice versa I won't worry, either is perfectly good," he stated that it referred to the thousand dollars that he and Barrett had agreed on in Chicago in addition to the $1,200 that he (defendant) admitted at that time as owing to Barrett.

It is to be borne in mind that the thousand dollars involved in this suit, and the testimony relating to it, is not the thousand dollars that was under dispute at Chicago, December, 1904, the testimony all relating to a thousand dollars claimed to be due outside of that amount. No declarations or instructions were asked by either party or given by the court. The court found for plaintiff, and entered up judgment in his favor for $1,367.49. A motion for new trial was duly filed, overruled, and exceptions saved, and defendant appealed in due form.

Samuel G. Ray, for appellant. Bishop & Cobbs and John A. Harrison, for respondent.

REYNOLDS, P. J. (after stating the facts as above). 1. Counsel for defendant contend that there is absolutely no evidence to support the judgment in favor of plaintiff on the issue of payment. We have accordingly read all the evidence, as set out in the transcript, and are forced to the conclusion that this contention cannot be sustained. The burden of proving payments rests on defendant. Griffith v. Creighton, 61 Mo. App. 1, loc. cit. 4, is one of many cases so holding. He has not met it. It was said by counsel for plaintiff, during the course of an argument over certain testimony, that the defendant, Mr. Kern, "would be the last man, if he was convinced that that thousand dollars had not been paid at that time, to dispute it." We have set out substantially the testimony given by defendant as to the fact of payment, and accepting in full the indorsement of counsel for plaintiff of the high character of Mr. Kern, we are compelled to say that his own testimony falls far short of being a positive and unqualified statement that he has paid the amount called for under the contracts. Clearly, as a highly conscientious man, he would not swear to a matter in unequivocal terms, as to which he was not absolutely sure, and he did not do so. His testimony threw upon the very learned and careful trial judge the burden of determining between it and the positive testimony given by plaintiff. The trial judge found for plaintiff. We are bound by that finding.

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2. That resolves the case into one of accord and satisfaction, the burden of establishing which also rests on defendant. Oil Well Supply Co. v. Wolfe, 127 Mo. 616, loc. cit. 625, 30 S. W. 145. Whether there was an accord and satisfaction was also entirely a question of fact. If the trial of this case had been before a jury, it would have been for the court to have submitted to the jury, under proper instructions as to the essentials of an accord and satisfaction, the question of whether there had been accord and satisfaction. Oil Well Supply Co. v. Wolfe, supra; Robinson v. Railroad, 84 Mich. 658, 48 N. W. 205. So, therefore, the solution of that fact must also rest on the finding of the trial judge, if that finding is supported by any substantial evidence and there was no error of law. The accord and satisfaction here relied on is founded on the transaction at Chicago, December 20, 1904, and upon the words, "Full all demands," written over the check for $83.02, remitted by defendant to plaintiff. While it is true that those words are on this check, and that the check was cashed, an examination of the letter transmitting it, it seems to us, not only fell short of any intimation that it was intended to be in full of all possible claims and demands from plaintiff on defendant, growing out of this transaction, but that plaintiff most clearly did not so consider it, and did not accept it with any such understanding. Defendant in his letter of transmittal of this check wrote, in part: "I inclose check for $83.02, assuming if eventually I am right you will return to me." Plaintiff in reply wrote: "I have yours of the 19th with check for $83.02, which amount I think will be found correct. At all events it is open for correction."

Moreover, it was for a balance due on interest on the $2,284.42, from December 20, 1904, to April 29, 1905, remitted on demand for the interest. Extending it beyond interest and covering the matters then in dispute or controversy between the parties, it related to the issue of whether defendant, on December 20, 1904, owed $1,284.42 or $2,284.42. Neither party, in the discussion of that, had any other sum or demand in mind. The thousand dollars now in controversy was then not only unthought of, but unknown. There was then no controversy about that to be settled—it was not the subject of discussion, much less of settlement. Hence, treating this check as in full of all demands, it could only be regarded as in full of all demands then made and under mutual consideration. The question over this thousand dollars now in suit came up afterwards; it was a demand which rested on the contract, for a balance of $1,000 due on a contract; plainly demanding payment of $8,200. The statement, in response to which this check was transmitted, calls for $283.02, and was a statement of interest. Two hundred dollars had been previously paid and was credited, and the $83.02 was the balance due. It might well be that it related solely to the interest account. Turning to the letter of transmittal and to the one acknowledging its receipt, we find that even the matters then under discussion between the parties were still open to future adjustment and correction. Looking at the transaction in Chicago on December 20, 1904, and to the correspondence following that, we find that the parties very carefully left the door of settlement of all matters wide open—each carefully reserving the right of future adjustment. It is of the very essence of accord and satisfaction that it finally and definitely closes the matter covered by it. Nothing of or pertaining to that matter must be left unsettled or open to further question or arrangement. In law it is a new contract, founded on a new consideration, and, to be enforceable, it must have all the essential elements of a contract, among them mutuality and certainty.

It cannot be said that there was a fair and well-understood compromise of any and all demands that might arise under these contracts, and without that there is no valid accord and satisfaction. Dry Goods Co. v. Goss, 65 Mo. App. 55, loc. cit. 61. The proposition that an accord and satisfaction to be binding must be mutually agreed to and accepted as accord and satisfaction is elementary. Unless paid, this thousand dollars was unquestionably due, and the payment of a smaller sum was not a satisfaction of it, even if accepted by plaintiff. Pollman Coal Co. v. St. Louis, 145 Mo. 651, loc. cit. 656, 47 S. W. 563; Wetmore v. Crouch, 150 Mo. 671, loc. cit. 683, 51 S. W. 738; Winter v. K. C. Cable Ry. Co., 160 Mo. 159, loc. cit. 178, 61 S. W. 606; McCormick v. City of St. Louis, 166 Mo. 315, loc. cit. 345, 65 S. W. 1038. Therefore the conclusion of the trial judge that accord and satisfaction has not been proven is binding upon us, there being evidence to support it.

Counsel for defendant have cited many and quoted some cases defining what constitute accord and satisfaction. An examination fails to bring this case within them.

The judgment of the trial court is affirmed. All concur.

STATE ex rel. SANKS v. JOHNSON et al.

(Springfield Court of Appeals. Missouri. Oct. 12, 1909.)

1. CERTIORARI (§ 29*)—NATURE OF REMEDY—CONTROL OF INFERIOR COURTS.

An inferior tribunal or officer having jurisdiction to act, and invested with discretionary powers, cannot be controlled by certiorari by a superior tribunal, however improperly the discretionary power has been exercised, but an inferior court has no unrestrained discretion to act in matters over which it has no jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 42; Dec. Dig. § 29.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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2. CERTIORARI (§ 28*)—NATURE OF REMEDY.

Certiorari is the proper remedy to restrain inferior courts or public officers when they act in excess of their jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

3. COURTS (§ 207*)—ORIGINAL JURISDICTION—SUPERINTENDING CONTROL.

Under Const. Amend. 1884, § 4 (Ann. St. 1906, p. 244), providing that the provisions as to the powers of the St. Louis Court of Appeals shall apply to such additional courts or appeal as may be created, and Rev. St. 1899, § 1598 (Ann. St. 1906, p. 1194), providing that all courts shall have power to issue writs necessary in the exercise of their respective jurisdiction, etc., the Springfield Court of Appeals has original jurisdiction to issue the writ of certiorari and other remedial writs, and to determine the same, and has a superintending control over all inferior courts of record in counties of its district.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

4. COURTS (§ 183*)—COUNTY COURTS—JURISDICTION.

The county court is of statutory origin, and has no common-law or equitable jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 454; Dec. Dig. § 183.*]

5. CERTIORARI (§ 14*)—COUNTY COURTS—SUPERINTENDING CONTROL.

The action of the county court is under the control of superior courts, exercised by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 19; Dec. Dig. § 14.*]

6. CERTIORARI (§ 5*)—ADEQUACY OF OTHER REMEDY.

The remedy by certiorari is not restricted to cases where no appeal lies, or where no writ of error may issue; but, where certiorari is the proper remedy in point of promptness and completeness, it affords an adequate remedy for an excess of jurisdiction, or the exercise by an inferior court or public officer of unauthorized powers.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. § 5.*]

7. COURTS (§ 231*)—JURISDICTION—SUPERINTENDING CONTROL.

The Court of Appeals may issue certiorari to review an order of the county court contracting for the employment of one convicted of the felony of having intercourse with an unmarried female between the ages of 14 and 18 years, in violation of Rev. St. 1899, § 1838 (Ann. St. 1906, p. 1272), and punished by imprisonment in the county jail, notwithstanding Const. Amend. 1884, § 5 (Ann. St. 1906, p. 244), providing that in all causes reviewable by the Supreme Court appeals shall lie from the trial court directly to the Supreme Court, and in all such cases it shall exercise exclusive superintending control, and Const. art. 6, § 12 (Ann. St. 1906, p. 218), providing that appeals shall lie to the Supreme Court in cases of felony.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 651; Dec. Dig. § 231.*]

8. CRIMINAL LAW (§ 27*)—"FELONY"—"MISDEMEANOR."

Under Rev. St. 1899, § 2393 (Ann. St. 1906, p. 1466), defining "felony" as any offense for which the offender shall be liable to be punished by imprisonment in the penitentiary, etc., and section 2395, defining a "misdemeanor" as any offense punishable by fine or imprisonment in the county jail, or both, one convicted of violating section 1838 (page 1272), providing that one carnally knowing an unmarried female between the ages of 14 and 18 years shall [illegible] deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary, or by imprisonment in the county jail or by fine, or both, is convicted of a felony though he is punished by imprisonment in the county jail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29–31; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 3, pp. 2736–2744; vol. 8, p. 7662; vol. 8, pp. 4533–4535; vol. 8, p. 7722.]

9. CONVICTS (§ 10*)—CONTRACTING FOR LABOR—STATUTES.

Rev. St. 1899, § 1791 (Ann. St. 1906, p. 1249), providing that the county court shall have the power to provide for the employment of all persons convicted of a misdemeanor, applies only to persons convicted of a misdemeanor, and the county court, undertaking to provide for the employment of one convicted of a felony, acts in excess of its jurisdiction, and may be controlled by certiorari.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 22; Dec. Dig. § 10.*]

10. CONVICTS (§ 10*)—CONTRACTING FOR LABOR—STATUTES.

Rev. St. 1899, §§ 1791–1793 (Ann. St. 1906, p. 1249), empowering the county court to provide for the employment of persons convicted of a misdemeanor, without any specific authority to allow the contractor to take the prisoner out of the custody of the sheriff or jailer, and authorizing the county court to cause all persons serving sentences in the county jail, or who are detained therein for nonpayment of a fine to work on public roads, etc., do not authorize the county court by contract to deprive the sheriff and jailer of the custody of prisoners, and all contracts for the employment of prisoners must be made subject to this restriction.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 22; Dec. Dig. § 10.*]

11. STATUTES (§ 181*)—CONSTRUCTION—RESULTS.

The effect and consequences of any proposed construction of the law may be considered in ascertaining the probable intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 263; Dec. Dig. § 181.*]

Certiorari by the State of Missouri, on the relation of John H. Sanks, against C. L. Johnson and others, Justices of the County Court of Texas County, to review the action of the county court in contracting for the employment of a prisoner confined in the county jail. Proceedings of the county court annulled.

Dooley, Hiett & Millard and Samuel J. Salyer, for relator. Lamar & Lamar and Hamlin & Seawell, for respondents.

NIXON, P. J. This is an action by the state of Missouri, at the relation of John H. Sanks, prosecuting attorney of Texas county, against the Texas county court. The record in this case shows that at the May, 1908, term of the Texas county circuit court, one Robert Pipkin was tried and convicted on the charge of having had sexual intercourse with one Ellen Bailey, an unmarried female of previous chaste character, between the ages of 14 and 18 years, and his punishment was by the jury assessed at three months' imprisonment in the

county jail of said county, and that he pay the costs of said prosecution, amounting to $306.30; that on appeal to the Supreme Court of the state of Missouri the judgment against him was affirmed. Subsequently, a capias execution was duly issued from the Texas circuit court to the sheriff of that county, directing him to apprehend and confine the said Robert Pipkin in the Texas county jail for a term of three months, and to collect the amount of costs taxed in said case. Said Pipkin was apprehended and committed to the common jail of Texas county to serve out his sentence.

On the 2d day of August, the county court of Texas county entered into a contract and agreement of record with one Edward Starns, a brother-in-law of the said Pipkin, conditioned that if the said Starns would pay the county court the sum of $308—the amount of the costs in said case—the county court would make an order releasing the said Robert Pipkin from the custody of the sheriff of said county, and deliver him to the said Edward Starns. The order of the county court is as follows:

"In the Matter of Robert Pipkin.

"Whereas, Robert Pipkin has heretofore been convicted of a misdemeanor and his punishment assessed at three months in the county jail, and whereas, Edward Starns has offered to the court to employ said Robert Pipkin, and has offered to the court the sum of $308 for the work and services of the said Robert Pipkin for the term of three months: It is hereby ordered by the court that the services of the said Robert Pipkin be let to the said Edward Starns for the term of three months, and that the said Robert Pipkin is hereby ordered turned over to the custody of the said Edward Starns to remain in his custody, at the call of this court, for the term of three months from this date.

"Now comes the said Edward Starns and files his bond in the sum of $308, as is above provided, which is by the court approved, which bond is as follows:

"Bond.

"Whereas, Robert Pipkin has been convicted of a misdemeanor, and his punishment assessed at three months in the county jail, and whereas, he has been sentenced to said term, and whereas, his service has been let to, and he has been awarded to, the custody of Edward Starns for three months, for the sum of $308, now, therefore, know all men by these presents that we the undersigned, Edward Starns as principal and ——— as sureties, are held and firmly bound unto the county of Texas in the sum of $308.

"The conditions of the above bond are such that if the said Edward Starns shall pay to the county of Texas on or before three months from this date and shall have the body of the said Robert Pipkin when and where this court may require, then the above obligation to be void, otherwise to remain in full force.

"Ed. Starns. [Seal.]
"M. F. Pipkin. [Seal.]
"P. W. Groce. [Seal.]
"Robt. Lamar. [Seal.]

"Approved this August 2, 1909.
"C. L. Johnson, P. J. Co. Court."

Afterward, on the 4th day of August, 1909, the sheriff of Texas county, James W. Cantrell, in obedience to the order of the county court, released the said Robert Pipkin from jail, and from his custody, and delivered him, under said contract, to the said Edward Starns. The question presented by this record is whether the county court of Texas county had authority, under the facts shown, to enter into the contract with Edward Starns for the employment of Robert Pipkin, a prisoner, and release him from the custody of the sheriff, under the provisions of section 1791 Rev. St. 1899 (Ann. St. 1906, p. 1249). This section is the only statute upon which the county court relies for its authority to make the contract in question.

Several objections are made to the issuance by this court of the writ of certiorari. It is urged, among others, that the authority of the Texas county court to make the contract for the services of the convict, Robert Pipkin, was discretionary, and that a superior court has no right, by certiorari, to control such discretion. It is no doubt a well-established principle of law, sustained by an abundance of authorities in this and other states, that where an inferior tribunal or officer has jurisdiction to act, and is invested with discretionary powers, such action, however improperly exercised, cannot be controlled by a superior tribunal. In the Matter of the Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337; State ex rel. v. Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; State ex rel. v. Reynolds, 190 Mo. 578, 89 S. W. 877; Journeay v. Brown, 26 N. J. Law, 111; In re Lanehart, 32 App. Div. 4, 52 N. Y. Supp. 671; State v. Second Judicial District of Silver Bow County, 15 Mont. 324, 39 Pac. 316, 27 L. R. A. 392, 48 Am. St. Rep. 682. These cases, as will appear from examination, were decided upon a state of facts where the court or officer whose action was brought into question had jurisdiction to act, and are all based on that assumption, and, of course, would apply in this case if an examination of the statute should show that the Texas county court, in the proceedings under consideration, had jurisdiction. It would be a palpable absurdity to say that a court had unrestrained discretion to act in matters over which it had no jurisdiction.

The principle that certiorari is the proper remedy to restrain inferior courts or public officers when they act in excess of their jurisdiction seems to be settled in this state beyond further controversy. State ex rel.

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45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653; State ex rel. v. Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787; State ex rel. v. Moniteau County Court, 45 Mo. App. 387; State ex rel. v. Selby, 133 Mo. App. 553, 113 S. W. 682; State ex rel. v. Lichta, 130 Mo. App. 284, 109 S. W. 825. This Court of Appeals has original jurisdiction to issue the writ of certiorari and other remedial writs, and to hear and determine the same, and has a superintending control over all inferior courts of record in the counties of its district. Constitution Amend. 1884, § 4 (Ann. St. 1906, p. 244); section 1598, Rev. St. 1899 (Ann. St. 1906, p. 1194); State ex rel. v. A. W. Allen, 45 Mo. App. 551; School District v. Charles Burris et al., 84 Mo. App. 654. The county courts of Missouri are creatures solely of statutory origin, and have no common-law or equitable jurisdiction. State ex rel. v. Madison County Court, 136 Mo. 323, loc. cit. 326, 37 S. W. 1126. The action of these courts is under the control of superior courts, and is exercised by the writ of certiorari. 6 Cyclopedia of Law and Procedure, 737. Furthermore, we cannot accept the view that the writ of certiorari is a remedy of such limited powers that it is restricted to cases only where no appeal would lie or writ of error could issue. On the contrary, if a writ of certiorari, in point of promptness and completeness, would afford an adequate remedy for an excess of jurisdiction, or the exercise by an inferior court or public officer of unauthorized powers, its employment is fully justified. State ex rel. v. Guinotte, 156 Mo. 513, loc. cit. 526-527, 57 S. W. 281, 50 L. R. A. 787; State ex rel. v. John D. Dowling et al., 50 Mo. 134, loc. cit. 136.

The right of this court to issue the writ is further challenged because of the provisions of section 5, of the Amendment to the Constitution of 1884. It is claimed that under this section of the Constitution, if Robert Pipkin was convicted of a felony, then the proceedings of the Texas county court were under the exclusive superintending control of the Supreme Court. Section 5 provides that in all causes reviewable by the Supreme Court appeals shall lie from the trial court directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such appeals, and in all such cases exclusively exercise superintending control over such courts. Section 12, art. 6, of the Constitution (Ann. St. 1906, p. 218) provides that appeals shall lie to the Supreme Court in an enumerated class of cases; among others, in cases involving title to real estate, and in all cases of felony. As Robert Pipkin had been tried for a felony, convicted and sentenced, and upon appeal to the Supreme or that an appeal could have been taken from the decision of the county court to the Supreme Court. No case has been cited where such a conclusion has been sustained. That the county court, in determining their right to hire out Pipkin, should inquire whether he was convicted of a felony or a misdemeanor does not affect the jurisdiction of this court. The proceedings of the Texas county court were in no way a trial, and in no way determined the guilt or innocence of Robert Pipkin. That matter had already been determined by the circuit court of Texas county, and its decision affirmed by the Supreme Court. It was no longer a matter open for trial or investigation, and no such trial or investigation was had before the county court.

The facts as disclosed by this record, as previously stated, are as follows: Robert Pipkin was convicted under section 1838, Rev. St. 1899 (Ann. St. 1906, p. 1272), of the crime of carnally knowing an unmarried female of previous chaste character between the ages of 14 and 18 years, and his punishment duly assessed at three months' imprisonment in the county jail; that he was committed to the sheriff of Texas county to serve out his sentence, and he was, at the time the contract in question was made, legally in the custody of the sheriff and jailer under this sentence.

The principle that underlies this case, and upon which the issuance by this court of the writ of certiorari is to be determined, depends upon whether the statute gives the county court any authority to contract for the employment of said Robert Pipkin, and remove him from the custody of the sheriff to that of the contractor. Section 1791 under consideration, provides that the county court "shall have the power to provide for the employment of all persons convicted of a misdemeanor and who may be sentenced to imprisonment in the county jail, or who may be committed to the county jail for nonpayment of fine." This provision of the statute, by its very terms, applies only to persons convicted of a misdemeanor, and under well-known principles of interpretation, by naming one class of persons, excludes all others. By no process of legal construction can it be claimed that the authority here given extends to and includes persons convicted of felony. The conviction of Robert Pipkin for the crime defined in section 1838 of the Revised Statutes of 1899, although the punishment assessed was imprisonment in the county jail, was a conviction for a felony, and not a misdemeanor. Our statute in express terms defines the word "felony" so plainly as to leave no shadow of doubt as to its meaning. Section 2393 of the Revised Statutes of 1899 (Ann. St. 1906, p. 1466) is as follows: "Sec. 2393.

Felony defined.—The term 'felony' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary and no other." This section has been repeatedly construed by the courts of this state, and it has been uniformly held that an offense that may be punished by imprisonment in the penitentiary, although a fine or jail sentence may be inflicted, or is in fact inflicted, will not reduce the crime to the grade of a misdemeanor. State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Johnston v. State, 7 Mo. 183; Ingram v. State, 7 Mo. 293; State v. Green, 66 Mo. 631; State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; State v. Gilmore, 28 Mo. App. 561; State v. Melton, 117 Mo. 618, 23 S. W. 889. Furthermore, the statute has also defined a misdemeanor. Section 2395 of the Revised Statutes of 1899 is as follows: "Sec. 2395. 'Misdemeanor.'—The term 'misdemeanor,' as used in this or any other statute, shall be construed as including every offense punishable by fine or imprisonment in a county jail, or both." And further, to make assurance doubly sure, section 1838 of the Revised Statutes of 1899, under which Robert Pipkin was tried and convicted, declares that any person convicted of such crime "shall be deemed guilty of a felony." Therefore, from every point of view, it is demonstrated that the county court undertook, under section 1791, to provide for the employment of a person convicted of a felony, and in so doing it unquestionably acted in excess of its jurisdiction.

The safeguarding of great public interests requires at our hands the development of another view of this case. The protection of life, liberty, and property, and the orderly and effective administration of the criminal law, is always a matter of paramount importance to society. It is this consideration that gives importance to an authoritative construction of sections 1791, 1792, and 1793 of the Revised Statutes of 1899, in order to determine whether they authorize county courts, by contract, to remove prisoners, duly sentenced, from the custody of the sheriff or jailer. Section 1791, as stated, provides that county courts shall have the power to provide for the employment of persons convicted of a misdemeanor, but gives no specific authority to allow the contractor to take the prisoner out of the custody of the sheriff or jailer. Section 1792 authorizes county courts to cause all persons legally convicted and serving sentences in the county jail, or who are detained therein for nonpayment of a fine, to work on the public roads or break rock for macadamizing purposes. Section 1793 provides that the county court may order the sheriff or marshal to cause all such persons to be put to work on public roads, highways, turnpikes, or other public works or buildings in said county.

In none of these statutes is there express authority given the county courts to remove prisoners from the custody of the sheriff or jailer, and deliver them to any contractor. If such was the intention of the Legislature, such intention can only be arrived at by a judicial construction of these statutes. We are persuaded that such was not the intention of the Legislature in enacting these statutes. The practical effect of such a construction would be, in many cases, to commute the jail sentence of the prisoner to a discharge on payment of costs or giving security for costs. Certainly such a law would open the door to intolerable abuses and public scandals. If, as is claimed in this case, the contractor was a relative or friend of the prisoner, and was allowed to have his custody, a convict who after a long and expensive trial had been finally convicted and sentenced to a term of imprisonment could, with the consent of the contractor, be turned loose upon society. He could expiate his crime against society while on fishing excursions and picnic trips. Again, there is no authority given by which the contractor, if disposed, could compulsorily detain the prisoner for whose services he had contracted, or, in case of his flight, recapture the prisoner. It is not to be presumed that the Legislature intended to enact such an absurd and unreasonable law, and to allow the county court by its contract to reward instead of punishing criminals. Courts will not construe laws so as to make their operation absurd and unreasonable. State ex rel. v. St. L. & S. F. R. Co., 105 Mo. App. 207, 79 S. W. 714; Hilgert v. Barber Asphalt Paving Co., 107 Mo. App. 385, 81 S. W. 496; Citizens' National Bank v. Graham, 147 Mo. 250, 48 S. W. 910; City of St. Joseph v. Israel Landis, 54 Mo. App. 315.

The effect and consequences of any proposed construction of a law may be considered in ascertaining the probable intention of the lawgivers. Bowers v. Smith, 111 Mo. 45, loc. cit. 56, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; Kane et al. v. K. C., F. S. & M. R. Co., 112 Mo. 34, 20 S. W. 532; Choteau v. M. P. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; State ex rel. v. Slover et al., 126 Mo. 652, 29 S. W. 718. Hence we conclude that under none of the sections of the statutes has a county court any authority, by contract, to deprive the sheriff and jailer of the county of the custody of the convict, and all orders and contracts for the employment and working of prisoners, authorized by the sections of the statutes considered, must be made subject to this restriction.

It is therefore adjudged by this court that the contract made by the Texas county court with Edward Starns for the employment and services of Robert Pipkin, and the release of the said Robert Pipkin from the custody of the sheriff of Texas county, and all the orders and proceedings of such county court thereunder, be quashed, vacated, and annulled. All concur.

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1. CONTRACTS (§ 303*)—BREACH—EXCUSES.
While, when the law creates a duty, and the party is disabled to perform it without any fault on his part, and he has no remedy over, the law will excuse him, yet where by his own contract he creates a charge or duty on himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, since he might have provided against it by his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

2. CONTRACTS (§ 147*)—CONSTRUCTION.
The cardinal rule for the interpretation of contracts is that the intention of the parties shall be effectuated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730–743; Dec. Dig. § 147.*]

3. INSURANCE (§ 146*) — CONTRACTS — CONSTRUCTION.
Insurance contracts must be liberally construed in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

4. INSURANCE (§ 146*)—FORFEITURES.
In order to work a forfeiture under an insurance contract, it must clearly appear that the matter was within the contemplation of the parties at the time the contract was entered into; and, if the question be doubtful, the doubt must be resolved against the insurer, and in favor of effectuating the indemnity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

5. INSURANCE (§ 539*)—ACCIDENT INSURANCE —NOTICE OF DISABILITY.
Where insured under an accident policy was, by reason of his injuries and of the administration of opiates in the treatment thereof, rendered unconscious for the period of three weeks, he was excused from complying with a condition of the policy requiring written notice of injuries to be given within 10 days, and a notice given within a reasonable time after insured became conscious was sufficient, especially in view of the fact that the policy did not include a stipulation requiring compliance therewith as to notice under such circumstances.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328–1336; Dec. Dig. § 539.*]

6. INSURANCE (§ 646*)—ACCIDENT INSURANCE — EXTRAHAZARDOUS OCCUPATION — BURDEN OF PROOF.
If, under an accident policy, a certain occupation was classed in the manual of defendant association as hazardous, rendering a higher rate of premium necessary, or affording a lesser amount of indemnity with the same premium than that pertaining to the ordinary occupation of insured, it was a matter within the knowledge of insurer, and the burden rested on it in an action on the policy to establish the same.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1653, 1654; Dec. Dig. § 646.*]

7. INSURANCE (§ 146*) — POLICY — CONSTRUCTION.
The conditions of an insurance policy, providing for the forfeiture of indemnity if insured engage in an occupation or act other than that mentioned in the policy, are strictly construed against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 295–296; Dec. Dig. § 146.*]

borers about oil wells, under an extra hazard did not amount to such classification of labor in handling gasoline, there being no specification as to the handling of gasoline.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 531.*]

9. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.
In an action on an accident policy, providing that if insured was injured while engaged in an act or occupation classified as more hazardous than that for which the policy was issued, he should receive only the indemnity for the more hazardous occupation, there being no evidence that plaintiff was injured while so engaged, any inaccuracy in submitting the question whether he was so engaged when injured was harmless to the insurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Circuit Court, Knox County; Charles D. Stewart, Judge.

Action by David J. Roseberry against the American Benevolent Association. Judgment for plaintiff, and defendant appeals. Affirmed.

O. D. Jones and E. S. Puller, for appellant. F. H. McCullough and C. R. Fowler, for respondent.

NORTONI, J. This is a suit on an accident insurance policy. Plaintiff recovered, and defendant appeals.

It appears plaintiff was insured in the defendant company for the period of one year in consideration of $1 per week premium paid by him. Plaintiff was insured as a railroad pumpman, and under the defendant's classification of risks relating to that vocation. The policy vouchsafed insurance at the rate of $35 per month during the period of total disability, provided the insured received bodily injuries solely through external, violent, accidental, and involuntary means which should produce visible marks upon his body, and, independently of all other causes, immediately, totally, and continuously disable him from performing any kind of labor or business. It was further provided that in no case should the indemnity exceed 12 consecutive months. Plaintiff was employed as a railroad pumpman at the time of his injuries. From this we infer it was his duty to attend to the pumping of water into the railroad water tank for the purpose of replenishing the supply of locomotives. He performed the service at night. Among other things, the railroad company maintained at the place of plaintiff's employment a small gasoline engine. This engine was not used in connection with the pumping of water, but instead was maintained for the purpose of hauling cars of coal into the coal chute there situated. It seems the railroad maintained a coal chute at this point where its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

locomotive engines received coal. It was necessary, every few days, to replenish the supply of coal in the chutes, and to do this cars laden therewith were placed therein and unloaded. When it was necessary to remove a car of coal from the side track into the coal chutes, plaintiff would operate the gasoline engine referred to for that purpose. His duties in respect of this engine may not have been parcel of the duties pertinent to a railroad pumpman, generally speaking; nevertheless such duties were incidental to his employment in the present instance, and he was required by the railroad company to perform them. While engaged in carrying a bucket of gasoline to replenish the gasoline engine, he spilled a considerable quantity of the fluid upon his trouser legs. His trousers became saturated therewith from his knees to his ankles. The gasoline with which his trousers were thus saturated became ignited from the fire in his lantern, which was near. This resulted in burning his limbs from the ankles to about four inches above his knees so severely as to partially roast the flesh. The physicians testified, not only was the skin of his limbs destroyed, but the muscles were severely burned as well. The testimony tends to prove that as a result of the pain incident to the burn, plaintiff became unconscious. The attending physicians testified that he was immediately placed under the influence of opiates, and so continued between two and three weeks. He was confined to his bed thereafter for more than eight months, and rendered wholly unable to perform any kind of labor or service for more than 14 months after the injury. In fact his disability was total for a period greater than the full term for which indemnity was provided in the policy. Although the policy required that in case of accidental injury, as above indicated, the insured should give defendant company written notice thereof within 10 days thereafter, it appears no notice whatever was communicated to defendant in that behalf until 19 days after the accident occurred. The stipulation in the policy touching this matter is to the effect, by its acceptance, plaintiff agreed "that notice in writing on blanks furnished by the association with full particulars of any disability or death for which claim is to be made, must be delivered to the association at St. Louis, Missouri, within ten days after the beginning of said disability in order to entitle the member to indemnity." This provision of the policy is invoked by the defendant, and it is urged that plaintiff is precluded thereby from any recovery on the claim asserted, for the reason the notice referred to was not given until 19 days after the date of the injury. To excuse himself in respect of this matter plaintiff himself testified that he was in an unconscious state of mind from the time of his injury for nearly three weeks thereafter. This condition of mind was induced by reason of the severity of his burns and the opiates administered by the physicians in order to allay his sufferings. The two physicians who attended him gave testimony to the same effect. It appears notice was given to the company forthwith after the plaintiff's mind was relieved from the influence of the opiates. It is argued on the part of defendant that these facts are not sufficient to relieve the plaintiff of the duty imposed upon him by the contract of insurance. It is said that where a person voluntarily assumes an obligation by contract, he is bound to perform it or suffer the consequence, notwithstanding that accident or necessity enforced his failure to perform, and that this is true for the reason he might have provided against such by contract. There can be no doubt that the condition of the policy above quoted requiring notice to the company within 10 days after the injury is a condition precedent to the right of the plaintiff to recover, and as a rule, failure to perform such condition within the time and manner specified, invalidates a claim to indemnity. McFarland v. U. S. Accident Ass'n, 124 Mo. 204, 27 S. W. 436; Ins. Co. v. Kyle, 11 Mo. 278, 289, 49 Am. Dec. 74; McCullough v. Ins. Co., 113 Mo. 606, 21 S. W. 207; 2 Bacon on Benefit Societies (3d Ed.) § 505. It must be conceded that the doctrine urged by defendant obtains in our law.

The question in respect of duties assumed by a party through his contract, which is neither immoral nor against public policy, was determined at an early date in the case of Paradine v. Jane, Aleyn's Rep. of Cases before the King's Bench, 27. It is said in that case: "When the law creates a duty, and the party is disabled to perform it, without any default in him, and he has no remedy over, the law will excuse him. But when the party by his own contract creates a charge or duty upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." The rule obtains with equal force in our law, and has been frequently quoted and affirmed. See Whittemore v. Sills, 76 Mo. App. 248, 251; Davis v. Smith, 15 Mo. 467; Harrison v. Mo. Pac. Ry. Co., 74 Mo. 364, 371, 41 Am. Rep. 318. However this may be, in respect of insurance contracts, the courts have modified the severity of the doctrine referred to by appropriate application of other pertinent principles which obtain, with more or less influence, in aid of effectuating the indemnity vouchsafed therein. The fundamental idea in insurance is that of indemnity. It is the prospect and hope of indemnity in the case of peril and loss which induces the insured to part with his means, and enter into the contract on the one hand, and it is the offer and sale of indemnity against loss which renders to the insurer the means to support his business and accumulate profits. The cardinal rule for the interpretation of contracts being that the inten-

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tion of the parties shall be effectuated, the courts have evolved a system of principles from the elements of natural justice which inhere in the common law, peculiar to insurance contracts, to the end of aiding the idea of indemnity vouchsafed therein. Among others, it is the rule that insurance contracts shall be construed liberally in favor of the insurance and against the insurer. This doctrine obtains, too, with peculiar force in respect of conditions contained in such contracts which operate thereon subsequent to the fact of loss thereunder. In other words, the rule enjoins that such interpretation of the contract shall be given as will effectuate, and not destroy, the indemnity, unless the express words contained therein evince that the parties clearly contemplated to the contrary. Lewine v. Sup. Lodge, K. of P., 122 Mo. App. 547, 99 S. W. 821; McFarland v. Accident Ass'n, 124 Mo. 204, 216, 27 S. W. 436; McNally v. Ins. Co., 137 N. Y. 389, 33 N. E. 475; Woodmen Accident Ass'n v. Pratt & Byers, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777.

And then, too, a rule of universal application obtains here. It is a principle always pertinent where forfeitures are sought. Here the principal features of the contract have been fully executed. All of the premiums have been paid, the loss has accrued, and a forfeiture of the plaintiff's right is sought because of his failure to perform a condition of the policy operating thereon after the fact of the loss. Forfeitures are not favored in the law. Therefore, in order to work a forfeiture under a contract, it must clearly appear that the matter was within the contemplation of the parties at the time the contract was entered into; and, if the question be doubtful, the doubt must be resolved against the insurer and in favor of effectuating the indemnity vouchsafed by the policy. Lewine v. Sup. Lodge, K. of P., 122 Mo. App. 547, 560, 99 S. W. 821; McFarland v. U. S. Accident Ass'n, 124 Mo. 204, 217, 27 S. W. 436. The principle obtains alike in another form in respect of forfeiture sought under statutes and by-laws. Albers v. Merchants' Exch. (Mo. App.) 120 S. W. 139. Now it must be conceded that by a literal interpretation of the words of the policy requiring notice to be given within 10 days after the accident, no exception whatever appears therein touching a case where the accidental injury wholly incapacitated the insured to perform the condition. It must be conceded as well that no express words therein require that such notice shall be given to the insurer, even though the happening of the very contingency insured against renders notice impossible, unless the general words suffice to that end. In such circumstances we believe that, by attending to the principle which directs forfeitures shall not be adjudged except in cases obviously intended or clearly within the terms of the contract, and to the principle directing the court to such an interpretation as will effectuate the purpose of awarding the indemnity rather than to destroy it, the case should be treated as one not contemplated by the parties upon entering into the contract. In other words, it not appearing to have been expressly provided for therein, we are of the opinion that the language used requiring notice within 10 days did not, as a matter of law, include a stipulation requiring compliances therewith as to notice under the circumstances presented, and that notice given within a reasonable time after plaintiff became conscious will be sufficient.

There are numerous well-considered authorities in support of this conclusion. See Comstock v. Fraternal Accident Ass'n, 116 Wis. 382, 93 N. W. 22; Woodmen Acct. Ass'n v. Pratt & Byers, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; Ins. Companies v. Boykin, 12 Wall. 433, 20 L. Ed. 442; Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135; 2 Bacon, Benefit Societies (3d Ed.) § 504. It is very true there are high and respectable authorities to the contrary. These cases proceed in affirmance of the doctrine that if a party assumes an obligation by contract, he should be held to discharge it, notwithstanding circumstances which render it impossible, for the reason he should have provided for such contingency. A notable authority supporting this doctrine is that of Gamble v. Accident Ins. Co., 4 Ir. R. L. C. 204. In that case the stipulation requiring such notice was a condition precedent, and the omission to give notice of death within the time, even when the death was instantly caused by the accident, was held to be a complete defense. It was said that, although the insured because of his death could not give notice, it might have been given by any person interested in the policy. See, also, Patton v. Employers' Liability Ass'n, 20 L. Rep. (Ir.) 93; Martin v. Equitable Accident Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; 2 Bacon, Benefit Societies (3d Ed.) § 405. But, as said by Mr. Bacon (section 505), this is regarded as too strict an application of the rule. Indeed it is so harsh in its application as to operate a complete destruction of the indemnity vouchsafed in the policy by the occurrence of the very event against which the insurer agrees to indemnify. The policy of the law is to maintain contracts, and enforce the rights of parties thereunder when this can be done without offending the ascertained intention of the contracting parties or some legal principle. Therefore, in accord with the principles above discussed, it was held by the Supreme Court of Nebraska, where the accident resulted in concussion of the brain, causing mental derangement, that during the time of such derangement the duty of giving notice enjoined upon the insured by the policy was excused. Woodmen Accident Ass'n v. Pratt & Byers, 62 Neb. 672, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777. To the same effect, see Comstock v. Fraternal Accident Ass'n, 116

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States said, in a fire insurance case, that insanity of the insured would operate to excuse him from giving notice of the loss which the policy enjoined. Insurance Companies v. Boykin, 12 Wall. 443, 20 L. Ed. 442. We believe, too, the principle affirmed by our Supreme Court in McFarland v. U. S. Accident Ass'n, 124 Mo. 204, 27 S. W. 436, is an analogous authority for the conclusion reached in respect of the matter now in judgment.

It appears plaintiff was mentally incapacitated as a result of the accident, and the effect of the opiates administered because of the same, for nearly three weeks thereafter, and we believe these facts to be sufficient in law to excuse him from performance of the condition requiring notice during such period, and that it was sufficient to communicate the same, as he did, immediately after the disability was removed. We believe, too, the judgment of the court should be placed upon the grounds that there are no express words in the policy requiring notice in a case circumstanced as this one is, and that therefore, in aid of the insurance and to the end of avoiding a forfeiture, it should be adjudged that it does not appear from the general words employed the circumstances presented were within the contemplation of the parties at the time the contract was entered into, for the reason such general words do not, as a matter of law, include the circumstances of the case. On this score we are impressed with the reasoning of the court in Comstock v. Fraternal Ass'n, 116 Wis. 382, 93 N. W. 22.

As stated before, plaintiff was insured as a railroad pumpman, at the rate of $35 per month for total disability. For this insurance he paid a premium of $1 per week. His injuries having been received while engaged in handling a bucket of gasoline for the purpose of supplying the tank of the gasoline engine, it is argued that he is entitled to recover only $25 per month therefor. This argument predicates upon the assertion that the act of handling or working with gasoline is classed by the company as more hazardous than the occupation of railroad pumpman; that is, that the hazard incident to such occupation or act is classed in the manual of the company as "EE," and that the rate of premium, $1 a week, paid by plaintiff under the provisions of the policy, entitled him to indemnity at the rate of $25 per month only if injured while engaged in such an occupation or temporary act. The provision of the policy touching the matter is as follows: "Sixth: Should the member holding this policy be disabled, fatally or otherwise while engaged in any occupation or act temporarily or otherwise or in the performance of any act pertaining to any occupation or hazard classed in the manual of this association as more hazardous than the one under which

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keeping a saloon under the terms of the policy. Union Central Life Ins. Co. v. Hughes, 110 Ky. 26, 60 S. W. 850. Of course this rule of strict construction obtains as well with respect to the defendant's manual, which is referred to by the policy as the standard by which the forfeiture is to be declared, as to the policy itself; that is to say, the court must construe the provisions of the manual, in respect to the classification of occupations and acts more hazardous, strictly against the insurer, and not allow an intendment to defeat the indemnity. But even allowing all reasonable intendments, we are unable to perceive how proof that defendant had classified in its manual laborers engaged about an oilcloth and linoleum factory under the hazard, "EE," and had classified therein laborers about oil wells under the same hazard, even tends to prove that a laborer engaged in the act of handling gasoline is so classified as well in its manual. There is not a word to be found in the manual relating to the classification of hazard incident to the occupation or act of handling gasoline. It, therefore, appears there is no proof whatever tending to support the defendant's theory that at the time of his injury plaintiff was engaged in the performance of an act pertaining to an occupation or hazard classed in the manual of the association as more hazardous than that of a railroad pumpman. The issue in respect of this matter should not have been submitted to the jury at all. The court should have instructed that, if the jury found for the plaintiff, the measure of recovery should be at the rate of $35 per month. Therefore the instruction, even though inaccurate, was not prejudicial.

The judgment will be affirmed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

PARKETON v. PUGSLEY.

(St. Louis Court of Appeals. Missouri. Oct. 2, 1909.)

1. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITY ON OFFICIAL BONDS.

Where a constable disregarded Rev. St. 1899, § 3163 (Ann. St. 1906, p. 1799), requiring an officer having an execution to apprise defendant therein of his right to hold property exempt from execution, and disregarded the request of defendant to set aside his exemptions, and levied on the property, some of which was exempt, and sold the same, an action on his official bond would lie.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 360; Dec. Dig. § 157.*]

2. EXEMPTIONS (§ 139*)—WRONGFUL LEVY—LIABILITY OF PLAINTIFF IN EXECUTION.

To sustain an action against the execution plaintiff for directing an officer to do an unlawful act by the performance of the execution debtor ant of necessary antecedent acts.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 139.*]

3. EXEMPTIONS (§ 139*) — WRONGFUL EXECUTION—LIABILITY.

An officer seizing and selling property absolutely exempt under the statute may be sued either in trespass or in trover, for conversion.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 139.*]

4. EXEMPTIONS (§ 138*)—WRONGFUL EXECUTION—LIABILITY.

Where an officer seizes property absolutely exempt under the statute, and he retains possession thereof, replevin or claim and delivery will lie therefor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 166; Dec. Dig. § 138.*]

5. EXEMPTIONS (§ 146*) — WRONGFUL EXECUTION—LIABILITY.

Where a plaintiff in execution directs an officer to levy on and seize property absolutely exempt, the execution defendant may sue him alone, or sue him and the officer jointly.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 146.*]

6. EXEMPTIONS (§ 89*)—WAIVER.

A right of exemption is a personal privilege, and may be waived by the debtor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 112; Dec. Dig. § 89.*]

7. EXEMPTIONS (§ 126*)—WAIVER—EFFECT.

A debtor who asserts his right of exemption, under Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), authorizing the selection of property in lieu of property exempt under section 3159, subds. 1, 2, thereby waives his right to claim property absolutely exempt under section 3159, and any property to be treated as exempt acquires the status of exempt property only from the fact that it has been selected by the debtor in lieu of that which is specifically exempted by section 3159.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 154; Dec. Dig. § 126.*]

8. EXEMPTIONS (§ 126*)—EXTENT.

Where property is specifically exempt by statute, it continues to be such until the right to it is waived; but, where property may be rendered exempt only by virtue of selection by the debtor, he must perform the acts contemplated by statute to render such property exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 154; Dec. Dig. § 126.*]

9. EXEMPTIONS (§ 126*) — SELECTION OF EXEMPT PROPERTY.

A demand by an execution debtor that the officer set off his exemption in lieu of property exempt by Rev. St. 1899, § 3159, subds. 1, 2 (Ann. St. 1906, p. 1795), does not operate to render any portion of the property exempt, as the debtor must make the selection, and the officer may not perform the act for him.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 154; Dec. Dig. § 126.*]

10. EXEMPTIONS (§ 125*)—SELECTION OF EXEMPT PROPERTY.

Until an execution debtor electing to take property under Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), in lieu of property exempt by section 3159, subds. 1, 2, makes his selection,

the officer having the execution need not summon appraisers, as provided by section 3163.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 150–153; Dec. Dig. § 125.*]

11. EXEMPTIONS (§ 133*)—WRONGFUL LEVY—LIABILITY.

In the absence of a conspiracy or fraud operating to defeat the exemption right, plaintiff in execution is liable to respond only as for a trespass, when he has directed a levy on, or sale of, exempt property.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 161; Dec. Dig. § 133.*]

12. EXEMPTIONS (§ 98*) — WRONGFUL LEVY — LIABILITY.

Where defendant in execution waived his right of exemption under Rev. St. 1899, § 3159, subds. 1. 2 (Ann. St. 1906, p. 1795), and failed to impress the character of exempt property by making the selection authorized by section 3162, there was a failure to impress the character of exempt property on any of his property, and the plaintiff in execution directing the levy and sale thereof did not direct the levy or sale of the exempt property.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 121–124; Dec. Dig. § 98.*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by William Parketon against J. B. Pugsley. From a judgment for plaintiff, defendant appeals. Reversed.

Ralph Wammack, for appellant. H. S. Green, for respondent.

NORTONI, J. This is a suit in conversion. Plaintiff recovered, and defendant appeals.

The controversy arises out of the sale of plaintiff's property by the constable, under execution at the instance and request of defendant. The case proceeds upon the theory that the property levied upon and sold by the constable at the instance of defendant was exempt from execution, and therefore defendant should compensate plaintiff on account of the wrong done in directing the constable to sell the same. It appears the present defendant sued the present plaintiff, and recovered a judgment against him on an account for groceries. Execution was issued on this judgment, and at the instance and request of the present defendant the writ was levied by the constable upon certain personal property owned by the present plaintiff, who was defendant in the execution. The constable advertised the property levied upon, and sold the same at public vendue. The proceeds of the sale amounted to nearly $600, which he applied to the payment of the judgment of the present defendant against plaintiff, and satisfied the execution. The constable also paid off two or three small chattel mortgages outstanding against the property levied upon and sold. After paying off the chattel mortgages on the property and satisfying the execution, there remained of the proceeds of the sale less than $20 in the hands of the constable. The property levied upon by the constable and sold under the execution consisted of eight horses, three log wagons, six milch cows, and four heifers. It appears this was all of the property which the plaintiff in this action, the defendant in the execution, owned, unless it be a small amount of household goods, specially exempted by the statute, and not involved here. Plaintiff here, and defendant in the execution, was a married man, the head of a family, and resided with the same in Stoddard county in this state. This suit is not against the constable as for a wrongful levy and sale, but instead it is against the plaintiff in the execution, under which the sale was had; that is to say, the suit proceeds against the creditor for having pointed out the property and instructed the constable to levy upon and sell the same for the purpose of satisfying his debt.

There is no evidence whatever in the case tending to prove that the defendant conspired in any manner with the constable in order to defeat the exemption rights of the present plaintiff. On the contrary, the proof only goes to the effect that the present defendant, as plaintiff in the execution, pointed out the several head of cattle levied upon, and directed the constable to levy upon and sell the same. However, a reasonable inference arises to the effect that the defendant, plaintiff in the execution, directed the constable as well to levy upon and sell the several head of horses mentioned. The constable made two visits to the home of the present plaintiff in order to levy the writ. Upon the occasion of his first visit he levied upon the eight horses, and removed them from plaintiff's premises. Not being able to locate the six milch cows and four heifers owned by the present plaintiff, who was defendant in the execution, the present defendant, plaintiff in the execution, accompanied him, and pointed out the cattle. But as said, there is a reasonable inference arising from the whole testimony that the present defendant directed the constable to levy upon and sell the horses as well as the cattle. The suit is not for the value of such property levied upon as is absolutely exempt from execution under our statute, but instead proceeds upon the theory that plaintiff waived his right to the property specifically exempt, and seeks a recovery as for property exempt by virtue of his selection, under the provisions of our statute authorizing the execution defendant to select $300 worth of other property in lieu of that allowed under the first and second subdivisions of section 3159, Rev. St. 1899 (Ann. St. 1906, p. 1795). The jury awarded plaintiff a verdict of $300 actual and $150 punitive damages.

Our statute (section 3159) declares a considerable amount of personal property to be exempt from attachment and execution when owned by the head of a family.

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Among other things therein mentioned are articles pertaining to the household, kitchen furniture, family wearing apparel, etc. With this portion of the section we are not concerned, however. The first and second subdivisions of that section are as follows: "The following property when owned by the head of a family, shall be exempt from attachment and execution: First, ten head of choice hogs, ten head of choice sheep, and the products thereof in wool, yarn or cloth; two cows and calves; two plows, one ax, one hoe and one set of plow gears, and all necessary farm implements for the use of one man; second, two work animals and feed of the value of twenty-five dollars for the stock above exempted." Another section of the statute (section 3162, p. 1797) provides that each head of a family, at his election, in lieu of the property mentioned in the first and second subdivisions of section 3159 last quoted, may select and hold exempt from execution any other property, real, personal, or mixed, or debts and wages not exceeding in value the amount of $300. It seems plaintiff, who was defendant in the execution, did not own all of the items of property mentioned in the first and second subdivisions of section 3159 quoted. Therefore he preferred to select other property in lieu thereof, as authorized by the provisions of section 3162. However this may be, he made no selection of the property whatever. At the time the constable made the levy, and possibly a second time before the sale was made, plaintiff said to the constable: "I demand you to set aside my exemptions." The constable gave no heed whatever to this demand, but, on the contrary, proceeded with the levy, and in due time sold the property at execution sale. Another section of our statutes (section 3163, p. 1799) enjoins the duty upon the officer holding the execution to apprise the person against whom the execution is issued of his exemption rights under sections 3159 and 3162. That section is as follows: "It shall be the duty of the officer in whose hands any execution may come, before he shall levy the same, to apprise the person against whom such execution has issued of the property exempt under sections 3158, 3159 and 3162, and his right to hold the same as exempt from attachment and execution; and such officer shall summons from the neighborhood three disinterested householders, who, after being sworn honestly and impartially to appraise the property exhibited to them, shall proceed to appraise and set apart to said defendant the property exempt to him under this chapter."

We have recently declared the provisions of this section to be mandatory. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 S. W. 481. And we entertain no doubt whatever that, were this an action against the constable on his official bond for a breach of this obligation, enjoined by the statute, a recovery should be sustained on the facts of this case. This, for the reason the constable not only disregarded the pointed command of the statute by failing to inform the present plaintiff, who was defendant in the execution, of his rights thereunder, but he disregarded the request of the plaintiff as well. Especially is this true in view of the fact that plaintiff here, and defendant in the execution, demanded that the constable should set aside his exemption. Such conduct on the part of the levying officer has been denounced by our Supreme Court as wrongful, oppressive, and contrary to the mandate of the statute. It was said, too, that it rendered the constable liable to an action on his bond. State, to Use of Regan, v. Romer, 44 Mo. 99. However this may be, the doctrine referred to does not obtain against the present defendant on the facts of the case now in judgment. An action against the constable on his bond, under the circumstances stated, predicates and proceeds upon the obligation enjoined against the constable by the statute quoted; whereas, in the present action against the plaintiff in the execution—that is, in the present action against the creditor who pointed out the property and directed the constable to levy upon and sell the same—there is no particular obligation enjoined by law commanding the creditor to notify the defendant in the execution of his exemption rights, and there is no bond of the creditor by which such statutory obligation is assumed. This suit, instead of proceeding on the obligation enjoined by the statute upon the constable, proceeds upon the theory that the plaintiff in the execution directed the constable to do an unlawful act in selling the property which was exempt from levy and sale. Therefore, in order to sustain the action, it is essential for the property levied upon and sold to be exempt; that is to say, if it be not property specifically exempted by the statute, it is essential for it to have been brought within the protection of the statute by the performance of the necessary antecedent acts on the part of the execution defendant. Wymond v. Amsbury, 2 Colo. 213; Finley v. Barker, 110 Mo. 408, 20 S. W. 177; Davis v. Williamson, 68 Mo. App. 307; Alt v. Lafayette Bank, 9 Mo. App. 91.

There can be no doubt of the general doctrine that where the officer seizes upon and sells property absolutely exempt under the statute, he may be proceeded against for damages. He may be sued either in trespass or in trover as for conversion, and indeed, when the property is still in his possession, and before the sale, an action for replevin or claim and delivery will lie. This doctrine obtains with respect to such items of property as are specifically exempted by the statute for the reason such property is not subject to levy in the first instance, and the officer is therefore a trespasser. Under such circumstances the obligation of the officer to answer for his wrong obtains, wholly irres-

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the trespass. 12 Amer. & Eng. Ency. Law (2d Ed.) 249, 250; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Eisenhauer v. Dill, 6 Ind. App. 188, 33 N. E. 220; Whittington v. Pence (Ky. 1897) 38 S. W. 843, 18 Ky. Law Rep. 942; Wyckoff v. Wyllis, 8 Mich. 48; Castile v. Ford, 53 Neb. 507, 73 N. W. 945; Livor v. Orser, 5 Duer (N. Y.) 501; Com. v. Stockton, 5 T. B. Mon. (Ky.) 192. The identical doctrine last referred to obtains as well with respect to a creditor or plaintiff in the execution who directs an officer to levy upon and sell exempt property thereunder, or otherwise participates in such a trespass. Such creditor or plaintiff in the execution is liable for the trespass or conversion to the same extent as the officer, and the execution defendant may maintain an action for damages, either against him alone, or against him and the officer jointly. However, it is fundamental to this doctrine that the property levied upon and sold by the officer, or by direction of the creditor or plaintiff in the execution, must be exempt from levy and sale. On this proposition authorities are abundant throughout the American jurisdictions where the principles of the common law prevail. Mitchell v. Corbin, 91 Ala. 599, 8 South. 810; Atkinson v. Gatcher, 23 Ark. 101; Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480; Pate v. Swann, 7 Blackf. (Ind.) 500; Huseman v. Sims, 104 Ind. 317, 4 N. E. 42; Douch v. Rahner, 61 Ind. 64; Mullaney v. Humes, 48 Kan. 368, 29 Pac. 691; Collett v. Jones, 7 B. Mon. (Ky.) 586; Spencer v. Brighton, 49 Me. 326; Walcot v. Pomeroy, 2 Pick. (Mass.) 121; Murphy v. Sherman, 25 Minn. 196; Matthews v. Redwine, 25 Miss. 99; Albrecht v. Treitschke, 17 Neb. 205, 22 N. W. 418; Union Pac. Ry. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290; O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L. R. A. 650, 40 Am. St. Rep. 486; Murray v. Mace, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; Castile v. Ford, 53 Neb. 507, 73 N. W. 945; Elder v. Frevert, 18 Nev. 446, 5 Pac. 69; Bonnel v. Dunn, 29 N. J. Law, 435; Pozzoni v. Henderson, 2 E. D. Smith (N. Y.) 146; Wilson v. McElroy, 32 Pa. 82; Gilleland v. Rhoads, 34 Pa. 187; Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53; Hart v. Hyde, 5 Vt. 328; 12 Amer. & Eng. Ency. Law (2d Ed.) 250.

As before stated, this suit predicates and proceeds upon the doctrine referred to; that is, upon the theory that the present defendant, who was the creditor and plaintiff in the execution, pointed out the property, and directed the constable to levy upon and sell the same. Now it appears that the constable levied upon all of the cattle and all of the horses owned by the plaintiff, who was defendant in the execution. This being true, he levied upon and sold at least two horses and two cows which were absolutely exempt. Had the plaintiff seen fit to do so, he might have recovered in this action the value of second subdivisions of section 3159, these animals are rendered absolutely exempt from levy in the first instance. Be this as it may, the right of exemption is a personal privilege, which the debtor may waive if he chooses to do so. Osborne v. Schutt, 67 Mo. 712; Hombs v. Corbin, 20 Mo. App. 497; Stotesbury v. Kirtland, 35 Mo. App. 148, 155. By asserting his right of election under section 3162 to take $300 worth of other property in lieu of that rendered absolutely exempt in the first and second subdivisions of section 3159, plaintiff waived his right to claim the two horses and two cows referred to as exempt under the provisions of section 3159; that is to say, having elected to proceed for the full $300 value under the statute affording him the right of election in that behalf, he voluntarily surrendered his right to claim the two horses and two cows as otherwise absolutely exempt. Therefore in this proceeding, if such property (the two horses and two cows) is to be treated as exempt at all, it must acquire the character or status of exemption from the fact that it has been selected by him, along with other property, in lieu of that which is specifically exempted by the provisions of section 3159. This for the reason that by electing to proceed for the $300 in value under section 3162, plaintiff waived his right to the absolute exemption in respect of the two horses and two cows. Now it appears that the plaintiff, who was defendant in the execution, made no selection whatever touching the property which he desired to retain as exempt in lieu of that specified in subdivisions 1 and 2 of section 3159. When property is specifically exempt by the statute, it of course continues to be such until the right with respect to it is waived for the reason that the statute has pointed out and designated it as exempt. However, the rule is not identical with respect to that property which may be rendered exempt only by virtue of the choosing of or selection by the debtor. In such cases, the property not being specifically exempt by the statute, it appears to be primarily subject to levy and sale, and it is essential for the execution debtor, not only to assert his right, but to perform such other antecedent acts as are contemplated by the statute in order to impress the character of exemption upon it. In other words, the property absolutely exempt is rendered so by specification of the statute, while property which attains the status of exemption only through the act of selection or choice by the execution debtor is impressed with the character of exemption by the commingling of the authority to that end conferred by the statute, and the specific acts required on the part of the execution debtor. Such property is afforded the protection of the statute as exempted property only after it has actually been selected as exempt.

Our Supreme Court has pointedly decided

to notify the defendant in the execution of his right to select certain property cannot impress the right of exemption upon it, if it has never been selected by the debtor as exempt in lieu of other property. In that case, the court said: "Until the selection is made the property is subject to levy." Finley v. Barker, 110 Mo. 408, 20 S. W. 177. See, also, Davis v. Williamson, 68 Mo. App. 307; Stewart v. Stewart, 65 Mo. App. 663. Although the officer must inform the debtor of his right of selection, the principle runs through the law to the effect that, where the property is not itself exempt, the debtor should manifest his intention in that behalf by actually selecting the same in lieu of the other property which is specifically exempt. Alt v. Lafayette Bank, 9 Mo. App. 91, 95. It has been decided, too, by a court of high authority, that the mere demand by an execution defendant of his right to select the property or demand upon the officer to set off his exemptions is not equivalent to making a selection. In that case it is said: "It is not the duty of the constable to set apart the exempt property, unless the claimant pointed out such property, when the seizure embraced other property rightfully taken, and the exempt property was not specifically exempt by statute." Schwartz v. Birnbaum, 21 Colo. 21, 26, 39 Pac. 416; Davis v. Williamson, 68 Mo. App. 307. See, also, Wymond v. Amsbury, 2 Colo. 213; Thompson on Homesteads & Exemptions, § 879; 12 Amer. & Eng. Ency. Law (2d Ed.) 233, 234. It therefore appears, even though plaintiff, who was defendant in the execution, demanded the constable to set off his exemptions without selecting the property he desired as exempt in lieu of that mentioned in the first and second subdivisions of section 3159, this demand did not operate to render any portion of such property exempt, for the reason it devolved upon him to select the same. The constable could not perform the act of selecting the property for him. The execution debtor alone is given authority by the statute to make the selection. Davis v. Williamson, 68 Mo. App. 307; Finley v. Barker, 110 Mo. 408, 20 S. W. 177; Alt v. Lafayette Bank, 9 Mo. App. 91, 95.

The provision in section 3163, to the effect that the officer shall summon from the neighborhood three disinterested householders to appraise the property exhibited to them, and set apart the same to the defendant as exempt, does not obtain on the facts of this case in a suit against the creditor or plaintiff in the execution, until after the execution defendant has actually made the selection. The statute (section 3162) authorizes him to select property to the value of $300 in lieu of that mentioned in the first and second subdivision of section 3159. We understand that the appraisers to be assembled by the officer are to give judgment upon the property chosen by the execution debtor after its selection, and until then, this statute is without influence in the particular circumstances o this case. None of the property involved i this suit having been selected by the plain tiff, who was defendant in the execution none of it acquired the character of exempt property. It not having acquired the character of exempt property, the prerogatives incident thereto did not attach to it. Under the circumstances of the case, all of the property involved, save the two horses and two cows mentioned, was primarily subject to levy under the execution. It being primarily subject to the levy, it was subject to sale as well, for the reason the defendant in the execution, plaintiff here, omitted to perform the essential act of selection which would operate to impress the right of exemption upon it. Touching the matter of the two horses and two cows absolutely exempt in the first instance, the right of absolute exemption as to them was voluntarily waived, in so far as this defendant, the creditor, is concerned, by the institution and prosecution of this suit. Such waiver essentially results in the circumstances of the case. The assertion of the right to property valued at $300 under section 3162, in lieu of the absolute exception allowed by the first and second subdivisions of section 3159, in and of itself involves a renunciation of all right to the absolute exemption afforded by the two subdivisions referred to. The two are inconsistent; one may assert either, but not both. In the absence of a conspiracy or fraud operating to defeat the exemption right the plaintiff in the execution or creditor is liable to respond only as for a trespass, when he has directed a levy upon or sale of exempt property. The trespass in such cases is involved in the wrongful intermeddling with such property as is in the first instance, or has attained the character of, exempted property. Such property is free from the creditor's interference by virtue of the protection afforded by the statute, and should not be molested. If, however, it is not specifically exempt, it must be actually selected by the creditor in order to take on the character of exempt property. It appearing that the plaintiff, defendant in the execution, waived his right of exemption under section 3159, in respect of the two horses and two cows absolutely exempt in the first instance, and that he failed to impress the character of exempt property upon any of that involved by making the selection required by the statute, it is clear the defendant creditor neither aided nor directed the levy upon, or sale of, exempt property, for the very simple reason that the property had not acquired the character of exempt property, which is essential to support the present action.

For the reasons given, the judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

BAKER et al. v. MODERN WOODMEN OF AMERICA.

(St. Louis Court of Appeals. Missouri. June 22, 1909. Rehearing Denied Oct. 19, 1909.)

1. APPEAL AND ERROR (§ 878*)—REVIEW—INSTRUCTIONS AGAINST APPELLEE.

The correctness of an instruction unfavorable to plaintiffs cannot be considered, there having been an appeal only by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3573; Dec. Dig. § 878.*]

2. INSURANCE (§ 748*)—FORFEITURE OF INSURANCE—"CONVICTION" OF INSURED—ABATEMENT.

Within the certificate of insurance and by-laws of a beneficiary society, providing that the certificate shall be void if insured be "convicted" of a felony, there was no conviction though he was tried for a felony, verdict was returned against him, and sentence of imprisonment imposed, appeal having been granted him, supersedeas bond having been approved, and he having been let to bail, with the result, under Rev. St. 1899, § 2698 (Ann. St. 1906, p. 1590), of suspending enforcement of sentence and judgment, and he having died pending action on the case by the Supreme Court, the "abatement" by his death not being simply of the appeal, but of the prosecution and the liability to prosecution, leaving the case as though no prosecution had ever been entered against him.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 748.*

For other definitions, see Words and Phrases, vol. 2, pp. 1584–1591.]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Ollie Baker and others against the Modern Woodmen of America. Judgment for plaintiffs. Defendant appeals. Affirmed.

Defendant, a fraternal beneficiary society, organized under the laws of the state of Illinois, a corporation authorized to furnish life indemnity or pecuniary benefits to the widows, heirs, and devisees of deceased members, or accident or permanent disability indemnity to members thereof, and authorized to do business in this state under the laws of the state relating to such societies, issued to one James Moat Baker a benefit certificate whereby it agreed to pay the sum of $2,000 upon his death to his beneficiaries, who in this case are his widow and minor son, plaintiffs herein, the latter suing by guardian and curator. It is stated in the certificate of membership that this sum is payable upon the death of James Moat Baker, who was a member of Cottonwood Camp of the order, only upon all the conditions contained in the application, certificate, and the by-laws of the society, as existing when the certificate issued, or as they may be thereafter modified, amended, or enacted, being fully complied with. The application for membership is made a part of the certificate, and the literal truth of all statements in it are warranted, it being provided that, if the application is not literally true, the benefit certificate shall be null and void; that it is issued in consideration of the warranties of agreements in the application and in consideration of the payment of assessments, and it is provided by the fifth paragraph of the certificate that if the member holding this certificate "shall be expelled from this society, or become intemperate in the use of alcoholic drinks; * * * or if he shall be convicted of a crime or felony, the punishment for which may be imprisonment in the penitentiary, after being adopted into this society, * * * then this certificate shall be null and void and of no effect, and all moneys which have been paid, and all rights and benefits which may have accrued, on account of this certificate, shall be absolutely forfeited, and this certificate become null and void." It is further provided in the eighth paragraph of the certificate that it shall be subject to forfeiture for any causes of forfeiture now or hereafter prescribed by the society by its by-laws.

The plaintiff, Ollie Baker, described as wife of James Moat Baker, is designated as the person to receive $1,000 of the $2,000, and Harrison Baker, the son, is designated as the person to receive $1,000. It is not considered necessary to set out other provisions of the application or of the certificate or of the by-laws of the defendant any further than to state that by section 12 of the by-laws it is specifically provided, among other things, that should any person, a member of the society, thereafter be convicted of a felony after being adopted in this society, "the punishment for which shall be imprisonment in a penitentiary, state prison, state reformatory, house of correction, or other state or federal penal institution, he shall, ipso facto, forfeit all payments made by him, and all rights as a member of this society, either social or beneficial, and his certificate shall thereby become absolutely null and void, without any action on the part of his local camp, the head camp, or of this society, or of any of the officers thereof; and the payment by him of any dues or assessments, thereafter made, or the acceptance thereof by the officers of his local camp, or of the head camp, or of this society, shall not have the effect of waiving such forfeiture or reinstating such certificate holder to any rights, benefits, or privileges as a member of this society."

Section 35 of the by-laws provides that no officer, nor any local camp officer, is authorized or permitted to waive any provision of the by-laws "which relate to the contract for the payment of benefits between the members and the society," and section 248 provides that no local camp, nor any of the officers thereof, shall have the right or power to waive any of the provisions of the by-laws of the society.

Section 275 provides that the clerk of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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local camp is the agent of the camp and not the agent of the head camp, and that no act or omission on his part shall have the effect of creating a liability on the part of the society, or waive any right or immunity belonging to it.

Section 278 forbids the camp clerk to knowingly receive assessments or dues from any person, "who, after his adoption into this society, shall have been convicted of a crime or felony; punishment for which may be imprisonment in the penitentiary, provided, however, that the receipt, retention, or transmission to the head camp, of such dues or assessments shall not have the effect of waiving the forfeiture of the certificate of such member, or secure to him any rights whatever."

Section 335 reads: "If any person, after becoming a member of this society, shall be convicted of a crime or felony, the punishment for which may be imprisonment in the penitentiary, he shall by such conviction be expelled from the society without any action being taken by the local camp, executive council, head camp, or any of the officers of the society."

The certificate, application, and by-laws are all properly pleaded and are all in evidence. It was in evidence in the case that on March 4, 1906, James Moat Baker and one Billy Barnett were jointly tried in the circuit court of Pemiscot county, this state, a verdict of guilty of murder in the second degree found against both of them, and their punishment fixed at imprisonment in the penitentiary for a term of 10 years. On the 10th of March, and during the same term of that court, sentence was pronounced against these two defendants in accordance with the verdict of the jury. At the same term, and in due time, James Moat Baker filed his affidavit praying an appeal to the Supreme Court which appeal was granted, and thereupon Baker entered into bond. The bond recites that, "Whereas, the said defendant, James Baker, stands convicted in this court of the crime of murder in the second degree, and has been sentenced, under the order and judgment of this court, to imprisonment in the state penitentiary for a term of 10 years, from which judgment and sentence the said James Baker has been granted an appeal to the Supreme Court of the state of Missouri," that if he shall appear in the Supreme Court at the October, 1906, term thereof, to receive judgment in the appeal, and in the circuit court of Pemiscot county, if the Supreme Court shall so order, and at such time and place as the court shall direct, "and render himself in execution and obey every order and judgment which shall be made in the premises," then this bond to be void, otherwise to be in full force. The bond was approved by the circuit court, whereupon Baker was released from custody.

There is evidence in the case tending to show that the officers and members of the local camp of defendant at Cottonwood Point knew of the fact that Baker had been convicted of murder in the second degree and sentenced to a term of 10 years in the penitentiary and had appealed. There is also evidence in the case tending to prove that, after the taking of the appeal and while the same was pending in the Supreme Court, some question arose as to the rights of Baker as a member of defendant order and as to whether he should pay dues and assessments pending his appeal; that a committee or certain members of the camp informally decided that he should pay his dues and assessments, as any other member, pending his appeal. It is undisputed that Baker thereupon continued to pay all dues and assessments up to the day of his death, the local lodge or camp and the clerk thereof taking and accepting these dues and assessments from him precisely as from any other member. While reports of his payments of dues and assessments were made by the local clerk of the camp to the head clerk of the head camp in the usual and ordinary way, no mention appears to have been made, so far as the evidence shows, of the fact of his conviction, in any communication from the local camp to the head camp. Baker died of pneumonia on the 21st day of March, 1907, his case pending on appeal in the Supreme Court, and he never having been imprisoned in the penitentiary. On the 14th day of May, 1907, no suggestion of the death of Baker having been made before the Supreme Court, that tribunal reversed and remanded the case both as to Baker and as to Barnett. The mandate of the Supreme Court is in evidence, and is in the usual form, reciting that the parties appeared by their respective attorneys before the Supreme Court, and that court being sufficiently advised, "doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Pemiscot county circuit court rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Pemiscot county circuit court for further proceedings to be had therein in conformity with the opinion of this court herein delivered, and that the said appellants recover against the said respondent their costs and charges herein expended." It is in evidence in the case that, upon the return of the mandate to the circuit court, the death of Baker was there suggested, and the cause abated as to him; Barnett, his codefendant, being placed on trial upon the same indictment, was acquitted.

The case at bar was tried before the court, a jury having been waived. No instructions appear in the abstract of the record before

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us as having been asked or given upon the part of the plaintiffs. Four declarations of law were given at the instance of defendant, and four refused, exception being duly saved by the defendant to the refusal of these four. One of the instructions or declarations of law given by the court at the instance of defendant declares that, under the evidence in the case, it is not shown that the defendant had any knowledge or notice of the trial or conviction of James Baker for a felony, if he was so tried and convicted, and it is therefore not estopped to assert such conviction, if had, as ground of forfeiture of the policy.

Instruction No. 6, given at the instance of defendant, after setting out the provisions of the application, the certificate and by-laws, declared that if the court should find from the evidence that Baker was, while a member of defendant society, convicted of a felony, then the judgment must be for the defendant.

Instruction No. 7, given at the instance of defendant, declared the law to be that the clerk of local camp at Cottonwood Point, Mo., had no right under the by-laws of the defendant society to accept any dues or assessments from Baker after he was convicted of a felony, and, if the court should find from the evidence that he was so convicted, the acceptance of any such dues or assessments by such local clerk would not bind the defendant, nor estop it from asserting a forfeiture of the policy by reason of such conviction, if the court finds there was a conviction, and this the court declared would be true even though the clerk knew when he received the dues of the fact of the conviction, unless the court further found that such knowledge or information of the conviction was made to the defendant society or to one of its principal officers at the time such dues or assessments were paid to the local clerk.

The eighth declaration of law held that no officer or member of a local camp has power to alter, change, or waive any of the by-laws of defendant relating to the contract, and that knowledge of the fact of conviction, if there had been a conviction, of the felony, would not be imputed to the head officers of the society so as to bind the defendant, unless the court further finds from the evidence that the head officers knew or had been informed of the conviction.

The first of the refused declarations of law asked by defendant announced that under the laws of Missouri, murder in the second degree is a felony, punishable by imprisonment in the penitentiary, and that where a person is tried by a jury and found guilty of murder in the second degree, and the sentence and judgment of the court is pronounced thereon, such person, in law, stands convicted of a felony, as used in the by-laws of the defendant and in the certificate sued on, and this is true whether or not a supersedeas bond is given and an appeal taken.

The second refused declaration of law asked by the defendant was to the effect that if the court found from the evidence that Baker, while a member of the defendant order, was tried by a jury in the circuit court on a charge of murder in the second degree, and found guilty, and the judgment and sentence of the court was pronounced on the verdict against Baker, then as a result of such trial Baker "stood convicted of a felony, which judgment ipso facto forfeited all rights which Baker had in the benefit certificate sued on, and the verdict in the case must be for defendant."

The fourth refused declaration asked by defendant was to the effect that the certificate and by-laws provided that conviction of a felony ipso facto forfeited all rights of membership, and, that if the court found from the evidence that Baker, while a member of the defendant society, was convicted of a felony, the conviction would ipso facto forfeit all rights as a member of the society, or forfeit such certificate, and it would thereby become null and void.

The fifth refused declaration of law asked by defendant was to the effect that if Baker, while a member of the order was tried on the charge of murder, found guilty, his punishment assessed at 10 years in the penitentiary, and a sentence pronounced thereon by the court, then the court declares the law to be "that such trial, verdict, and judgment would in law be the convicting of the said James Moat Baker of a felony, as defined in the by-laws of the defendant, and his benefit certificate would thereby become ipso facto forfeited, and the judgment in this case must be for the defendant."

From a verdict in favor of plaintiffs, defendant appeals.

Benj. D. Smith and Barbour & McDavid, for appellant. Faris & Oliver and Ward & Collins, for respondents.

REYNOLDS, P. J. (after stating the facts as above). From the instructions given by the court it will be noted that in the first place the court held, in effect, that the reception of dues and assessments from Baker by the local camp, the fact of his alleged conviction not being communicated to the superior authorities of the order, was no estoppel against the order setting up forfeiture. As plaintiffs have not appealed from this declaration of law, although their counsel, as well as counsel for defendant, have argued this proposition with great earnestness and with much learning, it is not before us, and in the view we take of the case, it is not necessary for us to consider it. We express no opinion whatever, therefore, on the effect of the action of the local camp in accepting the dues, remarking, however, that it appears by the uncontroverted evidence in the case, that the dues of James Baker, and

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conviction within the meaning of the certificate and the by-laws of the defendant, Baker was in no way in default, and was in good standing in the order down to the day of his death. The point here in decision, therefore, is whether, within the meaning of the by-laws of the organization and of the certificate of membership and of the law, James Baker was convicted of a felony. If so, his membership was forfeited, assuming for this case only, but not deciding, that the local camp had no power to waive forfeiture, and did not do so by acceptance of dues and assessments. We have been cited to a number of cases on this question of the effect of the verdict and sentence, but on careful consideration of them, hold that they do not meet this case. The matter presents itself to us in a very simple light. That Baker was tried for a felony, a verdict returned against him, and sentence of imprisonment imposed by the circuit court, is beyond question. It is also beyond dispute that he appealed from that to the Supreme Court. Section 2696, Rev. St. 1899 (Ann. St. 1906, p. 1590), provides for the allowance of an appeal in all cases of final judgments rendered upon an indictment. Section 2698 provides that no such appeal or writ of error shall stay or delay the execution of the judgment or sentence, except in capital cases, unless the court in which the judgment is rendered shall be of opinion that there is probable cause for such appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment. While we do not find in the record in the case any order of the court, on granting the appeal, suspending the execution of the judgment, and while our own experience shows us that in practice such order is rarely entered, it commonly being assumed that the granting of the appeal and approval of the bond, or taking recognizance, meets that requirement of the law, and, as it is very evident that an appeal was granted and supersedeas bond approved, and that Baker was let to bail, the effect was to suspend enforcement of sentence and judgment. When the appeal was perfected, and a supersedeas bond tendered and approved, the cause passed out of the jurisdiction of the circuit court and was pending, as on a trial at law, before the Supreme Court, as completely as if there instituted. Pending action on the case by the Supreme Court, Baker died. His death abated the case, not simply the appeal, but abated the prosecution, so that it stood, as far as he was concerned, as if no prosecution had ever been entered against him. State v. Woods, 56 Mo. App. 55; Town of Carrollton v. Rhomther view of it could the case be proceeded with. If it is a criminal proceeding it abates as a matter of course"—citing State v. Perrine, 56 Mo. 602. In this latter case, the Supreme Court, speaking through Judge Wagner, referring to the case under consideration, and to the fact that the defendant had been convicted and appealed to the Supreme Court, says: "Pending the appeal he died, and the case has been revived in the name of his administrator, who is now made a party to the record. We know of no law continuing a prosecution against a dead man. The statute provides that, when an appeal or writ of error shall be prosecuted from the judgment, in a case of misdemeanor, the recognizance shall be conditioned that the defendant shall appear in the court in which the judgment was rendered at such time and place as the Supreme Court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises. When the party is dead, it is impossible for him to comply with the stipulations of the bond, or obey the mandate of the court. The case was thereby necessarily abated, and it must be dismissed." It is true that these cases arose in prosecutions for misdemeanor, and in one case against a surety on a bond, but the proposition that death abated the cause is clearly announced in each of them, and we know of no difference in application of the principles between felonies and misdemeanors. The conditions of the bond or recognizance are practically identical in each class. It is not the appeal which abates, but the prosecution itself, the right of action itself, the liability to prosecution for the alleged crime. Abating, as it does, on the death of the defendant, does not simply mean a discontinuance; it means an extinguishment of the very right of action itself. The right of prosecution is as effectually wiped out as if it had never existed. In State v. Brown, 1 Mo. App. 449, loc. cit. 450, this court, treating of the effect of the death of one of the parties to the cause, pending an appeal, says: "When either ceases to exist, and is incapable of being represented by any successor, the 'case' is at an end." The very term "abatement" carries this meaning. "Abatement," says Am. & Eng. Ency. vol. 1, p. 41 (2d Ed.), "is a generic term derived from the French abattre, and signifies the quashing, beating down, removing, or destroying of a thing."

Applying the principle in this case, and without regard to the fact that the Supreme Court reversed and remanded the case against Baker, he then being dead, we hold that the fact of his death having been established pending the appeal in the Supreme Court, he was not a "convict." The case against him ended, ended as completely and effectually as if never

certificate of membership and in the by-laws of the defendant organization, we hold that the term, "shall be convicted of a crime or felony," as there used, means lawfully convicted, convicted by a final judgment that stands and disposes of the case against the defendant beyond all power of reversal or change or annulment by any authority. The death of this man then, having the lawfulness of the conviction of the lower court before the Supreme Court, that very question of the lawfulness of his conviction being open and undetermined, freed him from further prosecution, and removed from him the judgment of the lower court. The defendant had no right under its issued certificate or its by-laws to claim a forfeiture, save under a lawful, a final, an enforceable conviction Until the Supreme Court passed on the lawfulness of the verdict and sentence there w no enforceable conviction, Baker could not committed to prison, the giving and appro of the bond effectually preventing impris ment in the penitentiary or elsewhere.

Defendant here claims a forfeiture. feitures are not favored by the courts; will not be enforced on narrow and dou constructions, and no court will, unless trolled by the contract the parties have selves made, enforce them, least of all allow one of the parties to a contract, absence of an express covenant in th tract itself to that effect, to construe feiture into a contract and declare force it. Organizations of like class defendant have been very kindly de by our laws; very liberal provisi made for them. Very many of o everyday people look to them for p These organizations should be ver insisting on rigid interpretations certificates and by-laws—more rigi so-called old-line companies are pe exact, in resisting and defeating of those by whose small contribut ganization is kept alive. In this for appellant remind us that its is founded on social features—t bring neighbors together in socia and that it is odious that the convict should be forced upon That is an unfortunate argume ant. The evidence in the ca this unfortunate man's own ne ed him and kept him in fello court and jury had found agai were the neighbors and frien with, and they do not seem door on him in the days of h

The judgment of the cir the right party, and is affir

NORTONI, J., concurs. sitting.

*For other cases see same top

or garnishable, even though his interest is still legal.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 12–41; Dec. Dig. § 8.*]

7. CREDITORS' SUIT (§ 5*) — PROPERTY OR RIGHTS WHICH MAY BE SUBJECTED.

A creditors' bill will reach such assets of the debtor as are not subject to levy and garnishment, without reference to fraud or other ground of equity jurisdiction.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 6; Dec. Dig. § 5.*]

8. JUDGMENT (§ 193*)—POWER TO HOLD CASE OPEN AFTER JUDGMENT.

A court of equity cannot, any more than a court of law, hold a case open after judgment for further adjudication on the merits, though it may retain it for administrative purposes, and make orders to carry a decree into effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 352, 353; Dec. Dig. § 193.*]

9. CORPORATIONS (§ 123*)—INTERESTS WHICH MAY BE ASSIGNED—CONTINGENT INTEREST.

The contingent interest of pledgor of a certificate of stock in the hands of pledgee, to indemnify it as surety for pledgor, is assignable in equity.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 123.*]

10. INJUNCTION (§ 44*)—GROUNDS OF RELIEF—FRAUDULENT TRANSFERS.

Where the judgment of a creditor may be rendered unavailable by a transfer of equitable assets, equity will grant an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 92; Dec. Dig. § 44.*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by David C. Ball against the Peper Cotton Press Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Judson & Green, John H. Overall, and Robt. L. McLaran, for appellants. Stewart, Elliot, Chaplin & Blayney, for respondent.

GOODE, J. On the 17th of September, 1895, the directors of the Peper Cotton Press declared a dividend to their stockholders of record September 16, 1895, in the sum of $6,000, to be paid pro rata on the number of shares held by them. The resolution declaring the dividend was duly entered upon the minute books of the company, along with the report of the proceedings of the directors of that date. The plaintiff appearing to be the owner of 443 shares of the stock of the company, his account on the ledger of the company was credited with $1,500, that being his proportionate part of the declared dividend, and, down to the date of the filing of the suit, that amount stood on the books of the company to his credit. It is stated in the petition, and admitted in the agreed statement of facts on which the case was tried, that the defendant Peper Cotton Press is utterly insolvent. It is alleged in the petition and admitted in the agreed statement that, at the time of the filing of the petition herein, the only property which defendant company owned and possessed, subject to execution, was a leasehold running from June 15, 1901, to June 15, 1905, with the privilege of four renewals of 10 years each, the lease being executed by the board of education of the city of St. Louis to the Peper Cotton Press of a lot of ground in the city of St. Louis upon which the Peper Cotton Press had made improvements. On this leasehold, as well as the rents reserved in the sublease, which the Peper Cotton Press had made of the leasehold, the Peper Cotton Press had given three deeds of trust, two of them securing an indebtedness of some $60,000 to Russell E. Gardner, the third securing a note of $24,422.76 to George Taylor Commission Company. The latter deed of trust, with the note secured thereby, was later transferred to the defendant, Annie Taylor Jones. After the institution of this suit one of the deeds of trust given to Gardner's trustee had been foreclosed, and, at the foreclosure sale, the property purchased by Annie Taylor Jones. In addition to the property leased from the board of education the defendant, Peper Cotton Press Company, had also a leasehold of an unimproved part of the city wharf, the lease running for a term of 10 years, from the 5th of July, 1903, at an annual rental of $900, this lease not being transferable without the written consent of the harbor and wharf commissioner, the right being reserved to the city of St. Louis to alter, amend, or repeal the ordinance and lease at any time. It is averred in the petition in the case that in addition to these leaseholds, "the defendant, Peper Cotton Press, had also another asset, which was not known by plaintiff at the time he filed said suit, being a contract entered into by defendant, Peper Cotton Press, and the St. Louis Cotton Compress Company, wherein said St. Louis Cotton Compress Company agreed to pay to the Peper Cotton Press the sum of $1,000 per year, beginning in 1901, and continuing for 12 years, provided the Peper Cotton Press would not engage in the business of storing and compressing cotton for the term of 50 years, the first five of said $1,000 payments having been already paid." It is further averred in the petition that the defendant, Peper Cotton Press, had another asset as follows: "One of the conditions of said ordinance" (referring to the city ordinance before noted) "leasing to the Peper Cotton Press a portion of the unimproved wharf of the city was that the Peper Cotton Press should file with the city of St. Louis a penal bond in the sum of $2,000, with good and sufficient securities, to secure the faithful performance of the terms, conditions, covenants, and stipulations of the said lease." The bond was filed by the Peper Cotton Press with the defendant Fidelity & Deposit Company of Maryland as surety. The latter company required the Peper Cotton Press to deposit with it as in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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demnity against any loss which it might suffer or incur as surety on said bond as aforesaid, the sum of $2,000, that sum being represented by a certificate of deposit of the Boatmen's Bank of the city of St. Louis, Mo., bearing 3 per cent. interest, it being agreed among other things, between the defendant, Peper Cotton Press, and the Fidelity & Deposit Company of Maryland, that whenever the bond should expire, or whenever the defendant, Fidelity & Deposit Company, was absolved from further liability as surety on the bond, the latter company was to return to the Peper Cotton Press the sum of $2,000, or the certificate of the bank for that amount, subject to whatever offsets, expenses, and deductions might have been incurred by the Fidelity & Deposit Company as surety on the bond. It is averred in the petition that after the institution of the suit the board of directors of the Peper Cotton Press, at a meeting duly held, and for consideration of $100, had transferred and assigned by quitclaim to Annie Taylor Jones' trustee, all the right, title, and interest of the Peper Cotton Press in the lease of the wharf, it being recited in the resolution making the transfer that the Peper Cotton Press was indebted to Mrs. Jones in the sum of $24,422.76, and accrued interest, evidenced by a promissory note of the company of date September 15, 1902, the note bearing 6 per cent. interest per annum, and the $100 indorsed as a credit on the back of the note, the note now being the property of Mrs. Jones and wholly unpaid except the $100, and it being recited in the resolution by which this was done that, as the corporation has no money, property, or assets of any kind, except a certain certificate of deposit issued by the Boatmen's Bank of St. Louis, Mo., for the sum of $2,000, and a certain contract between the corporation and the St. Louis Cotton Compress Company, by which contract the Cotton Press Company agreed to pay to the Peper Cotton Press the sum of $1,000 each year until 1912, and that whereas Mrs. Jones has offered to purchase the certificate of deposit and contract for the price of $2,000 and $6,500 respectively, by indorsing and crediting those amounts on the promissory note above referred to, it was resolved that the Peper Cotton Press assign, sell, and transfer, and hereby does assign, sell, and transfer to Mrs. Jones, the certificate of deposit and contract for the sum mentioned above, the president of the company being directed to make the necessary indorsements and transfers to put title in Mrs. Jones, the note being credited with the amounts as aforesaid. It is averred that this had been done; that is, that the certificate had been indorsed to Mrs. Jones and credits of $6,500 and $2,000 had been duly entered on the note of the company. It is averred that this transaction between Mrs. Jones and the company was made after the institution of this suit with the knowledge of all the parties to it, and it is also averred that neither the Peper Cotton Press nor Mrs. Jones has ever secured or attempted to secure the transfer of the leasehold from the harbor and wharf commissioner of the city of St. Louis. It is further averred that the proceeds derived from the sale under the deeds of trust have discharged the debts due to Gardner, and that plaintiff and Mrs. Jones are the only creditors of the Peper Cotton Press. The prayer of the petition is that the court enter up a decree directing the Fidelity & Deposit Company of Maryland, upon the termination of its liability as surety on the bond, to pay plaintiff the sum of $2,000 "or so much of it as may at that time remain as due, payable, and returnable to the defendant Peper Cotton Press Company, or such part of said sum as may be necessary to pay the aforesaid claim of plaintiff against the Peper Cotton Press, together with the interests and costs of the action;" and a general prayer for relief.

All the defendants plead the five-year statute of limitation in bar of the action. The Peper Cotton Press Company further pleads that on the 17th of September, 1895, it had on hand no profits, surplus, or funds of any kind out of which a dividend on its capital stock could be lawfully declared or paid, and that the dividend declared on that date was unlawfully declared as to stockholders and creditors, it also pleads that it is and has long been insolvent and that it has other creditors who are not parties to the action. The Fidelity & Deposit Company, admitting that it holds the $2,000 certificate of deposit in the Boatmen's Bank, avers that it holds it as a condition for the performance by the Peper Cotton Press of all the terms, conditions, and covenants of the lease between the city of St. Louis and the Peper Cotton Press; that it has signed the bond as surety for the Peper Cotton Press; that the lease is still in full force, is to continue in full force and effect for a period of 10 years from April 8, 1903, and it avers that its liability as surety upon the bond has not been terminated, and it therefore has a right to hold, apply, and dispose of said collateral under the terms of its pledge contract, without interference or restraint, and that the same is not subject to equitable garnishment or to the order of court in this proceeding. Mrs. Taylor, in her answer, sets up that she is the owner of the note referred to for $24,422.76, and that there is now due on it, after all credits have been given, $20,218.84. She prays for judgment against the Peper Cotton Press on this account. She avers that the Peper Cotton Press is also indebted to her assignee, the George Taylor Commission Company, in the sum of $4,000 on open account, and she demands a further judgment for that amount. She also avers that the Peper Cotton Press is insolvent and out of business, and that the only property which it has is this $2,000 certificate of deposit, and

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that this certificate of deposit can be subjected to equitable claims of creditors, she is entitled to share ratably in the $2,000 with the plaintiff, both of them being creditors. The agreed statement practically and substantially covered these facts.

At the conclusion of the hearing the court found the issues for plaintiff, and entered a decree in his favor for $1,770, being the $1,500 dividend, with interest thereon at the rate of 6 per cent. per annum from the 16th of November, 1904. It was further decreed "that whatever right, title, and interest in and to said certificate of deposit for $2,000 is acquired by assignment, by the defendant, Annie Taylor Jones, it is subordinate to and subject to the prior claim of the plaintiff herein for recourse upon said certificate for payment and satisfaction of his judgment against the Peper Cotton Press." The court further decreed that the "Fidelity & Deposit Company of Maryland shall, at such time as its liability on said bond may cease, account to the plaintiff herein for said sum of $2,000 or the certificate of deposit representing said sum of $2,000; shall render a true and faithful account of all offsets, expenses, and deductions, if any, which have been incurred by the said Fidelity & Deposit Company of Maryland, and which are held as charged against said fund of $2,000 or the certificate representing the same. And the whole of said sum, or the balance thereof, reduced by said offsets, if any, shall be paid by the said Fidelity & Deposit Company of Maryland to the plaintiff herein, or so much thereof as may be necessary to satisfy the judgment herein; and upon receipt of an amount sufficient to satisfy the judgment herein plaintiff shall satisfy his judgment recovered herein, and the receipt of the plaintiff herein, given to the defendant Fidelity & Deposit Company of Maryland for such sum as shall be paid by said defendant to the plaintiff under and pursuant to this judgment and decree, shall be received and accepted as a full and complete receipt and settlement of the plaintiff, and shall also be a full and complete settlement, so far as the amount is concerned, of whatever rights the defendant, Annie Taylor Jones, may have in and to so much of the fund of $2,000 or the certificate of deposit representing said sum."

The foregoing is an accurate recital of the pleadings, facts, and judgment prepared by the presiding judge of this court. The case was submitted by the parties on an agreed statement of facts with the right to object to the relevancy or materiality of any admitted fact. The circumstances stated supra, as having been alleged in the petition, were agreed to by the parties. Annie Taylor Jones was not at first a party, but she applied to be made a coplaintiff, alleging the Peper Cotton Press Company owed her more than $2,000; that said company was insolvent and had no assets except the certificate of deposit mentioned in plaintiff's petitio and held by the Fidelity Company as there in stated, and so it would be useless fo her to get judgment against the Peper Cot ton Press. This motion was made in June 1905, and while it was pending plaintiff filed an amended petition making said Annie T Jones a defendant, and alleging certain transfers of property, including the certificate of deposit by the Peper Company to her, subsequent to the institution of this suit. In her answer Annie Jones did not claim the certificate of deposit by virtue of the assignment of it to her by the Peper Company, but only asked the court to allow her, as a creditor of said company, to share pro rata with plaintiff, if the court found said certificate could be subjected in equity to the company's debts. In his reply plaintiff alleged she was estopped to demand a prorating in the proceeds of the certificate because she had taken an assignment of it with notice of plaintiff's suit to have it devoted to paying his demand, and because, further, she had been preferred by the Peper Company's assigning her a contract on which she would be paid $1,000 annually for six years. Certain facts were admitted which tend to show the Peper Cotton Press was insolvent September 16, 1895, when the dividend was declared, though perhaps this is not a necessary conclusion from the admission regarding its assets. The plaintiff was connected with the company as stockholder from September 16, 1895, to September 17, 1902, and was director and vice president during said time, but continuously resided in the city of New York and did not attend the meetings of directors or stockholders. He was not present at the directors' meeting when the dividend was declared, and never was notified of the declaration of the dividend, nor was any offer made to pay him his part, and he remained in ignorance of the declaration until a few months before the filing of this suit, though, as said, he was credited with his proportion on the books of the company. The only other shareholder at the time besides the directors, who seem to have been but nominal shareholders, was Sarah E. Taylor, executrix, who was paid her part of the dividend shortly after it was declared. On February 20, 1905, defendant, Annie Taylor Jones, acquired by transfer and assignment all the shares held by said Sarah E. Taylor, executrix, on September 16, 1895, to wit, 1,327 shares, and acquired them knowing the dividend had been declared on them and that Sarah E. Taylor, as the then owner of the stock, had been paid her part of it. We believe the agreed facts sufficiently appear in the above statement for the decision of the case.

1. We are not favorably impressed with the contention that plaintiff is not entitled to recover his proportion of the dividend because the financial condition of the corporation on September 16, 1895, did not warrant

the directors to declare a dividend. The only party making this defense is the Peper Cotton Press itself. It is not interposed by Annie Taylor Jones, either as a creditor or shareholder of the corporation, or by the Fidelity & Deposit Company of Maryland, which could have no interest in the matter. No creditors of the corporation complained, and it does not appear there were any creditors at the time. All the stockholders except plaintiff and Sarah E. Taylor were directors who participated in declaring the dividend, and all but plaintiff accepted their parts years ago. In truth the only real stockholders at the time were Sarah E. Taylor and plaintiff, the only ones now are plaintiff and Annie Taylor Jones, and the only creditors are those two. The corporation had no right to make this defense in behalf of either plaintiff or Annie T. Jones. The interest of the former is opposed to it, and the latter is a defendant and could have made it for herself had she desired to avail herself of it.

2. The defendants set up the statute of limitations in their separate answers, contending plaintiff's cause of action for his dividend accrued more than five years prior to the institution of the present suit and was barred. In response plaintiff's counsel say the written declaration of a dividend by a business corporation is a promise in writing to pay money and falls within the ten-year statute of limitations. The agreed statement of facts quotes from the record of the company, showing the meeting of the directors September 17, 1895, a report of the secretary about the profits during the preceding 12 months, and a recommendation of the disposition to be made of the net profits. So far as is material this record is as follows: "The secretary presented a statement of the profits of the company covering the period of 12 months ending August 31, 1895, showing a net profit of $37,922.22, and that the disposition of the same, according to the agreement in force between the Peper Cotton Press and the parties sharing therein, should be as follows: 1st. To the stockholders of record September 16, 1895, the sum of $6,000, to be paid pro rata according to the number of shares held by them. * * * On motion said report was received, approved, and filed, and a division of profits was on motion made, seconded, and carried, directed to be made as above recited." The agreed statement of facts further recites "that upon the declaration of said dividend the plaintiff's account on the ledger of the Peper Cotton Press Company was credited with said sum of $1,500, and said sum still stands to his credit on said books." After the declaration of the dividend the corporation was indebted to plaintiff for his part. McLaran v. Planing Mill, 117 Mo. App. 40, 93 S. W. 819. The question for decision is whether the minutes and entries recited from the books of the Peper Cotton Press constituted a promise in writing to pay plaintiff his part in the meaning of the statute which says an action "upon any writing, whether sealed or unsealed, for the payment of money or property, shall be commenced within ten years." Rev. St. 1899, § 4272 (Ann. St. 1906, p. 2347). Our statutes say the transactions at meetings of boards of directors of private corporations shall be recorded, and access to the records afforded stockholders, at all reasonable times (Rev. St. 1899, §§ 1320, 1322 [Ann. St. 1906, pp. 1068, 1070]). Hence, the record of the declaration of the dividend was in conformity to the law. In order for a writing to be a promise to pay money in the sense of the ten-year limitation section, the writing must contain words which either express a promise to pay or from which a promise may be implied. Reyburn v. Casey, 29 Mo. 129; Carr v. Thompson, 67 Mo. 472; Howe v. Mittelberg, 96 Mo. App. 490, 70 S. W. 396. What was written in the record of the meeting of the directors of the Peper Company imported a promise to pay plaintiff $1,500 as his part of the dividend. This is the conclusion to be drawn from the language of the resolution adopted by the directors, namely, "that the disposition of the same [the net profits shown by the secretary's report] according to the agreement in force between the Peper Cotton Press and the parties sharing therein should be as follows: (1) To the stockholders of record September 16, 1895, the sum of $6,000, to be paid pro rata according to the number of shares held by them." That was a plain promise to pay, and was accompanied by a credit in favor of plaintiff of the sum due him. McLaran v. Planing Mill, supra; Winchester v. Wickliffe, 100 Ky. 531, 38 S. W. 866, 66 Am. St. Rep. 356. In the case last cited the Kentucky court of appeals passed on the point in hand with reference to a limitation statute which read: "Any action or suit upon a recognizance, bond, or written contract * * * or upon a bond or obligation for the payment of money or property, or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action first accrued." The case was instituted October 16, 1894, by an administrator to recover dividends declared for the years from 1877 to 1899, inclusive, and due from the turnpike company to his decedent. A five-year limitation statute was interposed in defense. It was held the 15-year statute controlled, meaning of course that clause of it which said an action on a bond or obligation for the payment of money should be commenced within 15 years after the cause of action first accrued. Said section is not different from our own except the period of limitation is 15 instead of 10 years. The present action was instituted about 9 years after the declaration of the dividend and is not barred.

3. The point now made that the demand against the Fidelity & Deposit Company on account of the certificate will be split if

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plaintiff, as creditor of the Peper Cotton Press, is allowed a right to recover the Peper Company's interest, was not set up in defense by the Fidelity Company, the only party that would be affected. Hence this assignment of error will be overruled, without deciding whether or not it would be good if raised by the right party. Johnson County v. Bryson, 27 Mo. App. 341, 349.

4. It is insisted for defendants the certificate of deposit issued by the Boatmen's Bank to the Peper Company, and turned over by the latter to the Fidelity & Deposit Company of Maryland to indemnify it against loss as surety for the Peper Company, is not an asset that can be reached by a petition in the nature of a creditors' bill or equitable garnishment. The argument on this point presents two phases. In the first place it is said the certificate of deposit, or the interest of the Peper Company in it, is a legal asset and hence not to be reached by a proceeding in equity. We reject this contention. To our minds it is clear the certificate was pledged by the Peper Company to the Fidelity & Deposit Company, and the former has a vested interest in it subject to the lien of the latter —an equity of redemption, we think (Perry v. Craig, 8 Mo. 516; Gaty v. Holliday, 8 Mo. App. 118; 22 Ency. Law [2d Ed.] 87); at any rate an interest not subject to levy or garnishment on legal process. The language of the certificate of deposit is not preserved; but we suppose, and the arguments of counsel imply, it was a promise by the Boatmen's Bank to pay to the Peper Cotton Press the sum of $2,000 with 3 per cent. interest, at a date not named in the agreed statement, which, however, gives the condition of the pledge—an agreement between the Peper Company and the Fidelity & Deposit Company—that whenever the bond on which the latter was surety should expire, or it was absolved from further liability as surety, it should turn over to the Peper Company the sum of $2,000, or said certificate of deposit, subject to whatever expenses or deductions might have been incurred as surety on the bond. All the books and cases, as far as we know, treat commercial paper, thus hypothecated and in the hands of the pledgee, as not subject to legal process in the absence of an enabling statute, and we have none. Sexton v. Monks, 16 Mo. 156; Jones, Pledges & Col. Sec. (2d Ed.) §§ 372, 373, and citations in notes. The text of the treatise says "though the pledgor has the general ownership, and, in general, the legal title, yet possession being in the pledgee, the former has strictly only the right to redeem; and neither he nor any one in his right can regain possession or a right to it, except on payment or tender of payment of the amount for which the property is held in pledge." The argument for defendants on this branch of the case assumes a creditors' bill is not the proper remedy under any circumstances to reach assets whereof the debtor originally held the legal title, but extends only to assets the title to which was vested in somebody else and the equitable interest in the debtor; that is, property held in trust for the debtor. No doubt a creditors' bill will lay hold of assets of the latter species, but it will reach those the debtor had owned in a legal sense, and which he had incumbered so as to make his present interest an equitable one, or such as are not leviable or garnishable even when his interest is still legal, like his title to property pledged by him. Bispham's Equity, § 325. In treating the subject of creditors' bills a standard work says as a rule every species of property belonging to the debtor, which is inaccessible on execution, can be subjected in equity for the satisfaction of his debts. 5 Ency. Pl. & Pr. 439. Many states have enacted statutes bringing such interests within the reach of executions, attachments, and garnishments; but, as said, we have no statute of the kind, and when this is true the remedy is in equity. Jones, § 372; Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666. The Supreme Court of Missouri had occasion to pass on the power of chancery to subject assets not leviable to the payment of creditors in the case of Pendleton v. Perkins, 49 Mo. 565—a suit to compel the city of St. Louis to pay the plaintiff a debt due by an insolvent who had absconded leaving money in the city treasury. The municipality was exempt from legal garnishment, but the court held not from equitable garnishment by creditors' bill. With that part of the case we have no concern, but only with the proposition declared by the court, that a creditors' bill would lie to subject a fund or chose in action of a debtor to the satisfaction of his creditor, without showing fraud or some other recognized ground of equity jurisdiction. The opinion says the courts of chancery of other states having no statute authorizing the garnishment of equitable interests, lend "their aid to enable creditors to subject property and mortgages, including choses in action, to the satisfaction of judgments, when they cannot be reached by execution and when the execution cannot be otherwise satisfied." After examining decisions pro and con, mostly of the New York courts, our Supreme Court said: "The affirmation of the proposition that a judgment creditor, who has exhausted every ordinary means to satisfy his judgment, should have the aid of the court, in analogy to its ancient chancery jurisdiction, to reach his debtor's funds, whether fraudulently withdrawn or concealed or not, seems to be necessarily inferred from the main object of chancery jurisdiction—to furnish a remedy when the strict rules of legal practice fail." The authorities reviewed were Hadden v. Spader, 20 Johns. (N. Y.) 554; Donovan v. Finn, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531; Edmeston v. Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Tarbell v. Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790; Bigelow v. Society, 11 Vt. 283;

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Williams v. Hubbard, Walk. Ch. (Mich.) 28. The effect of all those decisions, except Donovan v. Finn, is in accord with the doctrine declared in the excerpt from the opinion of the Supreme Court of Missouri, and this is the common doctrine at the present day. See 5 Ency. Pl. & Pr. 439 et seq.; Waite, Fraud. Con. & Cred. Bills (3d Ed.) § 33, and cases cited in note 4; also Dunlop v. Ins. Co., 12 Hun, 627; Id., 74 N. Y. 145, 30 Am. Rep. 283; an instructive case and like this one, but governed, it seems, by a New York statute authorizing the garnishment on legal process of equitable interests. Though the ruling in Pendleton v. Perkins, that a municipality may be made an equitable garnishee, has been commented on with doubt in later opinions, the ruling has never been questioned that a creditors' bill will reach such assets of a debtor as are not subject to levy and garnishment, without reference to fraud or other ground of equity cognizance.

The second phase of the argument, that the interest of the Peper Company in the certificate of deposit cannot be appropriated, either in law or equity, to satisfy plaintiff's demand, is grounded on the contingent nature of the interest of the Peper Company in the asset, which is said to be so remote and uncertain as to withdraw the asset from the range of any remedy plaintiff might seek, because, until the Fidelity & Deposit Company's liability as surety terminates, it cannot be ascertained whether the Peper Company will have any equity in the certificate, or, if any, how much. We are cited to Stevenson v. McFarland, 162 Mo. 159, 62 S. W. 695, as supporting the proposition—an authority which differs widely in its facts from the case at bar. It was an action in the nature of an equitable garnishment by a judgment creditor of McFarland's to lay hold of his interest in a contract between him and Vette, according to the terms of which Vette was to pay McFarland, in return for services to be rendered, 25 per cent. of the profits of a loan and real estate business during three years. A man named Kilgen was interested with McFarland in the contract. The business was in progress when the action was begun, and the agreement provided McFarland and Kilgen could not draw more than $100 per month each "until and unless upon the termination of this contract it shall be ascertained by collection of all outstandings that the net profits arising to each shall have been in excess of the sums so respectively drawn by them." It is manifest there was no way for the court to determine whether Vette would be entitled to anything; inasmuch as, under the terms of the contract, his interest was not to be ascertained until the expiration of a stated period. Hence the court could enter no decree appropriating any certain interest to satisfy plaintiff's judgments. In the case at bar we have a fund of more than $2,000, with the accumulated interest, in the hands of the Fidelity & Deposit Company, to indemnify the latter as surety on a contract which was to run ten years from April 8, 1903. The lease will not expire until April 8, 1913, and meanwhile the Surety Company may be mulcted so as to entitle it to retain as indemnity all or part of the proceeds of the certificate. We are dealing with a positive asset already in existence, and not a mere chance or possibility which may or may not become a reality in the future; and in this respect, which is important to the point ruled in the next paragraph, the case is unlike Stevenson v. McFarland. Nevertheless it falls within the principle of that decision. It is impossible to know what losses the Fidelity Company may sustain before its obligation as surety expires, or what claim of loss it may make which the Peper Company or plaintiff will not concede. The Fidelity Company may insist then it has sustained losses, and the Peper Company dispute the claim. Hence, while the right as between plaintiff and the Peper Company, and as between plaintiff and Annie Taylor Jones, can now be determined, questions which cannot be may arise between the Peper Company as principal and the Fidelity Company as surety, and even between the latter and plaintiff and Annie Jones as creditors of the Peper Company. And, indeed, the judgment entered in the case suggests the court was conscious of this fact, for it did not finally settle and determine the rights of the parties. Instead of doing so, it adjudged the Fidelity Company, when its liability on the bond "shall cease, shall render a true and faithful account of all offsets, expenses, and deductions, if any, which have been incurred by the said Fidelity & Deposit Company of Maryland, and which are held as charges against said fund of $2,000, or the certificate representing the same. And the whole of said sum, or the balance thereof reduced by said offsets, if any, shall be paid by the said Fidelity & Deposit Company of Maryland, to the plaintiff herein, and upon receipt of an amount sufficient to satisfy the judgment herein, plaintiff shall satisfy his judgment recovered herein, and the receipt of the plaintiff herein, given to the defendant Fidelity & Deposit Company of Maryland, for such sum as shall be paid by said defendant to the plaintiff under and pursuant to this judgment and decree, shall be received and accepted as a full and complete receipt and settlement of the plaintiff, and shall also be a full and complete settlement, so far as the amount is concerned, of whatever rights the defendant Annie Taylor Jones may have in and to so much of the fund of $2,000, or the certificate of deposit representing said sum." That judgment undertakes to make a receipt from plaintiff to the Fidelity Company an acquittance of the latter's responsibility for the certificate now in pledge. But if the Peper Company or Annie Taylor Jones should contest the amount retained by the Fidelity

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tained until the expiration of the lease in order to preserve the status quo, and a supplemental petition then be filed setting up the facts regarding what the Fidelity Company has paid as surety and its right to indemnity, is opposed to the decision of the Supreme Court in St. Louis v. Crow, 171 Mo. 272, 71 S. W. 132, wherein it was said a court of equity, no more than a court of law, could hold a case open after judgment for further adjudication on the merits, though it might retain it for administrative purposes and make orders to carry a decree into effect. The rights of these parties in the certificate of deposit cannot be settled presently by a final judgment; and according to said case the cause cannot be held, but must be treated as premature in so far as it calls for an ascertainment of their respective interests in the certificate. But because the asset in controversy is in esse, and of a kind equity will lay hold of to satisfy plaintiff's demand, when the Peper Company's interest can be ascertained, no further assignment of said interest, whereby it will be put beyond plaintiff's reach at the proper time, ought to be permitted if it can be prevented. He prayed not only for special relief, but for such other and proper relief as the facts might warrant; and under said prayer and the agreed facts, he was entitled, when the suit was begun, to enjoin the Peper Cotton Press from transferring its interest in the certificate to a holder for value. In equity such contingent interests and expectancies are assignable; and, indeed, Annie T. Jones, the real contestant, claims under an assignment. 22 Ency. Law (2d Ed.) 879; Johnson County v. Bryson, 27 Mo. App. 341; Bell v. Mulholland, 90 Mo. App. 612; Savannah Bank and Trust Co. v. Hartridge, 73 Ga. 223; American Pig Iron, etc., Co. v. German, 126 Ala. 194, 28 South. 603, 85 Am. St. Rep. 21; Lincoln v. Linde (Super. N. Y.) 16 N. Y. Supp. 106; Dunlap v. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283. As she acquired her title after this suit was begun it would be unfair to permit her to take the whole amount of the certificate to the exclusion of plaintiff. She does not assert the right to do this, if plaintiff is entitled to a judgment for his dividend, but only the right to share with him in proportion to her claim as creditor of the Peper Company. If plaintiff could enjoin a transfer by said company to his prejudice, then as she stands in the shoes of the company, he may enjoin a transfer by her. In circumstances like those at bar, and where the judgment of a creditor may be rendered unavailing by a transfer of equitable assets, chancery grants an injunction. Orr v. Peters, 197 Pa. 606, 47 Atl. 849; Deveau v. right of plaintiff to proceed in equity without having first obtained a judgment at law, and as to this we say nothing. If he takes further steps against the certificate when it is released from the lien of the Fidelity & Deposit Company, it may then be determined whether Annie Taylor Jones is entitled, as creditor of the Peper Cotton Press, to share in said certificate pro rata with plaintiff.

The judgment of the court below is reversed and the cause remanded, with directions to enter judgment for plaintiff against the Peper Cotton Press for the amount of his dividend and interest from November 16, 1904, and enjoining the Peper Cotton Press, Annie Taylor Jones, and the Fidelity & Deposit Company from making any transfer or disposition of the certificate of deposit to the prejudice of plaintiff's rights while the obligation of said Fidelity & Deposit Company as surety for the Peper Cotton Press continues. All concur.

BOYLES et al. v. ROBERTS et al.

(Supreme Court of Missouri. June 8, 1909. On Motion for Rehearing, Oct. 22, 1909.)

1. RELIGIOUS SOCIETIES (§ 24*)—ECCLESIASTICAL TRIBUNALS—REVIEW BY COURTS.
Civil courts will investigate ecclesiastical decrees, where necessary in determining property rights.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 157; Dec. Dig. § 24.*]

2. RELIGIOUS SOCIETIES (§ 24*)—ECCLESIASTICAL TRIBUNALS—REVIEW BY COURTS.
Civil courts, in determining property rights, will investigate and see that the church judicatory has acted, and, if so, whether it has acted within its constitutional grant of power.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 157; Dec. Dig. § 24.*]

3. RELIGIOUS SOCIETIES (§ 12*)—ECCLESIASTICAL TRIBUNALS—ACTS BEYOND POWER.
Where beyond the constitutional provisions of the church, acts of a church judicatory will be declared void.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 93; Dec. Dig. § 12.*]

4. RELIGIOUS SOCIETIES (§ 23*)—ECCLESIASTICAL TRIBUNALS—REVIEW BY COURTS.
In determining property rights, courts will compare creeds, and award the property to the persons, whether in the majority or the minority, adhering to the doctrine and faith existing prior to the schism and division in the church.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147–153; Dec. Dig. § 23.*]

5. RELIGIOUS SOCIETIES (§ 12*)—ECCLESIASTICAL TRIBUNALS—REVIEW BY COURTS.
Civil courts should investigate the jurisdiction of ecclesiastical courts, even though accepting proper decrees therefrom.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 93; Dec. Dig. § 12.*]

6. RELIGIOUS SOCIETIES (§ 23*) — PROPERTY AND FUNDS.

In the event of division in a church, that portion of the organization, whether the majority or the minority, which adheres to the existing creed, doctrines, and faith at the time of dispute, is entitled to the church property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 151; Dec. Dig. § 23.*]

7. RELIGIOUS SOCIETIES (§ 34*) — PROPERTY AND FUNDS—TRANSFER FROM ONE CHURCH TO ANOTHER.

There might be such a similarity between Confessions of Faith of churches as to warrant united action between them, and yet not such an identity as is required to pass the property of one to the other.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

8. WORDS AND PHRASES — "CONFESSION OF FAITH."

A "confession of faith" is the construction which a religious organization gives the Holy Book.

9. RELIGIOUS SOCIETIES (§ 34*) — PROPERTY AND FUNDS—TRANSFER FROM ONE CHURCH TO ANOTHER.

Identity of faiths, doctrines, and standards, described merely as "sufficient agreement to warrant this union," is not that identity which the law demands in determining the right to transfer the property of one religious organization to another.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

10. RELIGIOUS SOCIETIES (§ 34*) — PROPERTY AND FUNDS—TRANSFER FROM ONE CHURCH TO ANOTHER.

There is no identity of doctrine in the Confession of Faith of the Presbyterian Church of the United States of America and that of the Cumberland Presbyterian Church; and hence, as against members of the latter, whether in the majority or the minority, adhering to its doctrine and faith, the property of that church could not be passed to the Presbyterian Church of the United States of America in pursuance of any attempted union between them.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

11. RELIGIOUS SOCIETIES (§ 23*) — PROPERTY AND FUNDS—DIVISION IN CHURCH.

Persons leaving the Cumberland Presbyterian Church and going into the Presbyterian Church of the United States of America are dissenters from the Cumberland Presbyterian doctrines and faith, and, whether in the majority or the minority, they are in no position to claim property conveyed and held in trust for the Cumberland Presbyterian Church.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147–153; Dec. Dig. § 23.*]

12. RELIGIOUS SOCIETIES (§ 5*) — CONSTITUTION.

The constitution is the contract of association in a church, binding upon all portions of it, as well as the judicatories thereof. It is the supreme law of the church, and must be adhered to by every part thereof.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 5.*]

13. RELIGIOUS SOCIETIES (§ 34*) — UNION — SUBMISSION.

The constitution of the Cumberland Presbyterian Church provides that, upon recommendation of the General Assembly by a two-thirds vote of the members thereof, the Confession of Faith, Catechism, constitution, and rules of discipline may be amended or changed, when a majority of the Presbyteries, upon the same being transmitted for their action, shall approve thereof. A plan for the union of the Cumberland Church with the Presbyterian Church of the United States of America involved the surrender of the name and organization of the Cumberland Church, and also the acceptance by the Cumberland Church of the doctrines and Confession of Faith of the Presbyterian Church of the United States of America, as revised in 1903, and of its doctrinal and ecclesiastical standards. The only part of the plan, however, submitted to the Presbyteries of the Cumberland Church, was embraced in the question, to which they were required to return a categorical answer, whether the Presbyteries were in favor of the union on the basis of the revised Confession of Faith, etc. *Held*, that, under the Cumberland constitution, its General Assembly had no power, without submitting the matter to the Presbyteries, to surrender the name and organization of the church and to dissolve it by consenting to its absorption by the Presbyterian Church of the United States of America.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

14. RELIGIOUS SOCIETIES (§ 34*) — UNION — RIGHT TO GO INTO OTHER CHURCH.

The powers given by the constitution of the Cumberland Presbyterian Church to its General Assembly to concert measures for the enlargement of the church and to receive "under its jurisdiction" other ecclesiastical bodies whose organization conforms to the doctrines and order of that church, when fairly construed, mean, first, that by work in different ways the General Assembly shall strive to secure individual members to join and thus enlarge the church, and, second, to receive other bodies of a similar faith and government; and the constitution, having mentioned the specific way by which mergers or unions can be formed with the church—that is, by receiving other bodies "under its jurisdiction"—excludes the idea of enlargement by the Cumberland Church going in under another organization, and does not admit of a surrender of its organization, name, or creed.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

On Motion for Rehearing.

15. RELIGIOUS SOCIETIES (§ 34*) — UNION — POWER OF GENERAL ASSEMBLY.

There having been nothing in the original act of organization of the Cumberland Presbyterian Church that indicated a purpose to unite with or become merged into the Presbyterian Church of the United States of America, it cannot be implied that the power to effect such a union or merger was given to the Cumberland General Assembly at the beginning of its organization, and there have been no additional powers given since.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

16. RELIGIOUS SOCIETIES (§ 34*) — UNION — VALIDITY.

The theory that the power of the General Assembly of the Cumberland Presbyterian Church was derived, not from the people composing the church, but from the Divine Founder, cannot be invoked to sustain an otherwise unauthorized union of the Cumberland Church with the Presbyterian Church of the United States of America, involving the surrender of the name and organization of the Cumberland Church, and also the acceptance by it of the doctrines and Confession of Faith of the Presbyterian Church of the United States of America, as revised in 1903, and its doctrinal and ecclesiastical standards; for the church has its laws,

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written by men, and the courts can only interpret them as the work of men.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

17. RELIGIOUS SOCIETIES (§ 28*)—ECCLESIASTICAL TRIBUNALS.

The interpretation put upon its dogmas by the church itself is binding on its own members, but not on those who are not members; and a person outside may put his own interpretation on them, and govern himself accordingly.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 28.*]

18. RELIGIOUS SOCIETIES (§ 24*)—ECCLESIASTICAL TRIBUNALS—REVIEW BY COURTS.

In a case involving title to property, if a question arises as to the meaning of clauses in the Confession of Faith of a church and if the parties litigant are all members of the church, the courts will adopt as conclusive the interpretation which the highest ecclesiastical court of that church has put upon the clauses; but, if the parties on one side are not members of the church, the courts must take the Confession of Faith and interpret it as they would any other instrument.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 24.*]

Woodson and Lamm, JJ., dissenting.

In Banc. Appeal from Circuit Court, Cooper County; Wm. H. Martin, Judge.

Action by C. A. Boyles and others against J. L. Roberts and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

W. C. Caldwell, E. B. Green, Robt. Reynolds, W. G. & G. T. Pendleton, and Jas. A. Kemper, for appellants. J. W. Suddath, O. L. Houts, W. M. Williams, and J. M. Gantt, for appellees.

GRAVES, J. This is one of the numerous cases in the different states which resulted from what is called a union between the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church, alleged to have been consummated in the year 1906. Both were voluntary, unincorporated religious societies. The Presbyterian Church of the United States of America has for its foundation the Westminster Confession of Faith, known alike to profane and ecclesiastical history. In what was known as the "great revival" of 1800, which spread over Kentucky, Tennessee, and other portions of the South, and in which Dr. McGready was one of the leading spirits, so great was the demand for the Gospel, that the more educated and intelligent laymen of devout character were called and did preach. This revival, as we gather from the early history of the Cumberland Presbyterian Church, was opposed by many of the straighter-laced Presbyterians, and the same opposed the uneducated ministers, who in the course of this great revival had buckled on their armor and hied to the field of action. In Cumberland Presbytery the "Revival Party," as it was called, was strongly in the ascendency, and this Presbytery had dared to send forth some of their educated laity to preach. In 1805 the Synod of Kentucky, under whose jurisdiction was the Cumberland Presbytery, appointed a commission of ten ministers and six elders to meet at Gasper River meeting house and investigate the proceedings of Cumberland Presbytery. The "Anti-Revival Party" was largely in the majority in the Synod, and from this majority the investigators and triers of the fact were selected. The charges against Cumberland Presbytery were (1) that such Presbytery had licensed men to preach, and ordained others to preach and administer the church ordinances, contrary to the rules of the church, and (2) that such Presbytery did not require such men so licensed and ordained to adopt the Presbyterian Confession of Faith, further than they believed it to be the word of God. As a result of this commission many preachers and licentiates were silenced from preaching. Shortly thereafter, in 1810, three ministers of the Presbyterian Church, who were not in accord with the Westminster Confession of Faith, organized the new church. They pointed out the doctrinal differences which led to their action, which differences it may become necessary to note in detail later. From a humble beginning the Cumberland Presbyterian Church grew and continued to grow, until in 1906 it had to its credit 114 Presbyteries, 17 Synods, a General Assembly, 1,514 ordained ministers, 9,614 ordained elders, 3,914 ordained deacons, 2,869 congregations, and a total membership of 185,212. One of these congregations was located at Warrensburg, Mo., and a schism therein has occasioned the case now before us. The petition in the case, which is one for injunction, sets out the steps of the alleged union of the two churches. Plaintiffs, who sue for themselves and in behalf of all the members of the Presbyterian Church of the United States of America, and especially for those members who were formerly members of the Cumberland Presbyterian Church at Warrensburg, Mo., ask that the defendants be enjoined and restrained from certain things, which are better stated in their prayer for relief, thus:

"And further pray the court to enjoin the ministers, officers, and members of the Cumberland Presbyterian Church, at Warrensburg, Mo., who repudiate and renounce the action of the General Assembly and the Presbyteries of said churches in agreeing to and forming a union with the Presbyterian Church in the United States of America, or who renounce the United Church resulting from said union, known as the 'Presbyterian Church in the United States of America,' together with all their associates, confederates, agents, and representatives, and that said persons be enjoined from doing the following things, to wit: First. From interfering with or molesting the pastors, elders, deacons, church members, or other ecclesiastical agen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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cies who adhere to and recognize said United Church, in the use, enjoyment, possession, and exclusive control of all houses of worship, parsonages, endowment funds, or other property or effects which belong to the Cumberland Presbyterian Church, or any of its boards, committees, judicatories, congregations, or institutions, or are held in trust for them. Second. From using the name of the 'Cumberland Presbyterian Church' as the name or part of the name of any of their organizations, congregations, sessions, Presbyteries, Synods, General Assemblies, boards, committees, or other ecclesiastical judicatories, institutions, or agencies, in connection with the claim on the part of said judicatory, organization, or agency, or any one acting for it, that it is a judicatory organization or agency of the original Cumberland Presbyterian Church as organized in 1810, as described in said deeds. And plaintiffs pray for such other and further relief as the court in equity and good conscience may find them entitled to."

The real bone of contention is three lots of ground, upon which is a church house, which were deeded to trustees for the Cumberland Presbyterian Church of Warrensburg, Mo. The petition is long, as also is the answer thereto. By answer, the defendants, among other things, deny the validity of the alleged union, and claim that by reason thereof, and that by reason of their deeds, they are entitled to the property. Other matters, of both petition and answer, may become pertinent later, and, if so, will be adverted to in the course of the opinion.

Going further into the historical part of the case, it appears that in 1903 the Presbyterian Church, U. S. A., amended its Confession of Faith by some additions thereto, and it also undertook to declare what certain other portions, although written in plain English, meant. Shortly thereafter, through overtures, the two churches appointed committees upon unions. These committees devised what they called a scheme or plan of union and reunion. Why both words, "union" and "reunion," were used, will only appear in the shades of the background and then only to the careful thinker. The Cumberland Presbyterian Church was a separate and distinct entity, and always has been. Its religious tenets were different, and its church polity different. As a church entity it never had been a part of the other church. The joint report of this committee was submitted and voted upon by the General Assembly of each of the two churches. It will only be necessary to note the action of the Cumberland Presbyterian Church in detail.

The courts or judicatories of the Cumberland Presbyterian Church consisted, first, of a church session, made up of the minister and the ruling elders, the latter chosen by the congregation; secondly, the Presbytery, made up of the ministers and certain selected ruling elders for the several congregations in a certain district; thirdly, a Synod, made up of three or more Presbyteries; and, fourthly, of a General Assembly. We have noted them in regular gradation, beginning with the lowest. In 1904 this joint report was presented to the General Assembly of the Cumberland Presbyterian Church. The material portions read:

"Therefore, we cordially recommend to your respective General Assemblies that the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church be accomplished as soon as the necessary steps can be taken, upon the basis hereinafter set forth. (1) The Presbyterian Church in the United States of America, whose General Assembly met in the Immanuel Church, Los Angeles, California, May 21, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the First Cumberland Church, Nashville, Tenn., May 21, 1903, shall be united as one church, under the name and style of the 'Presbyterian Church in the United States of America,' possessing all the legal and corporate rights and powers which the separate churches now possess. (2) The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice. (3) Each of the assemblies shall submit the foregoing Basis of Union to its Presbyteries, which shall be required to meet on or before April 30, 1905, to express their approval or disapproval of the same by a categorical answer to this question: 'Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?' Each Presbytery shall, before the 10th day of May, 1905, forward to the stated clerk of the Assembly with which it is connected a statement of its vote on the said Basis of Union."

Upon the incoming of this joint report, the following resolution was offered by Dr. Templeton, in the General Assembly:

"Resolved: (1) That the foregoing Report and Supplementary Report of the Committee on Presbyterian Fraternity and Union, appointed by the General Assembly in 1903, be received and spread upon the minutes of this General Assembly, and that the included Joint Report on Union be adopted, and that the Basis of Union be and is recommended

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Stated Clerk be instructed to submit the Basis of Union, contained in said report, to the Presbyteries of the Cumberland Presbyterian Church, in the usual constitutional manner, upon receiving official notification of the adoption of the said Joint Report on Union by the General Assembly of the Presbyterian Church in the United States of America."

This resolution was adopted by a vote of 162 to 74, and was declared to be by the constitutional two-thirds vote. Upon a submission to the Presbyteries of the question to be categorically answered, set out above, it was found that 111 Presbyteries had returned their vote. Of these, 60 answered the question in the affirmative and 51 answered it in the negative. A summary of the vote in the 111 Presbyteries voting upon this question shows that 691 ministers and 649 elders, or 1,340, voted for union, and 470 ministers and 1,007 elders, or a total of 1,477, voted against union so that, whilst the question was answered in the affirmative by a majority of nine Presbyteries, it was answered in the negative by a majority of 137 votes of those ministers and elders who voted thereon. The Union was declared adopted.

In the General Assembly of the Cumberland Presbyterian Church for the year 1906, just after the resolution as to union and reunion was declared passed by the vote above mentioned, there was a protest, signed by 100 of the commissioners, in which they charged the invalidity of the action upon many grounds not necessary here to state. The Assembly appointed a committee to answer the protest, and after its answer was read, and some other business was transacted, the majority adjourned the Assembly sine die. Before this was done, however, the protestants gave notice that they would continue the work of the General Assembly under the rules and Confession of Faith and Practice of the Cumberland Presbyterian Church. Pursuant to such notice the protestants did reorganize such Assembly, proceeded with their work, and finally adjourned to a day and place named for the next meeting. From that time to this there has been a General Assembly, under which were Synods, Presbyteries, and congregations, regularly meeting and adhering in the strictest letter to the Cumberland Presbyterian Confession of Faith, as well as to the name. Now to the particular case.

The defendants in this case were within the jurisdiction of the Lexington Presbytery and entered their protest to that body. In answer to their protest, they were, after kindly admonitions as to their spiritual welfare, notified that they had no standing in that judicatory, and that the civil courts would not protect them in their alleged both federal and state, and with one accor they held that the property interest of th Cumberland Presbyterian Churches had bee so safeguarded as to have been safely trans ferred to the Presbyterian Church, U. S. A Just who had the temerity to approach a judge of a court for a written opinion upo a disputed legal proposition, or what judges both state and federal, so far forgot thei high position as to give such opinion, we are not advised by the record. Suffice it to say that, notwithstanding this reply, the defendants held possession of the property in dispute, and this action resulted. The temporary injunction was made permanent as to the property in question, but by the grace of the judge nisi the defendants were permitted to cling to the name "Cumberland Presbyterians." From this judgment, involving title to this property and constitutional questions as well, the defendants in proper order and due time appealed to this court. This sufficiently states the case for a discussion of legal questions involved.

1. An all-important preliminary question is as to what extent this, a civil, court can go into the questions raised in this case. As has been stated, there was a division in the Cumberland Presbyterian General Assembly when the union of the two churches was declared adopted. A very large minority of the commissioners, after having protested and giving notice before final adjournment, immediately elected proper officers, and proceeded with the General Assembly, and adjourned it to a named time and place, and such General Assembly is going on under the constitution of the Cumberland Presbyterian Church, with its congregations, Presbyteries, and Synods. There is also a division in the local congregation, some having gone over to the Presbyterian Church, U. S. A., and others remaining steadfast to the original organization. The question before us is to determine property rights in a case wherein there is a schism in a church organization from its highest to its lowest judicatory, as well as in its membership. Presbyterian disputes of this character are not new to this court. We have had them before. Respondents contend, in effect, that we have but to register the edict of the highest church judicatory, and by so doing pass all Cumberland Presbyterian property to the Presbyterian Church, U. S. A. Appellants contend that the action of the General Assembly was ultra vires and void.

In an early Presbyterian controversy, the case of Watson v. Garvin, 54 Mo., loc. cit. 377, this court said: "At the threshold of this inquiry, we are met with the startling proposition that, in cases like this, the judgments or decrees of ecclesiastical judicatories are final and conclusive, and that the civil

courts have no authority in the premises, except to register these decrees and carry them into execution. It is to be regretted that loose expressions, by elementary writers, and also by judges in delivering their opinions, have given too much foundation for this false doctrine. Even the Supreme Court of the United States, in Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666, gives prominence to this idea by making it the chief foundation of their opinion. That court seemed to think the judges not sufficiently learned in ecclesiastical law to pass on such questions, and that the ecclesiastical courts, being better qualified than themselves, ought to be allowed to be the exclusive judges. The civil courts are presumed to know all the law touching property rights; and if questions of ecclesiastical law, connected with property rights, come before them, they are compelled to decide them. They have no power to abdicate their own jurisdiction and transfer it to other tribunals. If they are not sufficiently advised concerning the questions that arise, it is their duty to make themselves acquainted with them in all their bearings, and not to blindly register the decrees of tribunals having no jurisdiction whatever over property."

The opinion recognized that there were certain church decisions or adjudications that it would not interfere with, not on the theory that such adjudications were in any way binding upon this court, but on the theory that this court had no jurisdiction of the subject-matter involved in the cases. On this question we then said: "The true ground why civil courts do not interfere with the decrees of ecclesiastical courts, where no property rights are involved, is not because such decrees are final and conclusive, but because they have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals. This principle forms the foundation of religious liberty in republican governments. The civil authorities have no power to pass or enforce laws abridging the freedom of the citizen in this regard, and hence, in matters purely religious or ecclesiastical, the civil courts have no jurisdiction. A deposed minister or an excommunicated member of a church cannot appeal to the civil courts for redress. They can look alone to their own judicatories for relief, and must abide the judgment of their highest courts as final and conclusive. But, when property rights are concerned, the ecclesiastical courts have no power to pass on them, so as to bind the civil courts. If they expel a member from his church, and he feels himself aggrieved in his rights of property by the expulsion, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of expulsion, but will examine into the case to see if it has been regularly made upon due notice, and, if they find it to be duly made, they will let it stand; otherwise, they will disregard it, and give the proper relief. In most cases, no doubt, the judgment will be found to be sufficiently regular to fix the status of the expelled member and to warrant the civil courts in denying the desired relief."

Under a note to the case of Hendryx et al. v. People's United Church of Spokane et al., 4 L. R. A. (N. S.) 1154, the learned annotator thus speaks of the Watson Case, supra: "It is apparent, therefore, that, unless there is some civil or property right involved, so as to confer jurisdiction upon the civil court, the question as to the effect of a decision of the ecclesiastical tribunal cannot legitimately arise. The distinction is clearly drawn in the statement of the court in Watson v. Garvin, 54 Mo. 355, that the true ground why civil courts do not interfere with the decrees of ecclesiastical courts, where no property rights are involved, is because the courts have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by these tribunals."

In Prickett v. Wells, 117 Mo., loc. cit. 504, 24 S. W. 53, this court further said: "While it is true that the civil courts may not properly interfere with that part of church management which concerns the spiritual welfare and discipline of the members, yet, when rights of property are involved in controversies of this class, those courts cannot justly evade the exercises of such jurisdiction as is necessary to the determination and vindication of such rights."

And to a like effect is Fulbright v. Higginbotham, 133 Mo., loc. cit. 677, 34 S. W. 877, whereat it is said: "It is well-settled law that the civil courts have and will exercise no jurisdiction to review the action of ecclesiastical bodies in matters relating purely to the faith and discipline of the church. It was for the congregation itself to determine whether these members held to doctrine that was contrary to that taught and held by the church, and to prescribe the rules of discipline. But the members of these bodies have the same right as those of other voluntary associations of persons formed for charitable and benevolent purposes to seek the aid of civil courts to prevent a diversion of its property from the uses and trusts to which it was devoted, and to secure to the members the enjoyment of the rights of membership in respect to the use of the property. It therefore sometimes becomes necessary for the civil courts, for the purpose of determining property rights of members, to pass upon questions which are ecclesiastical in their nature. State ex rel. v. Farris, 45 Mo. 183; Prickett v. Wells, 117 Mo. 503, 24 S. W. 52; Russie v. Brazzell, 128 Mo. 107, 30 S. W. 526, 49 Am. St. Rep. 542."

In the case of Russie v. Brazzell, 128 Mo.,

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loc. cit. 113, 30 S. W. 531, 49 Am. St. Rep. 542, we said: "The question on this branch of the case is: Did the revised confession, as requested by the members and adopted by the general conference, so change the distinctive doctrines of the church as to destroy its identity, and operate as a perversion of the trust under which the property in question was held? However embarrassing it may be, it becomes our duty to determine this question. The action was one at law. The question thus raised is one of fact, which was passed upon by the circuit court without declaration of law, and the conclusion reached is binding upon this court, unless the finding was clearly erroneous. Mead v. Spalding, 94 Mo. 47, 6 S. W. 384, and cases cited."

For the purpose of determining the question as to whether or not there had been a diversion of the property which was held in trust, in the Russie Case, we compared the two Confessions of Faith (the old and new) and determined the right of property by determining that there was in fact no change in the creed of the church, and in so doing we followed the cases of Schlichter v. Keiter, 156 Pa. 145, 27 Atl. 45, 22 L. R. A. 161, Kuns v. Robertson, 154 Ill. 394, 40 N. E. 343, and Bear v. Heasley, 98 Mich. 300, 57 N. W. 270, 24 L. R. A. 615, which cases had considered the same revised Confession of Faith that we had under consideration. The latter case held that there was a difference between the original and amended documents; the former two, that there was not. But each case passes upon the question. All these cases grew out of disputes having their origin in certain amendments made to the Confession of Faith of the church of the United Brethren in Christ. The organization was a large one, and cases reached the appellate courts of several states, as above indicated.

An analysis of our cases show that, in cases where civil or property rights are involved, the courts of this state will inquire into matters ecclesiastical. In the Watson Case, supra, we hold an act of the General Assembly of the Presbyterian Church, U. S. A., to be invalid and void, and to do so reviewed the constitution of the church, seeking for the alleged authority claimed by the General Assembly. So that this court has authorized an investigation of the fundamental laws of the church to determine whether or not its acts were valid thereunder. In the Russie Case, supra, for the purpose of determining whether or not property had been diverted from a trust, we compared the two Confessions of Faith, to see whether or not they differed in doctrine. Thus it appears that, under our holdings, we will for ourselves examine such instruments for that purpose.

And may we now be permitted to add that in our humble judgment it would be a flagrant violation of constitutional mandates for the civil courts of this state, in cases involving property rights, to attempt to hide behind the judgments and decrees of any ecclesiastical tribunal? The duty of our courts in such cases is to investigate the facts, and all the facts, bearing upon the issue as to property rights. If that investigation in a measure intrudes upon the decrees of bodies having no authority to pass upon property rights, there is no remedy for it. Of those pure ecclesiastical questions of creed, faith, or church discipline we should wash our hands, unless an investigation thereof is required to determine property rights. If for that purpose it should be required, our constitutional duty is to so investigate. Some of the courts are not as explicit in terms as was this court in the case of Watson v. Garvin, supra, but from the cases may be deduced the following:

(a) Civil courts will investigate ecclesiastical decrees when it becomes necessary so to do in determining property rights. Grimes' Executor v. Harmon et al., 35 Ind., loc. cit. 254, 9 Am. Rep. 690; Smith v. Pedigo, 145 Ind., loc. cit. 375, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 833; Hatfield v. De Long, 156 Ind., loc. cit. 207, 59 N. E. 483, 51 L. R. A. 751, 83 Am. St. Rep. 194; Bird v. St. Mark's Church, 62 Iowa, loc. cit. 573, 17 N. W. 747; Bridges v. Wilson, 11 Heisk. (Tenn.) loc. cit. 470; Deaderick v. Lampson, 11 Heisk. (Tenn.) loc. cit. 523; Associated Reform Church v. Trustees, etc., 4 N. J. Eq. 77; Free Church of Scotland v. Lord Overton et al., Appeal Cases [1904] 515 et seq. All of these cases, and those that follow under further lettered subdivisions, recognized the right of civil courts to investigate matters ecclesiastical in case property rights are involved. We shall not quote lengthily, nor from all; but, as indicative of the trend of authority short excerpts from some cases, upon the question involved under each subdivision, are at least pardonable, in view of the bold stand taken by counsel for respondents in the oral argument before the court and reiterated in briefs filed herein—i. e., that for no purpose would the civil courts go behind the adjudications of ecclesiastical tribunals. So strong did they put it in oral argument that they declared that, if an ecclesiastical judicatory declared that the word "white" meant "black," we had to enter the decree. The writer received such argument with a mental reservation of a right to dissent therefrom, but this dissent is better expressed in the case law than can we, with our limited ability, express it.

In the Grimes Case, supra, the Indiana court says: "That over the church, as such, the legal tribunals do not have, or profess to have, any jurisdiction whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and

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its members belong to the church judicatories to which they have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church, when rights of property and civil rights are involved." Note the language contained in the last sentence. Does that mean that a church court can say black is white and the civil court be bound thereby? Not by a long ways. It means what it says, as should church confessions mean what they say. It means that the courts will determine the meaning of the documents which express the doctrine of faith, aided by such lights as the law permits. And why not? In all other cases wherein the rights of property is on trial, the civil courts must construe all written instruments introduced in evidence and bearing upon the issues. That we will not construe them in purely ecclesiastical cases, in which no property rights are involved, is because they cannot lawfully be before us for construction. But if a civil, as distinguished from a pure ecclesiastical, right is before us, we must construe them and determine their effect in so far as the property interest is concerned.

Again says the Indiana court in the Smith Case, supra: "While the courts of this state have no ecclesiastical jurisdiction whatever, yet they are charged with the duty and clothed with the jurisdiction of protecting property rights of religious societies, corporations, and churches, as well as that of individuals, and thereby, of necessity, they may be compelled to decide a question of ecclesiastical law, when that law becomes a fact upon which property rights depend. They ought not, however, to be inclined to 'rush in where angels fear to tread,' and where necessity does not compel them."

In the Bird Case, supra, the Iowa court says: "The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters; but they will interfere with such associations when rights of property or civil rights are involved."

In the Deaderick Case, supra, the Tennessee court, following Gartin v. Penick, 5 Bush, 110, in the Kentucky court says: "The rule is thus laid down, and we think correctly, by Judge Robertson of the Supreme Court of Kentucky, in the case of Gartin v. Penick, 9 Am. Law Reg. (N. S.) 213, that, while the general desire of the courts is to avoid ecclesiastical or spiritual questions, they find it impossible to do so. If a body of men have wrongful possession of a church, or of a sum of money, on the pretense, for example, that they are the religious body to which the money or the building was destined, their opponents have no right of redressing the wrong and vindicating their own right, except by appealing to the civil tribunals of the country, and civil tribunals have no means of doing justice in such cases, except by investigating into differences of doctrine, discipline, or practice, which, to the litigants may be religious differences, but to the judge are mere matters of fact, bearing on a question of civil right. He then adds that, while courts could not control or mold the faith or doctrines of the church, nor settle questions of orthodoxy, yet so far as the identity of the respective claimants with the beneficiary, to whom the church property was dedicated, may be affected by their doctrines, or by the acts of the General Assembly in that case, the essential coincidence of the doctrines and the legal effect of those acts must necessarily be considered, for the purpose of deciding the question of title to the property. These principles will sustain the jurisdiction of civil courts in cases like the present, and the views we have above expressed."

(b) And in the investigation of property rights the civil courts will investigate and see that the church judicatory has acted, and, if so, whether it has acted within the terms of the constitutional grant of power. If beyond the constitutional provisions of the church, the acts will be declared void. Watson v. Garvin, supra; Watson v. Avery, 2 Bush (Ky.) 332; Perry v. Wheeler, 12 Bush (Ky.) loc. cit. 549; Gartin v. Penick, 5 Bush (Ky.) 110; Bouldin v. Alexander, 15 Wall. 131, 21 L. Ed. 69; Krecker v. Shirey, 163 Pa., loc. cit. 551, 30 Atl. 440, 29 L. R. A. 476; Brundage v. Deardorf (C. C.) 55 Fed. 839; Kerr's Appeal, 89 Pa., loc. cit. 112; McAuley's Appeal, 77 Pa. 397; McFadden et al. v. Murphy et al., 149 Mass. 341, 21 N. E. 868.

Speaking to the contention that the action of the church judicatories of the Presbyterian Church could not even be questioned upon the ground that the action was unconstitutional, and that such bodies were judges of their own jurisdiction, the Court of Appeals of Kentucky in the Watson Case, supra, says: "Such a construction of the powers of church tribunals would, in our opinion, subject all individuals and property rights confided or dedicated to the use of religious organizations, to the arbitrary will of those who may constitute their judicatories and representative bodies, without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was intended that said individual and property rights should be protected. Especially is this so with reference to the powers of the higher courts of the Presbyterian Church. Those powers are not only defined, but limited by the constitution. But if it be true, as insisted for the appellees, that the inferior courts and people of the church are bound to accept as final and conclusive the Assembly's own construction of its powers, and submit to its edicts as obligatory, without inquiring whether they transcend the barriers of the constitution or not, the will of the Assembly, and not the constitution, becomes the fundamental law of the church. But the constitution,

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is at once a government of despotism and unlimited powers. But we hold that the Assembly, like other courts, is limited in its authority by the law under which it acts; and when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from a violation of a contract, or the fundamental law of a voluntary association."

This is particularly applicable to the case at bar, because upon the question of limitation of power the Cumberland Presbyterian constitution is similar to that of the Presbyterian.

So, too, says Mr. Justice Strong in the Bouldin Case, supra: "But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church, and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be exscinded, was not the action of the church, and that it was wholly inoperative."

In the Krecker Case, supra, the Pennsylvania court said: "But if such decisions plainly violate the law they profess to administer, or are in conflict with the laws of the land, they will not be followed. Commonwealth ex rel. v. Cornish, 13 Pa. 228; O'Hara v. Stack, 90 Pa. 477, supra." And on the same page the court also says: "It does not matter that a majority of any given congregation or annual conference is with those who dissent. The power of the majority, as well as that of the minority, is bound by the discipline, and so are all the tribunals of the church from the lowest to the highest. McAuley's Appeal, 77 Pa. 397; Sutter et al. v. Reform Dutch Church, 42 Pa. 503; O'Hara v. Stack, 90 Pa. 477; Schlichter et al. v. Keiter et al., 156 Pa. 119, 27 Atl. 45, 22 L. R. A. 161."

In Kerr's Case, supra, the same court, in speaking of a previous case decided by it, in which the court had sustained a mandamus to reinstate certain exscinded members of a church, says: "This was, indeed, but a reiteration of that principle, so well known to our jurisprudence, that the decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority and has observed its own organic forms and rules. But the decree under consideration is not only open to the objection that it is not in accord with the well-known law of the church that no one or hearing. Gibson, C. J., in Commonwealth v. Green, 4 Whart. (Pa.) 601. As a judicial decree, therefore, the synodical resolution was ultra vires and ineffectual to dispose of the charter and property of the Second Reformed Congregation."

It thus appears that Missouri does not stand alone when, in the Watson Case, we examined the constitution of the Presbyterian Church and condemned its action as ultra vires. And in the Brundage Case, supra, no less a personage than Judge William H. Taft, in speaking of an amended Confession of Faith, has said: "Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the Supreme Court, in Watson v. Jones, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts."

In Bear v. Heasley, 98 Mich., loc. cit. 307, 57 N. W. 280, 24 L. R. A. 615, the Michigan court says: "The relation between the members of this association is one of contract, and the Confession of Faith and the constitution constitute the terms of the agreement, which is binding upon all."

(c) And in such investigation of property rights the courts will take and compare the two creeds, and award the property to the parties, whether in the majority or the minority, who have adhered to the doctrine and faith which existed prior to the schism or division. Krecker v. Shirey, 163 Pa., loc. cit. 551, 30 Atl. 440, 29 L. R. A. 476; Brundage v. Deardorf (C. C.) 55 Fed., loc. cit. 846; Bear v. Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615; Lemp v. Raven, 113 Mich. 375, 71 N. W. 627; Deaderick v. Lampson, 11 Heisk. (Tenn.) loc. cit. 535; Rodgers v. Burnett, 108 Tenn., loc. cit. 183, 65 S. W. 408; Free Church of Scotland v. Lord Overton et al., Appeal Cases [1904] 515.

In the Brundage Case, supra, Judge Taft says: "The question is one of identity, and that identity is to be determined by a reference to the fundamental law of the church, which was the original contract or compact under which its organization was effected, and in pursuance of which and subject to which all the property acquired for its use became vested in the church. An open, flagrant, avowed violation of that original compact, by any persons theretofore members of the church, was necessarily a withdrawal from the lawful organization of the church, and the forfeiture of any rights to continued membership therein, and to the control and enjoyment of the property conferred on such organization."

We shall not quote further under this proposition. Suffice it to say that, in determining the question of whether or not property has been diverted from a trust, it becomes necessary to show the identity of the organization claiming the property with the organization existing when the trust was created. This identity is shown by the creed or confession of faith. In each of these cases, cited supra, the courts did examine the creeds to determine the identity of the organization. No more thorough exposition of the Calvinistic doctrine can be found in the law books than in the discussion of the two creeds under review by the House of Lords in the Free Church of Scotland Case, supra.

In the case of McBride v. Porter, 17 Iowa, 203, much relied upon by the respondents in this case, the court examined the creeds of the two churches which had united, and found them to be the same, and held for that reason the identity of the beneficiary had not been lost by the mere change of name. But the court puts it on the ground that the two churches were "entertaining the *same* faith and doctrine." The italics are ours. These observations as to the law indicate our purpose to go into all questions in the case, and such is our purpose.

(d) There is yet another and further reason that civil courts should investigate the jurisdiction of ecclesiastical courts, even though they are going to accept proper decrees therefrom. The idea is well expressed by the Michigan court in the Bear Case, supra: "It has been expressly held by this court that the provision of the federal Constitution that full faith and credit shall be given in each state to the records and judicial proceedings of every other state does not preclude an inquiry into the jurisdiction of courts; and if, in fact, the subject-matter of a suit was not within the jurisdiction of the state from which the court derives its authority its judgment is a nullity, and may be so treated everywhere. People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Wright v. Wright, 24 Mich. 180; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332."

It is useless for me to cite cases in Missouri that we will see that the foreign court had jurisdiction before we give its judgment the full faith and credit required by the federal Constitution. By what reason can it then be said that we shall blindly register the decrees of ecclesiastical bodies holding their courts respectively in Illinois and Iowa?

2. That there must be identity of doctrine and faith before a majority of a church organization can take the church property into another church is fully recognized by McBride v. Porter, 17 Iowa, 203. That, in case of a division in a church organization, that portion of the organization, whether the majority or the minority, which adheres to the existing creed, doctrines, and faith at the time of the dispute, is entitled to the church property, is unquestioned law. In the case at bar, even if civil courts were bound to recognize and register the ecclesiastical decrees, yet there has been no decree from either of these church judicatories, saying that there was an identity of confessions of faith, doctrines, disciplines, or church polity. The most that is said is "it is mutually recognized such agreement now exists between the systems of doctrine contained in the Confession of Faith in the two churches as to warrant this union, a union honoring alike to both." If this be the ecclesiastical judgment, and it is the only one in the record upon the question, then there has never been an adjudication of the fact that there was identity in the two Confessions of Faith. There might be such a similarity of the confessions to warrant united action between the churches, and yet not such an identity as is required to pass trust property. The question as to whether or not these two confessions of faith are the same has never been adjudicated.

In Bear v. Heasley, supra, Judge McGarth, speaking of an amended confession of faith against which the defendants were protesting, well said: "It is urged, however, that the judgments of ecclesiastical tribunals in matters of faith and discipline and the general polity of the church are binding upon civil courts. In the present case there has been no judicial determination of any matter of faith or discipline or general polity adverse to defendants. As already suggested, there has been no adjudication that the confession of faith has not been changed." So, too, in this case, if the adoption of the resolution for a union of these two churches is to be taken that the Cumberland Presbyterian Church amended its whole Confession of Faith by adopting that of the Presbyterian Church, U. S. A., then there is and has been no adjudication that such amendment did not change the original Confession of Faith. Therefore, even if we were disposed to make the decree of the church judicatory our decree, we have no decree upon the vital question to be adjudicated by this court.

3. Was there identity of church faith, discipline, and polity? Was there identity of the Confessions of Faith? We say not, and for two reasons: First, from the evidence before us nobody claims that there was; and, secondly, an examination of the documents themselves fails to so indicate. We shall consider in this paragraph the testimony (by way of written statements) of the parties themselves that there was no identity of the Confessions of Faith.

With the report of the Committees on Fraternity and Union, there came to the Cumberland Presbyterian Assembly a supplemental report, signed by William H. Black, for the committee. I take it this was the action of the Cumberland Presbyterian half of the joint committee. This supplemental report urges many reasons for action in fa-

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of Faith favors it. There never can be a unanimity that is absolute, where many finite intelligences are concerned. We see things from different points of view, with different degrees of emphasis, out of differing personalities, and impelled by disparate motives. Therefore it is to be expected that any one who so desires can find objections in the statements of others; but brethren dwell together in unity, not by identity of beliefs, nor by the acceptance of absolutely unobjectionable doctrinal symbols, but by mutual tolerance, forbearance, and love. If this union is consummated, the real tie which binds will not be in the confessional symbol of the United Church, but the spirit of Christ in the hearts of the brethren." Note the language: "But brethren dwell together in unity, not by identity of beliefs, nor by the acceptance of absolutely unobjectionable doctrinal symbols, but by mutual tolerance, forbearance, and love."

This comes from the committee, which for 12 long days considered the subject, and all they can say is "that the doctrinal status" favors union, but adds that such union will be "not by identity of belief, * * * but by mutual tolerance, forbearance, and love." Such identity is not sufficient to carry with it trust property. By the report itself it is suggested, as in paragraph 2 of this opinion fully quoted, that "it is mutually recognized that such an agreement now exists between the system of doctrines contained in the Confessions of Faith * * * as to warrant this union." Not a word said about the identity of the system of doctrine in the respective Confessions of Faith. Further, they say " it is also recognized that liberty of belief exists by virtue of the declaratory statement," etc. Why suggest that there was liberty of belief, if identity of doctrine and faith was to be procured by this union?

It is further said that the ordination vows required of the ministers, ruling elders, and deacons "requires the reception and adoption of the Confession of Faith only as containing the system of doctrine taught in the Holy Scriptures." And in the Moffat Resolution, passed by the Presbyterian Assembly and spread upon the minutes of the other Assembly, it is said: "The ministers and ruling elders and deacons, in expressing approval of the Westminster Confession of Faith as revised in 1903, are required to assent only to the system of doctrine contained therein, and not to every particular statement in it." In other words, the officers of the church need not indorse what is contained in the Confession of Faith, unless they thought it was well founded in the Holy Book. But how about the unofficial members of the church, and the applicants for admission? No provision for these, except

port. It would appear from this that we have a Confession of Faith that can be accepted in part by a class, but must be accepted as a whole by another class. We confess that we do not know whether this is usual or unusual, but we had thought that one who was a member of a church with a written Confession of Faith would be classed as heretical who taught or believed doctrines contrary to the Confession of Faith. Our theology may be lame upon this proposition, and we only here mention this matter as indicating that this Joint Committee and these two churches fully recognize that there was not identity of doctrine and faith.

We are not prepared to say that our theology is lame, however. What is a confession of faith, as applied to this or any other church? As we understand it, a confession of faith is simply the construction which a particular religious organization gives to the Holy Book, and of this no one will speak with more reverence than the writer. Different views of the meaning of the Holy Word have been the occasion of denominational differences, and have forced the different denominations of the church. I dare say that neither layman nor theologian will deny that the churches generally expect their followers to entertain the peculiar construction of the Holy Book given in their respective Confessions of Faith. Such facts we gather from profane history, as well as from theology. We do not mean that the Presbyterian Church, U. S. A., actually required the member to subscribe to an oath or an obligation that he or she believed in the construction placed upon the Holy Word in their Confession of Faith; but what we do mean is that this church, and all other churches having a written confession of faith, expect their respective members to be in accord and sympathy with the construction of the Bible which has been placed thereon by the church authorities.

Such has been the history of the Presbyterian Church, U. S. A. As evidence thereof we have only to refer to the incident heretofore referred to as to the origin of the Cumberland Church. Not only did the Presbyterian Church, U. S. A., adhere in strictness to their Westminster Confession of Faith, as to doctrine, when they practically cut off the Cumberland Presbytery, but they adhered in all strictness to one of their rules as to the educational requirements for ordained ministers. But for the fact that the Presbyterian Church required, at that time, a strict adherence to their doctrinal tenets, there would have been no Cumberland Presbyterian Church, and we have seen nothing manifested (by constitutional edict) since that time to lead us to believe there has been a change of heart in the Presbyterian Church,

U. S. A., to demand less of its members than an adherence to their doctrinal tenets as found in the Confession. On the contrary, if the rules and discipline of the church mean anything, they mean that the members of the church, both children and adults, are to be taught from the Catechisms, which in doctrine have never been changed from the date of Calvin, and cannot be changed, except by the action of the Presbyteries. In other words, if I have children in the Presbyterian Church, U. S. A., whether voluntarily or involuntarily, the discipline of the church requires that they be taught this doctrine. To close, why found a church upon this construction of Holy Writ, and yet say the members are to be in good standing, if they deny the central thought of the doctrine? The statement of the question answers it, in the minds of thinking persons. If the church has changed its original position, then by constitutional amendments both to the Confession of Faith and the Catechisms, that change of mind can be evidenced; but it cannot be done by mere declaratory statement, which leaves all the text of the Confession of Faith in full force, and does not even mention the Catechisms, the remaining doctrinal standards of the church. No attempt to change all the doctrinal standards, yet the alleged union was on the basis, not only of the Confession of Faith of the Presbyterian Church, U. S. A., but upon that "and the other doctrinal standards," a part of which is the unchanged books of Catechism, which they teach from and which remain as they have heretofore been.

Now let us take the Presbyterian side of the question and get their views of the identity. When the General Assembly voted upon and adopted the plan of union reported by the Joint Committee, it passed a resolution making it clear what effect that church thought the revision of 1903 had upon the Westminster Confession of Faith. Section 4 reads: "That the Assembly, in connection with this whole subject of union with the Cumberland Presbyterian Church, places on record its judgment that the revision of the Confession of Faith effected in 1903 has not impaired the integrity of the system of doctrine contained in the Confession and taught in Holy Scripture, but was designed to remove misapprehensions as to the proper interpretation thereof." If the revision of 1903 "has not impaired the integrity of the system of doctrine" in their Confession of Faith, which was the Westminster Confession of Faith, then by the declaration of the Presbyterian Assembly itself the Westminster Confession of Faith stands unimpaired, with all its doctrines of fatality in full force. If it has not been impaired, it remains unimpaired—unchanged.

The representatives appointed by the Presbyterian Church on the Joint Committee made a report to their church, when they presented the joint report upon union. In this report, among other things, it was said that at the outset certain things were made plain to the Cumberland brethren of the committee, and among these things made plain was this: "And that the revision of the Confession of Faith had effected no material change in the doctrinal attitude of the Church." That doctrinal attitude prior to 1903 was the Westminster Confession of Faith, and this had not been materially changed. This committee further says: "The language used in the first paragraph of Concurrent Declaration No. 1, declaring that 'such agreement now exists between the systems of doctrine contained in the Confession of Faith of the two churches as to warrant this union—a union honoring alike to both,' was primarily the language of that committee (meaning the Cumberland Committee). It is to be interpreted in the light of the fact that preceding it the statement is found that the Cumberland Presbyterian Church is to adopt the Confession of Faith of the Presbyterian Church in the United States of America. Whatever the differences between the churches have been, and there have been decided differences, these brethren must be regarded as giving expression to the sincere conviction that such a doctrinal agreement now exists between the churches as to warrant their adopting our confession as interpreted by the Declaratory Statement. Your committee likewise appreciated the power of this presentation made by the brethren of the other committee, and, while the language of Declaration No. 1 was not satisfactory to them or to us, an effort was made to secure a different phraseology, it was felt by all that some cordial acknowledgment of a sufficient doctrinal agreement to warrant union, should union be deemed advisable, was due to a church, which it is proposed by both committees should yield its name, adopts our standards as an entirety, and find complete union with us."

If there could be a clearer admission that the parties considering the question did not think there was substantial identity, we misinterpret the language of these distinguished theologians. Not only were they not satisfied that there was identity of faith and doctrine, but what they did agree upon was satisfactory to neither, but this committee felt there should be "some cordial acknowledgment of a sufficient doctrinal agreement to warrant union." No concession here that there were two churches with the same faith, but there would be if the Cumberland Presbyterians would "adopt our standard as an entirety and find complete union with us."

Referring to the differences in church polity as to the selection of negroes as commissioners to the General Assembly and not maintaining separate Presbyteries and Synods for them, a thing not tolerated by the Cumberland Presbyterians, this committee said: "The committee in all its negotiations

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stood firm upon the scriptural principles of the real unity of the household of faith and the equality of all its members." And they close with these remarks: "If this General Assembly and the Cumberland Presbyterian General Assembly cannot see their way clear to acknowledge a sufficient agreement in doctrine between the two churches to warrant the union, and if this Assembly and church feel unable to provide in a constitutional manner for the existence of more than one Presbytery on the same ground, then it is respectfully submitted that the proper course to pursue would be to recommit the Plan of Union with a view to further and modified action."

In 1907 the General Assembly of the Cumberland Presbyterian Church sent a communication to the General Assembly of the Presbyterian Church, U. S. A., to which reply was made. In this reply we find this language: "We had not heard, until your communication announced it, that anybody had claimed or induced others to believe that the Presbyterian Church in the United States of America had abandoned the Westminster Confession of Faith. This is not true. The fact is in easy view of all, and nobody could have obscured it, if it had been attempted, that the reunion was effected upon the doctrinal basis of the Westminster Confession of Faith as revised in 1903 and the other doctrinal standards of the Presbyterian Church in the United States of America." The answer then reiterated the often-repeated phrase that the churches, in adopting the plan of reunion, "declared that there was sufficient agreement between the systems of doctrine of the churches to warrant this union," etc. This record evidence, which speaks louder than words, shows that the Presbyterian Church, U. S. A., is holding on with tenacity to the system of doctrine promulgated at Westminster. After the union that church through its General Assembly boldly announces that, if anybody claimed or induced others to believe that it had abandoned the Westminster Confession of Faith, such was not true. Note the language above: "This is not true."

But why multiply words, with these admissions from both sides? As between the two Confessions of Faith, no one claims that there was even substantial identity. From the record it appears that the Presbyterian Church, U. S. A., was taking legal advice, and this advice was to the effect, if the union was made, it must be upon the basis that all the standards of the new church should be the doctrines and standards of the Presbyterian Church, U. S. A., and that the name of the Presbyterian Church, U. S. A., must be retained. Their church had large holdings of property in trust. These lawyers realized that this property might be lost if the doctrines of that church were impaired in the slightest, and they would not even permit a change of name. Their idea was to preserve absolute identity throughout. Not mere identity of faith, doctrines, and standards, but name as well. They were not willing to stand upon McBride v. Porter, 17 Iowa, 203, so often cited in respondent's brief, which held that, if there was identity of doctrinal standards, a new name would not destroy the identity of the church. We are not criticising these lawyers, for they gave good legal advice. Nor are we criticising the church for seeking advice, because their vast interests demanded it, and their officers would have been derelict in duty had they failed to seek proper legal advice. But we dare say that the advice then given was far from what is now urged in this court. In our statement we refer to the use of the words "union" and "reunion" in the submission of the question. We were impressed with the notion, when reading the record, that the able counsel, whoever they were, in advising how the plan should be submitted, had likewise suggested the use of both words as a better means of safeguarding the property rights of their clients, and hence our statement that the reason for the use of the two words appeared only in the shadows of the background. But we repeat that this was proper legal advice, and the church was right in seeking it.

But all this goes to show that at no place throughout the proceedings did these two churches consider that there was even substantial identity of doctrines and standards. "Sufficient agreement of doctrine for union" is an uncertain and intangible thing. What one person would say was a sufficient agreement might not be so considered by another. Then the character of united action must be considered. In the broad sense of the mere saving of souls, there is sufficient agreement of doctrines for all churches to unite upon. Identity of faiths, doctrines, and standards, described merely as "sufficient agreement to warrant this union," is not that identity which the law demands, when determining the rights of parties to trust property. We conclude this paragraph by saying that the evidence of the parties themselves does not show that they considered there was identity of doctrines such as the law demands.

4. Now, going a step further, let us take up the two doctrines themselves and compare them. We shall not go elaborately into them, but far enough to illustrate that there is not identity of doctrine in the two Confessions of Faith. For a better exposition of them we refer the inquiring mind to the able and learned opinion of Neil, J., of the Tennessee Supreme Court, in case of Landrith et al. v. Hudgins et al. (not yet officially reported) 120 S. W. 783. To shorten expression, we shall speak of one church as the Presbyterian and the other as the Cumberland. Under the head of "God's Eter-

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er may or can come to pass upon all supposed conditions, yet hath He not decreed anything because He foresaw it as future, or that which would come to pass upon such conditions.

"Sec. 3. By the decree of God for the manifestation of His glory, some men and angels are predestined unto everlasting life, and others foreordained to everlasting death.

"Sec. 4. These angels and men, thus predestined and foreordained, are particularly and unchangeably designed, and their number is so certain and definite that it cannot be either increased or diminished.

"Sec. 5. Those of mankind that are predestinated unto life, God, before the foundation of the world was laid, according to His eternal and immutable purpose, and the secret counsel and good pleasure of His will, hath chosen in Christ unto everlasting glory, out of His mere free grace and love, and without any foresight of faith or good works or perseverance in either of them, or any other thing in the creature, as conditions, or causes moving him thereunto; and all to the praise of His glorious grace.

"Sec. 6. As God hath appointed the elect unto glory, so hath He, by the eternal and most free purpose of His will, foreordained all the means thereunto. Wherefore they who are elected being fallen in Adam, are redeemed by Christ; are effectually called unto faith in Christ by His spirit working in due season; are justified, adopted, sanctified and kept by His power through faith unto salvation. Neither are any other redeemed by Christ, effectually called, justified, adopted, sanctified and saved, but the elect only.

"Sec. 7. The rest of mankind, God was pleased, according to the unsearchable counsel of His own will, whereby He extendeth or withholdeth mercy as He pleaseth, for the glory of His sovereign power over His creatures, to pass by, and to ordain them to dishonor and wrath for their sin, to the praise of His glorious justice."

On the same subject the Cumberlands say:

"8. God, for the manifestation of His glory and goodness, by the most wise and holy counsel of His own will, freely and unchangeably ordained or determined what He Himself would do, what He would require His intelligent creatures to do, and what should be the award respectively of the obedient and the disobedient.

"9. Though all divine decrees may not be revealed to men, yet it is certain that God has decreed nothing contrary to His revealed will or written word."

The General Assembly of the Presbyterian Church, in 1903, adopted what they call a "Declaratory Statement," with reference to chapter 3 of their Confession of Faith, from which chapter, sections 3 to 7, quoted above, Confession of Faith: That concerning those who are saved in Christ, the doctrine of God's eternal decree is held in harmony with the doctrine of His love to all mankind, His gift of His son to be the propitiation for the sins of the whole world, and His readiness to bestow His saving grace on all who seek it. That concerning those who perish, the doctrine of God's eternal decree is held in harmony with the doctrine that God desires not the death of any sinner; but has provided in Christ a salvation sufficient for all, adapted to all, and freely offered in the Gospel to all; that men are fully responsible for their treatment of God's gracious offer; that His decree hinders no man from accepting that offer; and that no man is condemned except on the ground of his sin."

We have some views of our own on this Declaratory Statement, but that we may not be said to express only worldly views, we quote a few lines from the late eminent Presbyterian preacher and teacher, Rev. Benjamin B. Warfield, D. D., LL. D., of Princeton Theological Seminary. Writing upon the subject of "The Confession of Faith as Revised in 1903," in the Union Seminary Magazine, Richmond, Va., vol. 16, No. 1, he says, among other things, as follows: "The Declaratory Statement is not a 'revision' of the text of the Confession, nor an 'addition' to the text of the Confession. It is only an 'explanation' of the text of the Confession. The text itself it leaves intact, and not only leaves the text intact, but it reaffirms that text. What it sets itself to do, in fact, is to protect this text from false inferences and to strengthen it by application. That this is the real state of the case will be apparent if we give attention to the terms of the preamble by which the Declaratory Statement is introduced. * * * This doctrine it declares, we observe, 'is held.' It is not repudiated; it is not modified; it is not qualified; it is not in any way weakened or diluted; it simply 'is held.' Reaffirmation could not be more explicit."

In our humble judgment, Dr. Warfield is not far from right. Had he gone further and examined chapter 24 of the "Form of Government" of the Presbyterian Church, which chapter pertains to amendments, he would have found that it is neither an amendment in law or fact. Such a document finds no constitutional support under the constitution of his church. Nor does the instrument itself purport to be a legislative act amending or changing the text. It affirms that everything in the sections we have quoted is correct, but that they further hold said statements are in harmony with certain other named doctrines. But, even giving it the status of an amendment, it leaves the sections we have quoted as fully in force and effect as the day they were adopted in the

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are harmonious with the other things stated. That the two doctrines are in harmony we are wholly unable to see. If it meant by this instrument that they want the court to say that the original sections do not teach that some men were damned from the beginning by the decree of God, and that some others were saved by the same decree from the same date, we will not so say. The language of these sections is in plain English, and the court is presumed to be able to understand English, whether it appears in a contract or a confession of faith. Confessions of faith to be read and understood by the masses, the ignorant as well as the highly educated, are presumed to be in plain terms, and we presume they generally are in plain terms. At least this one is in plain terms. It is not claimed that these sections do not form a part of the Confession of Faith, or that a letter or syllable therein has been changed. The preamble says that the Declaratory Statement was for the purpose of "a disavowal by the church of certain inferences drawn from statements in the confession of faith." What these inferences were we are left to gather from what follows. But this is immaterial. It is evident that these sections are left, and are unimpaired, as Dr. Warfield says, and as the church itself said in the Assembly of 1907. We cannot say that there is identity of doctrine between these sections and the two sections quoted from the other Confession of Faith. They are diametrically opposed to each other.

But, going to another matter, when the committee was appointed to prepare this identical Declaratory Statement, it received instructions from the General Assembly thus: "It being understood that the revision shall in no way impair the integrity of the system of doctrines set forth in our Confession and taught in the Holy Scriptures." Thus they were charged in advance to in no way impair the Westminster Confession of Faith, and we think they have obeyed instructions.

Remembering that the union was effected "on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards," let us now go to a portion of such standards, about which there is no claim of wrong inference having been drawn, and which have not been either explained or modified by Declaratory Statement or otherwise. The Catechisms contain the doctrines actually and daily taught. These Catechisms cannot be changed, except by amendment, approved by two-thirds of the Presbyteries in the Presbyterian Church. Chapter 24, section 3, of Presbyterian Form of Government. No pretense that these have been amended. Let us, therefore, compare the doctrinal tenets of the Presbyterians say:

"Q. 12. What are the decrees of God? A. God's decrees are the wise, free and holy acts of the Council of His Will, whereby, from all eternity He hath, for His own glory, unchangeably foreordained whatsoever comes to pass in time, especially concerning angels and men.

"Q. 13. What hath God especially decreed concerning angels and men? A. God, by an eternal and immutable decree, out of His mere love for the prayers of His glorious grace, to be manifested in due time, hath elected some angels to glory; and in Christ hath chosen some men to eternal life, and the means thereof; and also, according to His sovereign power, and the unsearchable counsel of His own will (whereby He extendeth or withholdeth favor as He pleaseth), hath passed by and foreordained the rest to dishonor and wrath, to be for their sin inflicted, to the praise of the glory of His justice.

"I. All those whom God had predestined unto life and those only, He is pleased in His appointed and accepted time effectually to call by His Word and Spirit out of that state of sin and death, in which they are by nature, to grace and salvation by Jesus Christ; enlightening their minds spiritually and savingly, to understand the things of God; taking away their heart of stone, and giving unto them a heart of flesh; renewing their wills; and by His almighty power determining them to that which is good; and effectually drawing them to Jesus Christ, yet so as they come most freely, being made willingly by His grace.

"II. This effectual call is of God's free and special grace alone, not from anything at all foreseen in man, who is altogether passive therein, until, being quickened and renewed by the Holy Spirit, he is thereby enabled to answer this call and to embrace the grace offered and conveyed in it.

"III. Elect infants dying in infancy are regenerated and saved by Christ through the Spirit, who worketh when, and where, and how He pleaseth. So also are all elect persons, who are incapable of being outwardly called by the ministry of the Word.

"IV. Others, not elected, although they may be called by the ministry of the Word, and may have some common operations of the Spirit, yet they never truly come to Christ, and therefore cannot be saved."

The Larger Catechism:

"Q. 67. What is effectual calling? A. Effectual calling is the work of God's almighty power and grace, whereby (out of His free and especial love to His elect, and from nothing in them moving Him thereunto) He doth in His accepted time invite and draw them to Jesus Christ, by His Word and Spirit, savingly enlightening their minds, renewing and powerfully determining their wills so as they

(although in themselves dead in sin) are hereby made willingly and able, freely to answer His call, and to accept and embrace the grace offered and conveyed therein.

"Q. 68. Are the elect only effectually called? A. All the elect, and they only, are effectually called; although others may be and often are outwardly called by the ministry of the Word, and have some common operation of the Spirit; who, for their wilful neglect and contempt of the grace offered them, being justly left in their unbelief, do never come to Jesus Christ."

The Shorter Catechism:

"Q. 19. What is the misery of that estate whereinto man fell? A. All mankind, by their fall, lost communion with God, are under wrath and curse, and so made liable to all the miseries of this life, to death itself, and to the pains of hell forever.

"Q. 20. Did God leave all mankind to perish in the estate of sin and misery? A. God, having out of His mere good pleasure, from all eternity, elected some to everlasting life, did enter into a covenant of grace, to deliver them out of the estate of sin and misery, and to bring them into an estate of salvation by a Redeemer.

"Q. 21. Who is the Redeemer of God's elect? A. The only Redeemer of God's elect is the Lord Jesus Christ, who, being the eternal son of God, became man, and so was and continueth to be God and man, in two distinct natures and one person forever."

The Cumberlands say:

"Q. 7. What are the decrees of God? The decrees of God are His wise and holy purposes to do what shall be for His glory. Sin not being for His glory, therefore, He has not decreed it."

"38. God, the Father, having sent forth His Son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the Holy Spirit with the same intent to every man."

"51. Those who believe in the Lord Jesus Christ are regenerated, or born from above, renewed in spirit, and made new creatures in Christ."

"54. All infants dying in infancy, and all persons who have never had the faculty of reason, are regenerated and saved."

"21. What are the evils of that estate into which mankind fell? Mankind, in consequence of the fall, have no communion with God, discern not spiritual things, prefer sin to holiness, suffer from the fear of death and remorse of conscience, and from the apprehension of future punishment.

"22. Did God leave mankind to perish in this estate? No; God, out of His mere good pleasure and love, did provide salvation for all mankind.

"23. How did God provide salvation for mankind? By giving His Son, who became man, and so was and continues to be both God and man in one person, to be a propitiation for the sins of world."

Page after page might be taken up; but it is useless. From these catechisms the people are taught the doctrinal theories of the churches. Some churches go so far as not to confirm the member until they have been fully studied and memorized. If the Presbyterian Church to-day is complying with the disciplines of their church, and teaching from these Catechisms, either Larger or Shorter, they are teaching Calvinism in its purity. We are to presume that, as faithful Christians, as they are, they are not remiss in this regard. But, be that as it may, these quotations are of their standards of doctrines and faith. Had that church desired to depart from them under their constitution, they should have been stricken out by amendment. So, too, had it been the purpose to depart from the old Westminster Confession of Faith, they would have stricken out by way of amendment that part relating to the "Decrees of God," which teach fatalism in terms too concise and plain to require argument here.

The position of the Cumberland Presbyterian Church is well stated by the following excerpts from Blake's Old Log House, pp. 267 to 270:

"The Cumberland Presbyterian Church claims to occupy what it denominates the 'Medium System of Theology,' a middle ground between Calvinism and Arminianism. The two latter systems (Calvinism and Arminianism), as we all know, are regarded as the extreme of theology. It is claimed by the advocates of the systems that there is no medium ground; that every one must either be a Calvinist or an Arminian in his religious belief or else he is nothing; but such an assertion, when analyzed, is absurd—might as well say there is no territory between the north and south poles, or that there is no space between the extreme ends of a platform; how could these two systems be the extremes of theology without having this intermediate area, this medium ground? But let us examine these systems (Calvinism and Arminianism) and see if there is not a theological medium ground.

"1. The Doctrine of Election.—Calvinism teaches that election is unconditional. Arminianism teaches that there is no election in this life. Medium system teaches that there is an election, but that it is conditional.

"2. The Doctrine of Salvation.—Calvinism teaches that salvation is unconditional to sinners, but certain to Christians. Arminianism teaches that salvation is conditional to sinners, but uncertain to Christians. Medium system teaches that salvation is conditional to sinners but certain to Christians.

"3. The Date of Election.—Calvinism teaches that the date of election is before man was created. Arminianism teaches that the date of election is not prior to the death of the Christian, if, indeed, it occurs then. Medium system teaches that the date of election

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is the moment when the sinner is regenerated.

"4. The Extent of the Atonement.—Calvinism teaches that Christ died for only a part of the human race—that salvation is not possible to all, and that none but those who were 'elected from the foundation of the world' will be saved. Arminianism teaches that the atonement of Christ was made for all mankind, that salvation is possible to all; but, as Christians may fall from grace, it is not certain that any one will be saved. Medium system salvation is possible to all, and that every one who has been truly regenerated will be saved.

"5. The Perseverance of the Saints.—Calvinism teaches that perseverance depends principally upon the immutability of the decree of unconditional election. Arminianism teaches that perseverance depends, not upon the immutability of the decree of unconditional election, nor upon the good works of the creature, but upon the love of God, the merits of Christ, the abiding of the Spirit and the covenant of Grace."

At the first meeting of the first Cumberland Presbyterian Synod there was promulgated the following:

"1. That there are no eternal reprobates.

"2. That Christ died, not for a part only, but for all mankind.

"3. That all infants dying in infancy are saved through Christ and the sanctification of the Spirit.

"4. That the Spirit of God operates on the world, or as coextensively as Christ has made atonement, in such a manner as to leave all men inexcusable."

Such is found implanted in every line of their subsequently made Confession of Faith. Such was there at the time of this union, and such is there both in spirit and letter at this time. We cannot hold that there is substantial identity between these two Confessions of Faith. To so say would be but to call from the grave the earnest protests of such venerable fathers in Israel as Ewing, McAdow, King, Calhoun, Donnell, Morrow, Bule, Burrow, Sloan, Patton, Rennick, and others, who from the beginning framed and fostered the spirit of Cumberland Presbyterianism, both in the East and West, and some of whom are buried beneath the sod of Missouri.

We therefore hold that the parties leaving the Cumberland Presbyterian Church and going into the Presbyterian Church, U. S. A., are dissenters from the Cumberland Presbyterian doctrines and faith, and, it matters not whether they be in the majority or minority, they are in no position to claim property conveyed and held in trust for the Cumberland Presbyterian Church. This statement is here made subject to the views we have as to the legality of the proceedings for Union, which follow.

4a. We do not contend that the Cumberland Presbyterian Church could not amend its Confession of Faith, by striking out portions thereof or adding portions thereto. Under their constitution this can be done, for section 60 of their constitution reads: "Upon the recommendation of the General Assembly at a stated meeting, by a two-thirds vote of the members thereof, voting thereon, the Confession of Faith, Catechism, constitution and rules of discipline may be amended or changed when a majority of the Presbyteries, upon the same being transmitted for their action, shall approve thereof." We have set out what was submitted to the Presbyteries to be voted upon. The question there submitted was the question of union, not the question of amending the Cumberland Presbyterian Confession of Faith. We have read this voluminous record, containing the proceedings of both Assemblies upon the question of union, and no word is found therein showing that they considered for a moment an amendment of the Cumberland Confession of Faith. Not an amendment was suggested by the General Assembly of the Cumberland Presbyterian Church, nor was one voted upon by the Presbyteries. The question of amending this Confession of Faith is never mentioned, and it remains in full tact to-day.

For the present, grant it that two churches having like creeds and doctrines can unite, and by such union, because of the identity of doctrine, carry to the union the property held in trust by both, yet that does not reach this case. Here we have two churches of different doctrines and faiths attempting to unite without changing by amendment the Confession of Faith of either. In the language of Judge Neil in Landrith et al. v. Hudgins et al., supra: "The union must be effected in strict accord with the constitution. That is, if it requires a preliminary change of faith and of name, and these changes can only be made by amendment, then such amendment must precede the actual union, and must be made in the manner pointed out in the contract. The principle is that as far as the method is distinctly pointed out it should be pursued." The constitution is the contract of association in churches and all unincorporated societies. It is binding upon all portions of the church, as well as the judicatories thereof. It is the supreme law of the church, and must be adhered to by every part thereof. To pass upon the meaning of such instrument is not dealing with ecclesiastical questions at all, but only determining the meaning of an organic agreement or contract. That these organizations cannot go beyond their constitutional powers is amply shown by the cases. Watson v. Garvin, 54 Mo. 379; Watson v. Avery, 2 Bush (Ky.) 332; Bear v. Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615; Bunn v. Gorgas, 41 Pa. 446; Krecker v. Shirey, 163 Pa. 534, 30 Atl. 440, 29 L. R. A. 476; Gartin v. Penick, 5 Bush (Ky.) 110; Kerr's Appeal, 89 Pa. 97;

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115 S. W. 684, of the Kentucky Court of Appeals, which we will mention later as one of the cases growing out of this particular union. Other cases might be cited; but we take it that it is clear that, whenever the church has a written constitution, such constitution is the contract between the members, and all are bound thereby.

The only way, under section 60, supra, by which the General Assembly of the Cumberland Presbyterian Church could change the name of that organization or change its doctrines or faith was by proper amendments, offered as to their own confession of faith and organic law. It has no inherent power to wipe out the name "Cumberland Presbyterian Church" until, by a two-thirds vote of the Assembly, it has asked its Presbyteries, by way of a proposed amendment, whether or not they will so permit. The parties had thought along this line, for in their plan for union which was adopted the first provision was: "The Presbyterian Church in the United States of America, whose General Assembly met in Immanuel Church, Los Angeles, Cal., May 21, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the First Cumberland Presbyterian Church, Nashville, Tenn., May 21, 1903, shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess." Even if it could be said that, if this had been submitted, it would have the effect of an amendment to the Cumberland Presbyterian constitution, so as to change the name of that church, yet this section 1 was never submitted to and voted upon by the Presbyteries of that church. Judge Neil, in the Tennessee case, has so forcibly presented this point that we use his language rather than our own. He says:

"The first subdivision of the plan which involved a surrender of the name and organization of the Cumberland Presbyterian Church was not submitted to the Presbyteries, but was left to be determined, and was determined, by the General Assemblies of the two churches, or, rather, by the General Assembly of the Cumberland Presbyterian Church. The question did not arise in the Presbyterian Church, U. S. A., because under the Plan of Union that church was to retain both its name and organization. Did the General Assembly of the Cumberland Presbyterian Church, without submitting the matter to the Presbyteries, have the power to surrender the name and organization of the church, and dissolve it, by consenting to its absorption into another organization? The view entertained by the two General Assemblies was that by submitting the question whether the Union should be made on the basis of the Confession of Faith of the Presbyterian Church, U. S. A., as revised in 1903, the whole plan was submitted. Indeed, from a letter which the moderator and stated clerk of the Cumberland Presbyterian General Assembly wrote to the Presbyteries, it appears that they signified to these bodies that their vote on these questions would mean the 'acceptance or rejection of the whole plan.' It is provided in the Plan of Union that each of the Assemblies shall submit the Basis of Union to its Presbyteries, to express their approval or disapproval, by a categorical answer to this question, setting forth the doctrinal question copied herein, concerning the adoption of the Confession of Faith of the Presbyterian Church, U. S. A. That is, while the plan consisted of two distinct parts—the matter of doctrine, and the matter of dissolving the organization of the Cumberland Presbyterian Church and its absorption into the Presbyterian Church, U. S. A.—only the question of doctrine was ordered to be submitted to the Presbyteries, and their answer to this was to be regarded, according to the plan, as an answer to the other; in other words, only a part of the plan was to be submitted to the Presbyterians, but this submission was to be regarded according to the plan as an answer to the other; in other words, only a part of the plan was to be submitted to the Presbyteries, but this submission was to be regarded as a submission of the whole. So, passing the statement above quoted from the letter of the moderator and the stated clerk to the Presbyteries as to what the effect of their vote would be as expressing merely their opinion, which, of course, was not binding upon the Presbyteries, or upon the court, because it does not appear that they had any authority to make such statement, but were merely required by the resolution of the Assembly to submit the Basis of Union to the Presbyteries, and also because the question is one for this court to determine, we must consider the question as one arising upon the Basis of Union itself, whether the submission of the single question referred to (the doctrinal basis) was also a submission of the other, concerning the surrender of the name of the church, and the breaking up and dissolution of its organizations. The question asked the Presbyteries was: 'Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal

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and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired Word of God, the only infallible rule of faith and practice?' Was that equivalent to asking the Presbyteries to vote upon the proposition involved in the first section of the plan, that the Cumberland Presbyterian Church should surrender its name and organization and be incorporated into the body of the Presbyterian Church in the United States of America, and under the name of the latter? Does the submission of the question, 'Are you willing to effect a union upon a certain doctrinal basis?' also submit the question, 'Are you willing that the Cumberland Presbyterian Church shall abandon its name and organization and be merged into the Presbyterian Church, U. S. A.?' We think not. Perhaps this might be true as a necessary implication, if merger were the only form of union, but it is not by any means the only form. At all events, the people of the church were entitled to have the whole question submitted to the Presbyteries. We do not think that the General Assembly had power to determine this question without a submission to the Presbyteries. There is nothing in any part of the constitution of the church which confers this power upon the Assembly, and by section 25 that body is denied all powers not expressly conferred."

The General Assembly of the Cumberland Presbyterian Church in 1906, by its action, undertook to surrender, not only the creed and doctrines of its church, but likewise to surrender its name, organization, and property, and this without a vote of the Presbyteries. This cannot be done under the Cumberland Constitution. The act was ultra vires and void.

5. But to our mind there is another phase of this case to be emphasized. We are firmly of the opinion that there was no power in the General Assembly of the Cumberland Presbyterian Church to submit the question of union. In this view we are opposed to some of the cases growing out of the controversy now before us. Section 43 of the Constitution reads:

"43. The General Assembly shall have power to receive and decide all appeals, references and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the church, in all cases submitted to it; to review the records of the Synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide or dissolve Synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church; to authorize Synods and Presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts, and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth and holiness throughout all the churches under its care."

It will be noticed that there are but two provisions herein that relate to changing the church status. We mean by that the church as a whole. First, it says "to concert measures for promoting the prosperity and enlargement of the church"; and, secondly, "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrines and order of this church." Then follows the clause that they can authorize synods to do the same things. It is hardly necessary to say the word 'church' in these clauses quoted has reference to the Cumberland Presbyterian Church, and none other. In this light, does the enlargement of the Cumberland Presbyterian Church, as spoken of in the first-quoted clause, mean the absolute surrender of the name, organization, and creed of the church? To my mind it means to enlarge the Cumberland Presbyterian Church organization itself, and not to destroy or surrender it. This construction receives sanction in the second clause quoted, because it there provides one method of enlargement, and that is to "receive" unto itself other organizations of like creed and faith. These powers, when fairly construed, mean (1) that by work in different ways they shall strive to secure individual members to join and thus enlarge the church, and (2) to receive other bodies of a similar faith, creed, and government. Neither of these contemplate the merger of the church into another organization. The constitution has dealt with the manner of enlarging the church, and in a manner which does not indicate that there should be a surrender of the church organization, the church name, or the creed. Authority to "receive" unto itself does not mean to go to another body. The written instrument having mentioned the specific way by which mergers or unions can be formed with the church—i. e., by receiving other bodies under its jurisdiction—excludes the idea of enlargement by such church going in under another organization. The constitution has dealt with the manner of enlarging the church, and in

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a manner which does not indicate that there should be a surrender of the church organization, the church name, or creed. The maxim "Inclusio unius, exclusio alterius," has peculiar application here. There is express provision for the consolidation of this church with other churches, but that provision is for the other to so amend its creeds, doctrines, and form of government as to make them conform to that of the Cumberland Presbyterian, and then come in under the jurisdiction of the Cumberland Presbyterian Church. Had the constitution been silent upon the question as to how the Cumberland Church should unite with other churches, there might be something in what respondents call the inherent power to unite. If the written constitution prescribes a method for union, and this constitution does, that method and none other should be followed. Any other method would be ultra vires. When they dealt with the question of merger or union, as they did, then the method adopted excludes the idea of any other. This constitutional method was "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."

The constitution provides for a union in express terms, but the one sought and attempted to be consummated was not such as is prescribed by the constitution. It was violative of the constitution, and therefore void. The sovereign power rests with the church as a whole, and the several judicatories, beginning with the church session and ending with the Assembly, are but agencies of the church, with granted powers, which are expressly limited by section 25 of the constitution. The General Assembly is not the church; neither is any other minor judicatory. They are but the constitutional agents of the church, and, whilst they can amend the constitution, as well as the creed, yet, until it is amended in strict compliance with the limiting terms of such constitution, the existing organic law is binding alike upon the General Assembly and the humblest member. So that we say that the attempted method of union was in direct violation of the constitution and void. In other words, until the church has amended section 43 of its constitution, it cannot form a union with any other ecclesiastical body, except to receive such other body under its own jurisdiction.

6. We do not feel that we should pass this case without some little comment upon the cases which have grown out of this controversy, and the case much relied upon by respondents; i. e., Watson v. Jones, 13 Wall. 729, 20 L. Ed. 666. This last-named case, in so far as it holds that civil courts will not look into the judgments of ecclesiastical courts, has been condemned in terms by the Supreme Courts of Missouri, Kentucky, Michigan, and New York, and sharply distinguished, if not criticised, by Taft, J., in the Brundage-Deardorf Case, supra. In the Brundage Case, however, the United States Circuit Court of Appeals (92 Fed. 214, 34 C. C. A. 304) said that they felt bound by that decision. But, as we have shown, the great weight of authority is that civil courts will investigate ecclesiastical judgments in all cases wherein property rights are concerned.

In Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415, Justice Sharwood uses this forceful language: "Courts which have the supervision and control of all corporations and unincorporated societies or associations must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund, and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the highest law, but must yield to the law of the land."

In Fussell v. Hall, 233 Ill. 73, 84 N. E. 42, a case growing out of this particular union, the Illinois Supreme Court said: "The civil courts afford no remedy for an abuse of ecclesiastical authority which does not violate a civil or property right. Church tribunals ought to perform their functions honestly, impartially, and justly, with due regard to their constitutional powers, sound morals, and the rights of all who are interested; but if tyranny, force, fraud, oppression, or corruption prevail, no civil remedy exists for such abuse, except where it trenches upon some property or civil right." This (the Fussell Case) is the first of the series of cases growing out of this union. The bill was one in chancery, the object of which was to prevent the two bodies from declaring a union. In other words, they sought to stop the two bodies from acting. The Supreme Court sustained the action of the lower court in sustaining a demurrer to the bill in this language: "There is no allegation setting forth any deed, devise, declaration of trust, or gift of any property, or any clause therein, or the terms thereof, whereby it can be seen that the proposed union would defeat its purpose. There is no statement whereby it appears that the complainants, or any of those they represent, have an interest in any property which will be in any way affected by the proposed union. It is not alleged that any action is proposed to be taken which will interfere with the management and control of the property of the various churches, boards, schools, and other institutions of the Cumberland Presbyterian

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We do not find that any property right is directly involved or can be directly affected by the proposed action of the General Assembly which it is sought to enjoin. This proposed action was still pending in the General Assembly, undetermined, when the bill was filed. It may well be doubted whether the proceedings of an ecclesiastical body can in any event be controlled by an injunction while the matter is still in fieri. But, without regard to this question, the case stated in the bill was not within the jurisdiction of a court of chancery, and the demurrer to the bill was therefore properly sustained." It thus appears that the Supreme Court of Illinois clearly indicates that, had there been allegations of property rights, an investigation should have been made by the civil courts. It so indicates throughout the entire opinion, and in this is opposed to what respondents say was the ruling in Watson v. Jones, supra. The Illinois Court of Appeals had sustained the action of the lower court upon other grounds, holding, among other things, that under the Cumberland Presbyterian Constitution, giving it power "to promote the prosperity and enlargement of the church," they could unite. The Supreme Court had that opinion before it, but did not see fit to indorse it. We have discussed this constitutional provision elsewhere.

Next we have Mack v. Kime, by the Georgia Supreme Court, 129 Ga. 1, 58 S. E. 184, which court followed the opinion of Fussell v. Hail, in the Illinois Court of Appeals, 134 Ill. App. 620, and holds that the court will not go back of the church adjudications. This court does not discuss the distinction between cases wherein property rights are involved, but bases its opinion upon Fussell v. Hail, supra, wherein the Illinois Supreme Court afterwards said no property rights were involved.

Next we have Wallace v. Hughes, by the Kentucky Court of Appeals, wherein, by a divided court, Settle, C. J., not sitting, and Nunn, J., dissenting, the court held that the Cumberland Presbyterian General Assembly had the power to enter into the union. The court goes into the constitutional power to form the union, and is of the opinion that there was such, but proceeds upon what we deem an erroneous theory, in that it holds that the adjudication of ecclesiastical tribunals are binding upon civil courts. This is apparent from the following language in the opinion: "We think the foregoing authorities establish beyond question that, unless there is something in the constitution of the Cumberland Presbyterian Church, as it existed before the union, which denied jurisdiction to the General Assembly, with the approval of the Presbyteries, to authorize

Next in order is Brown v. Clark, 116 S. W. 360, by the Supreme Court of Texas. That court follows and relies upon the following cases: Fussell v. Hail, 134 Ill. App. 620, a case in which no property rights were involved, and practically ignored by the Supreme Court of the state in the same case; Mack v. Kime, 129 Ga. 1, 58 S. E. 184, which followed the Illinois Court of Appeals; Wallace v. Hughes, Kentucky Court of Appeals; and Watson v. Jones, 13 Wall. 729, 20 L. Ed. 666. Not another case is cited, and the court sought cover under the doctrine that civil courts are bound by decrees of ecclesiastical tribunals, even where property rights were involved as they were. The court overrules the opinion of the Court of Civil Appeals, which opinion reviews many of the authorities which we have reviewed, and cites even others. For thoroughness of research the latter is much the better of the two opinions.

The views which we have expressed upon this union have been entertained in full or in part by the following cases: Clark v. Brown (Tex. Civ. App.) 108 S. W. 421; Ramsey v. Hicks (Ind. App.) 87 N. E. 1091; Landrith v. Hudgins, Supreme Court of Tennessee; and by Fussell v. Hail, Supreme Court of Illinois. In the latter case the court clearly indicates that, had property rights been involved, an inquiry into all matters would have been proper. But, whatever may be the views of other courts as to the duty of a civil court to merely act as the clerk of an ecclesiastical court and register its decrees upon any question, in a case wherein property rights are involved, it has never been the doctrine of this court, from the case of Watson v. Garvin, 54 Mo. 379, to this date, and our views, as we think we have shown, have been those of a great majority of the courts. Justice Miller, in Watson v. Jones, supra, concedes that his ruling was contrary to English authority, and in the Free Church of Scotland Case, in Appeal Cases for year 1904, the English rule is adhered to in all its strictness, and the two church creeds examined, pronounced not identical, and the union declared void.

7. This union is an unwarranted merger of the Cumberland Presbyterian Church into the Presbyterian Church, U. S. A. It is an unwarranted surrender of name, Confession of Faith, judicatories, and an unconditional merging of the one church into the other. We say unconditional surrender and merger, because one party kept name, creed, government, and everything, whilst the other abandoned everything. Such mergers have been condemned by the best-considered cases both in this country and England. In England the attempted union merger of the Free Church of Scotland and the United Presbyterian Church was condemned by the House

of Lords. Appeal Cases [1904] 695. Such a union is likewise condemned by one of the strongest Chancery Courts in this country, that of New Jersey. Associated Reform Church v. Trustees of Theological Seminary, 4 N. J. Eq. 77. You cannot by union or merger put one church into another, having a different creed and doctrines, without forfeiting the property held in trust to such members of the body as remain faithful to the original creed and doctrine.

By the deeds the property in this case is held by F. M. Cockrell, J. L. Roberts, and W. K. Morrow, as "trustees of the Cumberland Presbyterian Church of the Warrensburg Congregation," in one deed, and in the others as "trustees of the Cumberland Presbyterian Church in Warrensburg, Mo." This attempted union being invalid, and the plaintiffs herein having dissented from the Cumberland faith and cast their lot with another church of a different faith and creed, they are not entitled to the beneficial use of this property, but the beneficial use thereof belongs to defendants and all other members of the congregation of the Cumberland Presbyterian Church of Warrensburg, Mo., as have remained faithful to the doctrines of that church. The universal rule is that, where there is a schism in a church, those remaining faithful to the tenets of the church at the time of the dispute, whether they be in the majority or the minority, are entitled to hold the property. Of course, if the whole congregation departed from the true faith, and the deed was for the benefit of the local congregation, as in this case, they could not be disturbed in their use by an outsider, who had no interest in the trust property. Such is not the case here, however. There is a substantial number of the old congregation adhering to the Cumberland faith, and as such they are entitled to the beneficial use of the property involved.

The decree nisi is for the wrong party. The judgment will be reversed, and the cause remanded, with direction to the circuit court to dissolve the injunction and dismiss the bill of the plaintiffs, and enter judgment in favor of defendants and against the plaintiffs for all costs. It is so ordered.

VALLIANT, C. J., and BURGESS and FOX, JJ., concur. LAMM and WOODSON, JJ., dissent. GANTT, J., did not sit.

On Motion for Rehearing.

VALLIANT, C. J., and BURGESS and FOX, JJ., concur in these views. VALLIANT, C. J., whilst concurring in all that is said in this opinion, in separate opinion on motion for rehearing has added some additional views, in which BURGESS, FOX, and GRAVES, JJ., concur. WOODSON, J., dissents in separate opinion. LAMM, J., likewise dissents and expresses his views in separate opinion. GANTT, J., did not sit.

VALLIANT, C. J. The opinion of my learned Brother GRAVES, in which I concur, so completely covers all the points in the case that I hesitate to attempt to add anything more; but in the motion for a rehearing there are two points urged with so much earnestness and force by the learned counsel for respondents that in deference to them I feel constrained to say a few words.

1. It is contended that the General Assembly of the Cumberland Presbyterian Church had full control of the subject, and had authority to do what they essayed to do, and what respondents think they accomplished. Before and until the accomplishment of that act there were two separate organizations, two separate entities, the Presbyterian church, U. S. A., and the Cumberland Presbyterian Church, each having a confession of faith essentially different from the other, at least a confession of faith which one of them interpreted to be essentially different from the other, and which, because of that interpretation, whether right or wrong, held itself independent of and separate from the other. But that act, whether we call it a merger, a union, or a reunion, if full effect be given to it, was an extinguishment of the Cumberland Presbyterian Church as an entity. It was an extinguishment even of the General Assembly itself which committed the act. As a rule an executive body appointed to administer the affairs of an association is created to effectuate the purpose of the association—to preserve it, not to destroy or extinguish it. However plenary in words the powers given to such a body may be, they must be construed in the light of the purpose for which they were given. In this particular there can be no difference between a church organization and an organization of any other kind, unless it be that the presumption that the executive board was created to preserve and perpetuate is stronger in regard to a church organization than any other, because a church organization always looks to perpetuity.

It is almost impossible to imagine an organization delegating to its executive board, or its administrative body, by whatsoever name it may be called, the power to take its own life, to destroy the organization. Certainly no such power can be implied. If it is conferred, it must be by express terms. There is nothing in the record in this case to show that any such power was conferred on the General Assembly of the Cumberland Presbyterian Church. All the powers conferred were to aid in carrying into effect the purpose for which the church was organized. The powers that the General Assembly had at the date of this alleged union were the same, and only the same, that it had from the beginning of the organization of the church. Surely there was nothing in the original act of the church organization that indicated a purpose to unite with or become merged into the Presbyterian Church.

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Therefore it cannot be implied that the power to effect such a union or merger was given to the General Assembly at the beginning of the church organization, and there have been no additional powers given since. It is argued in one of the briefs that the power of the General Assembly was derived, not from the people composing the church, but from the Divine Founder of the Christian religion. That may or may not be true as a theological dogma. We do not know. Human tribunals are limited within the bounds of human laws, and therefore, if we should attempt to follow that argument, it would lead us outside of our boundary, and we should be unable to find our way. The church has its written laws, and those laws were written by men, and we can only interpret them as the work of men. The only knowledge we have of the powers of the General Assembly is derived from those written laws. It is said in the brief that all the membership of the Cumberland Presbyterian Church assented to a declaration, contained in the church constitution, to the effect that the governmental power of the church comes from the Divine Founder, and therefore the defendants in this suit cannot question the act of the General Assembly. But the same constitution which it is claimed concedes the divine authority of the General Assembly in matters of church government specifies certain powers which are conferred on the General Assembly, but among those specifications the power to transfer all members of this church into another church is not expressed.

If we are to understand the argument to be that the power of the General Assembly is unlimited because of its divine authority, then it would follow that the General Assembly could merge this church into any other Christian church, however different in its confession of faith. Assuming that the General Assembly of the Cumberland Presbyterian Church derived its authority from the Divine Founder, we must assume, also, that the General Assembly of the Presbyterian Church, U. S. A., derived its authority from the same divine source, and, if so, in matters of Christian faith both General Assemblies were unerring. Yet we find that in 1810 there was a wide difference in the Confessions of Faith of the two churches as each interpreted it, and that difference existed until 1906, when the General Assembly of the Cumberland Presbyterian Church extinguished that church by merging into the Presbyterian Church, U. S. A. For nearly a hundred years the divinely created and divinely empowered General Assembly of the Cumberland Church suffered its members to grope in error on the very point of faith on which that church was founded; that is to say, the members of the Cumberland Church groped in error if there was during all that time really no difference in what they deemed was essential in the dogmas of the two churches, because the Presbyterian Church, U. S. A., has been careful to say that it has not receded from the position it has held from the first. We say this with perfect reverence, and only to show how impossible it is for a human tribunal to follow the purely theological argument of the learned counsel who advance it. We are concerned now only with a question of title to property, and we are bound to decide that question according to human law. Whilst title to real estate is the only question before us to decide, yet in the argument a question of personal right might arise, if full effect is given to the alleged act of union or merger. If that act carries the property of the Cumberland Presbyterian Church into the Presbyterian Church, U. S. A., it carries also its members, who ipso facto become members of the Presbyterian Church and subject to its discipline. The only way an individual member could avoid it would be to withdraw and withdrawal concedes membership. Therefore either one of these defendants, if he should act contrary to a rule of the Presbyterian Church or express a disbelief in one of the articles of Confession of Faith, would be liable to have charges preferred against him in a court of that church, and if found guilty have the stigma of expulsion pronounced against him. Is it possible that one could be so stigmatized by a church in which he never voluntarily became a member?

2. The other point on which I will express my views is the contention that, in so far as the defendants' case rests on what they claim to be a difference in the Confessions of Faith of the two churches, it is without foundation, because the General Assembly of the Presbyterian Church, U. S. A., has so interpreted its Confession of Faith that it does not mean to teach fatalism, and is therefore not what the founders of the Cumberland Church thought it was, and that judgment of the ecclesiastical court on that question is final, and cannot be reviewed, or its correctness questioned, by this or any other court. It may be conceded that the judgment of the church court declaring the meaning of the church dogmas is conclusive on all the members of that church; but it is not conclusive on those who are not members. It may be conceded, also, that even a majority of the members of the church, if they should dissent from the interpretation put upon its written doctrines by the church court, would have no right to claim to be the church, and to hold the church property in opposition to the minority, who yield to the judgment of the church court; but when the church is seeking to reach out and take in people who never were members, and who refuse to become members, a different case is presented.

Doubtless many of the points of difference between different churches arise because those outside of a particular church inter-

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pret its dogmas to mean what the church itself says they do not mean. The interpretation put on its dogmas by the church itself is binding on its own members, but not on those who are not its members; and a person outside has a right to put his own interpretation on them when they concern him, and to govern himself accordingly. Perhaps, if the General Assembly of the Cumberland Presbyterian Church had adopted the Confession of Faith of the Presbyterian Church, and had then put an interpretation on it, that interpretation would be binding on its members; but that was never done. The only thing the General Assembly of the Cumberland Church did was to merge its church into the Presbyterian Church, while that church in its most solemn form declared it had never receded from the dogmas which it had always declared.

Therefore, in a case involving title to property, if a question arises as to the meaning of certain clauses in the confession of faith of a particular church, and if the parties litigant are all members of the same church, and if the highest ecclesiastical court of that church has put on the disputed clauses a certain interpretation, this court would adopt that interpretation as conclusive; but, if the parties litigant on one side were not members of the church, we would have to take the written confession of faith and interpret it as we would any other written instrument.

BURGESS, FOX, and GRAVES, JJ., concur in the views herein expressed. GANTT, J., not sitting.

The motion for rehearing is overruled.

WOODSON, J. I was one of the dissenters from the opinion handed down in this case, but was prevented by the pressure of other official duties from then expressing my views of the case. Since then a motion for a rehearing has been filed, and I will now avail myself of this opportunity to submit the following observations in reference thereto.

1. The main legal proposition involved in this case regards the power of the Presbyterian Church, U. S. A. (which will hereafter be designated as the Presbyterian Church), and the Cumberland Presbyterian Church (which will hereafter be designated as the Cumberland Church), to unite and become one church. The affirmative of this proposition is contended for by the former, while the latter maintains the negative thereof. If we should concur with the view entertained and presented by counsel for the latter, then that would dispose of the entire case, and would render it wholly unnecessary to decide any of the other questions presented for our determination, and for that reason I will express my views upon that question first.

If I correctly understand counsel for respondents, they contend that the governing bodies of these two churches have the inherent power to order and consummate a union between them, while counsel for appellants insist that the constitutions of these respective churches do not authorize a union between them, nor empower those bodies to unite them into one church; but, being creatures of those constitutions, their authority in that regard is limited to the powers expressly granted therein. These bodies, or courts, are denominated by section 24 of the constitution of the Cumberland Church as church sessions, Presbyteries, Synods, and General Assemblies. In order to properly understand the character of these courts, we must first ascertain from the constitution what is "the church" and what is "a particular church" over which they exercise jurisdiction.

The church is defined by sections 1 and 2 of the constitution as follows:

"1. Jesus Christ, who is now exalted far above all principality and power, has established in this world a kingdom which is His Church.

"2. The universal church consists of all those persons, in every nation, who make profession of the holy religion of Christ and of submission to His laws. As this immense multitude cannot meet together in one place to hold communion or to worship God, it is proper, and authorized by scripture example, that they should be divided into many particular churches."

Section 3 prescribes the requisites for membership, but has no bearing upon any of the questions involved in this litigation.

And "a particular church," by section 4, is declared to consist of a number of professing Christians, voluntarily associated together for divine worship and godly living, agreeable to the Holy Scriptures, and submitting to a certain form of government. Its officers are the ministers in charge, the ruling elders, and the deacons. Its jurisdiction is lodged in the church sessions, composed of the minister in charge and ruling elders.

Section 8 provides that: "The ordinary and perpetual officers of the church are teaching elders or ministers of the Word, who are commissioned to preach the gospel and administer the sacraments; ruling elders, the representatives of the people; and deacons."

Section 17 prescribes the duties of the ruling elders, and in so far as it is material to this suit is as follows:

"Ruling elders, the immediate representatives of the people, are chosen by them, that, in conjunction with the ministers, they may exercise government and discipline, and take the oversight of the spiritual interests of the particular church, and also of the church generally, when called thereunto. It appertains to their office, both severally and jointly, to watch diligently over the flock committed to their charge, that no corruption of doctrine or of morals enter therein. Evils

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which they cannot correct by private admonition they should bring to the notice of the church session."

The church session and its jurisdiction are defined by sections 26, 27, and 28 of the constitution, as follows:

"26. The church session consists of the minister in charge and two or more ruling elders of a particular church. In the absence of the minister in charge, and in a vacant church, the ruling elders alone may form a church session for the transaction of any business. The church session shall be convened when any two ruling elders shall so request. The minister in charge may convene the church session at any time. A majority of the church session shall be necessary to constitute a quorum, unless, with the concurrence of the church, the church session shall otherwise determine; but any two of the ruling elders, in conjunction with a minister, may receive members and grant letters of dismission.

"27. The church session is charged with maintaining the spiritual government of the church, for which purpose it is its duty to inquire into the doctrines and conduct of the church members under its care; to receive members into the church; to admonish, suspend, or excommunicate those found delinquent, subject to appeal; to urge upon parents the importance of presenting their children for baptism; to grant letters of dismission, which, when given to parents, shall always include the names of their baptized children; to obtain and install ruling elders and deacons when elected, and to require those officers to devote themselves to their work; to examine the records of the proceedings of the deacons; to establish and control Sabbath schools and Bible classes, with especial reference to the children of the church; to order collections for pious uses and church purposes; to take the oversight of the singing in the public worship of God; to assemble the people for worship when there is no minister; to concert the best measures for promoting the spiritual interests of the church; to observe and carry out the injunctions of the higher courts; and to appoint representatives to the higher courts, and require on their return a report of their diligence.

"28. Every church session shall keep an accurate record of its proceedings, which must be, at least once in every year, submitted to the inspection of the Presbytery. * * *"

Sections 29 to 34, both inclusive, define what is a Presbytery and its jurisdiction in the following language:

"Presbytery.

"29. A Presbytery consists of all the ordained ministers and one ruling elder from each church within a certain district. Every particular church which is willing to support the gospel as God has prospered it shall be entitled to be represented by a ruling elder in Presbytery. Every ruling elder not known to the Presbytery shall produce evidence of his regular appointment from the church he represents.

"30. Any three ministers belonging to the Presbytery, being met at the time and place appointed, shall be a quorum competent to proceed to business.

"31. The Presbytery has the power to examine and decide appeals, complaints, and references brought before it in an orderly manner; to receive, examine, dismiss, and license candidates for the holy ministry; to receive, dismiss, ordain, install, remove, and judge ministers; to review the records of the church sessions, redress whatever they may have done contrary to order, and take effectual care that they observe the government of the church; to establish the pastoral relation, and to dissolve it, at the request of one or both of the parties, or where the interests of religion imperatively demand it; to set apart evangelists to their proper work; to require ministers to devote themselves diligently to their sacred calling, and to censure and otherwise discipline the delinquent; to see that the injunctions of the higher courts are obeyed; to condemn erroneous opinions which injure the purity or peace of the church; to resolve questions of doctrine and discipline seriously and reasonably proposed; to visit particular churches, to inquire into their condition, and redress the evils that may have arisen in them; to unite or divide churches, with the consent of a majority of the members thereof, and, for cause, to dissolve the relations between it and a particular church, which shall thereafter cease to be a constituent of the Cumberland Presbyterian Church, and forfeits all rights as such to form and receive new churches; to take special oversight of vacant churches; to concert measures for the enlargement of the church within its bounds; in general, to order whatever pertains to the spiritual welfare of the churches under its care; to appoint representatives to the higher courts; and, finally, to propose to the Synod, or to the General Assembly, such measures as may be of common advantage to the church at large.

"32. The Presbytery shall keep a full and fair record of its proceedings, and shall send it up to the Synod annually for review. It shall report to the Synod and the General Assembly every year the condition and progress of religion within its bounds during the year, and all the important changes which may have taken place, such as the licensures, the ordinations, the receiving or dismissing of members, the removal of members by death, the union and division of churches, and the formation of new ones, and such statistical information as may be required.

"33. The Presbytery shall meet as often as once a year on its own adjournment, and when an emergency shall require a meeting sooner than the time to which it stands ad-

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journed, the moderator, or, in case of his absence, death, or inability to act, the stated clerk, shall, with the concurrence or at the request of two ministers and two ruling elders of different churches, call a special meeting. For this purpose he shall give notice—specifying the particular business of the intended meeting—to every minister belonging to the Presbytery, and to the church session of every particular church, in due time previous to the meeting, which shall not be less than ten days. And nothing shall be transacted at such special meeting besides the particular business for which the Presbytery has been thus convened.

"34. If, for any cause, the Presbytery shall fail to meet at the time and place to which it stands adjourned, it shall be the duty of the moderator, or, in case of his absence, death, or inability to act, the stated clerk, or, in case of his absence, death, or inability to act, any three ministers belonging to the Presbytery, to call a meeting as early as practicable, at such place as may be designated, for the transaction of the regular business; and for this purpose a circular letter shall be sent, as before prescribed, not less than ten days before the meeting."

A Synod and its jurisdiction are stated in the following sections:

"35. The Synod consists of all the ministers and one ruling elder from each church in a district comprising at least three Presbyteries. The Synod may be composed, at its own option, with the consent of a majority of its Presbyteries, either of all the ministers and one ruling elder from each church in its district, or of equal delegations of ministers and ruling elders selected by the Presbyteries on a basis and in a ratio determined in like manner by the Synod and its Presbyteries.

"36. Five ministers, who are members of one or more of the Presbyteries composing the Synod, shall constitute a quorum for the transaction of synodical business, provided there be present at least one minister or one ruling elder from each of three Presbyteries. Members of the different Presbyteries in Synod shall not be entitled to vote on questions of appeal before the Synod from their own Presbyteries, nor on other questions immediately concerning their own presbyterial action.

"37. The Synod has power to receive and decide all appeals, complaints, and references regularly brought up from the Presbyteries; to review the records of the Presbyteries, and to redress whatever they may have done contrary to order; to take effectual care that Presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide, or dissolve Presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction—in general, to take such order with respect to the Presbyteries, church sessions, and churches under its care as may be in conformity with the principles of the government of the church and of the Word of God, and as may tend to promote the edification of the church; to concert measures for promoting the prosperity and enlargement of the church within its bounds; and, finally, to propose to the General Assembly such measures as may be of common advantage to the whole church.

"38. It shall be the duty of the Synod to keep full and accurate records of its proceedings, to submit them to the inspection of the General Assembly at each of its stated meetings, and to report to it the number of its Presbyteries, and of the members thereof; and, in general, all important changes which may have occurred within its bounds during the year, as well as such statistical information as may be required.

"39. The Synod shall meet as often as once in two years, on its own adjournment. If, for any cause, the Synod shall fail to meet at the time and place to which it stands adjourned, it shall be the duty of the moderator, or in case of his absence, death, or inability to act, the stated clerk, or, in case of his absence, death or inability to act, any three ministers entitled to membership in the Synod, and belonging to different Presbyteries, to call a meeting as early as practicable, at such place as may be designated, for the transaction of the regular business; and for this purpose a circular letter shall be sent to every minister and ruling elder entitled to membership, or constituent body entitled to representation therein, not less than thirty days before the meeting."

And the General Assembly and its jurisdiction are stated in the following sections:

"40. The General Assembly is the highest court of this church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and constitutes the bond of union, peace, correspondence, and mutual confidence among all its churches and courts.

"41. The General Assembly shall meet as often as once every two years, at such time and place as may have been determined at its preceding meeting, and shall consist of commissioners from the Presbyteries in the following proportion: Every Presbytery shall be entitled to send one minister and one ruling elder; but if it consists of eighteen or more ministerial members, it may send an additional minister and ruling elder. Each commissioner, before his name shall be enrolled as a member of the General Assembly, shall produce from his Presbytery satisfactory evidence of his appointment.

"42. Any twenty or more of these commissioners, at least ten of whom shall be ministers, being met on the day and at the place appointed, shall be a quorum for the transaction of business.

"43. The General Assembly shall have power to receive and decide all appeals, refer-

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ences and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the church, in all cases submitted to it; to review the records of the Synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide, or dissolve Synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church; to authorize Synods and Presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts, and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth, and holiness throughout all the churches under its care.

"44. If, for any cause, the General Assembly shall fail to meet at the time and place to which it stands adjourned, it shall be the duty of the moderator, or, in case of his absence, death, or inability to act, the stated clerk, to call a meeting as early as practicable, at such place as he may designate, for the transaction of the regular business; and for this purpose a circular letter shall be sent to the stated clerks of the Presbyteries not less than sixty days before the proposed time for the meeting. In case of the death, absence, or inability to act of both the moderator and stated clerk, such meeting may, in like manner, be called by the commissioners or one or more of them, from any five of the Presbyteries."

The Confession of Faith, Catechism, constitution, and rules of discipline are governed by section 60, which reads as follows:

"60. Upon the recommendation of the General Assembly at a stated meeting, by a two-thirds vote of the members thereof, voting thereon, the Confession of Faith, Catechism, constitution, and rules of discipline may be amended or changed when a majority of the Presbyteries, upon the same being transmitted for their action, shall approve thereof."

"The other parts of the government—that is to say the General Regulations, the Directory of Worship, and the Rules of Order—may be amended or changed at any meeting of the General Assembly by a vote of two-thirds of the entire number of commissioners enrolled at that meeting, provided such amendment or change shall not conflict in letter or spirit, with the Confession of Faith, Catechism, or constitution."

The jurisdiction of the foregoing courts is limited by the express provisions of section 25, which reads as follows:

"25. The Church session exercises jurisdiction over a single church; the Presbytery over what is common to the ministers, church sessions, and churches within a prescribed district; the Synod, over what belongs in common to three or more Presbyteries, and their ministers, church sessions, and churches; and the General Assembly, over such matters as concern the whole church; and the jurisdiction of these courts is limited by the express provisions of the constitution. Every court has the right to resolve questions of doctrine and discipline seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity, or progress of the church; and, although each court exercises exclusive original jurisdiction over all matters specially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation. All church courts shall be opened and closed with prayer."

The constitution of the Presbyterian Church, in so far as it is material to the question of the power of these two churches to unite, is substantially the same as are the foregoing provisions copied from the constitution of the Cumberland Church, and it will for that reason be unnecessary to burden this opinion with extracts from the former, and what is said of the one will apply equally as well to the other.

In the discussion of this proposition it is all-important to bear closely in mind those constitutional provisions which are common to both churches, showing that the judicatories of each possess and exercise the same authority, jurisdiction, and powers, and upon these provisions are based the contentions of counsel for the respective parties. In order to successfully maintain appellants' position, as stated at the beginning of this opinion, counsel must also successfully maintain this preliminary question, namely, that these constitutional provisions are not only expressive of the sole mode of union, but are also a limitation upon the authority of the governing bodies of the churches to act in the premises. In other words, they contend that "the jurisdiction of the General Assembly and of the Presbyteries, as well as the other courts of the church, being limited in their nature and by the express provisions of section 25 of the constitution, and those provisions not conferring the power in question, it must follow inevitably that the union and merger attempted, as aforesaid, and all steps taken for the accomplishment of that end, were

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without constitutional authority, and, therefore, ultra vires and void. Their powers being restricted by the constitution to those enumerated, the courts of the church cannot constitutionally exercise any other power."

I am unable to lend my concurrence to that contention, for the reason that, when we read the constitution, it is to be seen that while section 25 purports to limit the jurisdiction and powers of the courts as regards the matters and things enumerated therein, as long as they remain in force, yet there is nothing contained in that instrument which even remotely indicates that they have no other powers or authority than those stated. Much light may be shed upon this question by a brief consideration of the Presbyterian Church and its mode of government. Both of these churches are of the associated class of religious societies, the initial unit of each being the "particular church," or local congregation, then ascending to the Presbytery, embracing all local churches within a given territory, then extending to a Synod, including not less than three Presbyteries, and, finally, reaching the General Assembly, which comprises all of the local churches, Presbyteries, and Synods, and constitutes the supreme judicatory of the church. These courts possess not only judicial power, but also legislative and executive. Mack v. Kime, 129 Ga. 1, 58 S. E. 184. These powers are inherent in these bodies, and are not delegated to them by the constitution. In fact, the General Assemblies of these churches are not only the legislative bodies thereof, but they also have the power, with the approval of the Presbyteries, to formulate, adopt, amend, and repeal the constitutions of their respective churches, and under this form of government their power is unlimited in that regard. (I am not now speaking of its effect upon property rights. That will be discussed later.) Of course, as long as the constitution, or any provision thereof, is in force, it is binding upon the General Assembly and upon all other judicatories of the church; but, as before stated, there is no provision contained therein, or existing elsewhere, which prevents the General Assembly, with the concurrence of the Presbyteries, from repealing or amending any and all provisions of the constitution. The individual church members have no voice in such matters. The General Assembly is supreme, and can no more be bound by a law enacted by a previous session than one Legislature of the state can bind a succeeding one by statute. The only limitation that is placed upon its authority in church matters is written in the constitution, and as long as it is in force its mandate is supreme and must be obeyed by all, the General Assembly included; but, where the constitution is silent, the Assembly is supreme. The constitution of neither of these churches is like the Constitution of the United States, a delegation of power; but it is more in the nature of the Constitution of the state, a limitation upon the inherent and otherwise absolute powers of the Legislature. McBride v. Porter, 17 Iowa, 211; McGinnis v. Watson, 41 Pa. 9; Methodist Church Case (Smith v. Swormstedt) 16 How. 288, 14 L. Ed. 942; Mack v. Kime, 129 Ga., 1, 58 S. E. 184; Fussell v. Hail, 134 Ill. App. 620; Ramsey's Appeal, 88 Pa. 60.

In the Iowa case the Synod was the highest court, and in discussing the inherent power of the churches to unite was used this language: "But, upon principle as well as by concession, the Synod possessed the power. If it is regarded as a representative body, and governed by the republican principle that a majority must rule, its acception [action] must be sustained; or, if the more fundamental principle is appealed to, that the people who are to be affected by a law are the primary source from whence comes the power to enact that law, we find a practical and literal adherence to that principle in the action of the Synod, by which the question was first referred or overtured to the several churches, and by them acted upon as instructions to the Synod. The Synod then had the power, for it derived it from the primary source of all governmental power—the people."

The inherent power of a church to divide into two branches was involved in the case cited from the Supreme Court of the United States, and in passing upon that question the court used this language: "It is insisted, however, that the General Conference in 1804 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division, and hence that the organization of that Church South was without authority, and the traveling preachers within it separate from an ecclesiastical connection, which is essential to enable them to participate as beneficiaries" in the fund in controversy. "But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it, and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one. In 1784, when this church was first established, and down till 1808, the General Conference was composed of all the traveling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities to administer its policy and promulgate its doctrines and teachings throughout the land. It cannot, therefore, be denied—indeed, it has

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scarcely been denied—that this body, while composed of all the traveling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference." This principle is the same, whether exercised in dividing or uniting two churches.

Again, the court, after noticing certain restrictions placed upon the General Conference, says: "In all other respects, and in everything else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before." Methodist Church Case (Smith v. Swormstedt) 16 How. 288, 14 L. Ed. 942.

The Supreme Court of Georgia had before it the identical union under consideration in the case at bar, and in Mack v. Kime, 129 Ga. 1, 58 S. E. 184, said upon this branch of the case: "The authority of the General Assembly of the Cumberland Presbyterian Church is derived from the constitution. This church, in its form of government, is like its predecessors. The form of government is not unlike the federal form of government under which we live. The General Assembly of the church is the highest legislative, executive, and judicial power of the church. It has, in these three capacities, all of the authority that is expressly conferred by the constitution, as well as that which is to be necessarily implied from any of the express powers therein granted, or from the general design and purpose for which the organization was formed. It being settled by the judgment of the General Assembly, as the final arbiter of the church in all such matters, that there is no substantial difference between the teachings and doctrines of the two churches, the question as to whether it was expedient for the two churches to unite under one name and form of government was a matter addressed to the sound judgment of the General Assembly of the Cumberland Presbyterian Church itself. The very constitution contemplates union with the other churches. It is authorized to receive into its jurisdiction other ecclesiastical organizations that conform to the doctrine and order of the Cumberland Presbyterian Church. When this provision was inserted in the constitution, it was probably contemplated that such organizations would generally be organizations of less power and less strength and less numbers than the existing Cumberland Presbyterian Church; but there is no limitation in the constitution upon the power to receive other organizations, and this power carries with it the implied power to unite with other organizations under the same limitations under which they could receive in their name and in their jurisdiction similar organizations. In the judgment of the General Assembly of the Cumberland Presbyterian Church, the purpose for which it was organized is to be promoted by the reunion with the church from which it sprang. They may be mistaken in this. The reunion may thrust upon them and their associates perplexing questions, which in time to come may bring about disagreement and separation. But all of those matters are matters for the ecclesiastical body itself, and, when determined by it, those members of the church who are not in accord with the governing authority must either bow in submission to the powers that be, or make their alignments with other organizations with whom they can live in accord and harmony."

In Fussell v. Hall, decided by the Appellate Court for the Third District of Illinois, and cited with approval by the Georgia Supreme Court, in discussing this union, the court said, in referring to the sections of the constitution of the Cumberland Presbyterian Church defining the powers of the General Assembly: "The effect of such sections is to make the General Assembly, not only the legislative and administrative body, but one with judicial powers upon ecclesiastical questions as well. It represents, in one body, all the particular churches in the Cumberland Presbyterian Church organization, and constitutes one bond of union. Why is it not possible to promote the prosperity and enlargement of the church by uniting with another body that teaches a doctrine of faith identical with its own? If these two churches, in their Confessions of Faith and their religious teachings, are the same, then these interests may be promoted by uniting all those who preach, teach, and believe in and care for those interests, the same as can be done by individuals joining their interests in copartnerships or corporations. United action is productive of more good than divided action under the circumstances. The General Assembly has power to receive under its jurisdiction other ecclesiastical bodies of the same faith. This clause must be read with the clause that directs the taking of measures to promote and enlarge the church; and in our judgment the church is enlarged, and its prosperity made more sure, by receiving the support of a stronger sister church. If a smaller church can be received, surely affiliation and union can be made with a stronger sister church, if thereby the church, as a religious body, is prospered and enlarged."

It will thus be seen that the courts, in the above cases, held that, under a reasonable construction of the express provisions of the written constitution, the power to form the union exists. But, returning to the analogy between the General Assembly and the Legislature of the state, the former is not bound with the same degree of firmness with which the Legislature of the state is bound by the Constitution; for the former may enact and enforce any and all laws for the good of the church, whether they be constitutional in character or merely ordinances for its government, while the latter can enact no law

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in conflict with the Constitution of the state. Russie v. Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542. Under the constitution of the church, the powers of the General Assembly are just as absolute and unlimited in that regard as are the powers of the framers of the state Constitution; yea, more so, for the former may adopt a constitutional provision proposed by itself with the approval of the Presbyteries, while the latter can only frame and refer it to the people for adoption. With whether or not that is a wise form of church government we have nothing to do, but must be content to deal with the situation as we find it. We might add, however, that there are other churches, and even governments, which are governed substantially in the same manner.

If the foregoing observations regarding the church judicatories are sound, and I do not believe they will be questioned, we must look to the constitution as it stood at that time to determine whether or not there is any provision therein preventing a union, or which prohibited the General Assemblies of the two churches from submitting the question of union to the Presbyteries, or from entering into a union with each other. Counsel for appellants contend that there is such a provision in the constitution, and call our attention to section 43 thereof, and especially to the following language therein, to wit: First, "to concert measures for promoting the prosperity and enlargement of the church;" and, second, "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrines and orders of this church." Appellants' contention is that those provisions expressly authorize a consolidation of the Cumberland Church with other churches whose organization conforms to the doctrines and ordinances of that church, and, having failed to provide for any other mode of union, the maxim, "inclusio unius, exclusio alterius," applies.

In my opinion counsel misconceive the proposition in hand. The question involved in this litigation is one of union between separate and independent churches, whose doctrines and ordinances were not the same, while those referred to in section 43 refer to the consolidation of two or more churches of the same faith and doctrine, or to receive into its organization another church which would conform to its doctrines and would come under and submit to its jurisdiction. It is not pretended that the Presbyterian Church proposed to submit itself to the jurisdiction of the Cumberland, and thereby become consolidated as one church under the name of the Cumberland Presbyterian Church; but the express intention of both was to adopt a new Confession of Faith, which was a modification of the Westminster Confession—neither to adopt the doctrines and ordinances of the other, or to become subject to the jurisdiction of the other, but to unite as one church, under the name of the Presbyterian Church, U. S. A., as above indicated. From this it seems perfectly clear to my mind that section 43 of the constitution is perfectly foreign to the question of the power of these two churches to form a union with each other; and that being true, and failing to find any other provision prohibiting their union, I am therefore forced to the conclusion that section 43 of the constitution is not only not a delegation of power to the General Assembly, but at most is only a limitation of power as long as it stands unrepealed by the General Assembly.

That being unquestionably true, then it must necessarily follow that the various judicatories of the church possessed all the ecclesiastical powers of the church which had not been taken from them by the express provisions of the constitution at the time this union is alleged to have been entered into. The same conclusion was reached by the Court of Appeals of Kentucky in the case of Wallace v. Hughes, 115 S. W. 684. To the same effect are the following cases: Clark v. Brown (Tex. Civ. App.) 108 S. W. 421; Landrith v. Hudgins (Tenn.) 120 S. W. 783; Ramsey v. Hicks (Ind. App.) 87 N. E. 1091. All of these cases cited grew out of the same church controversy, and involved the question of the power of these two churches to form a union, and all held that they had that inherent power, and no case can be found which holds to the contrary.

2. This brings us to the consideration of another important question, namely: Was there a union in fact effectuated between these two churches? Section 60 of the constitution provides that "upon the recommendation of the General Assembly, by a two-thirds vote of the members thereof, voting thereon, the Confession of Faith, Catechism, constitution, and rules of discipline may be amended or changed when a majority of the Presbyteries upon the same being transmitted for their action shall approve thereof." In pursuance to this constitutional provision, the General Assembly of each of these two churches appointed a committee upon union. These committees devised a scheme, called a "Plan of Reunion and Union." This Plan of Union was by this joint committee submitted to the General Assembly of each of the two churches, which was as follows:

"2. Joint Report on Union.

"As the second part of our report we submit the following Joint Report on Union:

The Committee on Church Co-operation and Union of the Presbyterian Church in the United States of America and the Committee on Fraternity and Union of the Cumberland Presbyterian Church, after a free and full interchange of views, with continued supplication for divine guidance, unanimously recommended to their respective General Assemblies for their consideration, and, if

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they deem proper, for their adoption, the accompanying papers, viz.: (1) Plan of Reunion and Union of the two churches. (2) Concurrent Declarations, to be adopted by the respective General Assemblies meeting in 1904. (3) Recommendations.

"I. Plan of Reunion and Union of the Two Churches.

"We believe that the union of the Christian churches of substantially similar faith and polity would be to the glory of God, the good of mankind, and the strengthening of Christian testimony at home and abroad. We believe that the manifest providential developments and leadings in the two churches since their separation, together with present conditions of agreement and fellowship, have been and are such as to justify their reunion. Therefore we cordially recommend to our respective General Assemblies that the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church be accomplished as soon as the necessary steps can be taken, upon the basis hereinafter set forth.

"(1) The Presbyterian Church in the United States of America, whose General Assembly met in the Immanuel Church, Los Angeles, Cal., May 21, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the First Cumberland Presbyterian Church, Nashville, Tenn., May 21, 1903, shall be united as one church, under the name and style of the 'Presbyterian Church in the United States of America,' possessing all the legal and corporate rights and powers which the separate churches now possess.

"(2) The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.

"(3) Each of the Assemblies shall submit the foregoing Basis of Union to its Presbyteries, which shall be required to meet on or before April 30, 1905, to express their approval or disapproval of the same by a categorical answer to this question: 'Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?' Each Presbytery shall, before the 10th day of May, 1905, forward to the stated clerk of the Assembly with which it is connected a statement of its vote on the said Basis of Union.

"(4) The report of the vote of the Presbyteries shall be submitted by the representative stated clerk to the General Assemblies meeting in 1905, and, if the General Assemblies shall then find and declare that the foregoing Basis of Union has been approved by the constitutional majority of the Presbyteries connected with each branch of the church, then the same shall be of binding force, and both Assemblies shall take action accordingly.

"II. Concurrent Declarations.

"As there are matters pertaining to the interests of the church which will manifestly require adjustment when the reunion shall have been accomplished, and concerning which it is highly desirable that there shall be a previous good understanding, the two Assemblies agree to adopt the following concurrent declarations as in their judgment proper and equitable arrangements and agreements:

"(1) In adopting the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, as a Basis of Union, it is mutually recognized that such agreement now exists between the systems of doctrine contained in the Confessions of Faith of the two Churches as to warrant this union—a union honoring alike to both. Mutual acknowledgment also is made of the teaching and defense of the divine favor and blessing that have made this common faith and service effectual. It is also recognized that liberty of belief exists by virtue of the provisions of the Declaratory Statement, which is part of the Confession of Faith of the Presbyterian Church in the United States of America, and which states that 'the ordination vow of ministers, ruling elders, and deacons, as set forth in the Form of Government, requires the reception and adoption of the Confession of Faith only as containing the system of doctrine taught in the Holy Scriptures.' This liberty is specifically secured by the Declaratory Statement, as to chapter 3 and chapter 10, section 3, of the Confession of Faith. It is recognized, also, that the doctrinal deliverance contained in the Brief Statement of the Reformed Faith, adopted in 1902, by the General Assembly of the Presbyterian Church in the United States of America, 'for a better understanding of our doctrinal beliefs,' reveals a doctrinal agreement favorable to reunion.

"(2) All the ministers and churches included in the two denominations shall be admitted to the same standing in the United Church which they may have held in their respective connections up to the consummation of the reunion.

"(3) The boundaries of the several Pres-

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preserved and held as making up the history of the one church.

"(5) As soon as practicable after the union shall have been effected, the General Assembly shall reconstruct and consolidate the several permanent committees and boards, which now belong to the two Assemblies, so as to represent, with impartiality, the views and wishes of the two bodies constituting the reunited church.

"(6) The institutions of learning, together with the endowment and other property, real and personal, owned by them, which are now under the control of the Cumberland Presbyterian Church, shall remain in charge of and be controlled by the board of trustees, or other managers respectively, now in charge of such institutions, endowment, and property, or by their successors similarly appointed or elected; and no greater control of such institutions, their property or affairs, shall be exercised by the General Assembly, or other ecclesiastical court, or body, of the reunited church, than is now exercised by the General Assembly, or other ecclesiastical church or body, of the Cumberland Presbyterian Church: Provided, that the governing board of any of said institutions of learning shall be at liberty to enter into such special arrangement or agreement with the ecclesiastical body controlling it as may enable said institution to preserve its integrity and maintain its present policy; and also provided, that nothing in this declaration shall affect the relationship or control of any of the institutions of learning now connected with the General Assembly, or other ecclesiastical court or body, of the Presbyterian Church in the United States of America.

"(7) The corporate rights now held by the two General Assemblies, and by their boards and committees, shall be consolidated and applied for their several objects as defined and permitted by law.

"(8) It should be regarded as the duty of all our judicatories, ministers, and people to study the things which make for peace, to guard against all needless and offensive references to the causes which have divided us, and to avoid the revival of past issues.

"III. Recommendations.

"(1) It is recommended that such a change be made in the Form of Government of the Presbyterian Church in the United States of America as will allow additional or separate Presbyteries and Synods to be organized in exceptional cases, wholly or in part, within the territorial bounds of existing Presbyteries or Synods, respectively, for a particular race or nationality, if desired by such race or nationality.

"(2) The foregoing Basis of Union and eight Concurrent Declarations shall be sub-

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the bond of peace.'

"W. H. Black.	B. G.
"R. M. Tinnon.	W. H.
"Ira Landrith.	Chas.
"E. E. Beard.	Rober
"S. M. Templeton.	Reube
"M. B. Templeton.	Dougl
"B. P. Fullerton.	Reube
"W. E. Settle.	E. S.
"D. E. Bushnell.	Wm.
"A. E. Turner.	Wilto
"W. J. Darby.	

"In conclusion, we unite he
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"Fraternally and obedi
"Wm. H. Blac
"James M. Hu

Upon the incoming of this
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"Resolved: (1) That the f
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Joint Report on Union be ad
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to the Presbyteries of the Cu
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approval.

"Resolved: (2) That the
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of the adoption of the said J
Union by the General Assemb
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America."

This resolution was adopte
162 to 74, and was declared

turned their vote. Of those, 60 answered the question in the affirmative and 51 answered in the negative, thereby adopting the Plan of Reunion and Union recommended and submitted to them by the General Assembly by a constitutional majority of 9. The same action with like results was taken by the Presbyterian Church. In the General Assembly of the Cumberland Church for the year 1906, upon the announcement of the adoption of the resolution of union and reunion, about 100 of the delegates thereto filed a protest, in which they charged the invalidity of the action of the Presbyteries and General Assembly in forming the union, assigning many grounds in support thereof.

Counsel for respondents contend that the foregoing proceedings show that all of the steps necessary to ascertain the will of the churches and for the orderly determination of the question of union in accordance with the constitution and form of their church government were regularly taken; that the General Assemblies of these two churches have the power, with the consent and approval of a majority of their respective Presbyteries, to form the union; that the highest judicatories of these churches have declared the plan of union duly and legally adopted; and, consequently, that said decision is binding upon the civil courts of the state.

In the discussion of a kindred question involving this same principle, this court, in the case of Russie v. Brazzell, supra, at page 112 of 128 Mo., page 531 of 30 S. W. (49 Am. St. Rep. 542), used this language: "It was said in the recent case of Prickett v. Wells, 117 Mo. 502, 24 S. W. 52: 'The people of that society (which was a Congregational Church), in the exercise of their religious liberty, had the undoubted right to adopt rules for their own church government, if not inconsistent with the laws of the land. In adjusting their respective claims to the use of Church property, as between themselves, the civil courts will give effect to those rules, subject to the qualifications just adverted to.' In another case it was agreed 'that, according to the rules governing the church, a majority of those present and voting at a regular meeting should govern, and its action is binding upon the whole body.' It was accordingly held that a majority vote, taken according to the customs and rules of the church, authorized an incorporation of the body, and the transfer of the property of the congregation to the corporation, though a majority of all the members did not vote in favor of the proposition. North St. Louis Christian Church v. McGowan, 62 Mo. 279. The General Conference of the United Brethren, being the highest legislative and judicial body of the church, declared that an affirmative vote of two-thirds of those voting on the also declaring what vote should be required on the question submitted. The civil courts should take this action of the conference as conclusive."

And the Supreme Court of Georgia, in discussing this question, growing out of this same schism, in the case of Mack v. Kime, supra, at page 19 of 129 Ga., page 192 of 58 S. E., said: "(2) The constitutional tribunal of the religious organization has jurisdiction to determine all ecclesiastical questions which are submitted to it under the law and usages of the society. It has also the authority to determine for itself whether it has jurisdiction in a given case. The highest church court of a religious society is like the highest civil court. It has submitted to it not only questions growing out of controversies, but it has, of necessity, imposed upon it the duty and responsibility of determining what are within the limits of its jurisdiction. In the case of State v. Farris, 45 Mo. 183, it was held that the General Assembly of the Presbyterian Church, commonly known as the 'Old School,' possessed extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself. In the opinion Judge Wagner says (page 197): 'Now, the General Assembly is the highest court of judicatory known to the Presbyterian Church. It possesses extensive original and appellate jurisdiction; and whether the case, in the matter of the Declaration and Testimony signers, was regularly or irregularly before it, was a subject for it to determine for itself, and no civil courts can revise, modify, or impair its action in a matter of purely ecclesiastical concern.' When a controversy involving the rights of a member is presented to the civil courts, they will examine into the constitution and laws of the religious society, to determine whether a tribunal has been erected for the decision of ecclesiastical questions, and they will also examine into the laws of the association, to determine whether the decision by the tribunal was concerning a matter which was within its jurisdiction. If its jurisdiction depends upon the construction of its own laws, and such laws have, either expressly or impliedly, conferred upon it the right to determine the limits of its jurisdiction, the decision of the church tribunal as to its jurisdiction will be no less binding than its decision on the merits of the ecclesiastical question determined by it."

In the case of Watson v. Jones, 13 Wall., at page 727, 20 L. Ed. 666, the Supreme Court of the United States, in speaking through Mr. Justice Miller, said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad

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tions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

The Circuit Court of Appeals of the Sixth Circuit, in the case of Brundage v. Deardorf, 92 Fed. 214, loc. cit. 228, 34 C. C. A. 304, 318, used this language: "What effect will a civil court give to the interpretation and construction by the highest judicatory of an ecclesiastical body of its own fundamental law? Is that judgment subject to review in the civil courts? Or will the civil courts accept the interpretation placed upon the organic law of the church by its highest judicatory, and apply the law so interpreted to the settlement of property questions depending upon that law? As we have already stated, the property here involved was not devoted by the express terms of any grant, gift, will, or sale to the support of any specific religious dogma, doctrine, or belief, but is properly acquired by the church for the general use of the society for religious purposes, and with no other limitation. The property here in question is held for the particular use of a congregation, which is only one of numerous others united to form a general body of churches, and subject to the ecclesiastical control of the General Conference, whose jurisdiction extends to all congregations composing the general body. The question here presented is merely one of identity—which of the two bodies claiming to be the legitimate successor of the original united organization is the legal successor of the body to which this property was conveyed? When this question is answered, the property must be awarded to that organization. The decision of this question involves the interpretation of the organic law of the church in respect to the appropriate method of altering or amending that law. But that fundamental law has been construed, interpreted, and applied by the highest judicatory of this church before its division, and the very changes in the constitution and Confession now complained of as irregular and revolutionary sanctioned and approved as having been made in accordance with the method prescribed by the fundamental law of the church for its own amendment. Shall we review that decision, and overturn its conclusiveness upon questions purely relating to ecclesiastical law and government, and take from the majority the general property of the church upon some difference of opinion as to whether the highest authority within the church had not mistaken the meaning of the church organic law? The question is not has application to the case for decision. This question was most thoroughly and elaborately considered by the Supreme Court of the United States in the leading case of Watson v. Jones, 13 Wall. 679–726, 20 L. Ed. 666. That case originated in a schism which occurred in the Presbyterian Church in respect to certain declarations made by its General Assembly during the late Civil War touching the subjects of slavery and secession."

In the case of Connitt v. Reformed P. D. Church of New Prospect et al., 54 N. Y., loc. cit. 561, Earl, C., speaking for the court, said: "Having thus reached the conclusion that this was an ecclesiastical matter, and that the church judicatories had jurisdiction of it, we cannot inquire whether they have proceeded according to the laws and usages of their church, nor whether they have decided the matter correctly. It is the settled law of this country, repeatedly announced by the most learned judges and highest courts, that in such cases the civil courts must take the decisions of the ecclesiastical courts as final and binding upon the parties. * * * In German Reformed Church v. Seibert, 3 Pa. 291, it is said by the court: 'The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals.'"

And Chief Justice Andrews, in the case of Trustees of Trinity M. E. Church v. Harris, 73 Conn. 223, 47 Atl., loc. cit. 119, 50 L. R. A. 636, in speaking for the Supreme Court of Connecticut, said: "The consolidation of the three churches into one was a matter of ecclesiastical law and practice, and the decision of the ecclesiastical tribunal on that matter is binding on the superior court and on this court. In all ecclesiastical matters the courts are bound by the decision of the ecclesiastical tribunal, It is so laid down by this court in Whitney v. Society, 5 Conn. 406, and in Gibbs v. Society, 38 Conn. 153. 'In this class of cases we think the rule of action which should govern the civil courts, founded in a broad view of the relations of the church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, whenever the questions of discipline, or of faith, or ecclesiastical rule,

custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them.' Watson v. Jones, 13 Wall. 727, 20 L. Ed. 666; Bouldin v. Alexander, 15 Wall. 131, 21 L. Ed. 69."

In Lamb v. Cain, 129 Ind. 513, 29 N. E. 21, 14 L. R. A., loc. cit. 527, the Supreme Court of Indiana, in speaking through Chief Justice Coffey, said: "All who unite with such associations, when so organized, impliedly consent to submit to such government. From these considerations the rule in this country has become elementary that, when a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right, and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepts such decisions as matters adjudicated by another legally constituted jurisdiction. White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136; Watson v. Jones, supra; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903; Connitt v. Reformed P. D. Church of New Prospect, 54 N. Y. 551; Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449; Harrison v. Hoyle, 24 Ohio St. 254. In the case of White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, supra, this court said: 'The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church, he becomes so upon the condition of submission to its ecclesiastical jurisdiction; and, however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded.' In the case of German Reform Church v. Seibert, 3 Pa. 291, it was said by the court: 'The decisions of ecclesiastical courts, like every other tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to revise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals.'"

In Gaff v. Greer, 88 Ind. 130, 45 Am. Rep. loc. cit. 452, the Supreme Court of Indiana said: "In the Presbyterian system, a local church is but a member of a larger and more important religious organization, and is under its government and control. The session, or local church, is controlled by the Presbytery, the Presbytery by the Synod, and the Synod by the General Assembly. The general church is controlled and governed by a body of constitutional and ecclesiastical laws, and all exercise legislative and judicial power. Questions of rule, usage, and custom affecting the local church, or the relation of its members to the organization, are subject to the judgment of these several bodies, called judicatories, in the order named, and the decision of the highest to which any question is carried is binding upon all. The decision of the Presbytery in this case adjudged that the withdrawal of the majority from its jurisdiction was a secession from the church. This cannot, we think, be gainsaid. The order was that those who remained constituted and would thereafter be recognized by the Presbytery as the church. This excluded those withdrawing, and if the order is binding the withdrawal operated as a secession from the church as fully and as completely as though these persons had voluntarily severed their connection with the church. The word 'church' is here used for 'congregation,' as a withdrawal from the Presbytery is, of course, a secession from the general organization. The judgment fixes the fact that the appellants seceded from the church, and, if this decision binds the civil courts, the proffered testimony was properly excluded. In Watson v. Jones, 13 Wall, 679, 20 L. Ed. 666, the Supreme Court of the United States, in a similar case, between the two bodies of a Presbyterian Church, each contending for the possession of the property, thus states the law: 'In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of the church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them.' In Shannon v. Frost, 3 B. Mon. (Ky.) 253, the court, on a similar question said: 'This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. * * * We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church.' The same rule is asserted in the following cases: State v. Farris, 45 Mo. 183; Robertson v. Bullions, 9 Barb. (N. Y.) 64,

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tion that the decision of these judicatories is binding upon the courts where such questions arise."

I might cite and quote from many other cases of similar import, but I think that is unnecessary, as it clearly appears from the foregoing quotations that the rule therein stated is elementary and is supported by the great weight of authority. In fact, I do not understand counsel for appellants to controvert the broad principle that where questions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest church judicatories to which the matter has been carried, that the civil courts must accept such decisions as final, and as binding on them in their application to cases pending before them; but they seek to modify that general rule by saying that, where property rights are involved in and depend upon such decisions, then the civil courts will not be bound thereby, but will investigate and determine for themselves the ecclesiastical questions so involved. This is not only an anomaly to me, but, in my judgment, it is supported by neither reason nor by the weight of authority; anomalous, because all must concede that church property is but a minor incident to religion and religious worship. And it is conceded by all and supported by all the authorities cited by counsel for both sides that in all matters purely ecclesiastical the church judicatories have original and exclusive jurisdiction, and that the civil courts have no jurisdiction or authority whatever to interfere therewith. This is true, because where, as in this country, there is a separation of church and state, the ecclesiastical code constitutes no part of the civil jurisprudence of the state; consequently all questions arising thereunder are beyond the jurisdiction and pale of the state tribunals, thereby leaving all such questions to be determined by the church judicatories, in accordance with the ecclesiastical laws. The laws and courts of the church are just as separate and independent of those of the state as the church itself is separate and independent of the state. The former follows as an incident of the latter, and the latter is firmly founded upon both a federal and state constitutional provision. Under this guaranty the church has selected for judges of its courts men learned in its laws, devout and pious, and who acknowledge allegiance to its laws and God. No others, according to the ecclesiastical law, are eligible to occupy those positions. Otherwise, we might witness the spectacle of a judge of a civil court administering ecclesiastical law, which is as foreign to his jurisprudence as the kingdom of God is foreign to the kingdom of man. Not only that, but, ment, expounding and determining questions of belief and other doctrinal matters according to the laws of the church, and at the same time disbelieve in them and in the divinity of Christ, to whom he acknowledges no allegiance. What a sacrilege it would be to compel the followers of Christ to submit to the decisions of infidels involving ecclesiastical matters. I can conceive of nothing which would hold religion up to greater ridicule, scorn, and disrespect than such a spectacle.

In response to this, it has been suggested that the judgment of the civil court is only binding in so far as it affects the property involved herein, and that the portion of the judgment which construes and determines the question of doctrine, belief, or creed may be ignored and disobeyed by all those members of the church who disbelieve in the doctrine or creed as construed and interpreted by the court, just as was done by them in this and in all other similar cases. That is true. They may disregard that part of the judgment, because, as before stated, the Constitution of the United States and that of this state guarantee religious liberty to all and the right to worship God according to the dictates of their own conscience; and those rights cannot be legally restrained by the judgment and decree of any court of this land. But this presents an anomalous position. Here we have a civil court sitting in judgment between two contending factions of a church over the ownership of certain property, which depends upon the proper construction of the creed and doctrine of the church. The ownership of the property is determined and follows as an incident to the decision of the doctrinal questions involved, and not otherwise. So we have a court deciding in this class of cases two questions: First, the doctrinal question, which is the principal and paramount one; and, second, the property rights, which are incidental and subordinate to the first, or doctrinal question. The first is not only the principal question to be adjudicated, but it is preliminary to the second, or subordinate question; and, as before stated, the second follows the determination of the first as naturally as day follows night. Yet, notwithstanding these conceded facts, the very moment the judgment is entered and the property is delivered in pursuance thereof, the principal part of the judgment has no binding effect whatever upon either faction of the church. They may violate it with impunity, for the reason the courts have no power to bind a man's religious views or opinions. Yet the second part of the judgment, which was purely incidental to the first part, remains in full force and effect, and must be obeyed by all.

If the judgment is not binding upon the parties to it, then the court had no authority to render it; and, if the court had the authority to render it, then it is binding upon all until it is reversed, modified, or set aside according to law. This is axiomatic; but this is clearly a case, if I may be excused for the comparison, where the tail wags the dog, and where the dog is killed for having been wagged. So it is in all cases of this class. The incident controls the principal, and the church is destroyed because its judicatories construed its own laws differently from what the civil courts thought was correct.

It has also been suggested that the church is not injured by depriving it of its property. This I deny. While the church grounds and buildings are only incidental to religious worship, yet the teachings of Christ cannot in this day and age be conducted and carried on successfully without proper grounds and suitable buildings for that purpose. It is true one or both factions might organize a new congregation, and each might erect new buildings for worship, and get along nicely and harmoniously until some other doctrinal question should arise; but if the decisions of the judicatories of the two churches did not meet with unanimous concurrence of all of the members, then they would have the right to split up, and there would then be another schism in each, and we would have four weak and impoverished church organizations, incapable of accomplishing much good, instead of one, the original, which was stronger than all of its different branches and offshoots, and which was capable of accomplishing much good for the cause of Christ. But, if this policy of appealing from the decisions of the church tribunals to the civil courts of the country is continued, then the cause of Christ and his teachings will be sacrificed upon an altar of gold. In this way it is made possible for the courts of the country to absolutely destroy the church, if such a thing were possible, through the improper control of its property. But it is said that, if there was no restraint or limitation placed upon the powers of the church judicatories regarding property rights, then they might and probably have in some cases through error of judgment or evil design diverted property from the teaching and promulgation of the doctrine and faith for which it was donated to the teaching of some other doctrine, and thereby defeat the will of the donor and deprive those of the property who adhered steadfastly to the faith. This is only conjectural; but, concede it to be true, yet might it not also be said with equal or even with a greater degree of truthfulness that civil courts also might, through error, ignorance, or design, so interpret ecclesiastical questions as to divert such property from the purposes for which it was donated? I dare say the civil courts have and will continue to commit more errors, and more serious in character, in the administration of ecclesiastical laws, on account of their ignorance of those laws, than have or will be committed by the judicatories of the church. This is perfectly natural, because the judges of the latter are more versant in their laws than a layman can hope to be; and especially is that true in doctrinal questions, which are but the expressions of faith and belief in Christ and His teachings, which are incapable of being fully and perfectly understood by those who do not believe therein. The seventeenth verse of the tenth chapter of Romans reads as follows: "So, then, faith cometh by hearing, and hearing by the Word of God."

This, in my judgment, is one of the chief causes for the existence of so much strife and division among Christian people. They do not hear alike, nor do they understand the Word of God alike; but those who do hear and understand the Scriptures alike, associate themselves together into one religious body, called the church, and those who hear and understand them in a different way associate themselves together and form another church, and so on unto the end of differentiation. All Christian people recognize the fact that faith is the chief constituent element entering into all doctrines, and that, before one can properly and correctly understand and interpret them, he must hear and understand the Scriptures in the same spirit in which they were heard and understood by those who wrote the creed. It is for this reason that the judicatories of all churches and those of the state should be completely barred from passing upon doctrinal questions of another church; for, obviously, without faith being called into requisition as an assistant interpreter, the correctness of their decisions would depend largely upon mere chance, and, consequently, in most cases would be erroneous. This matter will, however, receive further attention later under a more appropriate topic. The sole effect of such decisions is to transfer the church property from one of the factions to the other, and leave both branches of the shattered church to heal their wounds the best they may, permitting the members thereof to form a new church organization, promulgate a new creed, and worship God according to the dictates of their own consciences, untrammeled by decisions of our civil courts, until another schism arises. The extent of the power of the civil courts to interfere with the authority of church tribunals to decide upon questions involving the rights to church property should be limited to the inquiry as to their jurisdiction of the latter. If under the constitution and laws of the church its judicatories have jurisdiction of the subject, then the hand of the former should be stayed, and leave it to the latter to inquire into and determine all questions of faith, doctrine, discipline, rule, custom, and ecclesiastical government, as well as all property rights de-

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contention of counsel for appellants supported by the weight of authority. It is true there are cases which hold that, wherever rights of property depend upon an ecclesiastical question, the civil courts will not only look into the jurisdiction of the church judicatories, but will also decide for themselves all questions of doctrine, confession of faith, etc., upon which the property right depends, and overrule the decisions of the church judicatories, where, in their judgment, the latter have erroneously decided such doctrinal questions. But, in my opinion, that position is not sustained by reason or by the weight of authority.

The Supreme Court of Georgia, in the case of Mack v. Kime, 129 Ga. 1, 17, 58 S. E. 184, 191, which grew out of this same church schism, said: "When an individual becomes a member of a religious organization, his uniting with it is his voluntary act, and he becomes bound by the rules and usages of the organization. A religious association usually adopts a constitution, by-laws, and form of government. A member, when he enters the organization, voluntarily assumes the duty of obeying the laws of the association. As to all matters purely ecclesiastical, he is bound by the decisions of the tribunals fixed by the organization to which he belongs, as an arbiter to determine the disputed questions relating to matters peculiarly within the province of the organization. In attempting to carry out the purpose for which religious associations are formed, it becomes necessary, in almost every instance, for the organization to hold and own property. The members of the organization, therefore, become interested in the property so owned. Differences may arise which bring about disputes as to what interest a member or class of members of an organization may have in this property. Rights of property are as peculiarly within the jurisdiction of the civil courts of the land as purely religious rights are within the jurisdiction of the ecclesiastical tribunals of a religious organization. How far the civil courts will interfere in the affairs of a religious body, where property rights are involved, is a question which has been addressed to many courts of this country. Often the controversy as to the right of the property grows out of a controversy as to creed, doctrine, or teaching. While all of the rulings of the American courts cannot be said to be entirely uniform, the great weight of authority is to the effect that if a religious organization has, under its form of government, a tribunal constituted with jurisdiction to decide differences between its members as to creed, teaching, or doctrine, the civil courts will not undertake to review or revise the judgment of the church tribunal in reference to such matters. The cases which deny to Congress and the lawmaking powers of the different states the right to interfere in matters purely ecclesiastical. In some cases it has been said that the decisions of the church tribunals are persuasive, and not to be departed from by the civil courts, except where the decisions are clearly wrong. But the sounder rule is that laid down in those cases in which it is held that, if the matter relates to creed, doctrines, or teaching, the judgment of the constituted church tribunal is absolutely conclusive upon the civil courts, whether, in the opinion of the judge of such courts, the decision appears to be right or wrong. Where a right of property turns upon such a decision, the civil courts will allow the property to go in that direction in which the decision of the church tribunal carries it. One of the leading cases on the subject in this country is Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666. It was there held that in a case where the right of property asserted in the civil courts is dependent upon a question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and that question has been decided by the highest tribunal within the organization to which it has been carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it. In the opinion Mr. Justice Miller says: 'It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men are in reference to their own. It would therefore be an appeal from the more learned tribunal in law, which should decide the case, to the one which is less so.' Page 729 of 13 Wall. (20 L. Ed. 666). See, also, 7 Rose's Notes, 769; Brundage v. Deardorf, 92 Fed. 214, 34 C. C. A. 304; Schweiker v. Husser, 146 Ill. 399, 34 N. E. 1022; Lamb v. Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Watson v. Avery, 65 Ky. 332; Trustees of Trinity M. E. Church of Norwich v. Harris, 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636; White Lick Quarterly Meeting of Friends, by Hadley et al., Trustees, v. White Lick Quarterly Meeting of Friends, by Mendehall et al., Trustees, 89 Ind. 136."

The question was most learnedly and exhaustively gone into by the Supreme Court of the United States in the case of Watson v. Jones, 13 Wall. 679. In 13 Wall. 722 et seq., 20 L. Ed. 666, Mr. Justice Miller, speaking for the court, used this language:

"We are next to inquire whether the decree thus rendered is based upon an equally just view of the law as applied to the facts of this controversy. The questions which have come before the civil courts concerning the rights to property held by ecclesiastical

bodies may, so far as we have been able to examine them, be profitably classified under three general heads, which, of course, do not include cases governed by considerations applicable to a church established and supported by a law as the religion of the state. (1) The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief. (2) The second is when the property is held by a religious congregation, which, by nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority. (3) The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization, in which there are superior ecclesiastical tribunals, with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization.

"In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced the formalities which the laws require. And it would seem, also, to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters. In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man, building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of government. The protection which the law throws around the trust is the same. And though the task may be a delicate one, and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of Attorney General v. Pearson, Lord Eldon said: 'I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the king's court is called upon to execute the trust.' That was a case in which the trust deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the Chancellor arrives at the conclusion, because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject. The case of Miller v. Gable, 2 Denio, 492 appears to have been decided in the Court of Errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

"The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society. In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control

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organism by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth. Of the cases in which this doctrine is applied no better representative can be found than that of Shannon v. Frost, where the principle is ably supported by the learned Chief Justice of the Court of Appeals of Kentucky. The case of Smith v. Nelson, 18 Vt. 511, asserts this doctrine in a case where a legacy was left to the Associate Congregation of Ryegate, the interest whereof was to be annually paid to their minister forever. In that case, though the Ryegate congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly if that congregation was to be treated as an independent one.

"But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important. It is the case of property acquired in any of the usual modes for the general use of a religious congregation, which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government. The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and

instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained; but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the Presbytery over the session or local church, the Synod over the Presbytery, and the General Assembly over all. These are called, in the language of the church organs 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

"We concede at the outset that the doctrine of the English courts is otherwise. In the case of Attorney General v. Pearson, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of Craigdallie v. Aikman the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of the Established Church, who con-

trols very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute book hampering the free exercise of religious belief and worship in many most oppressive forms, and, though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling, established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the Court of Sessions after no little struggle and resistance. The full history of the case of Craigdallie v. Aikman, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in Galbraith v. Smith, show this conclusively.

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine, which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian Churches) has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law, which should decide the case, to one which is less so.

"We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others. We have already cited the case of Shannon v. Frost, in which the appellate court of the state where this controversy originated sustains the proposition clearly and fully. 'This court,' says the Chief Justice, 'having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. In the subsequent case of Gibson v. Armstrong, which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case, and in the case of Watson v. Avery, the case relied on by the appellants at bar, and considered in the former part of this opinion, the doctrine of Shannon v. Frost is in general terms conceded, while a distinction is attempted which we shall consider hereafter. One of the most careful and well-considered judgments on the subject is that of the Court of Appeals of South Carolina, delivered by Chancellor Johnson in the case of Harmon v. Dreher. The case turned upon certain rights in the use of the church property claimed by the minister, notwithstanding his expulsion from the Synod as one of its members. 'He stands,' says the chancellor, 'convicted of the offenses alleged against him, by the sentence of the spiritual body of which he was a voluntary member,

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and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran, or whether his conduct was or was not in accordance with the duty he owed to the Synod or to his denomination. When a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decision out of which the civil right arises as it finds them.' The principle is reaffirmed by the same court in the John's Island Church Case, 2 Rich. Eq. 192.

"In Den v. Bolton, 12 N. J. Law, 206, the Supreme Court of New Jersey asserts the same principles, and, though founding its decision mainly on a statute, it is said to be true on general principles. The Supreme Court of Illinois, in the case of Ferraria v. Vasconcelles, 23 Ill. 456, refers to the case of Shannon v. Frost with approval, and adopts the language of the court that 'the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members. When they became members, they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power, and cannot now invoke the supervisory power of the civil tribunals.' In the very important case of Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95, recently decided in the same court, Judge Lawrence, who dissented, says: 'We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts.' And he dissents with Judge Sheldon from the opinion because it so holds. In the case of State v. Farris, which was a case growing out of the schism in the Presbyterian Church in Missouri in regard to this same Declaration and Testimony and the action of the General Assembly, that court held that whether a case was regularly or irregularly before the Assembly was a question which the Assembly had the right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern. We cannot better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of the German Reformed Church v. Seibert: 'The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals.'

"In the subsequent case of McGinnis v. Watson, 41 Pa. 9, this principle is again applied and supported by a more elaborate argument. The Court of Appeals of Kentucky, in the case of Watson v. Avery, before referred to, while admitting the general principle here laid down, maintains that, when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and, if it did not, its decision could not be conclusive. There is, perhaps, no word in legal terminology so frequently used as the word 'jurisdiction,' so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have been discussing, it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else; or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal. The right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up; and it might be said in a certain general sense very justly that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable. But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often

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used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care; for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

The same result was reached by the Circuit Court of Appeals of the Sixth Circuit in the case of Brundage v. Deardorf et al., 92 Fed. 214, 34 C. C. A. 304. The syllabus tersely states the substance of the opinion as follows: "5. Same—Dissenting Members—Right to Church Property.—The general conference of a religious society decided that its constitution and creed, which the conference had previously adopted, and which provided that it should not be amended except on request of two-thirds of its members, etc., was inadequate, and adopted measures for its amendment. The amendments were submitted to a vote of the members, after due notice, and more than two-thirds of those voting voted in favor of the amendments, whereupon the general conference decided that they had been adopted. A portion of the dissenting members then withdrew, and claimed the property purchased by the church, on the ground that those favoring the amendments had departed from the principles and purposes of the church. Held, that the amendment to the constitution and creed were matters of ecclesiastical cognizance within the jurisdiction of the conference, that the society was bound by its decisions, and that the withdrawing members were not entitled to such property."

And the Supreme Court of New York announced the same rule in the case of Connitt v. R. P. D. Church of New Prospect, 54 N. Y. 551, and on page 562 the court quoted approvingly the following language of Chancellor Johnson in the case of Harmon v. Dreher, 2 Speers, Eq. (S. C.) 87: "When a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide; but the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." These views are fully sustained by the courts of our own state. Dutch Church of Albany v. Bradford, 8 Cow. 457; Walker v. Wainwright, 16 Barb. 486; Robertson v. Bullions, 9 Barb. 64; Dieffendorf v. Reformed Calvinist Church, 20 Johns. 12. I have purposely abstained from discussing the question whether the decision of the classis and other judicatories was right—that is, in accordance with the constitution, laws, and usages of the church—because of the view I have taken that those judicatories had jurisdiction of the subject-matter, and hence that we are not to review their decision."

And in the case of Trustees of Trinity M. E. Church v. Harris, 73 Conn. 216, 224, 47 Atl. 116, 119, 50 L. R. A. 636, Chief Justice Andrews, in speaking for the Supreme Court of Connecticut in a well-considered case, said: "The case of Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449, is in principle precisely identical with the one at bar. That was an action demanding the title to and the possession of lands, and the case depended upon the application of ecclesiastical law. Land has been conveyed to certain persons named in the deed, and described as trustees for the Presbyterian Church in Aurora, Ill., and to their successors in office. The church edifice was erected on this land. A disagreement had arisen between the members of the church in respect to the employment of a pastor. The matter was taken before the Presbytery. The Presbytery decided that the further employment of this pastor was unwise, and directed the church to secure the services of some other minister. With this decision the majority were dissatisfied, and, the Presbytery refusing upon application to recede from its position, they presented to the Presbytery a paper reciting their grievances, and asking for certain relief, which concluded by saying: 'Failing in this, we have no other alternative but to withdraw from your ecclesiastical jurisdiction.' The Presbytery considered the paper, and determined that when any portion of the members of a church withdrew the remaining members constitute the church. This decision has been approved by the Synod, and by the General Assembly of the Presbyterian Church. The majority had possession of the church building, and continuously had regular preaching and services in conformity with the rites and ceremonies of the Presbyterian Church. The minority, under the direction of the Presbytery, thereafter selected elders, elected trustees, employed another minister, demanded the possession of the church property, and, that being refused, brought the suit for its recovery. The court held and decided that the determination of the Presbytery 'that, where any portion of the members of a church withdrew, the remaining members constitute the church,' was binding upon it [the court], and that the minority was entitled to recover. The decision may be expressed in this way: 'Where a Presbytery has decided that certain members of a Presbyterian Church have seceded, the decision binds the civil courts, and the seceders, although a majority, lose their rights to the church property.' There are many other cases to the same effect, among which we have examined the following ones: State v.

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Farris, 45 Mo. 183; Robertson v. Bullions, 9 Barb. (N. Y.) 64, 134; McKinney v. Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360; Henderson v. Hunter, 59 Pa. 335; Krecker v. Shirey, 163 Pa. 534, 30 Atl. 440, 29 L. R. A. 476; College v. Wyatt, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68; Shannon v. Frost, 3 B. Mon. (Ky.) 253; Smith v. Swormstedt, 16 How. 288, 14 L. Ed. 942; Hennessey v. Walsh, 55 N. H. 515, 530; Baxter v. McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670. In Wheelock v. Presbyterian Church, 119 Cal. 477, 51 Pac. 841, the court said: 'But the ecclesiastical court known as the "Presbytery" had the power to deal with the First Presbyterian Church in all matters ecclesiastical. The church, as an ecclesiastical body, was under the absolute control and dominion of the Presbytery, and the decisions and decrees of that body were binding upon it, as the decisions of this court are binding upon inferior judicial tribunals. These decisions are not only binding upon the church as an ecclesiastical body, but they are binding and conclusive upon courts wherever and whenever material to pending litigation.' We think these authorities are sufficient to establish the proposition, made a little above, that in all matters ecclesiastical the decision of the ecclesiastical tribunals is binding on the courts, and that the action and decision of Bishop Walden, to the effect that the plaintiffs are, according to the rules, usages, laws, and discipline of the Methodist Church, the successors of the grantees named in the deed of Mr. Swan, ought to have been held by the superior court as binding upon it, that the general claims of the plaintiffs are correct, and that their prayers for relief, as the pleadings now stand, should have been granted."

In the case of Lamb v. Cain, 129 Ind. 486, 514, 29 N. E. 13, 21, 14 L. R. A. 518, at page 527, the Supreme Court of Indiana said: "In this case it is contended by the appellants that the new constitution and the revised Confession of Faith were never legally adopted, and that those acting under such constitution and Confession of Faith have created a new organization, which is not the Church of the United Brethren in Christ, while they, adhering to the old constitution and the old Confession of Faith, which are still in force and unchanged, constitute the church, and that they are for that reason entitled to hold and control the property in controversy. We think it must be true that, if the old constitution and the old Confession of Faith have never been legally changed and are still in force, those adhering thereto constitute the church; while, on the other hand, if they have been legally changed, and the new constitution and new Confession are now the Confession of Faith and constitution of the Church of the United Brethren in Christ, those who refuse to accept and act under them are to be regarded as seceders, and no longer members of that church, and have no right to control its property." And the same court, in the case of Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449, held that: "Where a Presbytery have decided that certain members of a Presbyterian Church under its jurisdiction have seceded, the decision binds the civil courts, and the seceders, although a majority, lose their rights to the church property."

I think I would be perfectly safe in stating that there are probably a hundred other cases in this country announcing the law to be in harmony with the views expressed by the courts before mentioned; but I will neither cite nor quote from them, because I believe the arguments made and cases referred to in those cited will convince any disinterested and unprejudiced mind that both the reason and great weight of authority are on respondents' side of this question. The vice underlying the cases relied upon by counsel for appellants consists in their failure to differentiate between the principles of law governing cases decided by the courts of those countries where a union of church and state exists, and where ecclesiastical law forms a part of their jurisprudence, and where, under that dual form of government, the civil courts must exercise more or less jurisdiction over ecclesiastical questions, as was pointed out by Mr. Justice Miller in the case of Watson v. Jones, supra, and that class of cases where the property which was the subject of litigation was by the deed or will of the donor, or other instrument by which the same was held, by express terms of the instrument devoted to the teaching, support, or spread of some particular form of religious doctrine or belief. In this class of cases the instrument is the declaration of the trust and the terms upon which the property was conveyed to and accepted by the trustee; and in that case the ecclesiastical body occupies the position of an ordinary trustee of an express trust, and it must administer the property according to the express terms of the instrument creating the same, and not according to the doctrines and beliefs entertained and taught as interpreted by the judicatories of the class of ecclesiastical bodies to which the trustees belong. In all such cases nothing is left to the judgment and discretion of the trustee; consequently its doctrines and beliefs are wholly foreign to and cannot enter into the administration of property so dedicated. The donor has formulated and promulgated his own creed, and the trustee must administer the property according to that creed, and not in accordance with its own. In the light of these brief observations, it can be readily seen that, when civil courts assume jurisdiction in that class of cases, they do so under the civil, and not by virtue of the ecclesiastical, laws; and all property so held must be administered under the former law, and not under the latter. From this, of course, it follows that the civil courts have exclusive jurisdiction

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in all such cases, and are not bound by the decisions of church judicatories.

But the property involved in this litigation was not donated to an ecclesiastical body for the purpose of teaching, support, or spread of some specific form of religious doctrine or belief; but it was conveyed to the trustees of the Cumberland Presbyterian Church in Warrensburg, Mo., which was a subordinate member of the general organization known as the Cumberland Presbyterian Church, in which there are superior ecclesiastical tribunals possessing a general and ultimate power of control over the entire membership of the general organization, which, of course, gives them jurisdiction, also, over all church property as an incident to their general jurisdiction over all church matters. First Baptist Church v. Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617; Lamb v. Cain, supra; Watson v. Jones, supra; Mack v. Kime, supra.

3. Counsel for appellants also assail the validity of the union effectuated between these two churches, for the reason that the Plan of Union, as reported by the committee appointed by the General Assembly of each church, was not submitted as an entirety to the Presbyteries of each church for their approval, but only such portions thereof were submitted as indicated below, namely, that the report of this joint committee, in formulating a plan of union, not only provided for the submission of the questions of union and adoption, by the Cumberlanders, of the doctrines and Confession of Faith of the Presbyterians, as revised by them in the year 1903, but also for the surrender of the former's name and church organization, while the General Assemblies submitted to the Presbyteries only the former, and made no provision whatever for the expression of the will of the Cumberlanders upon the proposition of surrender of name and organization. It is therefore contended by them that the submission of this incomplete report upon the Plan of Union nullified the entire proceedings and prevented a legal union from being consummated between them. For the sake of argument, concede that to be true, yet it is the first time in the history of parliamentary usage and practice that I ever heard it contended that the conventions or assemblies appointing a committee to report upon any given subject or proposition were bound by such a report, and were not at liberty to accept or reject any or all portions thereof as in their judgment they deemed wise, just, and proper. Yet for the first time in history this schism has afforded the basis of a decision which is relied upon by this court for so holding and thereby solemnly adjudicated that the agent has greater powers than its principal, and that the fountain is higher than its source.

The case of Landrith v. Hudgins (Tenn.) 120 S. W. 783, is the case relied upon as the authority supporting this contention. That case so holds, but no authority is cited by the learned judge who wrote that opinion supporting him in those views. Nor does he give any reason for his conclusion, except the bare statement that section 60 of the constitution of the Cumberland Church required the submission of the entire Plan of Union. I do not so read that section. It is set forth his verba in a former portion of this opinion, and it could serve no good purpose to recopy it at this place. It is sufficient to state that it provides in substance that, upon the recommendation of the General Assembly, the Confession of Faith, Catechism, constitution, and rules of discipline may be amended or changed with the approval of the Presbyteries. It should be noted that this section does not require the General Assembly to submit any proposition whatever to the Presbyteries for their approval. It simply provides that the Confession of Faith, etc., may be amended or changed in any manner upon the recommendation of the General Assembly. This, of course, permits it to exercise its own discretion in determining what amendments, if any, it will submit for the approval of the Presbyteries. This record shows that the General Assembly submitted to the Presbyteries two propositions: First, the question of union; and, second, the acceptance by the Cumberland Church of the Confession of Faith of the Presbyterian Church as revised in the year 1903. Both of these recommendations were duly and legally adopted by the Presbyteries, which, upon approval, became operative and binding upon both churches, because both agreed to them in a constitutional manner, by and through their duly constituted authorities. But if the question of the surrender of the name and church organization of the Cumberland Church was not included as a necessary incident to those recommended and approved, then it is self-evident that it still retains its name and its organization. But this can in no manner affect the legality of the propositions which were properly submitted to and duly approved by the Presbyteries—the union of the two churches and the acceptance by the Cumberland Church of the Confession of Faith of the Presbyterian Church.

But in my judgment appellants' whole contention is untenable, for the reason that the record unmistakably shows that the whole object of the entire proceedings was to bring about the union between these two churches, which was duly submitted to and approved by the Presbyteries, and the question of doctrine and Confession of Faith was the only serious difference existing between them. That question was also properly submitted to the Presbyteries for approval, and it was approved by a constitutional majority. All else was mere formality, and the change of the name and church organization would necessarily, in the absence of an agreement to the contrary, follow as the result of and

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as an incident to the union—in the same manner and to the same extent as if, for instance, two business copartnerships existed under the names of Jones & Smith and Brown & Smith, and they should agree to unite their old businesses and form a new copartnership and for the same purpose under the name of the former. The moment the union was agreed to and the new copartnership was formed, the names of the old firms would be surrendered and their business organizations would, as a matter of law, be dissolved. In the supposed case it would be self-evident that, after the formation of the new copartnership, neither of the old copartnerships of Jones & Smith and Brown & Smith could longer exist, much less could those names be retained and transferred by the old firms to the new firm, in the absence of an agreement to the contrary; and that would be true, whether the latter had agreed upon a new name or not. In the absence of an agreement to the contrary, as before stated, both of the old names would be surrendered, as a matter of law, thereby leaving the new firm to adopt a name and to organize its business according to its own plans, regardless of the names and organizations of the old firms. The same is unquestionably true of these two churches. If, however, it be true, which I do not believe, they have not agreed upon a name for the united church, nor formulated its organization, then there is nothing in the civil law which will prevent them from now doing so; and their failure to do so in advance of the formation of the union can in no manner affect the legality of that union. These observations, it seems to me, are self-evident.

4. The next insistence presented by counsel for appellants for determination involves the question of identity of doctrine and Confession of Faith as believed in and taught by these two churches. It is insisted that a radical difference exists in that regard between these two churches, that before a valid union can be effectuated between them there must be identity of doctrine and faith possessed by both, and that in the absence of such showing the majority of neither can legally take possession of and transfer the property thereof to the other church without the unanimous consent of all of the members, or so long as there is a single dissenter thereto. Upon the other hand, counsel for respondents contend that at the time of the submission of the question of union to the Presbyteries for their approval there was no substantial difference of doctrine and faith existing between these two churches, that a literal identity was not necessary, that the determination of that question rested exclusively with and was determined by the judicatories of the church, that the decisions of those courts are conclusive upon all ecclesiastical questions and upon all property rights of the church depending upon those questions, and that the members of the church, as well as all civil courts, are concluded and bound thereby.

(a) What are the doctrines and beliefs of these two churches? They are reduced to writing and are found printed in what is denominated the "Confession of Faith," which in so far as they are material to the questions involved in this case are set forth in the majority opinion. Any one can read them, but, like all other written documents, in order to ascertain the meaning of those who wrote and promulgated them, they must be construed; and that brings us to the consideration of the question, by whom should they be construed? Counsel for appellants insist that it should be done in this case by the civil courts, for the reason that upon them depend property rights; while counsel for respondents contend that under the Constitution of the United States and that of this state that authority rests exclusively in the church tribunals. Article 1 of the amendments to the Constitution of the United States reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." And section 5, art. 2, of the Bill of Rights of this state (Ann. St. 1906, p. 130), reads as follows: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this state, nor be disqualified from testifying or from serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this state, or with the rights of others."

In order to fully and properly understand these constitutional provisions, we should bear in mind the conditions that existed in other countries, and the evils our forefathers intended to abolish by their adoption. At that time practically all European countries had a union of church and state, and out of this grew religious intolerance, persecution, and oppression; and to that door history has laid many of the most diabolical crimes which are recorded in the annals of time. Under such a union the ecclesiastical laws constituted a portion of the jurisprudence of those countries, and especially was that true of England, our mother country. Without going to the bottom of the question, yet from a superficial investigation of the subject, I conclude those laws were more in the nature of ordinances of cities than general laws of the country. And while the church judicatories were called ecclesiastical courts, yet they were in fact legally constituted in-

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derstanding of clergy and laymen that, if any member does not subscribe to the doctrines of the church as expounded by the highest tribunal thereof, then his only remedy is to withdraw his membership therefrom, and, should he decline to do so, the church may expel him therefrom, and in both instances he would lose whatever interest he had in the church property. This seems to be the consensus of opinion of all of the courts of this country and of England. But in this case the exact reverse is held to be the rule. The majority, who remained steadfast with the church, have forfeited their property rights to the retiring minority.

If the position contended for by counsel for appellants is sound in this case, then the same contention should also hold good in a similar case arising out of a schism in any other church. This, I suppose, will be conceded; and, in view of the concession, let us suppose the following case: Suppose the members of the Christian Church at St. Joseph (which is a strictly congregational or independent organization governed solely within itself, by a majority of its members) should elect officers and employ a minister who construe the Scriptures to mean and teach Fatalism in the sense in which it was interpreted and stated by the Presbyterian Church in the Calvinistic Confession of Faith prior to its revision; and suppose a minority of the members should disagree with said officers and minister in their interpretation of the Scriptures bearing upon the question of salvation, and should believe and teach that salvation was possible to all and certain to Christians; and suppose a schism should arise in the church over this difference of construction, and thereupon the minority should attempt to expel the majority, who concur with the minister in his belief and teachings; and suppose the minority should bring suit for the possession of the church property, alleging for their cause of action the above-assumed facts, and pray judgment for the possession of the property, for the reason that those facts showed the majority had departed from the faith and teachings of the church as expounded by Alexander Campbell and other eminent theologians of that church: Would it, under that state of facts, be seriously contended by counsel for appellants that the courts of the state would have jurisdiction over and should take up the Scriptures, which constitute the only creed and confession of faith which that church has, and construe them for the purpose of ascertaining whether or not they taught foreordination and predestination, and solemnly determine that fact in favor of the minority or majority, and in pursuance to that ascertainment and determination decree the property to the parties whose faith coincide with the interpretation of the court? Certainly not, and any civil tribunal in Christendom which would undertake so foolish a thing would justly subject itself to contempt and ridicule. Yet that it just what they ask this court to do in principle in this case. There is not a whit's difference in principle between the two cases.

In the case at bar, the Confession of Faith and other doctrinal teachings of the Presbyterian Church are simply condensed statements of the Scriptures, as construed by the church authorities, expressing the religious belief of the church, and setting forth the most important doctrines the church believes the Scriptures teach. The Bible itself expresses the religious beliefs and teachings of the Christian Church, while the Confession of Faith in a brief manner expresses that of the Presbyterian Church; and if error has been committed by either church in its construction of the Scriptures, that error should be corrected by another and proper construction; and any law which would prevent that correction would, in my judgment, be unwise and greatly injurious to the Christian religion, and no court should hesitate for one moment to declare it invalid under the constitutional provisions before mentioned. The mere fact that the Presbyterian Church, or other church, for that matter, has deemed it proper to summarize and compile its beliefs and teaching into a statement, called a "Confession of Faith," should no more prevent that church from reconstruing the Scriptures, and thereby expunge error from its Confession, any more than the early construction placed upon the Scriptures by Alexander Campbell should prevent the ministers of to-day of the Christian Church from placing a different construction upon them. The only difference I am able to see consists more in the form in which the construction is stated than in substance. The former is in writing and is called a Confession of Faith, while the latter was oral and is called a sermon; and in the former, as I understand it, all of the ministers adhere to and teach the Confession of Faith as written, until it is repealed or amended in the manner provided for by the constitution of the church, while in the latter each individual minister is at liberty to place his own construction upon each passage and preach that construction to all who will hear him. And if error be committed in that regard to-day, to-morrow will witness its correction by the first minister who discovers it, thereby placing it beyond the power of any individual, or even an entire congregation, from binding the entire church to error, until there is a unanimous agreement among all of the members to correct the error. The belief of the Presbyterian Church, as well as that of the Christian is based upon the Scriptures, and the chief distinguishing feature existing between the two churches, as I see it, is the manner in which the Scriptures are interpreted and taught by each. If that is true, and if the minority of the members of the Christian Church would have no right to oust the majority from the

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possession of the church property because its ministers at different times placed different constructions upon certain portions of the Scriptures, then a fortiori should the minority in the Presbyterian Church be denied the power to oust the majority and take possession of the church property for amending the Confession of Faith in conformity to the teaching of the Scriptures, as shown by a later and wiser construction. The churches of the country should be encouraged along this line of progress, in order that they may keep abreast of the times, and throw aside all useless doctrinal matters, and teach and practice Christianity as Christ taught and practiced it while he was on earth.

The framers of the constitutions of these two churches, in their wisdom, foresaw the time when doctrinal questions would cease to play important roles in the teachings and practices of the Christian religion, and would give way to broader and higher conceptions of God and Christ and His teachings. In order to meet those important emergencies as they might arise from time to time, the constitution of each provides that "upon the recommendation of the General Assembly * * * the Confession of Faith, Catechism, constitution and rules of discipline may be amended or changed" by the approval of a majority of the Presbyteries. The framers of those instruments saw and fully understood that the Confession of Faith was not perfect when adopted, and that in the course of time members of these churches would grow in grace and knowledge through works and faith in Christ, and would for that reason be better fitted to understand the teachings of the Scriptures, which would necessitate a modification or change in the Confession of Faith, in order to conform to this new knowledge of Christian teachings. The founders of these churches, knowing from the teachings of the Scriptures that this growth of their members in the spirit of God would require a modification of the Confessions of Faith, met that contingency by a constitutional provision authorizing amendments to the Confession of Faith, and every member, when he or she joined the church, thereby agreed to that constitutional provision in the same manner that he and she agreed to all other laws of the church. That being true, it must follow as a necessary sequence that when the two churches through their properly constituted authorities amended the Confession of Faith, in the manner pointed out by the constitutions of the two churches, all members of both churches are bound thereby so long as they remain in the church; and if the amendment does not meet with their religious convictions, and they are legally bound according to the ecclesiastical laws of the church to withdraw from its membership, otherwise each and every dissenting member may effectually prevent all amendments to the Confession of Faith, and thereby bind the church to the Confession as originally written, as long as time lasts, although every other member of the entire church may believe in and favor the amendment. Such a result is clearly against the whole spirit and growth of the church, and violative of all of its laws, and no court, civil or ecclesiastical, should lend its aid to such an unwise and unjust result.

Not only are members of religious associations, such as churches, bound by constitutional provisions which authorize amendments to their Confession of Faith and other by-laws, as is fully established by the numerous authorities heretofore cited, but the same rule of law applies in fraternal insurance associations, the primary object of which is pecuniary protection, and upon which property rights depend; and, when such amendments are made in the manner provided for by the constitution thereof, they are binding upon all. The Supreme Court of Indiana, in the case of Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 496, 20 N. E. 483, 3 L. R. A., loc. cit. 412, used this language:

"The provisions of the established by-laws of an association, such as that with which the assured united are, as appellee's counsel justly affirm, elements of the contract of insurance. They are factors that cannot be disregarded. That they have this effect all who become members of the association must know. A person who enters an association must acquaint himself with the laws, for they contribute to the admeasurement of his rights, his duties, and his liabilities. Bauer v. Samson Lodge K. of P., 102 Ind. 262, 1 N. E. 571; Fugure v. Mut. Society of St. Joseph, 46 Vt. 368; Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 319; Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425; Coleman v. Knights of Honor, 18 Mo. App. 189; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. 402; People v. St. George's Society, 28 Mich. 261; Osceola Tribe v. Schmidt, 57 Md. 98; Sperry's Appeal, 116 Pa. 391, 9 Atl. 478; Bacon, Benefit Societies, p. 81. It is not one by-law, or some by-law, of which the member must take notice; but he must take notice of all which affect his rights or interests. Poultney v. Bachman, 31 Hun (N. Y.) 49. Where, as here, there is an express and clear reservation of the right to amend, he is bound to take notice of the existence and effect of that reserved power. The power to enact laws is inherent in every corporation as an incident of its existence. This power is a continuous one. Niblack, Mut. Ben. Societies, p. 124. No one has a right to presume that by-laws will remain unchanged. Associations and corporations have a right to change their by-laws, when the welfare of the corporation or association requires it and it is not forbidden by the organic law. The power which enacts may alter or repeal. Richardson v. Union Cong. Society, 58 N. H. 187; Com. v. Mayor, 5 Watts (Pa.) 152; St. Patrick's

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demanded, and with their discretion courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only when there is an abuse of discretion, and a clear, unreasonable, and arbitrary invasion of private rights, that courts will assume jurisdiction over such societies or corporations. With questions of policy, doctrine, or discipline courts will not interfere. Courts will compel adherence to the charter, and to the purpose for which the society was organized; but they will not do more. Stadler v. Grand Lodge, 3 Am. Law Rec. 589; Crossman v. Massachusetts Ben. Ass'n, 143 Mass. 435, 9 N. E. 753; Hussey v. Gallagher, 61 Ga. 86. The principle which rules here is strictly analogous to those which prevail in controversies between the officers and members of religious organizations; and it is well settled that in such cases courts will not control the exercise of discretionary powers, or direct the course of an action in matters of expediency or polity. Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903.

"To justify interference by the courts, and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there was an abuse of power, or that the later by-law is unreasonable. It is not enough to show that a better or wiser course might have been pursued, for it must be shown that there was an abuse of discretion, or that the by-law is so unreasonable as to be void. We do not affirm that a benefit society may, by a change in its by-laws, arbitrarily repudiate an obligation created by a policy of insurance; but we do affirm that where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It may sometimes happen that the interests of an individual, or of a few individuals, may be impaired; but it is the right, and, indeed, it is the duty, of the society to protect the interests of the many, rather than of the few. Persons who become members of such societies must take notice of this; and one person cannot, therefore, demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit. In the case before us the change from the one plan to the other was not an arbitrary or unreasonable exercise of power; nor was it the repudiation of a debt, nor the destruction of a vested right. It was not unreasonable, because it may well be that the system of insurance originally adopted, which gave no heed to age, was so infirm as to be incapable of long enduring. It was not arbitrary, because the right to the avails of assessment provided for by the contract was not taken away. It was not the destruction of a vested right, because the power to amend was, as reserved, a part of the contract from which the right of the beneficiary emanated, and because, also, the right to enter the new class was open to all members on equal terms."

If such amendments are valid and binding upon the property rights of members in fraternal associations, whose primary object is to furnish protection for the families of the deceased members, which is purely a property right, then how much stronger should the reason be for holding such amendments valid and binding upon members of religious societies, where the primary object of the society is to care for the spiritual welfare of its members, and where their property rights and interests are purely incidental and of minor and secondary consideration. In each case the members have agreed in advance that the amendment might be made, and, where so made in pursuance to their previous agreement, they are bound thereby so long as they remain members of the society; and in each case, if they are dissatisfied with and cannot conscientiously subscribe to the amendment, then his only legal remedy is to withdraw from the society, and by so doing, in the absence of an agreement to the contrary, he forfeits all his interests in and rights to the property of the association. The mere fact that some of the members of the Cumberland Church could not subscribe to the Confession of Faith of the united church, which was a modification of the Presbyterian Confession, which was adopted as the Confession of the united church, was wholly immaterial from a legal standpoint, for the reason that the constitutional provisions which authorized such amendment did not limit the church to any particular kind of amendment, nor require that it should conform to the religious beliefs and convictions of each and all of the members before it should become valid and operative.

(b) We are now brought to the question: Was there an inconsistency and irreconcilable conflict between the Confessions of Faith at the time the union was approved by the Presbyteries of the two churches? Should we concede this to be true, still that, in my judgment, would not alter the legal aspect of the question involved, for the reason, as before pointed out, there was no limitation placed by the constitution upon the church as to the character of amendments that it might make to the Confession of Faith, Catechism, constitution, and rules of discipline, and in the absence of such limitation clearly the church had the power to make any amendments they deemed proper and for the good of the

church, especially in doctrine or touching doctrinal matters, and if any member cannot conscientiously subscribe to the Confession as amended, then he may withdraw, if he wishes, from the church. But to my mind such conflict would not warrant the courts in declaring the union invalid, or justify any member in withdrawing from the church, any more than he would be warranted in repudiating the Christian religion, simply because there are the same apparent and irreconcilable conflicts contained in the Holy Scriptures themselves. That such apparent conflict does exist therein is evidenced by the existence of so many churches, all of which believe in the Christian religion, but no two of them construe or interpret the Scriptures alike, thereby showing that they mean one thing to one church and another thing to another church, and so on to the end of the list.

Take this very case, and if it be conceded that the Presbyterian Church, prior to the modification of its Confession of Faith in 1903, believed that the Bible taught Fatalism, or predestination, or foreordination, while the Cumberland Church believes it teaches man is a free, moral agent, and that all men through the atonement and divine influence of God may be saved. In fact, my understanding is that this very difference in belief largely caused the Cumberland Church, in 1810, to separate from the Presbyterian. So it is seen that it would be just as consistent for the Cumberland members to say that they would repudiate the Christian religion because those apparent inconsistent teachings are found in the Bible as for them to withdraw from the United Church because its Confession of Faith contains those same identical inconsistences. But let us withdraw the concessions before made, and look at these two Confessions of Faith as they were at the time the union was voted upon.

In the year 1884 the Cumberland Church amended its Confession of Faith regarding the questions of "Fatalism" and "Free Agency," and promulgated the same, with the following preliminary statement, each of which reads as follows:

"The founders of the Cumberland Presbyterian Church in their licensure and ordination by the Presbyterian Church were permitted to 'except the idea of fatality,' as they believed it to be embraced in the doctrines of unconditional election and reprobation, and an atonement, limited to a definitely elected number, as taught in the Westminster Confession of Faith. Subsequently, having for this been cut off from the parent church, in fixing a standard of doctrine for the Cumberland Presbyterian Church, which they organized, they adopted the Westminster Confession of Faith, modified in the following particulars: (1) That there are no eternal reprobates. (2) That Jesus died, not for a part only, but for all men, and in the same sense. (3) That all infants dying in infancy are saved. (4) That the Holy Spirit operates on all the world—on all for whom Christ died—in such manner as to render all men responsible, and therefore inexcusable."

And in 1903 the Presbyterian Church accomplished a revision of its Confession of Faith also, which embraced a declaratory statement intending to explain the objectionable clauses and remove all misapprehension of their meaning, which in so far as is material to this case reads as follows:

"II. The Declaratory Statement.

"While the ordination vow of ministers, ruling elders, and deacons, as set forth in the Form of Government, requires the reception and adoption of the Confession of Faith only as containing the system of doctrine taught in the Holy Scriptures, nevertheless, seeing that the desire has been formally expressed for a disavowal by the church of certain inferences drawn from statements in the Confession of Faith, and also for a declaration of certain aspects of revealed truth which appear at the present time to call for more explicit statement, therefore the Presbyterian Church in the United States of America does authoritatively declare as follows:

"First, with reference to chapter 3 of the Confession of Faith, that concerning those who are saved in Christ, the doctrine of God's eternal decree is held in harmony with the doctrine of His love to all mankind. His gift of His Son to be the propitiation for the sins of the whole world, and His readiness to bestow His saving grace on all who seek it; that concerning those who perish, the doctrine of God's eternal decree is held in harmony with the doctrine that God desires not the death of any sinner, but has provided in Christ a salvation sufficient for all, adapted to all, and freely offered in the Gospel to all; that men are fully responsible for their treatment of God's gracious offer; that his decree hinders no man from accepting that offer; and that no man is condemned except on the ground of sin.

"Second. With reference to chapter 10, section 3, of the Confession of Faith, that it is not to be regarded as teaching that any who die in infancy are lost. We believe that all dying in infancy are included in the election of grace and are regenerated and saved by Christ through the Spirit, who works when and where and how he pleases."

For years—yes, for more than a half century—the former church had from time to time made overtures to the latter, looking toward a union between them; and with that idea in view, as I understand this record, the principal difference that existed between them was over the question of Fatalism, and in order to harmonize their Confessions of Faith with each other in that regard the amendments before stated were made. Thereupon steps were taken to form this union, and, as before stated, each church appointed a Committee on Fraternity and

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Union. These committees met, and formulated and agreed upon the joint report hereinbefore set out. This report declared, in substance: That such agreement now exists between the system of doctrine contained in the Confessions of Faith of the two churched as to warrant this union—a union honoring alike to both. The Plan of Union provides that the two churches "shall be united as one church, under the name and style of the Prebyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess." It was further provided that "all ministers and churches included in the two denominations shall be admitted to the same standing in the United Church which they may have held in their respective connections up to the consummation of the reunion"; also "that the boundaries of the several Presbyteries and Synods shall be adjusted by the General Assembly of the United Church, and the official records of the two churches during the period of separation shall be preserved and held as making up the history of the one Church." This report was duly adopted by the General Assembly of each church, and was by them recommended to their respective Presbyteries for approval, which was duly approved by each in the manner and form provided by their respective constitutions, as before stated.

Counsel for respondents contend that this record shows that the creeds of the two churches are substantially the same, and that there is no real conflict between them. The two churches, in a constitutional manner, after years of work and deliberation, solemnly declared that they were substantially the same, and that the only difference, "Fatalism" and "Free Agency," that separated and held them apart, had been removed by the revision of the Confession of Faith of the Presbyterian Church in the year 1903. It seems to me that the determination of that question by the decisions of the highest judicatories of those two churches should and does fully determine that question. It was purely a question of belief regarding spiritual matters, and in the very nature of things no one can tell what the religious convictions of a man are as well as he can himself. The good people of these churches were not feigning and trying to deceive each other as to what their beliefs were upon the question of "Fatalism." It seems to me that the time, place, and subject-matter were sufficient inducements for them to speak the truth, and should remove every doubt as to their sincerity, when they solemnly declared that the two Confessions of Faith were substantially the same. This, alone, should constitute sufficient reason for this court to adopt the decisions of the courts of these churches upon that question.

But, independent of this, a creed or confession of faith cannot be construed by the same canons of construction with which we construe ordinary written documents. One of the principal rules for construing wills, deeds, and other documents is that all "words and phrases used therein shall be taken in their plain or ordinary and usual sense." When applied to the construction of legal instruments, that is a wise and helpful rule in ascertaining the intention and meaning of the parties who executed it, for the reason they refer to things and express ideas about worldly matters with which all are familiar; but that is not true in spiritual matters. No one possesses actual knowledge of God and His infinite wisdom, and for that reason but few persons can have the same conception of Him or of His will. So it must follow therefrom that all words and phrases spoken or written of or concerning God are understood and interpreted in the light of the conception the reader or hearer of those words has of God and of His will, and when so used and interpreted he attaches to them the usual meaning which is given to them by the persons who have the same idea or conception as his own of God, and with whom he usually associates and discusses religious matters. Or, to make my meaning plainer, words and phrases are used to express and convey ideas which are transcripts, images, or pictures of images of things we have in mind, and when applied to terrestrial matters, such, for instance, as contracts or other legal instruments, the mind naturally reverts to the worldly matters which constitute the subject-matter of the contract, about which practically all persons possess the same common knowledge; and for that reason, when words are used regarding such instruments, they convey practically the same image, picture, or idea to the minds of all who read or hear the words spoken, and it is for this reason that the rule is upheld which requires courts in the construction of contracts and other legal instruments to give to the words thereof their plain and ordinary meaning. But that is not true in religious matters, where the words used refer to spiritual matters, and present to the minds of those who use, read, or hear them images or pictures of spiritual and invisible things as they conceive them to be, few of whom, however, entertain the same conception or idea of God, Christ, and the Holy Spirit; and for that reason, when words are used in reference to spiritual matters, they convey to the minds of those who read or hear them quite different ideas, for the reason that they have not the same conception of those matters as they have in the case of worldly matters, and consequently the words used present to the mind of each person the picture or image of God and a transcript of His words as they have previously conceived Him and them to be. To all persons of a particular sect the words and phrases employed by them in their confession of faith, or other doctrinal matters, have a particular or technical meaning, which

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expresses their own particular conceptions and beliefs in spiritual matters; but such language would fail to express the conceptions and belief of any other religious sect, for the reason that their conception of spiritual matters is entirely different from the former; and this is the reason, as before stated, for the existence of so many different religious denominations. This same rule of interpretation is applied in the business affairs of life. The books are full of cases which show that certain words and phrases, when used in certain business transactions, have a particular meaning, which is understood only by those who are familiar with that particular kind of business; and, if applied to some other business, they would convey an entirely different meaning. This condition calls for expert testimony, and no witness is qualified to testify of such matters, except when it is first shown that he is familiar with that particular class of business. So it is in religious matters. No one is competent to interpret the words and construe the confession of faith of a particular church without it is first shown that he is a believer in that doctrine. His belief in spiritual matters occupies the same relative position to the knowledge of the expert in business affairs, and without that belief the former cannot properly interpret the words of the confession of faith of a particular church, any more than a witness without such knowledge could testify as to the meaning of technical words used in a particular business transaction. This rule applies equally as well to all, whether judges, saints, or sinners. This being unquestionably true, then we may have the same word spoken in the presence of two or more persons regarding religious matters, and each and every one of them may attach a different meaning to them and understand the proposition stated differently. This truth is recognized and acknowledged generally by all well-informed religious people, and is taught in the Scriptures. For this reason it would lead to erroneous conclusions were we, in the construction of creeds and confessions of faith, to give to the words and phrases thereof the plain and ordinary meaning that is attached to them in the ordinary affairs of life; for by so doing they would mean one thing to the member of one church and another thing to a member of a different church, and just so long as people have imperfect conceptions of God and spiritual matters, just that long will this apparent conflict in the Scriptures and creeds of churches exist, for the reason, as before stated, the language used therein does not express or convey the same idea alike to all who read or hear it spoken, but is construed by each individual and church according to the correct or incorrect conception he or it has of God and of heavenly matters. If his conception of God is that He is, for instance, a personal God, then the word "God" conveys to his mind the image of some perfect man; and, of course, that conception or image differs in the minds of all such, for the reason that they do not all have the same conception of what constitutes a perfect man, but each attributes to his own ideal man the most perfect qualities and attributes which his mind is capable of conceiving. That being true, then in all such cases each person's conception of God varies according to their various conceptions of what constitutes a perfect man; and the latter depends largely upon his intelligence, knowledge, and moral qualities. But these are all formal matters and have nothing to do with true religion. The fault rests with the individual, and not with religion or the Scriptures; and my only object in mentioning them was to show why, in my judgment, the Scriptures and church creeds are misunderstood by so many people.

But when we come to investigate true religion and the teachings of Christ, we find that there is no real conflict, either in the Scriptures or between the two Confessions of Faith involved in this case. All teach substantially the same great fundamental truths, and all Christians, regardless of the particular church to which they belong, believe in those truths, some of which are as follows: The existence of God, the Trinity, the authenticity of the Bible, creation, providence, the fall of man, God's universal love for all, that Christ died for the sins of the world, that through the atonement whosoever will may be saved, and that all infants dying in infancy and all others who never possessed reason, and all who have no knowledge of the Scriptures, but have led exemplary lives according to their dim lights, will be saved. Upon these matters all churches and all Christians agree, and their only differences grow out of their imperfect knowledge of God and His plan of salvation, which has caused confusion in the minds of many, leading them to believe that some formal and immaterial matters are of substance and are essential to salvation; but, upon the other hand, the Bible is so plain upon the fundamental principles of religion that no church or member thereof has ever been so confused or so misled thereby as to mistake substantial matters taught therein for formal or immaterial matters, and for that reason disregard its mandate.

When we take this broad view of the Scriptures, and read the two Confessions of Faith in the light thereof, can there be any possible doubt in the minds of intelligent men about the identity of doctrine stated in the two? If I had the legal right to decide that question, which I deny, I would not hesitate one moment in answering it in the negative. Any other construction would seem to me to be too narrow and technical to meet the broad and useful purposes intended to be accomplished by their promulgation. On account of the inestimable good which would have been done for the church, religion, and the

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human family generally, it is, in my judgment, to be deeply regretted that this wise and beneficial union is to be disturbed.

For the reasons hereinbefore stated, I believe the motion for a rehearing should be sustained, in order that this important case, the most important, in my judgment, which has ever been presented to this court, may be argued again.

LAMM, J. (dissenting). What I have to say can be said shortly; for in the face of all that has been said pro and con (and well sa'd), the furor scribendi is out of place. While the opinions of my learned Brothers GRAVES and VALLIANT, concurred in by a majority of the Brethren, do not say in so many words that legal church unions are impossible, yet, as read between the lines, in final effect they seem to announce to the several denominations of the Christian church in America a doctrine tantamount to that. I do not agree to that doctrine, by or large, in whole or in part. I do not agree that the road to church unity on the basis of the essentials of Christian faith (allowing flexibility and liberty of belief in nonessentials) is laid with legal pitfalls or bristles with obstacles well-nigh insurmountable. To my mind there are no legal lions in the way to the affirmance of this decree. I am not willing to announce as the solemn and final conclusion of this court that the longing, abiding, and great hopes of Presbyterian church unity are vain; that the dreams of the wise and good in that behalf may never come true. The new dogma of "once split, always split," is a heresy in logic and in law. The Christian church, burst asunder centuries ago by cleavages, need not stay apart like inanimate rocks burst in twain by heat or frost. It seems to me the bounden duty of courts is to lend all the art and reason of the law to smooth the way and make the path easy to unity in endeavor, Christian faith, and church relation; and any other view is dreary and unnecessary.

With such predilections, I have read the briefs of counsel, the opinions of the majority, the record in the cause, and the dissenting opinion of my learned Brother WOODSON. The propositions of law announced and the authorities cited by him have my approval, and therefore I dissent from the majority opinions and vote to sustain the motion for a rehearing.

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DOBBS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909.)

CRIMINAL LAW (§ 814*)—CHARGE NOT AUTHORIZED BY EVIDENCE.

There being no evidence that defendant in a larceny case made any explanation of his possession of the article, except on the witness stand, or that his possession was challenged, or that the circumstances demanded a statement of him, charging as to the law if, when his possession of the article soon after the theft was questioned, he made an explanation of how he came by it, and the state has shown the falsity of it, is error, requiring reversal, where, in view of the facts, it may be such charge was calculated to lead the jury to believe evidence had been introduced tending to show the falsity of defendant's explanation on the stand, and gave undue prominence to his possession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979–1987; Dec. Dig. § 814.*]

Appeal from District Court, Mason County; Clarence Martin, Judge.

Will Dobbs appeals from a conviction. Reversed and remanded.

Moursund, Moursund & Rowe, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the district court of Mason county, by indictment filed therein on the 7th day of March, 1908, with burglary and theft; the substance of the charge being that on the night of the 25th of February of that year he entered the smokehouse of Dave Polk and stole therefrom certain personal property, bacon and other hog meat, of the value of $55. He was convicted of the crime of theft of the value of less than $50, and his punishment assessed at a fine of $175 and eight hours' confinement in the county jail.

The facts show beyond dispute that on the night of the 25th day of February of last year the smokehouse of Polk was entered and a quantity of meat taken therefrom. This meat was on the next day discovered in the town of Brady, and we think the testimony sufficiently identified it. This case is largely circumstantial. No one claims, or pretends, to have seen him at or near the place of the theft. As we think, the record contains but slight evidence connecting him with the original taking, except in so far as this fact is disclosed and discovered by his subsequent connection with the meat. That he sold this meat in Brady the next day to one Charles Broad is shown beyond doubt, and admitted. Appellant denies any connection with the unlawful acquisition of the meat, or any knowledge that same had been stolen, and claims that he sold it to Charles Broad for one Jim Pirtle. The testimony of Broad lends some support to his contention. He says, among other things, upon cross-examination: "As to whether he said anything, when he went out, to indicate his purpose in going out, I think he says, 'Wait until I see.'" It is true that on redirect examination he stated that he did not claim that the bacon belonged to some other person than himself; but he says as well: "He did not make any statement that it belonged to him." Again he says: "To the best of my knowledge, Mr. Dobbs said on this occasion: 'I will have to see him.'" Appellant introduced considerable testimony tending to prove an alibi. This, however, does not seem to us to be as conclusive as appellant's counsel contends. However, the issue was raised, and there was much evidence in support of it.

The court gave in most respects an exceptionally good charge in the case, submitting both burglary and theft, and charging the law of principals, as well as the law on circumstantial evidence and alibi. Among other things the court charged the jury as follows: "If you believe from the evidence that the bacon and hog meat described in the indictment had been stolen from Dave Polk, and that recently thereafter the defendant was found in possession of the same, and when his possession was first questioned he made an explanation of how he came by it, and you believe that such explanation is reasonable and probably true, and accounted for defendant's possession in a manner consistent with his innocence, then you will consider such explanation as true, and acquit the defendant. If, on the contrary, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or you believe same accounted for defendant's possession in a manner consistent with his innocence, but the state has shown the falsity thereof, then you will take the possession of the defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and if you believe defendant guilty beyond a reasonable doubt you will so find; otherwise, you will acquit the defendant." The court, also, just preceding this paragraph of his charge, after a general definition of the law of principals, gave the following instruction: "In this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant, either acting alone or with one Jim Pirtle, as a principal, as that term is defined to you in the above paragraphs of this charge, is guilty of the offense of burglary or of theft as charged in the indictment, you will find him guilty of whatever offense the evidence warrants (if any at all), and assess the penalty in accordance with the rules prescribed in this charge. On the other hand, if you find that the defendant did not act with Jim Pirtle as a principal in the commission of the offense charged in the indictment, or if you have a reasonable doubt as to his participation in the commission of the offense charged with Jim Pirtle, then you are in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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structed that the defendant would not be guilty of any offense that you might find to have been committed by Jim Pirtle, if you find he committed any offense whatever."

There was no evidence at all that appellant made any statement as to his possession of the property alleged to have been stolen, that such possession was challenged, or that the circumstances demanded or called on him for a statement, unless we may say he was called on to make a statement when offering the property for sale. In this state of the record appellant urges that, considered especially in connection with the charge of the court on the law of principals, the first paragraph of the court's charge above quoted was erroneous, because (a) said charge was misleading and not warranted by the facts in the case, in that there was no evidence of any explanation at all having been made by the defendant when his possession of the alleged stolen property was first called in question, and said charge gave undue prominence to the fact of the defendant's possession of such property, and was calculated to cause the jury to believe that the fact of the defendant's possession of such property was alone sufficient to authorize them to convict him; (b) because said charge was upon the weight of the evidence, and calculated to mislead the jury, in that it failed to define the character of possession necessary to be proven by the state in order to warrant the jury in considering the mere fact of possession as a circumstance in the case; (c) said charge is further upon the weight of the evidence in this case, in that it is calculated to lead the jury to believe that evidence has been introduced by the state tending to show the falsity of the explanation made by the defendant on the witness stand as to his possession of the alleged stolen property, there being no evidence that he made any explanation when his possession of said property was first called in question."

We think, in substance, that the complaint of counsel is sustained, both in reason and on authority. This direct question was so decided in the case of Mayfield v. State, 23 Tex. App. 649, 5 S. W. 161. In that case, where a similar charge had been given, where there was no evidence on which to base same, Judge Wilson, speaking for the court, used this language: "It was error for the court to instruct the jury as it did in relation to explanations and declarations made by defendant in relation to his possession, etc., of the alleged stolen animal. There was no evidence to warrant such instruction. No such declarations or explanations were in evidence, and a charge should be confined to the facts in evidence." The principal rule in this case was in terms approved in the later case of Lynch v. State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888, where, among other things, the court say: "However correct a principle of law may be in the abstract, it is error to give it in charge where there is a total want of evidence to support the phase of case to which it is applied." Conn v. State, 11 Tex. App. 390. "If the court assumes and charges on a theory not raised or indicated by the evidence, it is radical error and fatal to a conviction." Ross v. State, 10 Tex. App. 455, 38 Am. Rep. 643; Taylor v. State, 13 Tex. App. 184; Hardin v. State, 13 Tex. App. 192; Stewart v. State, 15 Tex. App. 598; Boddy v. State, 14 Tex. App. 528; Mayfield v. State, 23 Tex. App. 645, 5 S. W. 161. See, also, Robinson v. State, 22 Tex. App. 690, 3 S. W. 736; Lehman v. State, 18 Tex. App. 174, 51 Am. Rep. 293; Pollard v. State, 33 Tex. Cr. R. 197, 26 S. W. 70. That the charge of the court was not demanded by the facts in this case, we think, is obvious. It is sometimes said that such a charge should be treated as harmless error; but, in view of the peculiar facts of this case, it may be that such a charge was, indeed, calculated to lead the jury to believe that evidence had been introduced by the state tending to show the falsity of the explanation made by the defendant on the witness stand, and that such a charge gave undue prominence to the fact of appellant's possession of such property. We suggest that on another trial the court instruct the jury in respect to the character of possession essential to be proven by the state in order to warrant the jury in considering the fact of such possession as a circumstance against appellant.

For the error pointed out, the judgment is reversed, and the cause remanded for proceedings in accordance with the law.

CARSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909.)

LARCENY (§ 40*) — PROSECUTION — ISSUES, PROOF, AND VARIANCE.

Pen. Code 1895, art. 874, makes the stealing or felonious taking of any growing, standing, or ungathered Indian corn theft, and makes any person who shall feloniously sever or carry away any such corn guilty of theft. Accused was charged in an information with unlawfully and fraudulently stealing from the possession of A. one bushel of corn, of the value of 40 cents, and that the offense was committed in a county named, upon a date specified. The evidence showed that accused sold two bushels of corn for 50 cents a bushel, that the corn at the time was in the field and ungathered, that later the corn was gathered by the purchaser, that the corn belonged to another person than accused, and that the latter was not present when the corn was gathered. *Held*, that the evidence did not support the indictment.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 40.*]

Appeal from Henderson County Court; J. S. Prince, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Coy Carson was convicted of theft, and appeals. Reversed and remanded.

J. A. McDonald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted on a charge of theft, preferred against him by information in the county court of Henderson county, Tex., and his punishment assessed at a fine of $1 and 30 days' imprisonment in the county jail.

The charging part of the information is as follows: "That Coy Carson, in the county of Henderson and state of Texas, on or about the first day of September, A. D. 1908, and anterior to the filing of this information, did then and there unlawfully and fraudulently take, steal, and carry away from the possession of A. C. Vener certain corporeal personal property then and there the property of and belonging to the said A. C. Vener, to wit, one bushel of corn of the value of forty cents in money, without the consent of the said A. C. Vener, and with the intent then and there on the part of him, the said Coy Carson, to deprive the said A. C. Vener of the value of said property, and to appropriate the same to the use and benefit of him, the said Coy Carson, against the peace and dignity of the state."

The testimony for the state disclosed the fact that about the 26th day of July, 1908, appellant sold to one J. H. Wetherley two bushels of corn for 50 cents a bushel; the corn at the time being in the corn field, which he pointed out across the road as belonging to his father. The evidence shows that the corn was later gathered by Wetherley and his employés, and that when sold the corn had not been severed from the stalks, and the stalks were rooted in the ground, where they were growing and had grown. As developed, the corn, in fact, was raised by one Vener, who was a tenant on the farm of one Putnam. Appellant was not present when the corn was gathered, and in fact had gone home before any effort was made to reduce it to actual possession. These facts were in substance denied by appellant. In the view we have taken of the case, it becomes unnecessary to set out the testimony further.

Appellant makes the contention that the prosecution cannot be sustained on the indictment preferred against him under the facts of the case, and this position, we think, must be sustained. Article 858 of our Penal Code of 1895 is as follows: "'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking." Article 874, which applies to the case at bar, is in this language: "The stealing or feloniously taking any growing standing or ungathered Indian corn, wheat, cotton, potatoes, rice or other agricultural product, shall hereafter be deemed theft; and any person who shall hereafter steal or feloniously take, pluck, sever or carry away any Indian corn, or wheat, cotton, potatoes, rice or other agricultural product, growing, standing or remaining ungathered in any plantation, field, or other ground, shall, on conviction thereof, be deemed guilty of theft, and suffer punishment as in other cases of theft."

This last article of the Penal Code has been considered as defining a particular form of theft. Under the last article the following form of indictment is recommended and indorsed as correct by Judge Willson: "A. B., on the ——— day of ———, A. D. ———, in the county and state aforesaid, did fraudulently take from the possession of C. D. certain growing, standing, and ungathered Indian corn (or wheat, cotton, potatoes, rice, or other agricultural product, naming such product, as the case may be), to wit (stating the quantity taken), of the value of ——— dollars, the same being the property of the said C. D., and the same being then and there growing, standing, and remaining ungathered in the plantation, field, and ground of the said C. D., without the consent of the said C. D., and with the intent to deprive the said C. D. of the value of the same, and to appropriate it to the use and benefit of him, the said A. B. (Conclusion and signature. See form 7.) Substantially the same form of indictment is laid down by Judge White in his Annotated Penal Code. See section 1498. In article 875 of the Penal Code, where stealing record books or filed papers is made an offense, it has been held that the indictment must allege the particular lawful use of the book or paper sought to be prevented by the accused by stealing it. As said by Judge Hurt in the case of Huntsman v. State, 12 Tex. App. 619: "There must be such an indictment, so accusing the defendant of the very crime of which he is convicted, to sustain the judgment, and the want of it will not be supplied by one charging another offense by allegations which do not include that for which the party is convicted."

Among other offices and purposes of an indictment is to advise a defendant of the particular crime of which he is accused, in order that he can be advised of the nature and character of the charge against him, and be prepared to defend against it. In this case it is manifest that appellant could have been convicted on proper evidence of theft committed at any time within the period of limitation and at any place within the limits of Henderson county. On the charge of theft of growing crops he could not, of course, have been convicted, except in respect to crops growing on the farm charged and which were then ungathered. While the defense is in its nature largely technical, it seems on authority and reason that

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it is meritorious, and, if correct, must be sustained. The indictment on its face, of course, is a valid one, and, because the facts do not support it, we cannot, as we otherwise would do, reverse and dismiss the case. If the evidence on another trial on this indictment is the same as here presented, the court should instruct a verdict of not guilty.

The judgment is reversed, and the cause is remanded.

HEATH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909.)

HOMICIDE (§ 310*) — TRIAL — INSTRUCTIONS — SUBMISSION OF ISSUE AS TO ASSAULT.

In a prosecution for assault to murder, there was evidence that the person assaulted brought on the difficulty, threw a rock at accused, and then pulled a pistol and threatened to kill him. *Held*, that this evidence necessitated a charge as to the law of aggravated assault, on the theory that the difficulty was begun by the prosecuting witness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 657–661; Dec. Dig. § 310.*]

Appeal from District Court, Cass County; P. A. Turner, Judge.

Garfield Heath was convicted of assault to murder, and appeals. Reversed and remanded.

O'Neal & Allday, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for assault to murder, two years being the assessed punishment.

There is quite a lot of testimony in the case going into minor details, but the substance is about as follows: Appellant and Floyd Steger, the assaulted party, were cousins. On Thursday night, prior to the difficulty Saturday evening, they were at the residence of a neighbor, where Coy Steger, brother of Floyd Steger, was present. Appellant had a guitar or banjo, which was handed Coy Steger by appellant at Coy Steger's request. Appellant requested its return. Coy Steger was indifferent or slow about returning it, and this brought up an angry colloquy. Coy Steger invited appellant to fight. They went out on the gallery, where appellant was struck on the head a time or two with a stick. After leaving this place, en route home, there was another difficulty, in which appellant was struck just over the eye with a rock, which caused a painful, but not a serious, wound. Floyd Steger inflicted this wound. The following Saturday evening Floyd Steger and one Will Taylor had been to a baseball ground two or three miles away, and in returning passed appellant's residence. Appellant was standing at his hog pen, looking after his hogs, when the parties approached. The testimony in regard to the immediate transaction is somewhat in conflict—Floyd Steger testifying, for the state, that appellant turned towards him and remarked that he wanted to compromise matters in regard to the previous difficulty, at the time having his right hand in his right pocket and a rock in his left hand; that appellant took his hand out of his right pocket and transferred the rock to his right hand, which he threw at Floyd Steger, and then approached him with a knife and cut him about the face, in fact inflicting several slight wounds about his face; and that while they were in this condition he (Floyd Steger) pulled his pistol, firing two shots at appellant, one taking effect in appellant's right hand, and the other entering his side. These wounds placed appellant in bed for some time under the treatment of a doctor. Appellant's testimony, supported by the other eyewitness, Taylor, is to the effect that he was attending to his hogs at the pen when the parties approached, and that he proposed to compromise the previous matters with Steger, who, in effect, declined. He says that Steger was going home, and in going home both of them had to pass appellant's house where the difficulty occurred. Appellant was at the hog pen, and looked like he was letting down the fence; that Steger said to him, before reaching appellant, that he and appellant had had a little trouble, but he did not say at that particular juncture what he was going to do with appellant. Steger, the assaulted party, was riding a mule. After overtaking this witness, Steger got off the mule, and they walked together; Steger leading his mule. The road passed in about 25 feet of the hog pen. When they reached the hog pen, or opposite it, they stopped, and appellant spoke, and said to Steger that he wanted to compromise for hitting him with a rock; that is, Floyd Steger hitting him (appellant) with a rock. Floyd turned his mule loose, and threw his hand into his bosom, and said: "God damn you; you had better get away from me, or by God I will kill you." At this time appellant was doing nothing but standing by the fence. This witness said he saw nothing in appellant's hand, but would have seen it if he had anything, as both hands were hanging by his side. Steger turned his mule loose, placed his hand in his bosom, and pulled his pistol up, putting the handle of it in sight. Appellant did nothing, and told Steger he did not want any trouble or fuss with him; that he wanted to compromise. At this juncture Floyd Steger turned his pistol loose, picked up a rock, and threw it at appellant, knocking off his hat. Appellant then threw something at Floyd Steger, either a rock or a chunk, but failed to hit him. Steger then ran up to appellant, and grabbed and hugged him, and went to beating him with his fist on the head. Ap-

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knife. With the knife he cut Steger two or three times, as before stated, and Steger shot appellant twice, as has been detailed. Appellant "fell loose" at the second shot and said, "Now, Floyd, you have done killed me, don't shoot me." Floyd Steger said, "Yes, and God damn you, if I had some more balls I would kill you." The testimony of this witness is not widely variant, and practically and substantially the same as that of appellant, who testified in his own behalf.

The court gave the following charge: "In this connection I further charge you that if you believe from the evidence, beyond a reasonable doubt, that the defendant threw a rock at Floyd Steger, and thereby commenced a difficulty with him, but if you believe that his purpose was simply to have a fight with said Steger, and to inflict on him some injury less than to kill, and less than a serious bodily injury that may probably result in his death, then his right of self-defense would not be wholly lost, but would be abridged to the extent that, if you believe that defendant cut Floyd Steger during said difficulty to keep him (Steger) from shooting him, and that said knife was a deadly weapon, then you will find the defendant guilty of an aggravated assault, even if you believe from the evidence, beyond a reasonable doubt, that during the difficulty Floyd Steger was about to shoot defendant with a pistol, and defendant cut him with a knife to keep said Steger from shooting him." This is the charge, as we understand, given on aggravated assault. It is insisted that this was error, and that the court further erred in not charging the law of aggravated assault from another phase of the case made by the facts, to wit: If Steger began the difficulty by throwing at appellant with a rock, and appellant cut him with a knife before the shooting occurred, or just previous to the firing of the shots, that still he would not be guilty of a higher offense than aggravated assault, if there was an absence of a specific intent to kill. The testimony of the defense, both by appellant and Taylor, raises this question squarely; for they testified that Steger began the difficulty by throwing the rock, which knocked off appellant's hat, and that they ran together, and a knife was used. It is shown that the knife was an ordinary tin-handle pocketknife, with a blade from 2 to 2½ inches in length and very dull, and the injury was not serious by means of the wounds inflicted. The state's contention is that the cutting occurred before the pistol was fired, by reason of the fact that the right hand of appellant, with which he used the knife, was shot and put in such condition that he could not use the knife after the

It occurs to us that there were perhaps three questions under the evidence to be submitted, assault to murder and aggravated assault from two standpoints. Two of these were submitted by the court, and the third was not, which has just been mentioned. If appellant brought on the difficulty, and made the attack with a knife upon Steger for the purpose of killing him, as contended by the state, the verdict of the jury might be justified from this standpoint; at least this authorized the charge given by the court submitting the issue of assault with intent to murder. The other issue was submitted by the court, as above stated, in his charge, to wit: That if appellant began the difficulty with Steger, but only for the purpose of having a fight with him, and to inflict some injury on him less than killing, or such serious bodily injury as might end in death, then his perfect right of self-defense would be gone, but he would be guilty of an aggravated assault. But appellant's theory of it was, supported by testimony, that Steger brought on the difficulty and threw a rock at him, then pulled his pistol on him and threatened to kill him, and that under those circumstances the difficulty began. If from the facts the jury should find, and the law ought to be applied to these facts, that Steger did begin the difficulty and started to pull his pistol with threats to kill, and picked up a rock and threw it, and knocked appellant's hat off, and appellant rushed upon him, and under those circumstances engaged in the trouble, this would present the issue of aggravated assault from appellant's view of the case. We are of opinion that this charge should have been given. From appellant's standpoint Steger was the aggressive party from the beginning, evidencing his intention by his acts and statements to kill. Drawing his pistol, abandoning the idea of shooting, then by returning his pistol, Steger seized a rock and threw at appellant, was clearly an assault, and under those circumstances, if appellant cut Steger not with the specific intent to kill, it certainly could be no higher offense than aggravated assault.

This issue of the case ought to have been presented to the jury; and, because it was not, this judgment will be reversed, and the cause remanded for another trial.

DEADWEYLER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909.)

1. CRIMINAL LAW (§ 598*) — CONTINUANCE — WANT OF DILIGENCE.

Where an indictment for violating the local option law was presented on April 16th, an ap-

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plication, filed on the 27th, asking a continuance to enable accused to procure apparatus from another state used to analyze the liquor sold, to show that it was not intoxicating, accused claiming it would require 10 days to procure the apparatus and chemist, was properly refused for want of diligence, where no effort was shown by accused between the 16th and 27th to procure the apparatus, and no process was issued for the chemist.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335–1341; Dec. Dig. § 598.*]

2. INTOXICATING LIQUORS (§ 239*)—PROSECUTIONS—INSTRUCTIONS—GOOD FAITH.

In a prosecution for violating the local option law, an instruction that if the jury believed beyond a reasonable doubt that accused sold intoxicating liquor, honestly believing that it was not intoxicating when drunk in reasonable quantities, he would not be guilty, sufficiently presented the question of good faith and mistake of fact by accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

3. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

Requests which were fully covered by the court's charge were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. JURY (§ 97*)—COMPETENCY OF JURORS.

It was not error to refuse to set aside the jury in a prosecution for violating the local option law, because many of the jurors were members of a local option league, whose object was to enforce the laws, and some of them had voted for local option, while others had voted against it; the officers not having acted fraudulently in selecting the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431–437; Dec. Dig. § 97.*]

Appeal from District Court, Marion County; P. A. Turner, Judge.

John Deadweyler was convicted of violating the local option law, and he appeals. Affirmed.

W. T. Armistead, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law. The evidence discloses that appellant was selling what is labeled "Hiawatha." The evidence is conflicting as to whether it was or was not intoxicating. The weight, perhaps, of the evidence, is that it was not; but there is evidence that it was intoxicating. There is also evidence, which seems to be uncontradicted, that appellant bought the Hiawatha under guaranty from the Houston Brewery that it was a nonintoxicant, containing alcoholic properties of less than 2 per cent., and that a sufficient amount of it could not be drank so as to produce intoxication. The state's evidence is that the liquid bought and used was intoxicating, and this is supplemented by evidence to the effect that other parties had bought liquids of similar character from appellant which produced intoxication, or could do so. The state's further theory was that the liquid sold and used was beer, and the effect on others by similar liquid put appellant upon notice of the fact that he was selling intoxicants.

Appellant's application for continuance was filed on the 27th of April. The indictment was presented on the 16th of April. It is alleged in the application that he at once, after being indicted, requested his attorney to prepare his case for trial; that said attorney applied to a chemist of the Jefferson Iron Company, located at Jefferson, to make an analysis of the "stuff" that he (appellant) was selling and offering for sale; that this "stuff," as he terms it, was known and called "Hiawatha," a temperance drink; that the proof will show that he only sold Hiawatha, and sold it on a guaranty that the same was not intoxicating, and on an analysis showing only 1½ per cent. and less than 2 per cent. of alcohol in volume; that the stuff he sold to the purchaser, Volley Nash, was Hiawatha, and came within that guaranty; that the same was not intoxicating, and that Mr. Cowan, the chemist mentioned, was the only chemist known to affiant in that county when applied to to make the analysis; that Cowan could not make it for want of a distillation apparatus, but stated he would make it if he could get the apparatus; that said apparatus could only be secured at Chicago; that at least 10 days would elapse before same could be procured; that he called on the Houston Brewing Company to furnish their chemist, Mr. Pilson, as a witness in his behalf; that Pilson could not be present at that term of the court until the following Monday, which would be May 5, 1908, because at the time he is alleged to have been at or near Abilene, Tex., under process of court, to testify in regard to the analysis of Hiawatha; that he expected to prove by both witnesses, Cowan and Pilson, that Hiawatha did not contain over 2 per cent. alcohol in volume, and hence not intoxicating; and if he could procure a postponement or continuance he expected to have the analysis made and the witnesses on hand to testify at the trial. It is further alleged that his information was that there are only a few chemists in the state who have made analyses of Hiawatha, and that he has not had time to procure any of those.

We are of opinion that the court did not err in overruling this application. There were at least 10 days elapsing between the return of the indictment and the time the application was filed, and there is nothing indicating, in the application, that any effort had been made to get the distillation apparatus from Chicago, or to secure the attendance of the witness Pilson. If in fact the apparatus could have been secured from Chicago in 10 days, there was time from the 16th of April to the 27th of April to have secured it, or to take steps to do so; but, so far as the record is concerned, there

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was no attempt to get the apparatus, and nothing indicating that any attempt whatever had been made to have the apparatus brought, nor was there any process issued for Pilson directed to the point where he was said to be in attendance upon court. He may have been able to have had Pilson present had he issued process. We are of opinion that there is an utter want of diligence to obtain the testimony.

Exception was reserved to the fourth paragraph of the charge in regard to the question of good faith and mistake of fact, in that it does not sufficiently present that issue to the jury. The indicated paragraph is as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant sold intoxicating liquors to Volley Nash, but you further believe that at the time of so doing he honestly believed that it was not intoxicating, and would not produce a state of intoxication when drunk in reasonable quantities, such as the human stomach will ordinarily hold, then the defendant would not be guilty, and you will find him not guilty." We are of opinion this charge does sufficiently present that question to the jury.

Appellant requested some special instructions, which were refused, and we think correctly. The special requested instructions pertained mainly to the question of the amount of intoxicating properties of the liquid sold, as well as appellant's good faith in selling it. Both questions were fully and sufficiently covered by the court's charge; therefore it was not error to refuse the requested instructions.

Appellant filed a challenge to the array of jurors. These jurors were summoned by the sheriff and his deputy, and were not selected by the jury commissioners. It is stated that the jurors selected by the officers were members of what is termed a "Law and Order League," or "Anti League," of Jefferson, Tex., and nearly all of them from precinct No. 3, and were local optionists. Evidence was introduced in regard to this motion. There is no evidence, as we understand it, that the officers acted corruptly, unless it be found in the fact that some of the jurors selected were members of the Law and Order League, or had contributed their influence and in some instances money in aid of upholding the validity of the local option law in a contest wherein it was sought to set aside the election. The jurors testified, those of them who had supported the local option ticket, or had contributed money, that there was no understanding on their part, or on the part of the league, that they would act in any way unbecoming jurors in the trial of local option cases, and there was nothing to impeach their testimony, or contradict it. The matter seems to have turned, so far as the evidence is concerned, upon the fact stated that they had either voted the local option ticket or were members of the league. They testified, further, that the league was organized to see that the law was enforced—not only in local option cases, but in all violations of the law. We are of opinion that, under the circumstances detailed by the witnesses, the court was not in error in not setting aside the jury. In addition, it may be said that the officers testified they only selected men whom they thought were good citizens and such as would make good jurors, and it further seems that some of these jurors had voted the anti-prohibition or anti-local option ticket; at least, were anti-prohibitionists.

It is contended the evidence is not sufficient. The evidence for the state shows that the liquid sold was capable of producing intoxication. This was met by appellant with evidence to the effect that he bought Hiawatha under a guaranty that it was a nonintoxicant, and, so believing, he sold it. There is a good deal of testimony, pro and con, as to whether or not the drink would produce intoxication; that is, the beverage that was sold by appellant. Some witnesses testify that the liquid they bought from appellant was intoxicating, while there is considerable testimony from other witnesses that they had used a great deal of it, and that what they used was not intoxicating. These matters were submitted by the court to the jury, and found adversely to appellant. We are of opinion that under the circumstances this court would not be justified in reversing the judgment.

Therefore it is ordered that it be affirmed.

LAWSHE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909.)

1. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO DISMISS—GROUNDS—SUFFICIENCY OF SHOWING—DISCHARGE OF ACCUSED.

A motion to dismiss the indictment on the ground that accused was brought into the state from Mexico without a proper warrant of extradition, supported by no proof except his sworn conclusion that the sheriff did not have "legal" and necessary extradition papers, warrant, and authority, is properly denied.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 137.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—BILL OF EXCEPTIONS.

Objections to the court's action in retiring the jury during counsel's discussion of the law after the conclusion of the evidence are not available on appeal, where the matter is not preserved by bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

3. EMBEZZLEMENT (§ 48*)—TRIAL—INSTRUCTIONS.

Where the employment and all the transactions were continuous, and the proof raised no

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issue of an embezzlement of less than $50, it was sufficient to charge the jury that the accused could be convicted of felony if the sum embezzled was in excess of $50, without also charging that before the jury could convict the proof must show an embezzlement at "one time" of a sum exceeding $50.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 48.*]

4. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—MOTIVE—INTENT.

Evidence that one on trial for embezzlement from one carrier was also the agent of another carrier, and that there was also a shortage of funds belonging to the latter, is admissible on the question of motive and intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

5. EMBEZZLEMENT (§ 43*)—ADMISSIBILITY OF EVIDENCE—MATTERS OF DEFENSE.

Evidence showing ill will of a person, not a witness, towards the accused, and which raises merely a bare suspicion that such person took the money embezzled, is properly rejected as immaterial.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 43.*]

Appeal from District Court, Austin County; L. W. Moore, Judge.

C. M. Lawshe was convicted of embezzlement, and he appeals. Affirmed.

John P. Bell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Austin county on January 15th of this year on a charge of embezzlement, and his punishment assessed at confinement in the penitentiary for a period of two years. From this judgment he appeals to this court, and seeks a reversal thereof on many grounds.

The facts, briefly stated, show that something like a year prior to the 26th day of June, 1906, appellant had been station agent of the Missouri, Kansas & Texas Railway Company of Texas at Sealy, in this state, and was also agent for the American Express Company at the same place. On the last-named date F. G. Abbey, who was then traveling auditor for the railway company, and W. T. Davis, who occupied a similar position with the American Express Company, appeared at Sealy to check up appellant's accounts. An examination of the books and accounts of these companies showed a shortage to the railroad company of $573.86 and a shortage to the express company of $170.53. According to the testimony of Davis, appellant admitted the shortage, and said to them that they had better telegraph for another agent; that they then asked appellant if he knew how much he was short, and that he would not tell at first, but afterwards said he was short enough, and finally said that he was $300 or $400 short; that immediately on entering the station they counted the money and checks on hand, which amounted to the sum of $131.93, which they replaced in the safe, and for the time being left appellant in charge; that during the day he left Sealy, and left the safe locked; that on obtaining the combination the next day they counted the money in the safe and found $96.08. The witness Davis testified that in a conversation with appellant he asked him what had become of the money, and was told that he did not know what had become of it, that his family troubles had been enough to drive a man crazy, and that he had lost part of the money playing poker, and also said that he had led an awful life. It was admitted by appellant that he left Sealy on that day, driving to a nearby town, where he took the train and went to Mexico, where he was subsequently recaptured on this charge on July 13, 1906. It was also disclosed by the testimony of the witnesses named above that they found on appellant's cash book an entry of $300 as having been remitted on June 21, 1906, and that, on his attention being called to it, appellant stated that in truth the remittance had not been made. Appellant, in his own behalf, testified, in substance, that almost from the time he went to Sealy to act as station agent shortages in his account began to appear. He denied that he had taken any part of the money, and testified, in substance, that he had turned over from the beginning the larger part of his salary to make these shortages good, and also testified that during the time he had sold some land which he had in Kansas to help cover the shortage; that this amounted to $100, which he had put in the money drawer; and that the original draft was remitted to the American Exchange National Bank of Dallas for account of the railway company. On cross-examination the various deficits for each month were distinctly shown by the witnesses, and he admitted from time to time he had covered up these shortages. His statement of how this was done is in this language: "In making up my report every month, I would place a sufficient number of freight amounts in the uncollected list to cover up the shortage of the month before, and in that way kept it covered from month to month as it got larger. Before doing this, however, I would place my pay check in the company's money in an effort to hide it that way if I could." It was shown by other persons that a number of employés about the office had access to the cash, and had frequently been in the habit of receiving payments for tickets, freight shipments, and telegraph and express tolls. When arrested, appellant had a very small amount of money, less than a dollar, and a meal ticket of value less than a dollar.

1. The court, in charging the jury, explained to them quite fully all the elements constituting the crime of embezzlement, and among other things submitted to them the issue as to whether appellant "did embezzle, fraud-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ulently misapply, or convert to his own use, without the consent of the said the Missouri, Kansas & Texas Railway Company of Texas, any money belonging to said railway company which may have come into his possession or be under his care by virtue of his agency or employment, of the value of $50 or over, and you further believe that each of the four essential requisites of embezzlement as above set forth in this charge have been established by the testimony beyond a reasonable doubt, then and in that event you will find the defendant guilty of embezzlement; and if you further believe, beyond a reasonable doubt, that the value of the property embezzled amounted to the sum of $50 or over, then you should convict, and assess his punishment as before defined and instructed." The court also instructed the jury that if they should believe beyond a reasonable doubt that the money was embezzled as alleged, yet if they had a reasonable doubt as to whether some person or persons other than the defendant took the money, they would acquit him.

2. Among other grounds upon which a reversal is sought is the refusal of the court to set aside the indictment and dismiss the case on the ground, in substance, that appellant had been arrested in Mexico and brought into Texas without a proper warrant of extradition. This matter is presented in a sworn motion by appellant, in which he avers, in substance, that he was arrested on July 13, 1906, by one Burns, a deputy sheriff of Austin county, Tex.; said Burns claiming to have a warrant and proper extradition papers for the purpose of arresting him on said charge. In his motion he makes the following allegation that "he verily believes that said Ed. Burns did not have the legal and necessary extradition papers, warrants, and authority to arrest and forcibly bring defendant from Mexico into Austin county, Tex., on the charge herein preferred, or on any charge whatsoever." There was no proof adduced on this motion, nor are the facts therein stated authenticated in any manner or form. The averment that "he believed that Burns did not have the legal and necessary extradition papers, warrants, and authority" was a mere conclusion, and certainly, in the absence of proof, could not have the effect to arrest the proceedings and entitle appellant to a discharge.

3. Again, it is urged that the court erred, after the conclusion of the evidence, in retiring the jury over appellant's protest, and then announcing to counsel that he would hear a discussion of the law. If in any event this could avail appellant, the matter is not preserved by any bill of exceptions, and the whole complaint rests merely upon the statements contained in motion for a new trial.

4. Again, it is claimed that the court erred in not charging the jury that before they could convict the proof must show an embezzlement at one time of a sum exceeding $50. In this connection it should be stated that Davis testified that he was unable to say precisely what character or amount of money—checks, gold, silver, or currency—was taken by appellant at any one time. Appellant's testimony denying the embezzlement raised the issue that the shortage occurred in different months, and that the first shortage was in the amount of $40. The proof of the state strongly indicated that at least $300 of the money was embezzled at one and the same time, and also suggests that on the 25th of June there was taken from the safe and misappropriated by appellant $35.85. Except for the statement of appellant of a shortage of about $40 the first month he began working for the railway company at Sealy, there is no other suggestion of any particular amount either lost or misappropriated. As authority for his position and insistence, appellant refers us to the cases of Lacey v. State, 22 Tex. App. 657, 3 S. W. 343, and Cody v. State, 31 Tex. Cr. R. 183, 20 S. W. 398. We do not believe that either of these cases are in point here. The case of Lacey v. State, supra, was a case of theft. It there appeared that there had been, as stated in the opinion, a series of constantly recurring thefts during the month. The record was silent as to the amount and value of lumber taken on any one particular occasion or night. Judge Hurt, summarizing the facts, uses the following language: "Hence we have no fixed amount of lumber taken on the night testified to by the witness, nor have we any aggregation of the previous takings, so that a due subtraction may be made, and a certain amount and value taken on that or any other night fixed." The Cody Case, supra, was also a theft case, where it appeared that certain sacks of cotton seed meal worth a dollar per sack had been taken on different trips and occasions on the same day, and the court charged the jury that before they could convict of a felony they must be satisfied beyond a reasonable doubt that the defendant took during one day a sufficient amount of cotton seed meal to the value of $20 or over. The charge is considered objectionable, among other things, because "it is to be observed, however, that whether it is one continuous transaction, or distinct and separate transactions, is a question for the jury, and it cannot arbitrarily be fixed by the court at one day, or at any other definite period." These cases are based on the fact that in theft it is the fraudulent asportation or taking from the owner which constitutes the offense. Here it is not the mere receipt or manual handling of the funds or money that constitutes the offense. Under the evidence appellant was entitled to receive the money, and it is for its fraudulent appropriation when so received by virtue of his agency that he is amenable to law. The testimony shows that the receipts of the office ran from $1,200 to

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$1,800 per month. The aggregate shortage is shown to be a sum largely in excess of $500. The proof strongly supports the contention that the $300 for which credit had been taken on the 21st day of June, on his cash book, and no remittance had been made therefor, was on that day and time appropriated by him. Under the facts of this case, we think it was not incumbent for the court to do more than instruct the jury, as he did do, if the sum taken and misappropriated was in excess of $50, he could be convicted as for a felony, and his punishment assessed accordingly. The employment and all the transactions were continuous, nor was the issue of an embezzlement of less than $50 raised. Taylor v. State, 29 Tex. App. 503, 16 S. W. 302.

5. Again, it is complained that the court erred in admitting in evidence the testimony of the witness Davis as to the fact that appellant was the agent for the American Express Company, and also that there was a shortage in the accounts of this company. When this testimony was offered, the court distinctly told the jury at the time that it was admitted, not for the purpose of showing another offense, but solely and wholly on the question of showing motive and intent, and that the jury would be so instructed. In pursuance of this statement the court did in his general charge thus instruct the jury: "The shortage, if any, of the money belonging to other companies, was admitted in evidence only for the purpose of showing the intent of the defendant, if it does so, and was not admitted for the purpose of showing the guilt of this defendant of any other money belonging to such other companies, and you will not consider it for any such purpose." We think there was no error in admitting this testimony.

6. Again, on the trial appellant offered in evidence his own testimony and the testimony of other witnesses to the effect, in substance, that one Elliott, employed by the company at Sealy, had threatened, in the event appellant superseded him with another employé, to get even with defendant, and that he would fix matters so he would be sent to the penitentiary. The evidence shows that Elliott quit the service of the Missouri, Kansas & Texas Railway Company of Texas on the 1st day of May, 1906, and never returned. There is no evidence in the record that Elliott was charged with the custody of this money, or that he was under any obligation for its safe-keeping, though it does show that on frequent occasions he collected money and had more or less unrestricted access to the cash received from day to day. Appellant also testified that he had never spoken to any one during any of these months about any shortage, though it appears from his testimony that he made complaint and desired Elliott's removal, and also that on one occasion he asked that the combination of the safe be changed. In this state of the record the court instructed the jury as follows: "If you should believe beyond a reasonable doubt that said money was embezzled as alleged, yet if you have any reasonable doubt whether some person or persons other than this defendant did take said money, you will acquit." It is not believed that the personal animosity or ill will of Elliott towards appellant could in any event be a controlling factor in the case. He was not a witness, and his personal relations with appellant are not material. Nor is there any showing in appellant's testimony that in fact Elliott ever took any money, or, if so, when and how much. At most the testimony raises a bare suspicion. Even if admissible, the rejection of this testimony was not of such importance as could or would in the nature of things have changed the result.

There are some other matters presented, which, we think, are not of such importance as to demand discussion.

Finding no error in the record, the judgment of conviction is affirmed.

LEON MERCANTILE CO. v. ANDERSON et al.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 16, 1909.)

1. INTOXICATING LIQUORS (§ 108*)—LICENSES—FORFEITURE—PARTIES.

An agreement between a nonresident of a county and a resident that the latter should obtain in his name a liquor license, and that the business should belong to the former, made to evade the law against the granting of licenses to nonresidents, is contrary to law; and the license issued may, at the election of the state, be canceled, but an individual in his private capacity may not enforce the forfeiture.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 108.*]

2. JUDGMENT (§ 785*)—LIEN—PROPERTY SUBJECT—CLAIMS OF THIRD PERSON.

Plaintiff obtained a judgment against a saloon keeper on a debt antedating his license. The license was procured under an agreement between the licensee and a third person, who provided the money and who owned the business. The judgment creditor had no notice of the agreement with the third person, nor of the third person's ownership of the license, except such as might be inferred from his occupancy of the building and conduct of the business. *Held*, that the judgment creditor was not a lienholder for value without notice of the third person's ownership of the license, and he could not take it in satisfaction of the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 785.*]

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Proceedings by the Leon Mercantile Company for the satisfaction of a judgment by issuing execution on a liquor dealer's license issued to the judgment debtor, in

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Wm. Watson and Jno. A. Newsome, for appellant. D. T. Garth, for appellees.

BOOKHOUT, J. Appellant, Leon Mercantile Company (Incorporated), recovered judgment against one T. H. Smith in the county court of Leon county, Tex., on the 8th day of January, A. D. 1907, for $888.40. Execution was issued on the 2d day of September, A. D. 1907, and returned nulla bona. Alias execution was issued on said judgment to Freestone county, Tex., on the 16th day of September, A. D. 1907, and it was placed in the hands of the sheriff of said county of Freestone, who on the 1st day of October, 1907, levied upon a liquor dealer's license issued by the authorities of Freestone county to T. H. Smith. D. J. Anderson filed an affidavit and bond for a trial of the right of property to the same, and a trial resulted in judgment in favor of the claimant, Anderson, and defendant appeals.

There is neither a statement of facts nor bill of exceptions in the record. The trial judge filed conclusions of fact and law as follows:

"Conclusions of Fact and Law.

"Leon Mercantile Co. v. D. J. Anderson et al.

"No. 3,737, District Court, Freestone County.

"Suit to try the right of property in retail liquor dealer's license issued to T. H. Smith in Freestone county, under Laws of 1907, levied on in execution out of county court of Leon county, upon judgment in favor of plaintiff against Smith on debt antedating the license. Defendant claimed the license on the ground that he provided the money to pay for same, and that, though in Smith's name, the license was his property, and the business conducted, that of retail liquor dealer, was his. The plaintiff replied that defendant was a citizen of Navarro county, and hence incompetent to own the license, and was estopped to claim same against plaintiff's levy.

"The facts are that in July, 1907, T. H. Smith, by proceeding in his name, instituted by an attorney employed by defendant, procured the license, it being agreed between him and defendant that the license should be so procured, as I infer and find, to evade the law against the grant of license to nonresidents of the county, and that the business should be defendant's, and the licensee, Smith, to be engaged as his employé in the business. Smith owed the plaintiff, and the debt had been put in judgment, in the sum of $888.40, and alias execution on said judgment was on the 1st day of October, 1907, procure and to pay for the license, and owned the business carried on under the license in said Smith's name, and spent about three days in each week in the saloon and in charge of the business, at which times Smith was absent, while Smith had charge the other days in the week. Anderson was, in actual charge and possession of the business and license when the levy was made. Plaintiff had no notice of the agreement of defendant with Smith, nor of defendant's ownership of the license, except such as might be inferred from his occupancy of the house and conduct of the business at the time of the levy.

"Conclusions of Law.

"The agreement of defendant and Smith was contrary to law, and the license was open to cancellation in any proper action taken in the name of the state.

"The plaintiff was not a lienholder for value, without notice of defendant's ownership of the license, and therefore could not take defendant's property to pay Smith's debt.

"As the state did not elect to forfeit the license, the plaintiff in its private action [could not] enforce the penalty of violated law and take the benefit of the state's nonaction. L. B. Cobb, Judge."

These conclusions of law announce correct propositions, and are adopted by this court.

The judgment is affirmed.

BLAIR v. BREEDING et al.

(Court of Civil Appeals of Texas. June 12, 1909. On Motion for Rehearing, Oct. 13, 1909.)

On Motion for Rehearing.

1. MORTGAGES (§ 459*)—FORECLOSURE—PROOF OF EXECUTION—NECESSITY.

In foreclosure, a general denial is sufficient to require proof of the execution of the mortgage, where it is alleged in the pleadings, or shown by the evidence, that the original has been lost or destroyed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1344; Dec. Dig. § 459.*]

2. WITNESSES (§ 145*)—COMPETENCY.

Where mortgage notes were given to plaintiff's husband, since deceased, in payment for a restaurant, sold while plaintiff and decedent were husband and wife, so that the notes and mortgage were presumably community property, and plaintiff sues, as owner of one-half of the community, to foreclose, proof by her of the execution of the mortgage was not subject to the objection that she was disqualified by reason of being an heir and representative of her deceased husband.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 145.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against F. M. Blair and others. Judgment for plaintiffs, and defendant Blair appeals. Affirmed.

Stevens & Pickett, for appellant. Marshall & Marshall, for appellees.

McMEANS, J. Eddie Breeding, joined by her husband, R. E. Breeding, brought this suit for herself and as next friend for Whitfield P. Murphy, a minor, against F. M. Blair, upon four promissory notes, aggregating $800, with interest thereon at the rate of 8 per cent. per annum from December 8, 1904, and for attorney's fees, and to foreclose a mortgage on land in Liberty county, given to secure the payment of said notes. Upon an allegation of plaintiffs' petition that W. F. Blair, the C. R. Cummings Lumber Company, and C. R. Cummings Export Company were cutting and removing the timber, saw logs, and other natural growth from the mortgaged land, whereby the land was being greatly injured and depreciated in value, these parties were made defendants to the suit. The defendants answered by general denial, and defendant F. M. Blair pleaded certain defensive matter which is immaterial to any issue raised by the assignments of error and need not be set out. The case was tried by the court without a jury, and a judgment rendered in favor of the plaintiffs against F. M. Blair for the amount of the principal and interest of said notes and for attorney's fees, and against all said defendants foreclosing the mortgage lien on said land. From this judgment, the defendant F. M. Blair alone has appealed.

The evidence shows that the notes and mortgage were held by William P. Murphy, who was the father of the minor, Whitfield P. Murphy, and the former husband of the plaintiff, Eddie Breeding, and that the same were the community property of said William P. Murphy and his said wife. Murphy died, and his widow, the said Eddie, married the plaintiff, R. E. Breeding, who joins her in this suit. The mortgage was not entitled to registration, because not acknowledged; but it was in fact recorded in the record of mortgages, etc., of Liberty county. After being so recorded it was lost, and although diligent search for it was made it could not be found. A certified copy of the mortgage, taken from the record, after proof of loss of the original was made, was offered in evidence. This was objected to on the ground that the mortgage was not proven in the manner prescribed by law. The plaintiffs then undertook to prove, by Mrs. Eddie Breeding, the execution of the mortgage by F. M. Blair, and she was permitted, over the objections of defendants, to testify that she was present when the transaction between William P. Murphy, her former husband, and mortgage she saw Blair execute, and testified that the original came into her possession after Murphy died.

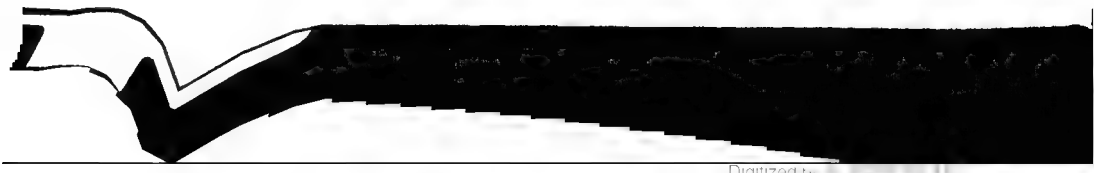
Appellant's first assignment of error complains that the court erred in permitting Mrs. Breeding to testify to the matters above set out, on the ground that "it appeared that she was the widow of William P. Murphy, deceased, and that she was an heir and legal representative of the estate of the said William Murphy, and was interested, as such heir and legal representative, in the transaction inquired about between her said deceased husband, William Murphy, and F. M. Blair, and that she was not a competent witness to testify to said transaction." The mortgage was alleged to have been executed by F. M. Blair. There being no plea of non est factum, no proof of execution was necessary as to him. Rev. St. 1895, art. 1265; Chator v. Brunswick, etc., Co., 71 Tex. 590, 10 S. W. 250; Fisher v. Bowser, 1 Posey, Unrep. Cas. 346. The original mortgage was admissible in evidence as against F. M. Blair without proof of its execution; and, the original having been lost, secondary evidence was admissible to prove its contents. The most satisfactory evidence of this character was a copy of the original mortgage. Admission of the testimony of Mrs. Breeding that the copy offered was identical with the original, which came into her possession after Murphy's death and which was subsequently lost, was admissible as identifying it as a true copy of the original, and was not in contravention of the provisions of article 2302, Rev. St. 1895, which prohibits parties to suits from testifying to statements or acts of a decedent arising out of transactions with such decedent. Choate v. Huff, 4 Willson, Civ. Cas. Ct. App. § 281, 18 S. W. 87. Proof of the execution of the mortgage was necessary only as to the defendants other than F. M. Blair, and they only can complain of the character of the testimony admitted by the court to make such proof; and, they not being parties to this appeal, the objection cannot be made for them by appellant. The assignment is overruled.

What we have above said disposes of the second and other assignments of error adversely to appellant. There being no reversible errors presented in the assignments, the judgment of the court below is affirmed.

Affirmed.

On Motion for Rehearing.

On further consideration we are of the opinion that we were in error in holding that proof of the execution of the mortgage was not necessary as to defendant Blair. It seems to be the rule that a general denial is sufficient to require proof of the execution of such an instrument, when sued upon, where it is alleged in the pleadings or shown



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by the evidence that the original has been lost or destroyed. Railway Co. v. McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 415; Erskine v. Wilson, 20 Tex. 79; Robinson v. Brinson, 20 Tex. 438; Hampshire v. Floyd, 39 Tex. 105. Having taken the view that it was not necessary for the plaintiff to prove the execution of the mortgage, and that there was no error in the manner of proving its contents, we did not think it necessary to pass upon the competency of the plaintiff Eddie Breeding to testify to the execution of the mortgage. Upon discovering our error in holding that proof of execution was unnecessary under the circumstances, and under the mistaken idea that Mrs. Breeding was not a competent witness to prove the execution of the mortgage, we granted appellant's motion for a rehearing, and ordered that the judgment be reversed and the cause remanded.

Upon further consideration, and after as thorough search of the authorities as we have had time to make, we have concluded that Mrs. Breeding was competent to testify, and that the execution of the mortgage was established by her evidence, or at least her testimony was not obnoxious to the objection urged against it that she was incompetent because "she was an heir and legal representative of the said Wm. P. Murphy, deceased." It appears from the evidence that the notes were given by Blair to Murphy in payment for a restaurant owned by Murphy in Louisiana and sold by him to Blair, and that the same were secured by the mortgage in question. Murphy and Mrs. Breeding were husband and wife at the time of the sale, and the notes and mortgage presumptively were community property. The suit was not by her as executrix or administratrix, nor as a qualified survivor under the statute; nor did she assert any right in the notes and mortgage as an heir of her deceased husband, or as a representative of his estate; nor did she sue as next friend for the minor, Whitfield P. Murphy, as we erroneously stated in the beginning of the opinion—the minor suing by R. E. Breeding as next friend—but she sued in her own right as the owner of one-half of the community. No objection was made that as coplaintiff of the minor heir she was incompetent to make proof. Under the rule laid down by the following authorities, we hold that proof by her of the execution of the mortgage did not come within the prohibition of the statute, or, at least, was not subject to the objection that she was disqualified to testify by reason of being an heir and representative of the estate of her deceased husband. Wilmurth v. Tompkins, 22 Tex. Civ. App. 87, 53 S. W. 833; Harris v. Warlick (Tex. Civ. App.) 42 S. W. 356; Evans v. Scott (Tex. Civ. App.) 97 S. W. 116; Field v. Field, 39 Tex. Civ. App. 1, 87 S. W. 726; Newton v. Newton, 77 Tex. 508, 14 S. W. 157; Wootters v. Hale, 83 Tex. 563, 19 S. W. 134.

We think that an order granting appellant's motion for a rehearing, and reversing the judgment and remanding the cause, should be set aside, and that his motion for rehearing should be refused; and upon our own motion it has been so ordered.

MISSOURI, K. & T. RY. CO. OF TEXAS v. MITCHAM.†

(Court of Civil Appeals of Texas. June 19, 1909. On Motion for Rehearing Oct. 16, 1909.)

1. RAILROADS (§ 400*)—INJURIES TO PERSON ON TRACK—DISCOVERED PERIL.

In an action against a railroad company for injuries to a pedestrian on the track struck by a train, the issue of discovered peril *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

2. RAILROADS (§ 390*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

A person's contributory negligence in being on a railroad track is no defense in an action for injuries by being struck by a train, based on discovered peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

3. RAILROADS (§ 390*)—INJURIES TO PERSON ON TRACK—DISCOVERED PERIL—DEFENSES.

That a railroad track was properly fenced and cattle guards erected at the place a person on the track was struck by a train, is no defense to a recovery on the theory of discovered peril.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 390.*]

4. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUDING EVIDENCE.

Where the injuries set out in the amended petition, on which a personal injury action was tried, were in substance the same as those in the original petition, the exclusion of that part of the original petition, which set up the injuries, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4199; Dec. Dig. § 1057.*]

5. RAILROADS (§ 376*)—INJURIES TO PERSON ON TRACK—DISCOVERED PERIL.

A railroad engineer, on discovering the peril of a person on the track, must use every means within his power, consistent with the safety of the train, to avoid running him down, and this duty continues until the danger of a collision is past.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275–1279; Dec. Dig. § 376.*]

6. RAILROADS (§ 401*)—INJURIES TO PERSON ON TRACK—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a person struck by a train, the undisputed evidence showed that the engineer saw plaintiff walking down the track with his back toward the engine when 200 yards from it; that plaintiff paid no attention to the signal, and did not look up; that the wind was blowing tolerably hard; and that the engineer did not attempt to apply the air in emergency until the engine struck plaintiff—the court properly refused to charge that an engineer need not make any effort to stop the train until it reasonably appears to him that the person on the track does not intend to get off in time to avoid danger, and that the law presumes that a person walking on a track will get

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

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GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a charge sufficiently embodied in the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

8. TRIAL (§ 252*) — INSTRUCTIONS — ISSUES — EVIDENCE.

Where the facts in a personal injury action did not raise the issue that the injury was the result of an accident, the refusal to give a charge submitting the law as to an accident, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

9. RAILROADS (§ 390*)—INJURIES TO PERSON ON TRACK—DISCOVERED PERIL—DEFENSES.

Where a recovery from a railroad company, for injuries to a pedestrian on the track struck by a train, was sought on the theory of discovered peril, the use of the track, at the place of the accident, by pedestrians, was immaterial.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 390.*]

10. TRIAL (§ 251*)—INJURIES TO PERSON ON TRACK—DISCOVERED PERIL—DEFENSES.

Where a recovery from a railroad company, for injuries to a pedestrian on the track struck by a train, was sought on the theory of discovered peril, an instruction, submitting the issue of contributory negligence on plaintiff taking the more dangerous of two or more pathways, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

11. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error in admitting evidence of a fact previously established by evidence admitted without objection is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

12. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMPTION OF FACT—UNDISPUTED FACTS.

It is not error to assume in the instructions a fact shown by the undisputed evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432–434; Dec. Dig. § 192.*]

13. CONSTITUTIONAL LAW (§ 305*)—DUE PROCESS OF LAW.

The 14th amendment to the federal Constitution does not determine by what process legal rights may be asserted, or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and accords fair opportunity to be heard before the issues are decided, and a judgment rendered by a state judge does not deprive the defeated party of his property without due process of law merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to a part of the judgment for his fees.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 305.*]

On Rehearing.

14. JUDGES (§ 46*)—DISQUALIFICATION—"PARTY."

Const. art. 5, § 11, and statute, providing that *no judge shall sit* in any cause where either *of the parties may* be connected with him by word "party" being applied only to the parties to the suit.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 213; Dec. Dig. § 46.*

For other definitions, see Words and Phrases, vol. 6, pp. 5202–5243; vol. 8, p. 7747.]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by W. A. Mitcham against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke, and Garnett & Hughston, for appellant. R. C. Merritt, for appellee.

BOOKHOUT, J. The appellee, W. A. Mitcham, sued the appellant in the district court of Collin county for personal injuries alleged to have been received by him on the 21st day of December, 1906. He alleged, in substance, that he was walking east upon the defendant's track about one mile east of Princeton, in Collin county, and that one of the defendant's trains, approached plaintiff from his rear, going in the same direction plaintiff was going, and ran against him and knocked him off the track and down an embankment. The plaintiff filed an amended petition on the 25th day of January, 1907, in which the grounds of negligence alleged were that the track was sufficiently straight for some distance for defendant's servants to have seen him; that there were no obstructions, and that they ran the engine against him with great speed and force; that defendant's track had been used by pedestrians for 10 years as a footpath; that a short distance west of where plaintiff was struck a public road crossed the track, and that defendant's servants failed to sound the whistle on approaching the crossing; that if they had sounded the whistle the plaintiff would have heard the same and have left the track; that a rule of defendant required the engineer on approaching a curve to sound the whistle; and that west of the point where plaintiff was injured there were several sharp curves in the track; and that defendant's servants failed to sound the whistle or give any warning upon approaching the curves as required by the rule; that if such signal had been given plaintiff would have heard it and escaped injury; that if defendant had checked up the speed of the train, plaintiff would have escaped injury. Plaintiff also alleged discovered peril, and if the defendant's servants had given any warning or sounded the whistle after they discovered his peril, or if they had used the means at their command to

stop the train or slacken its speed, they could have prevented the injury to plaintiff; that, if they had kept a proper lookout for persons on the track, they could have seen plaintiff a long distance before reaching him, and could have given a signal to warn plaintiff of the approach of the train, and could have used the means at their command, and averted the injury. The defendant's answer consists of a general denial: That plaintiff was guilty of contributory negligence; that the whistle was sounded, and they rang the bell on approaching the crossing of the public road with its track; that it never assented to, nor acquiesced in, the use of its track as a footpath by pedestrians, and that plaintiff was a trespasser; that its track was fenced and protected by suitable fences and cattle guards for the purpose of protecting its right of way and track from trespassers, and to prevent its being used by persons and stock; that plaintiff went upon its right of way and track for some purpose unknown to defendant, and in doing so he assumed all the dangers and risks incident to being upon the track where it was customary and usual to operate trains; that parallel to its track and right of way there was a path in which he could have walked without danger, which was as convenient and practicable as the one in which he was walking when he was hurt, and that he negligently and carelessly chose the more dangerous path in preference to the safe one; that he was further guilty of contributory negligence in that he neither looked nor listened for an approaching train; that after defendant's servants saw him and realized, that he might not leave the track, they used all the means in their power consistent with the safety of the train, to stop it, and gave signals to warn plaintiff of same; that the injuries plaintiff received were slight and superficial, and that he was guilty of contributory negligence in caring for his wounds and treating them.

The case was tried by a jury, and the verdict was for $1,000. Judgment followed on the verdict, and defendant perfected an appeal.

Conclusions of Fact.

On the morning of December 21, 1906, the appellee was walking down the track of the Missouri, Kansas & Texas Railway about one mile east of the town of Princeton, in Collin county, going east, when one of appellant's trains approached him from the rear going in the same direction, and struck him, knocking him off the track and down an embankment, injuring him, from which he sustained damage in the amount of the verdict and judgment. The agents and servants of appellant operating its train, which struck appellee, saw appellee upon the track, and discovered his peril in sufficient time, by the use of the means at hand, to have stopped and slowed up its train, and to have avoided striking and injuring him, and they were guilty of negligence in failing to make use of the means at hand to stop or slow up the train. Appellee, at the time of the injury to him, did not know of the approach of the train, and did not hear any signal of its approach.

Conclusions of Law.

It is contended by appellant that the verdict is contrary to the evidence, and that there is no evidence tending to support the same. We do not agree to this contention. The appellee knew that a train passed over the track in the morning, and looked and listened for a train before going on the track. Not seeing or hearing a train, he concluded the early train had passed. He went upon the track, and was traveling east between the rails going to get his cows, when the train ran up behind him and struck him and knocked him off the track and down an embankment. The engineer operating the train saw appellee walking between the rails on the track when 200 yards from him and whistled a road crossing. The engine was running from 12 to 15 miles per hour and gaining speed. The engineer testified that appellee did not pay any attention to the whistle, and he then, when about 30 yards from him, gave the stock signal, and then applied the brakes in emergency. It was two or three seconds after blowing the stock signal when he applied the air. He testified that the man never did look back. He did not keep blowing the whistle, although he did not have to quit blowing to apply the air. There is evidence tending to show that he did not apply the air until the engine struck appellee. The evidence was amply sufficient to authorize the submission of the issue of discovered peril. It is argued that the evidence indisputably shows that appellee was guilty of contributory negligence in being upon the track. Appellee's contributory negligence in being on the track constitutes no defense in a case of discovered peril. The engineer saw appellee walking down the middle of the track between the rails, and that he paid no attention to the crossing signal, and did not know of the approach of the train. The engineer knew that his train was gaining speed, and he testified that he did not know whether or not at the time he attempted to stop the train he had struck appellee. Railway v. Breadow, 90 Tex. 26, 36 S. W. 410; Railway v. Staggs, 90 Tex. 458, 39 S. W. 295. Nor did the fact that the defendant's track was properly enclosed with fences and cattle guards at the time and place of the injury present any defense. The only ground of recovery submitted by the court was discovered peril, and the fact that the track was properly fenced and cattle guards erected at the place of the injury furnished no defense. No reversible error is shown in the exclusion of that part of the original petition setting up the injuries alleged to

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have been sustained by plaintiff. It is not shown in what respect this pleading is pertinent to any issue in the case, or wherein the appellant has been injured by the ruling. It seems that the injuries set out in the amended petition upon which the case was tried, were, in substance, the same as those in the original petition.

The sixth clause of the court's charge is assailed as erroneous. This clause reads as follows: "And that as soon as it became reasonably apparent to the engineer in charge of said engine that plaintiff would not get off the track that said engineer in charge of said engine immediately used and continued to use such care, attention, skill, and effort to stop or check up and avoid a collision with the plaintiff as an ordinarily prudent person would have used under the same or similar circumstances." The particular part of the clause complained of is: "Continued to use such care, attention, skill, and effort to stop or check up." It seems to be contended that this language imposed a greater duty on appellant than required by law. We do not concur in this contention. The engineer upon discovering the peril of appellee, owed him the duty of using every means then within his power, consistent with the safety of the engine, to avoid running him down and striking him, and a failure to perform this duty would render appellant liable. Such duty continues until the danger of collision is past. The charge did not impose upon appellant any greater duty than the law required.

Error is assigned to the court's failure to give appellant's requested charges Nos. 8 and 2, as follows: (8) "You are instructed that it is not incumbent upon the engineer in charge of a train to make any effort to stop the train until it reasonably appears to him that such person does not intend to leave the track in time to avoid danger, and if you find from the evidence that plaintiff was struck and hit by the defendant's train, and was thereby injured, and you further find that after the engineer became aware of the fact that plaintiff was not conscious of his danger, and did not intend to leave the track in time to avoid danger, the engineer used all the means at his command and in his power to stop the train consistent with the safety thereof, the plaintiff cannot recover." (2) "The law presumes that a person walking upon a railroad track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have, by the ordinary use of hearing and seeing, and the managers of the train may act upon this presumption." The court did not err in refusing these charges. Neither of these charges was called for by the evidence. The undisputed evidence is that the engineer saw appellee walking down the track between the rails with his back toward the engine, when 200 yards from him; that he paid no attention to the signal. The wind was blowing "tolerably hard," and he did not look up. The engineer did not attempt to apply the air in emergency until the engine struck appellee; the testimony of the engineer being "I don't know whether I had already struck the man when I first attempted to stop the train." It is clear that the engineer discovered the peril of appellee, and that he would not get out of danger in time to have stopped or slowed up the train before striking him.

Appellant's special charge No. 15, the refusal of which is complained of in the sixth assignment, was sufficiently embraced in the court's main charge. The facts do not raise the issue that the injury to appellee was the result of an accident, and for this reason the court did not err in refusing appellant's special charge No. 12, submitting the law in reference to an accident. The twelfth and thirteenth assignments present no reversible error. The former complains of the admission of evidence relating to the use of the track, at the place of the accident, by pedestrians, and the latter to a refusal of a requested charge touching this issue. These matters were immaterial in view of the recovery being solely based on discovered peril. For the same reason there was no error in refusing appellant's special charge No. 4, which sought to have the jury instructed in reference to contributory negligence, if appellee took the more dangerous of two or more pathways. There was no error in admitting the answer of Dr. Hunter to the question by which it was sought to show that appellee's injuries were permanent. This witness had previously testified without objection, in substance, that appellee's injuries were permanent, so that if there was error in admitting the answer complained of, it was harmless. The undisputed evidence showed that plaintiff was knocked off the track by one of defendant's passing trains, and the court did not err in assuming that fact in his charge to the jury.

It was shown on the hearing of appellant's motion for new trial that the attorney for appellee was to receive for his services one-third of the amount recovered by him in suit, and one-fourth of the amount recovered by compromise, if the suit was compromised, and that one-third of the amount which should be realized from appellant by suit was conveyed by appellee to said attorney, and there was also conveyed to him one-fourth of any sums he might receive by way of compromise. It was admitted that Mrs. R. C. Merritt, the wife of appellee's attorney, is and was at the time of the trial, and the hearing of the motion for new trial, the daughter of the trial judge, and it was contended in the motion that "the trial of the case before said judge was void and of no effect, in that it is a denial to defendant of its property without due process of law, and that it denies to the defendant the equal protection of the laws, and

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is therefore violative of and contrary to section 1, article 14 of articles in addition to an amendment of the Constitution of the United States. It is contended that under the laws of this state the contract made the recovery in this case community property between the said Merritt, and his wife, and she being the daughter of the judge, the law disqualified him from trying the case.

The Constitution declares, and the statute provides, that "no judge of the district court shall sit in any cause wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree." Const. art. 5, § 11, Rev. St. 1895, art. 1068. Neither the attorney, R. C. Merritt, nor his wife was by name a party to the suit. The word "party" is not confined solely to those persons named on the docket as such. It is said in the case of Hodde v. Susan, 58 Tex. 394, that "a narrow or contracted construction of the term 'party,' which confines it to the very persons named on the docket as such, and excludes such as stand in precisely the same relation, would often defeat the end had in view, of having justice impartially administered free from the bias and influence produced by the interest held in the cause by the judge or his relations." That was a suit on a claimant's bond, and one of the sureties on the bond was related to the magistrate who tried the case within the third degree. Chief Justice Willie, in discussing the case, says: "Whether or not a person is directly interested in the subject-matter of a suit depends upon whether the judgment will directly affect him. Under the law, existing at the time the bond in this case was given, judgment in proceedings of this sort, where the claimant failed to establish his right to the property, was against all the obligors of the bond for 10 per cent. damages on the value of the property claimed. Precisely the same judgment was to be rendered against the obligors as against the principal in the bond. Paschal's Dig., art. 5314. If the claimant did not return the property within 10 days after such judgment, and such failure was certified to the court, it was its duty to indorse it 'forfeited,' and it then had the force and effect of a judgment against all the obligors for the value of the property with legal interest, upon which execution might issue as in other judgments. Id. art. 5316. In all these proceedings, from the time of trial to that of final execution, no difference is made between the claimant and his sureties. The same liability is imposed upon them; the same judgment is rendered against them. The sureties have a right to protect their interests by interposing a defense to the suit, taking such control over its proceedings as will prevent loss to them by neglect or inattention, and finally of appealing to a higher court, if in their opinion an erroneous judgment has subjected them to loss or damage." 58 Tex. 393. The attorney for appellee in the instant case does not occupy such position. He would not be affected by the judgment in the case further than losing pay for his services in the event judgment went in favor of the defendant. No judgment could go against him in the case. This court has held that an attorney occupying the relation to a cause similar to that of appellee's attorney cannot be required to make himself a party to the suit and execute a bond for costs. We are of the opinion that under the facts the district judge was not disqualified under the Constitution and statute from trying the case. Winston v. Masterson, 87 Tex. 200, 27 S. W. 768; Patton v. Collier, 13 Tex. Civ. App. 544, 38 S. W. 53; Id., 90 Tex. 115, 37 S. W. 413; Ry. Co. v. White (Tex. Civ. App.) 32 S. W. 324; Knapp & Co. v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Ry. Co. v. Scott (Tex. Civ. App.) 28 S. W. 458; Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 122; Ry. Co. v. Mathes (Tex. Civ. App.) 73 S. W. 412.

Did such relationship of the judge to appellee's attorney, under the facts, deprive the appellant of its property without due process of law, and the equal protection of the law, and violate section 1 of the 14th amendment of the Constitution of the United States? The 14th amendment in no way undertakes to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure, adopted for these purposes, gives reasonable notice and accords fair opportunity to be heard before the issues are decided. The decisions of the Supreme Court of the United States are to the effect that due process of law is determined by the state, and is not one of the immunities guaranteed by the 14th amendment. See the opinion in Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, for a full discussion of this question. The trial court did not err in overruling appellant's motion for new trial.

Finding no error in the record the judgment is affirmed.

On Motion for Rehearing.

Appellant in its motion for rehearing strenuously contends that the trial judge was prohibited from trying this cause by the terms of article 5, section 11 of the Constitution of this state. The terms of this clause are set out in the opinion, and the correctness of appellant's contention depends upon the construction of the same. This clause came before the Supreme Court for construction in the case of Winston v. Masterson, 87 Tex. 200, 27 S. W. 768. As to the construction to be put upon the words "party" and "parties," as used in said clause, the court say: "The words 'party' and 'parties,' when used in connection with suits or actions, are technical words, the meaning of which is as certainly fixed as any words in the language;" and it was held that these words as therein used applied only to "he or they by or against

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whom a suit is brought whether in law or in equity." This is the construction placed upon this clause by subsequent decisions by the appellate courts. Railway v. Scott (Tex. Civ. App.) 28 S. W. 458; Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 122; Railway v. Mathes (Tex. Civ. App.) 73 S. W. 412.

We conclude that the trial judge was not prohibited or disqualified from trying the cause, and appellant's motion for rehearing is overruled.

GULF, C. & S. F. RY. CO. v. ADAMS.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 16, 1909.)

1. MASTER AND SERVANT (§§ 116, 129*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

Where plaintiff was directed to clean out the inside of a tank car, and to use a defective ladder already placed inside the car by other employés, and, in doing so, he was injured by the breaking of the ladder, defendant was negligent, which negligence was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 207, 257–263; Dec. Dig. §§ 116, 129.*]

2. MASTER AND SERVANT (§ 233*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was directed to clean out the inside of a tank car, and for that purpose to use a ladder placed inside the car by other employés, and he was injured by the breaking of the ladder, he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684–686, 701–742; Dec. Dig. § 233.*]

3. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where plaintiff was injured while using a defective ladder to get into a tank car which he had been directed to clean, and plaintiff had no knowledge that the ladder was defective until he stepped on it, when it broke, he did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—TOOLS—DUTY TO INSPECT.

A servant owed no duty to the master to inspect the tools furnished for his use unless the servant had knowledge of notices alleged to have been posted in defendant's yards requiring such inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 714; Dec. Dig. § 235.*]

5. CONTINUANCE (§ 24*)—ABSENCE OF WITNESS—CUMULATIVE AND IMPEACHING EVIDENCE.

Plaintiff, in an action for injuries, testified to a serious injury to his back, and denied that after it occurred he took out insurance, and stated in his application that he had not suffered any serious personal injury, claiming that he had told the agent concerning his condition. The physician who examined him testified for defendant that plaintiff made a statement that he had never suffered any injury, and other witnesses for defendant testified that plaintiff, while in C. after the injury, did not appear to have been injured. *Held*, that evidence of the agent who procured the insurance, that he never knew that plaintiff had had an accident, was both cumulative and impeaching, and the court did not err in denying defendant's application, made during plaintiff's argument to the jury, for a continuance to procure the attendance of such agent.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 72; Dec. Dig. § 24.*]

6. NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted for newly discovered evidence, the object of which is merely to contradict an inference deducible from the evidence of the successful party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

7. NEW TRIAL (§ 150*)—NEWLY DISCOVERED EVIDENCE—MOTION—AFFIDAVIT.

Where a new trial is applied for because of newly discovered evidence to contradict evidence given at the trial, the affidavit of the impeaching witness must be filed, and must show that his evidence can be obtained on another trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306–310; Dec. Dig. § 150.*]

8. NEW TRIAL (§ 104*)—GROUNDS—NEWLY DISCOVERED CUMULATIVE EVIDENCE.

A new trial will not be granted for newly discovered evidence, which is merely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218–220, 228; Dec. Dig. § 104.*]

9. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where, in an action for injuries, defendant knew of plaintiff's application for insurance, in which, subsequent to the injury, he stated that he had never suffered an injury a month or more prior to the trial, a new trial will not be granted for newly discovered evidence of a witness who testified that plaintiff conversed with him concerning the insurance, and admitted telling the agent that he had never been hurt, in the absence of an affidavit, from the parties who worked up defendant's case, that they did not know that the witness would so testify.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210–214; Dec. Dig. § 102.*]

10. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—ASSUMED RISK—INSTRUCTION.

Where plaintiff was injured by the breaking of a defective ladder, an instruction that plaintiff did not assume the risk of the defect in the ladder, unless at the very time he was injured he knew or in the ordinary discharge of his duties must necessarily have acquired knowledge of the defect, properly stated the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

11. TRIAL (§ 121*)—ARGUMENT OF COUNSEL.

Where witnesses for defendant railroad company from without the county testified that defendant furnished them free transportation, and in addition, paid their expenses and agreed to pay them for their time at a rate from $1.50 to $15 a day, it was not error for the court to refuse to charge the jury not to consider remarks of plaintiff's counsel that the statute (Rev. St. 1895, art. 2268) prescribed $1 a day as the fee for witnesses, and that defendant's witnesses from C., in accepting more than that sum, received an amount not permitted by law.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 121.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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nished free transportation over defendant's road to the place of trial, and admitted that they were not employés nor within any of the exceptions prescribed by Gen. Laws 1907, p. 93, c. 42, prohibiting the issuance of free passes, and declaring that all persons, except those mentioned in section 2, obtaining a free pass or using free tickets, shall be guilty of misdemeanor, it was not error to permit plaintiff's counsel, in argument, to state that such of defendant's witnesses as so testified violated the law in accepting transportation paid by defendant.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 121.*]

13. Appeal and Error (§ 1060*)—Argument of Counsel—Prejudice.

Where plaintiff's testimony showed that he sustained a serious injury, and that he had been injured was not denied, and defendant did not claim that the verdict was excessive, remarks of plaintiff's counsel, tending to prejudice the jury against defendant's witnesses testifying to the extent of plaintiff's injuries, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

14. Evidence (§ 271*)—Extent of Injuries—Relevancy.

Evidence of a witness who had seen plaintiff often, both before and after the injury, that it was quite a while before plaintiff could get off the place, that witness saw plaintiff try to cut a little wood, and that he could not do so, and saw him try to cut some weeds, which he failed to do, was not objectionable as self-serving.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1085; Dec. Dig. § 271.*]

15. Evidence (§ 471*)—Conclusion of Witness.

Evidence of plaintiff's wife that after his injury he attempted to assist her to clean up the yard, and failed, and she did the hoeing for him, was not objectionable as a conclusion, she having testified minutely to plaintiff's condition, his confinement, and injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

16. Master and Servant (§ 270*)—Reception of Evidence—Rebuttal.

Where defendant's foreman denied that F., a former servant, had come to him with the broken ladder, by which plaintiff was injured, some months before the injury, and that he had told him to have it repaired by a carpenter, F. was properly permitted to testify in rebuttal that he had called the defect to the foreman's attention, and had been directed to have the ladder repaired, but that the carpenter had been too busy to fix it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

Error from District Court, Johnson County; O. L. Locket, Judge.

Action by J. G. Adams against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Terry, Cairn & Mills, Brown & Lomas, and Chas. K. Lee, for plaintiff in error. W. Poindexter and S. C. Padelford, for defendant in error.

of plaintiff in error as a common laborer. A trial resulted in a verdict and judgment for $1,250 for plaintiff, and defendant perfected a writ of error.

Conclusions of Fact.

J. G. Adams, while in the employ of the Gulf, Colorado & Santa Fé Railway Company as an ordinary laborer, and in the act of entering a tank car to clean the same, a ladder upon which he attempted to descend in the car broke, by reason of a defect therein, and he was precipitated to the bottom of the car, and injured. The tank of the car was about eight feet in diameter, and to enter the car plaintiff was compelled to climb on top of the car and through the manhole and then descend on a ladder placed inside of the car to the bottom. The plaintiff in error furnished ladders for its employés to use, and the ladder upon which Adams attempted to descend was defective, and broke, and as the proximate result of such defect, plaintiff was injured. By his injuries he has, without negligence on his part, sustained damage in the amount of the verdict and judgment. The plaintiff in error was guilty of negligence in furnishing Adams a defective ladder to use in cleaning out its cars, and such negligence was the proximate cause of his injuries. Adams was not guilty of negligence, and did not assume the risk.

Conclusions of Law.

Plaintiff in error assigns as error the court's refusal to give a requested charge asked by it, instructing a verdict in its behalf. There was no error in the court's action in this respect. This is the second time this case has been before this court. On a former appeal we certified to the Supreme Court the question whether, under the evidence, the trial court should have instructed a verdict for the defendant. This question was answered in the negative. Adams v. G., C. & S. F. Ry. Co. (Tex.) 102 S. W. 908.

The evidence on the trial, resulting in the judgment from which this writ of error is prosecuted, is, in our opinion, stronger in favor of plaintiff than it was on the former appeal. Adams was instructed by his foreman to clean out this particular tank car. He procured a candle and matches, and looked for a ladder upon which to go down into the car. He failed to find a ladder, and saw the air men come up out of the car, and was told by them that he could use their ladder. The car was under a shed, and it was dark inside the tank car. He climbed upon the car and descended through

the manhole until his foot reached the ladder left in the car by the air men. As soon as he put his weight on the ladder it broke, and he was precipitated to the bottom of the car, severely wrenching the muscles of his back, and permanently injuring him. When he climbed out of the car he withdrew the ladder, and discovered that it was the same ladder which had been broken some time prior to that time as the result of a defect in the material out of which one side was made. This particular side of the ladder had, by reason of being made of cross-grained material, been broken, and a cleat nailed on. Adams, when he first discovered this break in the ladder, took it to the foreman and told him it was not safe, and to have it fixed. The foreman told him to use the air men's ladder until he could have that one fixed or a new ladder made. This was the same ladder that was in the car when Adams attempted to descend, and it had not been fixed. It is contended that if there was a defect in the ladder Adams knew of the defect, and assumed the risk of injury so far as the original construction is concerned. This contention is not sustained. The foreman, upon his attention being called to the defect in the ladder, promised Adams that he would have it repaired, and for him to use the air men's ladder. He had the right to rely on the promise of the foreman to have the ladder repaired, and did not assume the risk. He did not know that the foreman had failed to have the ladder repaired, or that the particular ladder placed by the air men in the tank car was this defective ladder. Again, it is contended that it was the duty of employés to inspect the tools to be used by them to see if they were safe, and there is evidence to the effect that notices to this effect had been posted up in the yards of appellant. The evidence fails to show that Adams had ever seen these notices, or that he had knowledge of the same. He testified he had never seen any such notice, and that he had never heard of the same prior to receiving his injuries. The duty to inspect the tools was not imposed on Adams unless he had knowledge of these notices. These same contentions were made by plaintiff in error on the former appeal, and were disposed of adversely to it. Adams v. Railway Co. (Tex. Civ. App.) 105 S. W. 526.

It is contended that the trial court erred in overruling the defendant's application to continue this case on the ground of surprise at the testimony of the witness J. G. Adams with reference to his policy of insurance, and the application therefor, in the order of the Modern Woodmen of America, for want of the testimony of the witness Watkins the party claimed by the said Adams to have taken his said application.

The testimony introduced by plaintiff was to the effect that he was permanently injured. On cross-examination he was asked if he had not within the past few months, but long after the alleged injury for which he sues in this case, applied to the Modern Woodmen of America for insurance on his life, and if he had not submitted to a physical examination at the hands of the medical examiner of that company, which questions were answered by the witness in the affirmative. Thereafter, the witness having denied that he made any statements to the medical examiner to the effect, in substance, that, prior to the said medical examination, he had never suffered from any serious bodily ailment or personal injury, he was asked by his counsel on redirect examination as to whether or not the deputy who took his application for said insurance knew of his (plaintiff's) condition, and the witness testified that he (plaintiff) told said deputy that he could not join said order on account of his physical condition, but that the deputy replied that he would fix that part of it, and that he guessed the deputy did fix it. Thereafter, on the 5th day of February, and while this case was being argued by counsel before the jury, but had not yet been submitted to the jury by the court, defendant in open court presented to the judge thereof a motion and application in writing for continuance, on the ground that it was surprised by the said testimony of Adams and desired the evidence of C. F. Watkins, the person who took his application for insurance in the Modern Woodmen of the World. It was stated in the application for continuance that neither it nor its attorneys or agents had any notice or intimation before plaintiff testified in this case that he would so testify; that there was not sufficient time for defendant to take the testimony of said Watkins before the trial of this case would conclude, and that defendant, by its attorneys, made all reasonable and possible effort to get said Watkins here before the case could or would be concluded; that telegrams were sent to Mr. Watkins, and to his employer, seeking to get him to come, but that same were unavailing, as is shown by the wire or telegram from Mr. Watkins; that Mr. Watkins, it is informed, resides in Amarillo, Tex.; and that if he was present he would testify that the aforesaid statements of plaintiffs were and are untrue, and that he never knew Adams had an accident or was ever injured when he took his said application. Defendant would show that the testimony of said witness is material, and it cannot safely go on with the trial of said case without the testimony of said witness. Defendant, therefore, prays the court to withdraw this case from the jury, and continue or postpone the trial of same, so as to give defendant reasonable time to obtain the testimony of said witness. The wire referred to reads as follows: "Impossible for me to come, on account of sickness. I never knew that J. G. Adams had an accident on railroad. Send for my deposition, if necessary." The ap-

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plication was not sworn to. It was overruled, and defendant excepted. The trial judge in allowing the bill of exception makes an explanation as follows: "That the statement of facts will show what the witness and plaintiff, J. G. Adams, testified on the trial, and the court is referred to the statement of facts for a detailed statement of the evidence of the plaintiff. This application for a continuance was made by the defendant whilst plaintiff's counsel was making the closing argument in the case. The application was not and is not sworn to, and the court was of opinion that the application came too late and showed no diligence to procure the attendance or testimony of the witness, the witness being a nonresident of the county of Johnson. The application showed on its face that the proposed evidence was sought for the purpose of impeaching and contradicting the plaintiff, and did not afford sufficient grounds to authorize the court to withdraw the case from the jury and continue the same." The action of the court in overruling the application is made a ground of the motion for new trial, wherein it is contended that the court erred in refusing the defendant a continuance of the case, on its application therefor during the trial, on the ground of surprise at the testimony of the plaintiff, Adams. In our opinion there was no error in the court's action, either in overruling the application for continuance or the motion for new trial. Neither an application for a continuance nor a motion for new trial for newly discovered evidence will be granted to procure cumulative or impeaching evidence, and such being the character of the testimony of the witness Watkins the court did not err as complained of in these assignments. There was ample evidence to the effect that plaintiff was injured. Dr. Gray, witness for the defendant, testified that, when plaintiff was examined for membership in the Modern Woodmen of America, he examined him, and he made a statement that he was not injured, and had never suffered any injury. Defendant introduced J. H. Clower, E. S. Clower, W. H. White, and they testified, in effect, that plaintiff, while in Clarendon, did not appear to be, or claim, that he was ever injured. The object of the testimony of said Watkins is to show that plaintiff told him, when he made application in said order, at the same time and occasion, that Dr. Gray's testimony was that plaintiff told him that he had never been hurt, and the plaintiff did not tell him that he had been hurt. It is held that a new trial will not be granted on the ground of newly discovered evidence when its object is merely to contradict an inference deducible from the evidence of the successful party, and when the affidavit of the impeaching witness is not filed, and it is not shown that his testimony could be obtained on another trial, Gassoway v. White, 70 Tex. 475, 8 S. W. 117. Nor will it be granted where the newly discovered evidence is merely cumulative. Parham v. Shockler (Tex. Civ. App.) 73 S. W. 839. Again, the record shows that the defendant did not use due diligence to obtain the evidence of the witness Watkins. The application shows that the defendant knew about the plaintiff's making application in said order long before the trial of this case; that their agent Randall was taking statements of witnesses of the defendant at Clarendon a month or so prior thereto. The defendant knew about the application, and about the statement of the plaintiff. There is no affidavit from Randall, and the parties who worked up the testimony for defendant, that they did not know what Watkins would testify. Railway v. Sloan (Tex. Civ. App.) 91 S. W. 243.

The fifth, sixth, and seventh assignments of error assail as error certain paragraphs of the court's charge, and special charge No. 6, given at the request of plaintiff.

The paragraphs of the main charge complained of are as follows: "If you find from the evidence that the plaintiff, at the time of his injury, knew that said ladder placed in said tank, and on which he attempted to descend, was at that time defective, if it was, or if he must necessarily have known such fact in the ordinary discharge of his duties as employed, then, in such case, the plaintiff, in attempting to go into said tank on said ladder with such knowledge, would in law assume the risk of being injured thereby, and, if you so find, your verdict should be for the defendant. On the other hand, if you find that the plaintiff did not know of said defect, if the same was defective at said time, or in the ordinary discharge of his duties he would not necessarily have acquired such knowledge, then, if you so find on the issue of assumed risk, you should find for the plaintiff." "If you believe from the evidence that the plaintiff was injured in the manner and at the time claimed by him, and that such injuries were the result of an accident, such as is ordinarily incident to the character of work in which he was engaged at said time, and that the risk and hazard was such as was assumed by the plaintiff, or if you believe that the said plaintiff was injured as alleged, and that the ladder on which plaintiff attempted to descend into said tank was defective, but you further believe that it was open and patent and visible to the common casual observer, and that it was known to the plaintiff or must necessarily have been known to him in the ordinary discharge of his duties as an employé of the defendant company, and that plaintiff undertook and did use said ladder with knowledge of the said facts, then, in law, the plaintiff would assume the risk of any accident or injury resulting to himself by reason of any such defect, then, if you so believe either of these propositions, you will find for the defend-

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that the same was defective, unless at the very time he was injured he knew or in the ordinary discharge of his duties must necessarily have acquired such knowledge of the same, and unless you so find you will find that the plaintiff did not assume the risk of said defective ladder."

The contention is that these charges are too restrictive in that they instruct the jury that plaintiff only assumed the risk from the use of the defective ladder in the event that he had necessarily acquired knowledge of the defect, whereas, the jury should have been instructed that if the plaintiff, in the exercise of ordinary care, would have found that the ladder was defective, he assumed the risk. And the additional criticism is made to special charge No. 6 that, if by its terms the jury could find for the defendant, they must believe that it was physically impossible for plaintiff to have failed to acquire knowledge of the defect, or, that if he had acquired knowledge of such defect, that such knowledge had not escaped him, but was in his mind at the exact instant he received the injury. The burden thus placed upon the defendant was improper and without support in law. These charges announced a correct principle of law, and the court did not err in giving the same. The special charge did not place too great a burden on appellant in instructing the jury that Adams did not assume the risk of the defect in the ladder, "unless at the very time he was injured he knew or in the ordinary discharge of his duties must necessarily have acquired knowledge of the defect." Bonnet v. Railway, 89 Tex. 72, 33 S. W. 334; Railway v. Hannig, 91 Tex. 347, 43 S. W. 508.

We have carefully considered the assignments complaining of the court's failure to give certain charges requested by the defendant, and because we are of the opinion they are without merit they are overruled.

The thirteenth, fourteenth, and fifteenth assignments of error are grouped and presented together. They complain of the court's action in overruling the motion for new trial, because of error in permitting counsel for plaintiff in his opening remarks to the jury to state in substance that the statute prescribed $1 per day as fee for witnesses, and that defendant's witnesses from Clarendon, in accepting more than that sum, were paid an amount not permitted or allowed by law; because the jury were probably influenced and misled by said remarks, same being highly improper. In his opening remarks to the jury one of counsel for plaintiff stated, in effect, that the law provided that witnesses should only be paid $1 per day for their attendance in civil cases, there-

been paid, said witnesses received a sum not allowed by the law of this state. The defendant requested a charge, which the court refused, instructing the jury, in effect, that the law does not prescribe $1 per day, or any other amount, as the fee for a witness residing out of the county where a civil suit is pending, and that the remarks of counsel were improper and will not be considered by you for any purpose.

The bill preserving the court's ruling is signed with the explanation "that the statement of facts will show that these witnesses admitted on cross-examination that the defendant company furnished them free transportation from Clarendon, Tex., to Cleburne, Tex., and, in addition thereto, paid their expenses, and agreed to pay them, for their time, at the rate of from $1.50 to $5 per day. The evidence also shows that the line of railroad over which these witnesses traveled from Ft. Worth to Cleburne is owned and operated by the defendant company. The court did not think counsel for plaintiff was out of the record. The law provides the means for obtaining the evidence of nonresident witnesses. The witness, Clower, testified that he was to receive $3 to $4 per day for attending court; the witness White, that he was to receive $1.50 per day; the witness McCrae, that he was to receive $5 per day, and the witness, Dr. Gray, that he was to receive $15 per day. This in addition to expenses and transportation." This action of the court does not constitute reversible error. The witnesses, it is true, resided outside of the county in which the case was tried, and, if subpœnaed, were entitled to fees for their attendance at the rate of $1 per day. Rev. St. 1895, art. 2263; Secord v. Eller (Tex. Civ. App.) 63 S. W. 933.

The sixteenth, seventeenth, and eighteenth assignments are grouped and presented together. They complain that the court erred in not granting defendant a new trial, because of the remarks of counsel for plaintiff in his argument to the jury in stating that the defendant's witnesses who resided in Clarendon, and who testified on the trial of this case in accepting tickets paid for by the defendant, were violating the law of this state. Also in refusing to give special charge No. 22, requested by the defendant, which was as follows: "You are charged that it was lawful for the defendant in this case to purchase and pay for the tickets used by its witnesses, who reside at Clarendon, and that the act of the defendant in so purchasing and paying for said tickets, and the act of the witnesses in accepting said tickets, was not a violation of the anti-pass law or any other law of this state, and you will, there-

fore, disregard the argument of counsel for plaintiff to the effect that said act or acts did constitute a violation of the law." The court refused the special charge above set out. The testimony showed that all of defendant's witnesses from Clarendon, in attendance on the court, were furnished tickets from Clarendon to Cleburne and return by appellant free.

The bill of exception preserving the court's action is signed with the explanation "that the witnesses from Clarendon admitted on cross examination that defendant company furnished them free transportation from Clarendon to Cleburne, Tex., and had agreed to furnish them free transportation back to Clarendon, and the evidence showed that the said witnesses were transported from Ft. Worth to Cleburne, Tex., over the defendant's line of railway. These witnesses further admitted that they were to be paid, also, for their time and expenses, as will appear from their evidence. All of the witnesses admitted that they were not employés of the defendant company, nor did they show that they came under the exceptions provided for under the acts of the last Legislature (Gen. Laws 1907, p. 93, c. 42) prohibiting the issuance of free passes, tickets, etc. Section No. 6 of act in question provides that all persons, except those mentioned in section No. 2, who use any free ticket, free pass, or free transportation shall be guilty of a misdemeanor."

In view of the evidence and the court's explanation, we are of the opinion that it cannot be said the remarks of counsel were improper. Again, the testimony of these witnesses related to the extent of the injuries to plaintiff. Plaintiff's testimony showed he sustained a serious injury, and it seems that there is no controversy but that he sustained an injury. There is no assignment that the verdict is excessive.

It is assigned that the court erred in admitting the testimony of the witnesses H. P. Barnes and Mrs. Cora Adams as to the efforts plaintiff had made to work, and why he could not do so, and in permitting the witnesses to answer that they had seen him try to work, and that he could not. While H. P. Barnes was upon the stand testifying in behalf of the plaintiff, counsel for plaintiff propounded the following question: "Did you ever see him (plaintiff) try to work? If so, state what effort he made and whether he could or could not" (to which question, and the answer sought to be elicited thereby, the defendant objected upon the ground that the acts or conduct of the plaintiff and his failure, if any, to work, were self-serving, and the testimony incompetent, the answer called for in response to said question would be a conclusion of the witness). The court overruled the exceptions, and the witness was permitted to state, in substance, that it was quite a while before the plaintiff could get off the place, and that he saw plaintiff try to cut a little wood and he couldn't do it, and that he saw him try to cut some weeds, and that plaintiff failed on that and dropped the hoe down, and that he saw plaintiff's wife take the hoe and cut the weeds herself.

"This bill is approved with the following correction and explanation: In addition to and preceding the statements contained in the bill the witness testified in substance that he saw plaintiff at his home, in bed, the next night after he was injured; that before plaintiff was injured he seemed to be very stout and active. He seemed to be suffering very much, complained of his back and spine. That he was confined to his room for quite a while, complained of great pain, and was very restless. The complaints lasted some 10 days. That he would see plaintiff out on the gallery all doubled up. Finally he began to go into the yard, and hobbled around there all doubled up. It was quite a while before he could get off the place. Then he proceeded with the statements as contained in this bill of exceptions. Witness lived near by and could see the plaintiff daily, and did. The court was of opinion then, and is, that this evidence was clearly admissible, and therefore overruled the objection."

There was no error in admitting the evidence of Barnes. It was admissible upon the ground set out by the court in the bill of exception. Nor was there error in admitting the testimony of Mrs. Adams, that "he (meaning plaintiff) tried one day to help me clean up the yard but he couldn't, and I went and done the hoeing for him also;" that he tried to work and could not stoop to do any good, and that he could not get up and down to do any good, and that since the injury he has never done anything about the house because he was not able. This evidence was objected to as being a conclusion of the witness. The court, in approving the bill of exception, appended the following explanation: "This witness is the wife of the plaintiff. She described minutely the condition of the plaintiff when he reached home after being injured and what she did for him, and what the doctor did. She then stated that plaintiff was confined to the house for 12 or 13 weeks. During this time he seemed to suffer with his back and hips, and that she doctored him and worked with him and nursed him the whole time, rubbed him and painted him and blistered his back, and that plaintiff's suffering was great. That he could not get up and down very well; that the seat of the trouble was in his back and hips; that he tried to work and could not stoop to do any good; that he could not get up or down to do any good. Then followed the statement, contained in this bill of exception, to which the objection of the defendant relates. The witness was present and saw the plaintiff try to use the hoe, and was a personal witness to his inability to use it, and she had,

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as before stated, stated the facts touching his inability to get up and down or to work or labor, etc., as shown in the statement of facts, and the court thinks this evidence was clearly admissible, and therefore overruled the objection."

It is insisted that the court erred in admitting the testimony of plaintiff's witness Russell Francis to the effect that some time in the spring of 1904, several months before the plaintiff's alleged injury, and while the witness was in the defendant's service, and had a ladder, it broke with him. After plaintiff had introduced his evidence and rested, and after the defendant had introduced its evidence and rested, plaintiff placed on the stand in rebuttal the witness Russell Francis, and counsel for plaintiff proceeded to ask him whether or not, prior to the month of June, 1904, while in the service of defendant, he had a ladder to break with him, to which question defendant objected because it was shown by the record that the witness left the service of the defendant on the 8th day of June, more than three months prior to the accident in question, and because the proof of the breaking of any other ladder than the one on which plaintiff claims he received his injury was incompetent, irrelevant, and immaterial, and because there was no identification at all of the ladder inquired about of this witness as being the ladder used by the plaintiff at the time he claimed to have been injured, and for the further reason that the testimony of this witness was not in rebuttal of any proof offered by the defendant, and if the testimony was offered for the purpose of contradiction no proper predicate for its introduction had been laid, which objections were by the court overruled, and the witness testified in substance that while using a ladder in the defendant's service, prior to the 8th day of June, it broke with him, and that he told Mr. Robertson, the foreman, about the ladder being broken, and that Mr. Robertson told him to take it down to some carpenter and tell him to fix it, and that he carried it to the carpenter, but the carpenter was too busy to fix it, and that he (the witness) concluded to repair the ladder himself, describing how he repaired it, to all of which the defendant then and there in open court excepted. This evidence was properly admitted to contradict the testimony of Robertson, defendant's foreman. Robertson had denied the fact that Francis came to him with the broken ladder and showed it to him where it had broken with him, Francis, some time prior to the plaintiff's injury, and the testimony showed that this ladder, so broken, and which he showed to Robertson, was the same ladder upon which plaintiff was injured.

Finding no reversible error in the record, the judgment is affirmed.

STEPHENVILLE NORTH & SOUTH TEXAS RY. CO. v. MOORE et al.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 16, 1909.)

1. EMINENT DOMAIN (§ 262*)—CONDEMNATION PROCEEDINGS—EVIDENCE—REVIEW — HARMLESS ERROR.

Where, pending condemnation proceedings, a railroad, after deposit, constructs its road over the land, the admission of evidence at the trial that a house on the land was burned since the railroad was put in operation is prejudicial to the railroad.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 262.*]

2. EMINENT DOMAIN (§ 124*)—CONDEMNATION PROCEEDINGS—VALUE OF LAND—TIME WHEN COMPUTED.

Where, before the trial in condemnation proceedings for a right of way the road was constructed over the land in question, the admission of evidence as to the market value of the land when the road was constructed, rather than at the time of trial, was not erroneous, especially where it did not appear but that the railroad made a deposit when it constructed the road, and in view of an agreement that the railroad had taken all necessary steps for the condemnation of the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. § 124.*]

3. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—EXAMINATION OF WITNESS.

Where no injury is shown by the action of the court in refusing counsel a longer time to examine witnesses, the error, if any, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1047.*]

Appeal from Erath County Court; M. J. Thompson, Judge.

Condemnation proceedings by the Stephenville North & South Texas Railway Company against Mrs. S. R. Moore and others. From a judgment for the property owners; the railroad appeals. Reversed and remanded.

See, also, 111 S. W. 758.

Marshall Ferguson, for appellant. J. M. Carter, J. B. Keith, and Theodore Mack, for appellees.

DUNKLIN, J. The Stephenville North & South Texas Railway Company instituted proceedings to condemn for right of way purposes certain land belonging to Mrs. S. R. Moore and others, and from a judgment in favor of the owners of the land the railway company has appealed.

The admission of the testimony of the witness Johnson Thomas to the effect that the rent house situated near the right of way has burned since the railroad was put in operation, we think, was error which was calculated to be prejudicial to the defendant, and for this error the judgment must be reversed.

Appellant complains of the admission of testimony as to the market value of the land taken at the time its railroad was built over

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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it, rather than at the date of trial. The basis of this assignment is the proposition that prior to the trial it made no deposit of the amount of damages assessed by the commissioners appointed by the county judge, that therefore there was no legal taking of the land prior to the trial, and that the proper measure of damages should be the value of the land at the date of the trial. We are inclined to hold that in any event the correct measure of damages would be the value of the land at the time appellant constructed its road upon it. In the case of Morris v. Coleman County (Tex. Civ. App.) 28 S. W. 381, cited by appellant, the commissioners' court had ordered a public road opened across certain land, and it was held that the market value of the land at the date of the trial was the proper measure of the owner's damages, in view of the fact that there had been no previous deposit of the amount awarded by commissioners appointed for that purpose, and therefore the date of the trial was the date the land was taken. But in that case it does not appear that the road had been opened on the land prior to the trial. However, at all events, there was no error in admitting the evidence complained of herein, in view of the fact that the record does not show that appellant had failed prior to the trial to make the deposit of the damages previously assessed, and in view of the agreement by the parties upon the trial that defendant had taken all necessary steps for the condemnation of the land.

No injury is shown to appellant by the action of the trial court in refusing to allow its counsel a longer time than was given to examine witnesses, and therefore the fourth assignment of error is overruled.

For the error above indicated, the judgment of the trial court is reversed, and the cause remanded.

JOHNSON et al. v. W. H. GOOLSBY LUMBER CO. et al.

(Court of Civil Appeals of Texas. May 29, 1909. Rehearing Denied Oct. 23, 1909.)

1. COURTS (§ 121*)—JURISDICTION—AMOUNT IN CONTROVERSY—COUNTERCLAIM.

The jurisdiction of the county court being limited to $1,000, that court had no jurisdiction of a cross-action to recover an overpayment of $750 in an action to recover a debt of $550, exclusive of interest.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–426; Dec. Dig. § 121.*]

2. APPEAL AND ERROR (§ 20*)—JURISDICTION OF TRIAL COURT.

Where the county court was without jurisdiction of a cross-action, the Court of Civil Appeals had no jurisdiction to revise the trial court's action with reference thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 81–87; Dec. Dig. § 20.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—FORM.

An assignment that the court erred in refusing to permit appellants to prove a certain contract without stating what evidence was offered for that purpose, but referring to several bills of exceptions, was insufficient under rules 25 and 30 (67 S. W. xv, xvi), requiring each assignment to specify the error relied on, and be accompanied by the statement of such proceedings contained in the record as are necessary to explain the assignment and to a decision of the question involved without reference to the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. APPEAL AND ERROR (§ 760*)—BRIEFS—REFERENCE TO RECORD.

Appellant's brief in so far as it sought a reversal because of assignments of error to the exclusion of evidence should state the page of the transcript where the matter supporting the assignment could be found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.*]

5. TRIAL (§ 219*)—INSTRUCTIONS—DEFINITION OF TERMS.

The court is not required to define a term of ordinary use when used in its popular sense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.*]

6. TRIAL (§ 260*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

An instruction that, where a person deals with an agent, he must assure himself that the agent has the necessary authority in the transaction in question, sufficiently covered a request that it is not sufficient to establish agency that the agent had claimed and to be such, but that it is the duty of the person dealing with the agent to ascertain the fact of agency and his authority to do the particular act.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

7. EVIDENCE (§ 43*)—JUDICIAL NOTICE—ATTACHMENT.

Where an attachment has been issued in an action on a debt, the court will take judicial cognizance thereof without a formal introduction of the papers in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62–65; Dec. Dig. § 43.*]

8. ATTACHMENT (§ 217*) — ENFORCEMENT — JUDGMENT.

Where the existence of an attachment lien was not an issue of fact for the jury, on the establishment of plaintiffs' debt by the verdict, it was the court's duty to recite in its judgment the issuance and levy of the attachment as the method prescribed by law for the preservation of the lien fixed by the levy until enforced by execution.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735–752; Dec. Dig. § 217.*]

9. ATTACHMENT (§ 217*)—JUDGMENT—SUFFICIENCY.

A judgment, after reciting the issuance and levy of an attachment, adjudged that the lien existing by virtue thereof be "recognized," and directed the clerk to issue an execution commanding a sale of the attached land and an application of the proceeds of the sale to the payment of the judgment and costs, and the return of any overplus to the landowner. *Held*, that the judgment, though containing more than was necessary to preserve the attachment lien, was not objectionable as purporting to foreclose the attachment lien on the land levied on.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735–752; Dec. Dig. § 217.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Appeal from Hunt County Court; J. W. Manning, Judge.

Action by the W. H. Goolsby Lumber Company and others against E. M. Johnson and others. Judgment for plaintiffs as against Mrs. Johnson, and defendants appeal. Affirmed.

M. W. Johnson and Neyland & Neyland, for appellants. Looney & Clark and L. L. Bowman, for appellees.

TALBOT, J. This is a suit instituted by W. H. Goolsby and J. H. Van Amburgh partners, doing business under the firm name of W. H. Goolsby Lumber Company, against Mrs. E. M. Johnson, formerly Bounds, her husband, Merrill W. Johnson, being joined pro forma, George Lindsey, and A. K. Doss to recover the sum of $555.03 alleged to be due for certain lumber and building material sold and delivered to defendants at their special instance and request during the year 1906. Plaintiffs also sued out a writ of attachment against the defendant Mrs. Johnson, which was levied on a part of lot 1, in block 14, of the Original Town Donation of Greenville, Tex. The defendant Mrs. Johnson, joined by her husband, pleaded the general issue, and specially and by way of cross-action, in substance, that she owned a certain building in the city of Greenville, which she rented to defendant A. K. Doss for a period of years, the rental contract being in writing; that she agreed to make certain repairs, improvements, and additions to said building in accordance with certain plans and specifications prepared by defendant George Lindsey; that the said Lindsey contracted and agreed with her to furnish and to pay for all the labor and material to make such repairs and improvements, the same to cost not more than $1,000; that "Lindsey was to pay for all labor and material weekly," and that she agreed to honor his draft for the value of such material and labor weekly. Mrs. Johnson further alleged that she never authorized the said Lindsey or Doss or any one else to purchase from the plaintiffs in her name, or on her credit, any of the material used in the repair or improvement of said building, and had not promised to pay plaintiffs the account sued on or any part of the same; nor had in any manner ratified the purchase of the lumber and material therein specified; that she "has largely overpaid said Lindsey the contract price of $1,000 for which he agreed and undertook to do and perform the work in the repairing, improving, and making the additions to said building, and has paid him the sum of about $1,750; that each and every item of the account sued on is unjust, and not a proper charge against her; that she had never held either Doss or Lindsey out to the world as her agent, and that, if any one is responsible to the plaintiffs for the value of the material specified in the account in question, it is either Lindsey or Doss, or both of them." The prayer of this answer and cross-bill is as follows: "Wherefore said defendant Mrs. E. M. Johnson prays that she have judgment discharging her with her costs, but, should the court hold her liable to pay the amount to plaintiff, then she prays that, having fully paid the said Lindsey far more than she contracted to pay him, she have judgment over against him for the amount of plaintiff's recovery against her, as well as for the amount she has overpaid him on the contract price, to wit, the sum of $750." There was no prayer for judgment over against Doss in the event judgment was rendered in favor of plaintiffs against Mrs. Johnson. The defendant George Lindsey in due order filed a plea in abatement to the cross-action of Mrs. Johnson, alleging that said action was based upon allegations charging him with the conversion of certain moneys, a cause of action arising ex delicto and in no way connected with the suit of plaintiffs, which is an action of debt arising ex contractu; and hence could not be maintained in this suit. Lindsey also filed a general denial to the allegations of both the plaintiffs and his codefendant, Mrs. Johnson, and specially denied that he ever contracted with Mrs. Johnson to make improvements on her house for $1,000, or for any other sum. He averred that the only contract he made with her was as an architect for a commission to plan and supervise the work of repairs on the building. Defendant Doss answered by simply adopting the answer of his codefendant Lindsey. The plea in abatement of Lindsey was sustained by the trial court and Mrs. Johnson's cross-action against him dismissed. A trial upon the merits of the case before a jury resulted in a verdict and judgment that plaintiffs take nothing as to defendants Lindsey and Doss, and recover of Mrs. Johnson the amount sued for; the judgment reciting the issuance and levy of the writ of attachment upon the lot levied on and described as above stated.

Appellants' first assignment of error complains of the court's action in sustaining Lindsey's plea in abatement to their cross-bill against him. The plea should not have been sustained, perhaps, on the ground urged; but it is apparent from the record that the county court had no jurisdiction of the amount involved therein, and there was no error in dismissing the bill. As has been seen, Mrs. Johnson charged in her cross-action against Lindsey that she had paid him over and above the amount she contracted to pay him for the improvements the sum of $750, and prayed, in substance, that, in the event the court should hold her liable for the claim sued on by plaintiffs, then, inasmuch as she had paid Lindsey more than she contracted to pay him, that she have judgment over against him for the amount of plaintiffs' recovery against her, and, in addition thereto, for the amount she had overpaid on the contract price, which she al-

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leged was $750. The amount of the debt sought to be recovered by plaintiffs was $550, exclusive of interest, and this amount, added to the sum alleged to have been overpaid Lindsey, namely, $750, makes the amount in controversy in the cross-action $1,300. The jurisdiction of the county court is limited to $1,000; hence the county court had no jurisdiction of the amount sought to be recovered in appellants' cross-action, and could not render the judgment therefor. The county court being without jurisdiction of the cross-action, this court has no jurisdiction to revise its action with respect thereto. Hall v. McGill (Tex. Civ. App.) 38 S. W. 828; Pennybacker v. Hazlewood, 26 Tex. Civ. App. 183, 61 S. W. 155; Standefer v. Aultman, 34 Tex. Civ. App. 160, 78 S. W. 552.

The second assignment is as follows: "The court erred in refusing to allow the appellants to prove their contract with George Lindsey and Lindsey & Coburn for the remodeling, improvement, and repairing the house into which appellees claim their material went, because, if the appellants were liable at all, they were only liable to the extent of the contract price made between the appellant Mrs. E. M. Bounds, now Johnson, and the said Lindsey, and, having paid much more than the sum contracted for, the appellants were not liable to the appellees in any sum whatever." The first proposition under this assignment is to the effect that appellant had contracted with appellee Lindsey to repair her building for a specified sum, and that her liability for material used in making such repairs did not exceed such sum; that payment to Lindsey of the amount agreed to be paid him for the improvements was a full settlement of her liability, and hence she was not liable for the price of the material ordered by her codefendants and sought to be recovered in this action; (2) that in such case, when the contractor fails to complete the work on the money paid, the contractor will become liable for any sum in excess of the contract price agreed upon necessary to complete the work contracted to be done, therefore the court erred in refusing to permit the appellants to prove the contract between appellant Mrs. Johnson and appellee Lindsey. This assignment is not sufficiently specific in pointing out the ruling appellants seek to have reviewed by this court, nor is there such a statement of the proceedings contained in the record in explanation and support of it as entitles it to consideration. As will be noted, the assignment is a general statement that the court erred in refusing to permit appellants to prove the contract between appellant Mrs. Johnson and appellee Lindsey. This, it is true, implies that evidence offered by appellants tending to prove the terms of such contract was excluded upon objection made thereto by the appellees, but what this evidence was does not appear from the assignment, the propositions, or the statement under them. The assignment and propositions each refer to five separate and distinct bills of exception, and, under the heading, "Statement under both Propositions," we find the following: "W. H. Goolsby Lumber Company sued appellants George Lindsey and A. K. Doss for the value of certain lumber said to have been sold defendants and used in the house of appellants by Doss and Lindsey. Appellants pleaded a contract with Lindsey and Doss, codefendants. See pleading." The assignment should distinctly specify the error relied on, and be accompanied, in the brief, with a statement of such proceedings, or part thereof, contained in the record, as are necessary to explain and support such assignment and enable the court to decide the question involved without reference to or an examination of the record. Rules 25 and 30 (67 S. W. xv, xvi); McManus v. Wallis, 52 Tex. 534; Krick v. Dow (Tex. Civ. App.) 84 S. W. 245. Appellants' brief touching the assignment in question is not only defective, in that it fails to comply with the rules in the respects mentioned, but, also, in that it fails to state the page or pages of the transcript where the pleadings and bills of exception to which we are referred in support of the assignment will be found.

The court did not err in refusing to charge the jury at appellants' request that the provision in the written contract entered into between Mrs. Johnson and A. K. Doss, whereby Mrs. Johnson leased to Doss the building upon which the repairs were made, to the effect that such repairs should be under the supervision of the said Doss, did not confer upon Doss authority to purchase material for such repairs on the credit of Mrs. Johnson; that the word, "supervision," means to overlook, to superintend, to supervise. It was not necessary to define the word "supervision." It is a word of ordinary use, and was used in its popular, and not in any technical, sense in the contract referred to. Such words and terms need not be explained, as the jury will be presumed to know their meaning. Anderson Elec. Co. v. Cleburne Water, etc., Co., 23 Tex. Civ. App. 328, 57 S. W. 575. Nor did the court err in refusing appellants' special charge to the effect that, when a person deals with an agent, he must take notice of the authority conferred upon him, and that it is not sufficient to establish agency that the party claiming to be the agent has represented himself to be such; that it is the duty of a person dealing with him to ascertain the fact of agency, and that the agent is clothed with the authority from the principal to make the particular contract in question for him. In so far as this charge stated a correct proposition of law applicable to the facts, it was covered by another special charge requested by appellants, reading thus: "You are charged that, where a person deals with an agent, he must take notice of the extent of the agent's authority, and assure himself that the person

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The fourth and last assignment of error is as follows: "The court erred in rendering a judgment on the following verdict: 'We, the jury, find for the plaintiff, against the defendants Mrs. E. M. Johnson and assess their damages at ($555.03) five hundred and fifty-five $^{03}/_{100}$ dollars, with six per cent. interest from Jan. 1st, 1907, and we find in favor of defendants Doss and Lindsey. A. A. Allen, Foreman'—the error in the judgment being that the court erred in recognizing the existence of an attachment lien upon a lot of land situated in Greenville, Tex., and a part of the town donation of said city and being part of block 14, because there was absolutely no evidence of any character produced or suggestion before the court or jury that any attachment was ever sued out in this cause, or that the same was ever levied upon any of the real estate of either of the appellants, it being necessary for such a recognition that there be some evidence of an attachment lien suggested to the court or evidence offered; and, further, the court erred in overruling the appellants' motion for a new trial because there was not introduced in evidence either a writ of attachment or a return of same showing there was a levy of a writ of attachment by the sheriff or other officer, and no evidence was introduced showing the existence of a writ of attachment, the levy of the same, or the return of same, showing a levy on the property described in said judgment, or any other property." The only question raised by this assignment is whether or not the trial court erred in recognizing the attachment lien without the introduction of the attachment papers in evidence or other evidence of the issuance and levy of the attachment upon the land described in the judgment. If the writ of attachment was regularly issued and levied upon the land described in the judgment and returned into court with the sheriff's return indorsed thereon showing such levy, which is not questioned by any thing appearing in the record, such writ and return was sufficient evidence to establish prima facie, at least, the issuance and levy thereof, and it was not essential to the authorization of a recital of such issuance and levy in the judgment, as directed by the statute for the preservation of the attachment lien when the attachment is issued from the county or justice court, that the attachment papers or any of them should have been introduced in evidence. These papers were filed papers, and constituted a part of the record before the court in the case of which the court would take judicial cognizance, and no formal introduction of them in evidence was necessary. The existence vel non of the attachment lien in its judgment the issuance attachment as the method p for the preservation of the l levy until it could be enf tion. Pitkins v. Johnson (T

It was further argued at court's judgment in effect f tachment lien upon the lan that this constituted funda which the case should be judgment, after reciting th levy of the writ of attachme proceeds to adjudge that t by virtue thereof be "recog clerk of the court is direc execution commanding the constable of Hunt county to the law directs, and apply such sale to the payment curred in this suit and the ment, and that, if after sati and judgment any money rem to pay the same over to M that, if the sum realized f the attached property is not plaintiffs' judgment and th that execution issue for the of the opinion this form o does not warrant a revers The judgment contains much necessary to preserve the but it does not purport t lien, and such is not, in our effect. The course directed to be pursued for its enforc course pointed out by law, a ordinarily be pursued with rections given therefor in th

Finding no reversible erro the judgment of the court b

FREEMAN v. GA

(Court of Civil Appeals of T 1909. Rehearing Denied O

1. Railroads (§ 282*) — Ins juries to Child—Pleadin

In an action for injuries being run over by an engine, the employés in charge of the plaintiff was on the running gine, and permitted him to rid did not appreciate the danger age, he was entitled to recove allegation of the petition tha ployés "knew" of plaintiff's p gine, and were negligent in fa warn him of the danger, alth did not know or appreciate th ing on a moving engine, it whether they warned or notifi they permitted him to ride.

[Ed. Note.—For other case Cent. Dig. § 921; Dec. Dig. §

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date,

2. Railroads (§ 282*)—Injuries to Child—Evidence—Sufficiency.

In an action for injuries to a child from being run over by an engine, evidence *held* insufficient to warrant a finding that defendant's employés knew of plaintiff's position on the running board of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 914; Dec. Dig. § 282.*]

3. Negligence (§ 85*)—Contributory Negligence of Child.

Where a minor possesses such a degree of intelligence as to appreciate the danger involved in his act, he is chargeable with contributory negligence as any other person.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 121; Dec. Dig. § 85.*]

4. Railroads (§ 282*)—Contributory Negligence of Child—Evidence.

In an action for injuries to a child from being run over by an engine, evidence *held* to show that plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Luz Garcia, by next friend, against T. J. Freeman, receiver. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

King & Morris and Hicks & Hicks, for appellant. Seth S. Searcy, for appellee.

JAMES, C. J. The appellee sued, alleging that plaintiff, a minor 11 years of age, climbed upon and stationed himself upon the running board of defendant's switch engine which was operating back and forth in what is known as the "stockyards" of defendant, and that he slipped and fell from the running board, and the wheels ran over his right leg, requiring amputation thereof above the knee, and causing him certain other injuries, all serious and permanent. It was alleged that defendant's servants permitted plaintiff to ride on said running board; that plaintiff was young, inexperienced and unaware of the danger; that he had been doing the same thing before, with the knowledge of said servant, but had not been warned of the danger; that said stockyards are located in a thickly settled portion of San Antonio, and are unprotected by gates or lookout; that children living in the neighborhood were in the habit of riding upon the cars and engines at that place, and that defendant and its servants knew this fact, but took no steps to prevent it; that on the date alleged plaintiff stationed himself upon the running board or step of the engine in full view of, and with the knowledge of, defendant's servants in charge of the engine, which was being operated back and forth as aforesaid, and while so riding plaintiff fell therefrom and received his injury. The petition alleged that plaintiff was injured through the negligence of defendant in this: "That no notice was given plaintiff of the perilous position he occupied, or of the danger he was in, in being upon and riding on said step or running board, and plaintiff was not warned of the danger he was in, in being upon the running board or step of said engine, although the defendant, its servants, and employés knew of plaintiff's whereabouts on said engine, or by the exercise of reasonable diligence could have known of his whereabouts and of the danger he was in, and that this negligence was the direct and proximate cause of plaintiff's injuries." Appellant answered by general and special exceptions, by general denial, and special answer: (a) That appellee was riding, or attempting to ride, on the cars or engine without the knowledge or consent of appellant, and while so doing, without any negligence upon the part of appellant, fell therefrom and was injured; that appellee was a trespasser and guilty of contributory negligence in riding or attempting to ride on said cars or engine. (b) Appellant further alleged that appellee was riding, or attempting to ride, upon said engine or cars while in motion in violation of section 18, c. 22, of the Revised Criminal Ordinances of the city of San Antonio, making it "unlawful for any person not a passenger thereon to get on or cling to any street car or other railroad car when in motion in the city of San Antonio," and that he was so doing without the knowledge of appellant or its employés, and was thereby guilty of contributory negligence. Appellant further alleged that appellee was injured while riding, or attempting to ride, on a freight train in the yards of appellant in the city of San Antonio without the knowledge and consent of appellant or its employés and contrary to the criminal statutes of the state of Texas, and that this was the proximate cause of his injuries, and that for said reasons he ought not recover. Plaintiff obtained a judgment for $3,000.

We shall first consider the third assignment of error, which complains of the charge which submitted the case upon the theory of whether or not those in charge of the engine knew that the minor was riding upon the running board of the switch engine, and which charged the jury that if they found that said employés knew the fact, and that plaintiff was a child of tender years, and did not know and appreciate the danger, if any, in riding upon said running board, and that said employés permitted him to be and ride thereon, and in so doing were guilty of negligence, and such negligence was the direct cause of plaintiff's injury, to find for plaintiff.

Three propositions are relied upon in connection with this assignment: (1) That where the sole ground of negligence is the failure to notify appellee of his perilous position, and to warn him of the danger he was in, a charge allowing a recovery in case the jury find that defendant's employés permitted appellee to ride upon the engine with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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knowledge of his danger is without pleading to support it. (2) Where the undisputed testimony shows that appellee knew it was dangerous to ride, or attempt to ride, upon an engine while in motion, a charge that allows a recovery in case the jury finds that he did not know of the danger is against the evidence. (3) Where there is no evidence from which the jury could reasonably conclude that the employés knew appellee was on the train at the time he was injured, the charge allowing a recovery if they found the employés knew he was on the train is without evidence to support.

We overrule the first proposition. The clause in petition which alleged the negligence relied on alleged that the employés knew of plaintiff's position on the engine, and his danger, and were negligent in failing to notify or warn him of the danger. The court by its charge took the view that if the employés were aware that plaintiff was on the moving engine, and permitted him to ride thereon, and plaintiff in fact did not know or appreciate the danger in riding the footboard on account of his age, plaintiff was entitled to recover. It seems to us that if the child did not know or appreciate the danger there was in riding on a moving engine, it was immaterial whether or not they warned or notified him, if they permitted him to ride thereon. The facts that they knew his presence on the engine, and his danger, and permitted him to ride thereon, were at least within the allegations relied on for recovery.

The third of said propositions alleges that there was no evidence from which it could be found that the employés of defendant knew appellee was upon the engine. We find this sustained by the record. The duty to take precautions to protect the minor from injury did not arise until it was known to the employés that he was upon the engine. The evidence relied on as sufficient to prove this was the testimony of plaintiff as follows: "I was south on Guadaloupe street. I got on the engine of the train that was switching around out there. I got on the rear part. I managed to stand on that part of the engine because I got on it. There were cars in the front. The train was going forward and backward. It was moving when I got on; it was going south. I stayed on the engine about five minutes. The engine was going while I was on it. It would stop for a while, then go forward and then go back. It was switching back and forth. I saw two men on the engine. There were some others around the train, but they were on El Paso street. Some were on the cars, and some were below. When I got on the engine, one of the men on the engine was looking forward, and the other was looking backward. It was a switch engine I got on." The fact that plaintiff was seen upon the engine could doubtless be made to appear by circumstances. But plaintiff did not say that any of these employés were looking at or towards him, but only that one was looking forward and the other backward; they being evidently engaged in the performance of their duties in switching. To find from this that the one looking backward saw plaintiff would be mere conjecture. The jury, in view of the charge upon which the case was submitted, must have found that plaintiff was seen, and because the evidence did not warrant the finding, the judgment cannot be approved.

But the question of more vital effect is one suggested by the second proposition, and also by propositions under the fourth assignment of error, which is that the court erred in refusing a peremptory instruction for defendant. Also by the fifth assignment. It concerns the matter of contributory negligence. Plaintiff was 11 years of age, and testified: "Yes; me and the boys hop the train down there pretty often. I knew that if I fell off that car that it would run over and hurt me, so when I got onto it I tried to hold on tight. Yes; when I went to jump I knew it was dangerous, and I was liable to get hurt. Yes; the police officers sometimes came down there, and got after us and chased us out in the brush." There is nothing tending to show that the defendant's servants had anything to do with causing the boy to jump or get off, nor is there anything in the boy's testimony in conflict with the above admission. The attempt to get off the engine while it was in motion was his voluntary act. His own testimony shows clearly that he understood and appreciated the danger of being injured in getting off as he did. In fact he admitted it, and it is impossible to see anything in the record which would warrant a jury in forming a different conclusion. The cases of Railway v. Rodgers, 89 Tex. 680, 36 S. W. 243, and Railway v. Phillips, 91 Tex. 281, 42 S. W. 852, lay down the rule that a minor who possesses such degree of intelligence as to appreciate the danger involved in his act is chargeable with contributory negligence as any other person. Plaintiff's own testimony shows, beyond any question, that he knew the injury now complained of was likely to result to him if he attempted to get off the engine while it was moving, or did not hold on tight. And he could not have known of this danger of injury as incident to jumping off without knowing also how to avoid it by not jumping or attempting to get off. We think plaintiff was guilty of contributory negligence upon his own testimony. Payne v. Ry. Co. (Mo.) 30 S. W. 148; Merryman v. Ry. Co., 85 Iowa, 634, 52 N. W. 545. That plaintiff's act led directly to his injury cannot be questioned. In view of this conclusion, there being in the petition no theory of recovery stated to which plaintiff's contributory negligence would not operate as a bar, the proper disposition of the case is to reverse the judgment and to render judgment here in favor of appellant.

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What has been said disposes, in effect, of all the assignments of error, except the first assignment, which complains of the admission of certain testimony, which could hardly have had the effect of misleading any intelligent jury.

Reversed and rendered.

MALONEY MERCANTILE CO. v. JOHNSON COUNTY SAVINGS BANK.

(Court of Civil Appeals of Texas. June 12, 1909. Rehearing Denied Oct. 23, 1909.)

1. CORPORATIONS (§ 599*) — DISSOLUTION — FAILURE TO PAY FRANCHISE TAX.

That a corporation's right to do business had been forfeited for failure to pay franchise tax as required by Rev. St. 1895, art. 5243i, as amended by Laws 1905, p. 21, c. 19, and continued in Laws 1907, p. 502, c. 23, did not destroy its corporate existence, though it assigned its assets, and ceased to do business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2398; Dec. Dig. § 599.*]

2. CORPORATIONS (§ 630*)—CORPORATE POWERS —RIGHT TO DEFEND.

Rev. St. 1895, art. 5243i, as amended by Laws 1905, p. 21, c. 19, and continued in Laws 1907, p. 502, c. 23, makes any corporation which fails to pay the franchise tax liable to a penalty, and forfeits its right to do business, and provides that any corporation whose right to do business has been forfeited may not sue or defend, and, in a suit against it on a cause of action arising before the forfeiture, no affirmative relief may be granted it unless its right to do business is revived. *Held* that, as the common-law right to defend should not be denied except upon the clearest necessity, the inhibition against affirmative relief would be construed as implying that defensive relief might be granted, so that, in an action upon bills of exchange against a corporation whose right to do business has been forfeited, it could be heard upon its plea of non est factum and other purely defensive relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2482; Dec. Dig. § 630.*]

Appeal from Erath County Court; M. J. Thompson, Judge.

Action by the Johnson County Savings Bank against the Maloney Mercantile Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. B. Keith, for appellant. W. H. Garrett, for appellee.

CONNER, C. J. This is a suit by appellee instituted on January 28, 1908, to recover $380 with interest upon four accepted bills of exchange dated January 12, 1907, alleged to have been drawn by the Puritan Manufacturing Company for $95 each on the appellant corporation, and to have been transferred to appellee in due course of trade before maturity. An answer was filed first suggesting that the suit be dismissed upon the ground that appellant was a domestic corporation, and that, as shown by affidavit and certificate of the comptroller attached as exhibits to the answer, its right to do business in this state had been duly forfeited the preceding July. The answer, however, in event the suggestion was overruled, further presented a duly verified plea of non est factum and a special plea setting up fraud and want of consideration for the acceptances, alleging that appellee was a purchaser, if at all, with full notice, etc. The court refused to adopt the suggestion, but on motion struck out the answer, and rendered judgment for appellee upon the acceptances which had been read in evidence.

The fact that appellant's right to do business had been forfeited because of the continued failure to pay its franchise tax as provided by article 5243i of the Revised Statutes of 1895, as amended by Gen. Laws 1905, p. 21, c. 19, and continued in Laws 1907, p. 505, c. 23, did not destroy a corporate existence not shown to have been otherwise terminated. The court therefore did not err in refusing to dismiss the suit, notwithstanding the appellant corporation may have assigned its assets and ceased to do business as alleged. See Moseby v. Burrow, 52 Tex. 396; Beach on Corporations, par. 50; Rippstein v. Haynes Medina Valley Ry. Co. (Tex. Civ. App.) 85 S. W. 314, and authorities therein cited.

The action of the court in striking out appellant's answer, however, raises a more difficult question. Rev. St. 1895, art. 5243i, as amended, provides that any corporation, domestic or foreign, which shall fail to pay the franchise tax imposed by that article at the time specified therein (May 1st of each year), shall immediately become liable to a penalty of 25 per cent. of the amount of tax due by it, "and, if the amount of said tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall, for such default, forfeit its right to do business in the state, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporation the word 'Forfeited,' giving the date of such forfeiture; and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this state, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such corporation unless its right to do business is revived, as provided in article 5243j." It is undisputed that appellant never "revived" its right to do business after the forfeiture of such right in July, 1907; but it is to be observed that the cause of action upon which appellee based this suit is one "arising before such forfeiture," and as to such causes of action we are of opinion that a proper construction of the law quoted does not preclude a trial upon appellant's said special de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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fenses. We have not been cited to any authority in point, but the natural and common-law right to defend is not to be denied, if indeed it can be, save upon the clearest necessity, and we see no reason for the Legislature to have distinguished between causes of action arising before and after forfeiture unless it was intended that a denial of the right to defend should be limited to causes of action accruing after the forfeiture. The statute declares that, "on a cause of action arising before such forfeiture, no affirmative relief may be granted." Adopting a familiar rule of construction, the declaration that no affirmative relief may be granted implies that the restriction shall not be extended beyond this, and that therefore other relief purely defensive as here presented, may be granted in such cases. It follows that in our opinion appellant was entitled to be heard upon its pleas of non est factum, etc., and that the court erred, as assigned, in striking out such pleas.

Judgment reversed, and cause remanded.

DURHAM v. BREATHWIT.

(Court of Civil Appeals of Texas. July 3, 1909. Rehearing Denied Oct. 23, 1909.)

1. SPECIFIC PERFORMANCE (§ 120*)—DEFENSES—ABANDONMENT—EVIDENCE.

Where, in a suit for specific performance, one of the defenses was that plaintiff abandoned the contract prior to the trial, evidence of plaintiff's possession and the construction of his improvements on the property was admissible on that issue.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 384; Dec. Dig. § 120.*]

2. APPEAL AND ERROR (§ 1050*)—EVIDENCE—HARMLESS ERROR.

In a suit for specific performance of a contract to convey land, evidence of the possession of the property by plaintiff's assignor at the date the contract was executed was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

3. SPECIFIC PERFORMANCE (§ 121*)—DEFENSES—INABILITY TO PERFORM—EVIDENCE.

Where defendant had contracted to convey certain property, and to procure a release of certain vendor's lien notes or submit proof of payment, his mere statement that he could not procure such notes or produce evidence of payment was insufficient to establish his defense that it was impossible for him to do so, and thereby perform his contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 395; Dec. Dig. § 121.*]

4. SPECIFIC PERFORMANCE (§ 13*)—DEFENSES—IMPOSSIBILITY OF PERFORMANCE.

Where a vendor had voluntarily agreed to procure a release of certain liens or show statutory evidence of payment, it was no defense to a suit for specific performance that it was impossible for him to perform such obligation; performance thereof not being prevented by act of God or through any fault of plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 30; Dec. Dig. § 13.*]

5. SPECIFIC PERFORMANCE (§ 92*)—RIGHTS OF PURCHASER—WAIVER.

Where a vendor had been unable to obtain certain outstanding vendor's lien notes or show proof of payment as agreed, plaintiff's waiver of such requirement on the trial of a suit for specific performance was in time.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233–244; Dec. Dig. § 92.*]

6. SPECIFIC PERFORMANCE (§ 7*)—WAIVER—PREVIOUS REFUSAL TO ACCEPT PERFORMANCE.

Plaintiff's refusal to accept a vendor's offer to convey the land without obtaining the release of certain vendor's liens which he had contracted to satisfy was no defense to plaintiff's subsequent suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 13; Dec. Dig. § 7.*]

7. SPECIFIC PERFORMANCE (§ 7*)—WAIVER OR ABANDONMENT OF RIGHT.

Where a suit in trespass to try title which was subsequently turned into a suit for specific performance was instituted to clear the title under an agreement between plaintiff and defendant's agent, and not with the intention of repudiating the contract of sale, the filing of the suit in trespass to try title was no defense to plaintiff's subsequent right to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 12, 15; Dec. Dig. § 7.*]

8. VENDOR AND PURCHASER (§ 207*)—ASSIGNMENT OF CONTRACT BY PURCHASER.

A contract for the sale of land to a purchaser in possession vested in him rights which he could lawfully transfer to another.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 423; Dec. Dig. § 207.*]

9. SPECIFIC PERFORMANCE (§ 131*)—VERDICT—JUDGMENT.

Where, in a suit for specific performance, a depositary of the deed and money was made a party as a stakeholder, a verdict "We, the jury, find for plaintiff," was sufficient to authorize a judgment disposing of all the issues as between all the parties, including the stakeholder.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 426; Dec. Dig. § 131.*]

Appeal from District Court, Palo Pinto County; J. H. Arnold, Judge.

Action by J. L. Breathwit against S. C. S. Durham. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Ritchie, A. Stevenson, and W. P. Smith, for appellant. J. H. Eaton and Gross & Allen, for appellee.

DUNKLIN, J. J. L. Breathwit recovered judgment for two acres of land against S. C. S. Durham, who has prosecuted this appeal. Originally the suit was in the form of trespass to try title, but by amendment was changed to one for specific performance of a contract to convey the property. The contract pleaded was in writing, and signed by defendant Durham and W. B. McCall. It obligated Durham to convey the property to McCall, and to procure a release of certain outstanding vendor's lien notes against the property in favor of Henry A. Lynn, or to furnish satisfactory evidence that those notes had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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been paid, and also to procure from Caroline Landers or her heirs or assigns such title to the land as she or they might have. At the time of the execution of the contract, the purchase price of $200 was deposited by McCall with the bank, and Durham deposited with the bank a deed to the property in favor of McCall, and the contract stipulated that the bank should pay over the money to Durham, and deliver the deed to McCall whenever Durham should procure a deed to the Landers interest in the property, and should obtain a release of the lien notes or furnish satisfactory evidence of their payment. It was further stipulated in the contract that John H. Eaton, an attorney, should pass on the title to the property, and that, when it should appear to him that Durham was unable to perfect the title, on Eaton's written statement of that fact the bank should return the deed to Durham and the $200 to McCall. Before the institution of the suit, W. B. McCall transferred to J. L. Breathwit all the interest he had in the land by virtue of said contract. I. N. Wynn, who seems to have been the cashier of the Bank of Mineral Wells, and the person with whom the purchase price of the property and the deed from Durham to McCall were deposited, was a party to the suit as stakeholder, and the judgment decreed that he should deliver the deed executed by Durham in favor of McCall to the plaintiff, and should also pay over the $200 deposited with him to defendant Durham.

By his first three assignments appellant complains of the admission of testimony of witness F. L. Deal to the effect that W. B. McCall was living on the land at the time of the execution of the contract, and that subsequent to the execution of the contract and the assignment of McCall's interest therein to the plaintiff the plaintiff entered upon the land and made certain improvements thereon. One of the defenses made by Durham was that Breathwit abandoned the contract prior to the trial, and we think that the evidence of his possession and improvements of the property was admissible upon that issue. The evidence of McCall's possession of the property at the date of the execution of the contract was harmless.

On or about April 12, 1906, appellant, who resided out of the state, wrote to his agent Barber in Mineral Wells that the lien notes were probably destroyed in the Galveston flood, where they were kept on that occasion, as he had never heard of the notes since that time, and requested Barber to get a settlement of the contract as he either wanted the money for the property or else the return of his deed. Barber informed John H. Eaton, the attorney, of the contents of this letter, and Eaton replied that he would require the notes or a release of them before he could pronounce the title acceptable, and that Durham must show payment of the lien notes before he could get the $200 deposited with the bank. Appellant insists that the evidence shows that it was impossible for Durham to procure a release of the lien notes or to make satisfactory proof of their payment, and, by reason of that fact, the contract to convey the property was terminated, and Durham's obligation to convey it discharged. Other than the statements of Durham contained in his letter to Barber and above mentioned, appellant does not cite us to any evidence in the record to show that it was impossible for Durham to procure a release of the lien notes, and, even if such a theory of defense be correct, we do not think that that evidence was of such a conclusive nature of impossibility to procure such a release as to sustain appellant's contention in his fourth assignment that the court should have instructed a verdict in favor of the defendant, or his other proposition contained in his fifth assignment, that, at all events, the verdict should have been set aside. Furthermore, Durham had contracted to procure a release of the liens or to show satisfactory evidence of the payment of the notes, and we think his contention that it was impossible for him to perform that obligation is no defense to plaintiff's suit; his obligation being voluntarily assumed, and his performance thereof not being prevented by the act of God or through any fault of the plaintiff. Frichott v. Nowlin (Tex. Civ. App.) 50 S. W. 164; Fruin v. Crystal Ry. Co., 89 Mo. 397, 14 S. W. 557; 9 Cyc. 625, 626, 627.

The vendor's lien notes outstanding against the property in favor of Lynn were never paid off, but upon the trial the plaintiff waived the payment of the same, and agreed that Durham have judgment for the $200 deposited by McCall with Wynn; plaintiff having theretofore procured a deed from Landers at his own expense of $150. Appellant insists that, as plaintiff had not offered to make the same waiver prior to the institution of the suit, such offer came too late thereafter. This contention is based upon the further contention that it was impossible for Durham to procure a release of the lien or to furnish satisfactory evidence thereof, and, the latter contention being unsound, the former is overruled for that reason, and for the further reason that, if at any time plaintiff had been required to waive this obligation of Durham as a condition precedent to his right of recovery, an offer on his part to comply with that requirement upon the trial of the case would have been sufficient, at least in the absence of some circumstances, to show that time was of the essence of the contract. Kalklosh v. Haney, 4 Tex. Civ. App. 118, 23 S. W. 420; Ward v. Worsham, 78 Tex. 180, 14 S. W. 453; Spann v. Sterns' Adm'rs, 18 Tex. 565; 4 Pom. Eq. § 1407.

By his ninth assignment appellant insists that the uncontradicted evidence shows that prior to the suit for specific performance the defendant offered to deliver the deed upon pay-

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ment of the $200 named in the contract, provided plaintiff would waive the requirement as to securing the release of the lien notes, that the offer was refused, and therefore plaintiff could not recover. If the proposition presented by this assignment is based upon the contention of alleged impossibility of performance by Durham, it is answered adversely to appellant by what we have above said. Otherwise, its effect would be to say that if Durham offered to do less than he was bound to do by the contract, and if this offer was refused by the plaintiff, then the contract was terminated, and plaintiff's right to recover defeated by reason of said refusal. This would clearly be incorrect.

By other assignments appellant contends that Breathwit repudiated the contract by first filing this suit in trespass to try title. The testimony of the witness Eaton, the attorney named in the contract, was to the effect that this suit as originally brought was for the purpose to clear up the title, and that it was instituted by agreement with Barber, Durham's agent, and not for the purpose of repudiating the contract, and the issue as to whether or not such action on the part of the plaintiff was a repudiation of the contract upon which the suit finally went to trial was fairly submitted to the jury by the court for their determination, and their finding thereon contrary to appellant's contention is amply sustained by the evidence.

The court also correctly submitted to the jury the issue made by the defense that plaintiff abandoned the contract, and there was ample evidence introduced to sustain the verdict in plaintiff's favor upon that issue.

Under another assignment, the following proposition is made by appellant: "The contract of sale, being only executory, and being in escrow with I. N. Wynn, and plaintiff being aware of that fact, could not and did not acquire any rights under said contract." No authorities are cited in support of this proposition. The contract certainly vested in McCall certain rights which we think were subject to be lawfully transferred by him.

The verdict of the jury was as follows: "We, the jury, find for the plaintiff." Read in the light of the charge, which submitted the issues made between all the parties to the suit, the verdict was sufficient to authorize the judgment rendered disposing of all the issues as between all the parties, and appellant's fifteenth assignment, asserting that under such verdict no judgment could be rendered as to the defendant, I. N. Wynn, is overruled. Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975; Evans v. Gray, 38 Tex. Civ. App. 442, 86 S. W. 375; Hamilton v. Rice, 15 Tex. 385.

We find no error in the record, and the judgment is affirmed.

CONNER, C. J., not sitting.

HEDRICK v. KILGORE.†

(Court of Civil Appeals of Texas. July 3, 1909. Rehearing Denied Oct. 16, 1909.)

1. APPEAL AND ERROR (§ 494*)—DECISIONS REVIEWABLE—NECESSITY OF FORMAL ORDER.

Where the record on appeal does not show any order made on an application for a continuance, alleged error in overruling the application will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2286; Dec. Dig. § 494.*]

2. ADVERSE POSSESSION (§ 116*) — ACTIONS — INSTRUCTIONS.

In trespass to try title, where defendant claimed under 10-year limitations, and the evidence was sharply conflicting as to whether defendant claimed adversely any land beyond his original inclosure, an instruction that the fencing and possession of some 12 acres, in connection with defendant's adjoining tract, did not support a claim under 10-year limitations to the land beyond that fenced, unless such fencing, in connection with defendant's acts with reference to the land, was sufficient to put a reasonably prudent person on notice that defendant claimed title to all the land, was proper, and not beyond the terms of Sayles' Ann. Civ. St. 1897, arts. 3343, 3344, providing when 10 years' adverse possession shall be a bar and what such possession shall embrace.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

3. TRIAL (§ 252*) — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In trespass to try title, where defendant claimed by limitations, a charge that the inclosure of a tract claimed would be sufficient, notwithstanding temporary breaks in the fence, if enough was left to give notice of defendant's adverse claims, was properly refused where the evidence did not show any break in the only fence constructed by defendant before the period of limitations began to run.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by Fannie Y. Kilgore against J. W. Hedrick. From a judgment in part for plaintiff, defendant appeals. Affirmed.

Nicholson & Fitzgerald, for appellant. Ben L. Cox, for appellee.

DUNKLIN, J. On July 1, 1908, Mrs. Fannie Y. Kilgore filed suit in trespass to try title against J. W. Hedrick to recover 285 acres of land situated in Jack county. Upon the trial the only controverted issue was the defense of 10-year limitation urged by Hedrick. Upon this plea 12⅝ acres of the land was decreed to him, but plaintiff recovered judgment for the remainder of the tract in controversy, and from this judgment in her favor defendant has appealed.

There is no merit in appellant's first assignment of error, complaining of the action of the court in overruling his application for continuance, as the record fails to show any order made by the court upon that application.

The defendant owned land adjoining plain-

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† Writ of error denied by Supreme Court.

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tiff's tract on its west boundary, and in fencing his land he also inclosed by the same fence the 12⅝ acres which he recovered, and which consisted of a strip off the west side of plaintiff's tract. Defendant testified that he thus encroached upon Mrs. Kilgore's land with the intention at the time of acquiring title by limitation to the entire tract of 265 acres. He also introduced testimony tending to support his contention that subsequently he inclosed all the land in controversy, and held peaceable, adverse, and continuous possession thereof under that inclosure, claiming title thereto, and using and enjoying the same for more than 10 years next before the institution of the suit. The court submitted the issue of limitation of 10 years as to the entire tract, and also as to 160 acres, including the 12⅝ acres recovered by defendant in accordance with articles 3343, 3344, Sayles' Ann. Civ. St. 1897. In submitting defendant's plea of limitation to the 160 acres, including said 12⅝ acres, the jury was instructed that the fencing and possession of the 12⅝ acres in connection with defendant's adjoining tract would not support defendant's claim of title by limitation to land beyond the defendant's original inclosure, "unless such fencing and possession of said 12⅝ acres of land in connection with all the other acts and conduct of the defendant, if any, in reference to said land, were sufficient for 10 years next before the 1st day of July, 1903, to put a reasonably prudent person on notice that the defendant was claiming title to all the land." This instruction is assailed as going beyond the terms of the statutes above referred to, and as therefore imposing an unwarranted burden upon the defendant. The evidence as to whether or not defendant asserted an adverse claim to any land beyond his original inclosure was sharply conflicting, and there was no error in the instruction. The case of Titel v. Garland, 99 Tex. 201, 87 S. W. 1152, was similar to this. In that case August Titel in inclosing his own land also by the same fence inclosed 12 acres adjoining belonging to Garland, and afterwards claimed title by limitation to 160 acres of Garland's land, including the 12 acres fenced. In the opinion rendered in that case Chief Justice Gaines of our Supreme Court, discussing Titel's claim of limitation to the 160 acres, said: "It would seem that, when one proposes to hold the land of another which he has neither occupied nor inclosed by virtue of the statutes of limitation, it should appear that he has exercised some acts of ownership over some definite part thereof calculated to apprize the owner that he is asserting 'a claim of right' thereto, and the extent of that claim." See, also, article 3349, Sayles' Ann. Civ. St. 1897; Webb v. Lyerla, 43 Tex. Civ. App. 124, 94 S. W. 1095; Bracken v. Jones, 63 Tex. 184.

By his third assignment appellant complains of the court's refusal to give a special instruction to the jury requested by the defendant, in effect, that, even though there were breaks in the fence inclosing the entire tract in controversy, still the inclosure would be sufficient within the meaning of the statutes of 10-years limitations if there was left standing a sufficient part of the fence to give notice to the world of defendant's adverse claim. The statement in appellant's brief following the assignment and in support thereof fails to show any evidence, nor have we found any, of a temporary break in the fence originally constructed as a whole. On the contrary, the testimony of three witnesses—Maxwell, Files, and Gibson—mentioned in the statement, was that the fence which defendant claims completed his inclosure of the entire tract in controversy was not erected until the summer of 1894, about nine years prior to the institution of the suit, and the testimony of Bloodworth, the only other witness mentioned in appellant's said statement, does not conflict with that of Maxwell, Files, and Gibson. The action of the court in refusing the requested charge was therefore correct.

There was ample evidence to support the verdict, and the court did not err in overruling defendant's motion for a new trial.

We find no error in the record, and the judgment of the trial court is affirmed.

WESTERN UNION TELEGRAPH CO. v. McDAVID.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 6, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*) — FAILURE TO TRANSMIT MESSAGE—ACTION—EVIDENCE.

In an action for failing to deliver a message announcing the illness of plaintiff's father, who died the next day, and was buried at 4 o'clock, evidence *held* to sustain finding that she could have been in time to attend the funeral had the message been delivered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 71*) — FAILURE TO TRANSMIT MESSAGE—EXCESSIVE DAMAGES.

There is no fixed rule for measuring damages for failure of a telegraph company to deliver a message, by reason of which a sendee is prevented from attending a relative's funeral, and it must clearly appear that the amount allowed is excessive before it will be disturbed on appeal.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 74; Dec. Dig. § 71.*]

3. TELEGRAPHS AND TELEPHONES (§ 71*) — FAILURE TO DELIVER MESSAGE—ACTIONS—EXCESSIVE DAMAGES.

At the death of plaintiff's father, she had not seen him for several years. He had formerly lived with her. After he left plaintiff's home there was no correspondence between them, and they never visited each other, with one exception, but she corresponded regularly with her

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brother, and through him heard from her father, who was 81 years old when he died. It appeared that plaintiff was on good terms with her father. Through the failure of defendant telegraph company to deliver a message announcing his illness, she was prevented from attending his funeral. *Held*, that $1,350 damages was not excessive.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 74; Dec. Dig. § 71.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*) — FAILURE TO DELIVER MESSAGE — INSTRUCTIONS.

In an action for failure of a telegraph company to deliver a message, where it was agreed that 30 minutes was a reasonable time within which to transmit the message, and the evidence showed that defendant received the message for transmission about 4 o'clock p. m., while the train, which plaintiff testified that she would have taken had she received the message, was not due to leave her home until 11:55 p. m., and the court charged that defendant would be liable for any damages resulting from the failure to deliver the telegram within a reasonable time, a failure to charge defining "reasonable time" was not error, especially where defendant did not request such a charge.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by J. E. McDavid against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Fearons, Ed J. Hamner, and N. L. Lindsley, for appellant. Wagstaff & Davidson, for appellee.

DUNKLIN, J. A judgment was rendered in favor of J. E. McDavid against the Western Union Telegraph Company for the sum of $1,350 as damages resulting from the alleged negligence of the defendant in failing to transmit and deliver the following telegram to plaintiff's wife, to wit: "Newark, Texas, January 11, 1908. To Mrs. J. E. McDavid, Abilene, Texas. Father is ill. Little chance for his recovery. [Signed] E. J. Rust." Mrs. J. E. McDavid was the sister of E. J. Rust, who was residing at Newark at the time the telegram was delivered to the defendant. Her father was ill at the home of her said brother, and died January 12, 1908, at 8 o'clock a. m., and was buried on the same day at 4 o'clock p. m. The telegram was delivered for transmission to defendant's agent at its office at Newark, Tex., about 4 o'clock p. m. on January 11, 1908, but it was never received at Abilene by plaintiff or his wife. The defendant also had an office and agent in Abilene, Tex., with a telegraph line between Newark and Abilene. Upon the trial it was agreed that 30 minutes was a reasonable time in which to send the message from Newark to Abilene. Plaintiff and his wife resided in the town of Abilene. It was also proved that a train left Abilene for Ft. Worth on January 11th at 11:55 p. m., which was due to arrive in Ft. Worth at about 7 o'clock a. m. of January 12th. Newark is situated about 20 miles from Ft. Worth. The Rock Island railroad runs from Ft. Worth to Newark, and a train from Ft. Worth to Newark over that road was scheduled to leave Ft. Worth about 15 or 20 minutes after the train from Abilene above mentioned was due to arrive in Ft. Worth. There was also testimony that the Rock Island train was scheduled to reach Newark about 8 o'clock in the morning. Mrs. McDavid testified that if the message had been delivered to her in time for her to have taken the train leaving Abilene at 11:55 p. m., she would have left on that train, and would have gone to her brother's home, and would have been present at the funeral. She did not learn of her father's death until after his burial. No testimony was offered to show when the train leaving Abilene at 11:55 p. m. on January 11th reached Ft. Worth, and appellant contends that, in the absence of such proof, there was no basis for a finding by the jury that Mrs. McDavid by taking the 11:55 p. m. train at Abilene could have reached Newark in time to attend her father's funeral. In the absence of testimony to the contrary we think the jury were warranted in assuming that the two trains ran on schedule time on the occasion in controversy, and appellant's first assignment is accordingly overruled.

By its second and third assignments of error complaint is made that the verdict and judgment was excessive. At the time of his death Mrs. McDavid had not seen her father for several years. He had formerly lived with her, but later lived with other members of his family. After he left plaintiff's home there was no correspondence between Mrs. McDavid and her father, and they never visited each other, with the exception of one visit by her to her father, but she corresponded regularly with her brother, and through him heard from her father, who was 81 years old at the time of his death. There was no evidence of unkind feelings between Mrs. McDavid and her father, but the testimony was that she was on good terms with him. In support of appellant's contention that the verdict and judgment was excessive but one case is cited—Telegraph Co. v. Bouchell, 28 Tex. Civ. App. 23, 67 S. W. 159. In that case a verdict was rendered in favor of the plaintiff for $1,250 as damages for the negligent delay in delivering a telegram, as a result of which delay Mrs. Bouchell was deprived of the privilege of being with her father about 3½ hours before his death, during which period her father was in an unconscious condition. She was present, however, at his funeral. In that case this court required a remittitur sufficient to reduce the judgment to $500. There is no fixed rule for measuring the damages to be allow-

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ed in such cases, owing to varying conditions and circumstances, and the jury being the exclusive judges of the facts, it must clearly appear that the amount allowed is excessive before this court would be authorized to disturb the verdict upon that objection. We have carefully examined the evidence; and, while the amount of the verdict seems somewhat large, we cannot say that it is excessive, and therefore the applicant's assignments raising that objection are overruled. Tel. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79; Tel. Co. v. Houghton (Tex. Civ. App.) 26 S. W. 448; Tel. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66; Tel. Co. v. Broesche, 72 Tex. 659, 10 S. W. 734, 13 Am. St. Rep. 843; Tel. Co. v. Adams, 75 Tex. 536, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Tel. Co. v. Rosentreter, 80 Tex. 419, 16 S. W. 25; Tel. Co. v. Lydon, 82 Tex. 366, 18 S. W. 701.

By its fourth assignment of error complaint is made that the court, after charging the jury in effect that defendant would be liable for any damages resulting from a failure to deliver the telegram within a reasonable time, failed to define the meaning of the expression "reasonable time." It having been agreed upon the trial, as above noted, that 30 minutes was a reasonable time within which to transmit the message to appellee, and the proof showing that the defendant received the message at Newark for transmission about 4 o'clock p. m. while the train which Mrs. McDavid testified she would have taken was not due to leave Abilene until 11:55 p. m., and defendant having failed to request a charge defining "reasonable time," this assignment is overruled.

We find no error in the record, and the judgment is affirmed.

WEATHERRED et al. v. FINLEY.

(Court of Civil Appeals of Texas. July 8, 1909. Rehearing Denied Oct. 23, 1909.)

1. CONSPIRACY (§ 21*)—CIVIL DAMAGES—INSTRUCTIONS.

Where W. agreed as plaintiff's agent to procure for her a proper investment in western lands, and there was evidence that he conspired with the other defendants to defraud plaintiff by selling her land at a price far in excess of its value, and that all of defendants jointly and severally made false representations and jointly and severally acted in the accomplishment of the swindle, whether W. acted as agent of plaintiff or as defendant M.'s agent, and whether there was a conspiracy between W. and M., was immaterial to plaintiff's right to recover, and hence the court did not err in refusing to charge that if defendant P. was not a party to the fraud or had not conspired, or if W. was not plaintiff's agent, the jury should find for the defendants.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 21.*]

2. TRIAL (§ 193*)—INSTRUCTIONS.

An instruction that the court had admitted evidence of acts and declarations of two of the defendants only on the theory that they were conspirators with defendant W., but that the court in doing so meant only that sufficient evidence of a conspiracy had been offered to permit the evidence to go to the jury because it was for the jury alone to determine on the facts whether there was a conspiracy, was not objectionable as indicating to the jury that in the court's opinion the evidence on the issue of conspiracy was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. § 196.*]

3. TRIAL (§ 194*)—CONSPIRACY (§ 21*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action for conspiracy to sell plaintiff certain property at an excessive price, she testified that as a condition to the purchase she insisted that she would have to sell some other property, and that defendant W. assured her that the property could be sold to P., who was interested, and that after the completion of her purchase she sold certain of her property to P., a requested charge that the conspiracy was completed, if at all, when the deeds were made to the property sold to plaintiff, was properly refused as on the weight of the evidence and as misleading the jury to disregard or minimize P.'s subsequent purchase as affecting the original transaction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439–441, 446–454; Dec. Dig. § 194;* Conspiracy, Dec. Dig. § 21.*]

4. CONSPIRACY (§ 19*)—EVIDENCE.

In an action for conspiracy to defraud plaintiff by inducing her to purchase certain property at an excessive price, evidence *held* sufficient to sustain a finding that defendant P. was connected with, and was a party to, the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 19.*]

Appeal from District Court, Midland County; Jas. L. Shepherd, Judge.

Action by Fannie Finley against T. B. Weatherred and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Cunningham & Oliver, Caldwell & Whitaker, J. W. Moffett, and Theodore Mack, for appellants. Hawkins & Hackett, for appellee.

CONNER, C. J. Appellants T. P. Weatherred, W. A. Meador, and J. N. Porter have appealed from a judgment against them in appellee's favor for the sum of $2,994. Appellants have severally presented briefs assigning various errors, most of which are common to all, but we think it sufficient to say in answer to the assignments of appellants Weatherred and Meador that the case made against them by both appellee's pleading and evidence is that of a simple swindle, in which both alike acted in the accomplishment of a certain purpose to appellee's damage.

Appellee alleged, among other things, in substance, that she was a widow residing at Abilene, desirous of investing in western lands; that appellant Weatherred was engaged in the real estate business in the town of Midland, and that he agreed to act for her as her agent, and to advise her in making investments, and to procure for her lands at

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full knowledge of the fact that said Weatherred was plaintiff's trusted agent, induced Weatherred to disregard his duty to plaintiff, and induced him to enter into an unlawful combination and conspiracy for the purpose of defrauding and swindling her; that the appellants jointly and severally represented to her that W. A. Meador was at the time the owner of a large body of land, consisting of four sections in block 39, which he was extremely anxious to sell; that said defendants represented that Meador had purchased said land prior thereto for the sum of $13,000, since which time real estate values in that portion of the state had advanced; that Meador was desiring to move to a different part of the state and engage in other business, and that his wife was in exceedingly bad health, and for this and other reasons he would sell said lands to plaintiff for the sum of $15,360; that Weatherred and Meador, with the connivance and consent of their co-conspirator, Porter, represented that said land at the price named, to wit, $15,360, was a great bargain for plaintiff; that said price was the lowest possible price for which said land or other land of like character could be purchased, and that the same was really worth vastly more than the sum of $15,360. Plaintiff charged that said representations were false, but that nevertheless she, relying thereupon, agreed to purchase the lands, after which Meador and Weatherred bought the land from the real owner for the sum of $5,120, which was not more than its real value, taking deed thereto in the name of Meador, and then transferred the same to plaintiff for the sum of $15,360, which she paid in cash and notes in ignorance of the true facts.

Appellee's testimony fully supported her allegations in respect to the representations and acts of appellants Weatherred and Meador, and, if believed by the jury, which was evidently done, it is immaterial whether Weatherred in representing and acting as he did was Meador's agent or that of appellee. It is likewise immaterial that there was a conspiracy between Meador and Weatherred. Both by allegation and proof they jointly and severally made false representations, and jointly and severally acted in the accomplishment of the swindle, and there was no error, therefore, in the court's action in refusing special instructions to the effect that if Porter was not a party to the fraud, or had not conspired, or if Weatherred was not appellee's agent, that the jury should find for appellants.

All appellants urge that the court erred in giving the following portion of paragraph 3 of the general charge to the jury, viz.: "The court has admitted before you evidence evidence of a conspiracy was offered to permit the evidence to go before you." It is objected that this charge is upon the weight of the testimony, and indicated to the jury that in the opinion of the court the evidence on the issue of conspiracy was sufficient. We are of opinion, however, that no error was committed in this respect. Reading paragraph 3 as a whole, it clearly appears that the issue of conspiracy was left solely to the jury's determination. Immediately following the words quoted, without punctuation or break in the sense, the charge reads: "because it is for you alone to determine upon the facts in evidence whether there was any conspiracy." It was the evident purpose of the paragraph to merely explain the circumstances under which the jury might consider or not certain acts and declarations of named conspirators. In the case of Luttrell v. State, 31 Tex. Cr. R. 493, 21 S. W. 248, a judgment assessing the death penalty for murder was affirmed, and in that case objection was made to a charge almost identical with that above quoted, the only change being in words necessary to its adaptation in this case. It was there said that: "It was the duty of the judge to tell the jury that, though he had received the evidence (acts and declarations of conspiracy), yet they had the right to determine whether in fact a conspiracy had been established, and, if not established, not to consider as evidence against appellant the acts and declarations of Carlisle, Fogg, and Poe. This duty was performed in plain and simple language, which could not have been misunderstood by the jury." The assignment under consideration is overruled.

The appellant Porter assigns error to the court's refusal to give the following special instructions: "In this case the defendant Porter is charged in plaintiff's pleadings with having conspired, together with defendant Meador and defendant Weatherred, in selling to the plaintiff the four sections of land described in plaintiff's pleadings. This transaction was completed when the deeds were made to the four sections of land to Mrs. Finley on July 10, 1907. Now, if you find from the evidence that the defendant Porter was during the time of the making and completing of said sale of said land at his ranch in Crane county, and that he was not present when said sale was made, and that he did not see or talk with the plaintiff, Mrs. Fannie Finley, or defendant Meador, or defendant Weatherred, during the time when this trade was being made and consummated, and that he had nothing to do with said transaction, then you will find a verdict for the defendant Porter, and the fact that said defendant Porter afterwards purchased Mrs.

Finley's houses in Abilene from her or from her agent would in no wise make this defendant liable in this suit for anything whatever." While in the court's general charge the jury were authorized to find a verdict against appellant Porter in event only of a finding that he had conspired together with Weatherred and Meador, there was no affirmative direction to find in Porter's favor in event the jury found that he was not a party to the conspiracy. There is no objection, however, to such omission, and the assignment objecting to the special charge above quoted must be overruled. As a part of the appellee's evidence offered on the issue of conspiracy, she testified that at the time of the Midland purchase she insisted that she would be unable to complete it unless she could sell some Abilene property, and that Weatherred assured her that it could be sold to Porter; that Porter was interested, had been there, and so told him, etc.; that after the completion of the Midland sale Porter in fact did purchase the Abilene property. The special charge, therefore, we think was upon the weight of the testimony in instructing the jury that the "transaction was completed when the deeds were made to the four sections of land to Mrs. Finley on July 10, 1907," and was further objectionable as tending to lead the jury to disregard or minimize the weight to be given to the fact of Porter's subsequent purchase of the Abilene property. If, as a material part of the original purpose of the conspirators, the purchase of appellee's Abilene property was to be made by Porter, then the "transaction," viz., the conspiracy, was not completed in all of its parts until that was done.

Appellant Porter further earnestly insists that the evidence fails to support the judgment against him, and that a requested peremptory instruction in his favor should have been given. We have finally concluded, however, that we cannot sustain the contention. It is true that aside from declarations of Weatherred there is no direct testimony that Porter had any connection with the fraudulent acts charged prior to the time when the Midland sale to appellee was completed by the execution and delivery of transfers, etc. But there is no dispute of the fact that after the Midland sale Porter purchased appellee's Abilene property, and in doing so was permitted to use as part of the purchase price to be by him paid $2,500 of the notes appellee had given to Meador in the Midland transaction. While Porter testified that he refused to give more than $3,000 for the Abilene property, and that the notes were secured by Weatherred, to whom he paid therefor $1,500 in cash, and Weatherred, Meador, and Porter all testified that Porter had no connection with the Midland deal, there is much evidence on the part of appellee and of her daughter showing that soon after the Midland sale she became dissatisfied and that Porter engaged actively in the effort to have the complaint adjusted. She testified that, among other things, Porter said to her: "'Now, Mrs. Finley, * * * you come on up here and I will see that you get some money.' I had made complaints previous to that time about money. I was after them all the time. I was writing them and seeing them in person all the time. * * * He (Porter) says, 'Well, let Tom Weatherred go, and I will see that you get your property and money back as good as you had before.' He would personally see that I got my property and money back. * * * He (Porter) said that him and Weatherred were going out to see Meador. He didn't say that Weatherred was going to do anything. He said that he would see that I got the money." There was other testimony of like effect, and the whole, we think, was in the nature of an admission of Porter's part that he had been interested in and a party to the transaction. His frequent and intimate conferences with Weatherred, his ability to control a part of the proceeds of the fraudulent sale, and his evident earnestness to effect a settlement, all at least tend to prove appellee's charge of conspiracy. True, the testimony was susceptible of an explanation consistent with his innocence, and his case may be but a modern illustration of the fabled story of "Poor Dog Tray," but it was for the jury to adopt that construction of the evidence that seemed to them most consistent with the truth, and, having found against appellant Porter on the issue, we do not feel that we can disturb their verdict.

All assignments are overruled, and the judgment affirmed.

PORTER et al. v. PECOS & N. T. RY. CO. et al.

(Court of Civil Appeals of Texas. June 18, 1909. Rehearing Denied Oct. 16, 1909.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTION OF DISMISSAL AS TO CERTAIN PARTIES.

Where several parties are sued and the judgment appealed from makes no mention of a part of them, and there is nothing in the record to show that they were ever served or answered, the court on appeal will presume that the suit was dismissed as to those parties, notwithstanding there is no judgment entry of the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.*]

2. APPEAL AND ERROR (§ 79*)—DECISIONS REVIEWABLE—FINAL JUDGMENT.

A judgment is final although some of the parties sued were not served and did not answer and therefore the judgment in the case makes no mention of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 487; Dec. Dig. § 79.*]

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3. PLEADING (§ 216*)—DEMURRER—MATTERS CONSIDERED UPON DEMURRER.

In considering a demurrer to a petition, only matters appearing on the face of the petition will be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 535; Dec. Dig. § 216.*]

4. COURTS (§ 289*)—FEDERAL COURTS—JURISDICTION—INTERSTATE COMMERCE.

In an action in a state court against a common carrier, the petition alleged that plaintiffs were the owners of goods at a place specified, in Oklahoma, and desired to ship them to a place named, in Texas, and that defendants agreed to carry them for 37 cents per hundred pounds; that the goods were carried by defendants to their destination, but that after their arrival one of the defendants, named, which had carried the goods in Texas only, refused to deliver the goods, notwithstanding the prepayment of the agreed rate and the offer to pay for the excess at the same rate, and that the goods were of a value stated, and that a defendant, named, had converted the goods. *Held*, that the petition does not raise a question as to interstate commerce, over which the federal courts alone have jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

Error from District Court, Deaf Smith County; J. N. Browning, Judge.

Action by G. H. Porter and others against the Pecos & Northern Texas Railway Company and others. Exceptions to amended complaint were sustained, and, plaintiffs declining to further amend, the suit was dismissed, and plaintiffs bring error. Reversed and remanded.

S. J. Dodson, for plaintiffs in error. Madden & Truelove, Turner & Boyce, Spoonts, Thompson & Barwise, J. M. Chambers, and Andrews, Ball & Streetman, for defendants in error.

CONNER, C. J. This suit was instituted in the district court of Deaf Smith county by plaintiffs in error G. H. Porter, B. M. Porter, and L. Cameron, against the St. Louis & San Francisco Railway Company, the St. Louis, San Francisco & Texas Railway Company, and the defendants in error the Ft. Worth & Denver City Railway Company and the Pecos & Northern Texas Railway Company, to recover, among other things, the alleged value of a car load of immigrant movables shipped from Fletcher, in Oklahoma, to Bovina, Tex. The trial court sustained general and special exceptions presented by defendants in error to plaintiffs in error's second amended original petition, and, they having declined to further amend, the suit was dismissed, to which action of the court exception was duly taken and an appeal perfected. No transcript on appeal, however, was ever filed in this court, but this writ of error was later prosecuted.

As preliminary to a determination of the merits, defendants in error suggest that the appeal should be dismissed on the ground, among other things, that there is no final judgment, in that the judgment fails to dispose of the St. Louis & San Francisco Railway Company and the St. Louis, San Francisco & Texas Railway Company. It is true that no mention is made of these railway companies in the judgment, but the suggestion is accompanied with the statement that "there is nothing in the record to show that the 'Frisco' was ever served or answered; and in fact there was neither service nor answer by that company." If so, and it is certainly true that there is nothing in the record showing that the "Frisco" Railway Companies were ever served or answered, we may indulge the presumption that the suit as to these companies was dismissed, notwithstanding there is no judgment entry of the dismissal. See Burton v. Varnell, 5 Tex. 139; Houston v. Ward, 8 Tex. 124. We cannot say, therefore, that at the time of the entry of the judgment from which the writ of error has been prosecuted the "Frisco" Railway Companies were before the court. If not, no necessity existed for a further adjudication as to them, so that on the whole we are unable to say that the judgment we are called upon to review in this case is not a final judgment.

The case on the merits seems to have been disposed of on the theory that the district court was without power to hear the controversy, in that it related to the question of rates, over which the Interstate Commerce Commission or the courts of the United States alone had jurisdiction. At least plaintiffs in error so present their case and defendants in error here so defend the action of the trial court; but while the answer of defendants in error presents this defense, it is not presented on the face of plaintiffs in error's amended petition to which the demurrers were addressed. On the face of the petition, which can alone be considered in determining whether the court properly sustained demurrers thereto, the allegations in substance are to the effect that plaintiffs in error were the owners of and desired to ship from Fletcher, Okl., to Bovina, Tex., certain immigrant movables, consisting of live stock, household goods, etc., in a car load lot, and that "the defendants agreed to carry said outfit from one of said points to the other for thirty-seven cents per hundred pounds." The petition further alleged, among other things, that the property specified had been carried from Fletcher, Okl., to Quanah, Tex., by the "Frisco" roads, and by the Ft. Worth & Denver City Railway Company, one of the defendants in error, from Quanah to Amarillo, and by the other defendant in error, the Pecos & Northern Texas Railway Company, from Amarillo to Bovina, but that after the arrival of the goods at Bovina, the latter-named railway company refused to deliver the goods, notwithstanding the prepayment of the agreed rate of 37 cents per hundred pounds and the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ceiver including the claim and demand of plaintiffs, and thereby said court expressly authorized the prosecution and maintenance of this suit against the receiver as well as its defense by him. It appears that there was no evidence introduced in reference to such an order of the Circuit Court. The proposition that it was necessary for plaintiffs to prove, as well as to allege, the authorization of the Circuit Court for the receiver to be sued on the cause of action, is sufficiently met by appellees with the proposition that it was not necessary to establish the allegation by evidence as the same related to plaintiffs' capacity to sue the receiver, and such matter is not required to be verified by proof when there is no sworn denial of it, under the procedure prescribed by our statute. The receiver was a proper party defendant. Railway v. Hurley, 10 Tex. Civ. App. 246, 31 S. W. 73. He stands in the place of the corporation with respect to the question of liability. McNulta v. Lochridge, 141 U. S. 339, 12 Sup. Ct. 11, 35 L. Ed. 796. The Circuit Court's order which was alleged, but not denied under oath, was for the purposes of the trial and judgment admitted to be as alleged. This disposes of all of appellant's propositions.

The petitions prayed that plaintiffs recover of the International & Great Northern Railroad Company the damages claimed, and that the amounts of the demands against the receivership be liquidated and established as such sums and for the costs of suit. The judgment as rendered is against the corporation alone, except in the matter of the costs, which clause of the judgment reads: "It is further ordered that the plaintiffs recover of the defendant International & Great Northern Railroad Company and of the defendant T. J. Freeman as receiver of the property of said company all costs herein to be paid in due course of the receivership of the property of said company." There is no proposition in appellant's brief complaining of this, but the brief mentions it as an error, in so far as it is a judgment against the receiver.

If error at all, it is in our opinion a mere formal and harmless one. The adjudication of the costs is against him as receiver of the corporation's property to be paid in due course of the receivership. This would have been the effect of the adjudication had it been against the corporation only, and had not professed to be against the receiver, and therefore we perceive nothing in this matter which prejudicially affects the receivership, or of which the receiver may justly complain.

The judgment is affirmed.

1. APPEAL AND ERROR (§ 742*)—STATEMENT UNDER PROPOSITIONS—REFERENCE TO EVIDENCE.

A statement under a proposition, which statement asserts that plaintiffs had no legal or equitable title to land on which a vendor's lien was claimed to secure notes sued on, and which does not point out any particular portion of the statement of facts to uphold the assertion except to refer to the entire statement of facts, is insufficient, as the appellate court will not search the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

2. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—STATUS BEFORE FORFEITURE.

Plaintiff was a settler on school lands, and sold the same to defendants, who gave him notes secured by a vendor's lien. The land was thereafter forfeited by the land office. In a suit on the notes, defendants set up a failure of consideration, in that plaintiff had no title to the land. *Held* that, though the lands were forfeited, the land before forfeiture was a subject of contract.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

3. PUBLIC LANDS (§ 173*) — LIEN NOTES — FAILURE OF CONSIDERATION—DEFENSE.

Held, also, that it is a good defense to the plea of failure of consideration that after forfeiture the land office recognized defendant's rights and reinstated the sale and awarded the land to defendant by reason of his purchase from plaintiff.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

4. BILLS AND NOTES (§ 524*)—INDORSEMENT—OWNERSHIP.

In a suit on notes, that some of the notes bore indorsement of plaintiff did not render such notes inadmissible in evidence where plaintiff claimed ownership, and, in the form in which the notes were, they could have been sued on by any possessor, as mere possession is presumptive evidence of ownership.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 524.*]

5. APPEAL AND ERROR (§ 758*)—BILL OF EXCEPTIONS—EVIDENCE.

An assignment in the brief complaining of the introduction of a land office copy of the classification and appraisement of lands in controversy, because of a specific indorsement, cannot be considered, where the bill of exceptions extends as well to the classification and appraisement, which were admissible in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 758.*]

6. APPEAL AND ERROR (§ 724*)—ASSIGNMENT OF ERRORS—SPECIFIC ERROR.

Assignments of error which fail to point out wherein the error lies will be disregarded as contrary to rules 24–26 (67 S. W. xv).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997–3001; Dec. Dig. § 724.*]

Appeal from District Court, Floyd County; L. S. Kinder, Judge.

Action by Henry Hobbs and another against J. T. Bynum on notes. From a judgment for plaintiffs, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Graham & Williams and J. B. Bartley, for appellant. Chas. E. Furr, T. F. Houghton, and H. C. Randolph, for appellees.

CONNER, C. J. Appellees Henry Hobbs and I. E. Gartin instituted this suit in the district court of Floyd county against appellant to recover upon three promissory notes for the sum of $762.50 each, with interest and attorney's fees as provided in the notes. It was alleged that the notes had been given by appellant, Bynum, as part of the consideration for certain school lands described in the petition, upon which the vendor's lien had been expressly retained to secure the payment of the notes. It was further alleged that before maturity Hobbs, the original payee, had for a valuable consideration duly assigned to appellee Gartin one of said notes.

Appellant, Bynum, among other things, pleaded that Hobbs had no title, legal or equitable, to any of the lands when he sold them; that therefore appellant had paid the sum of $1,000 in cash and given the notes sued upon; that because of the want of title there was an entire failure of consideration and absence of lien, and he pleaded a misjoinder of causes of action and parties, and also prayed for a cancellation of the notes and a recovery of the $1,000 paid by him, charging that Gartin was a purchaser with notice, etc. The trial resulted in a judgment for appellees.

The following is appellant's first assignment, proposition, and statement thereunder: "The trial court erred in not sustaining and in overruling appellant's plea in abatement based on alleged misjoinder of parties plaintiff herein." Proposition under said assignment: "There being no valid lien in existence securing the payment of the several notes sued on, there was no such joint or community interest between the parties plaintiff or their causes of action as entitled them, as a matter of law, to jointly bring this suit." Statement under said proposition: "The pleadings and evidence in this case show that plaintiff Hobbs sold defendant, Bynum, certain lands which at that time were public free schools lands belonging to the state, Hobbs having no legal or equitable title thereto. That as part of the purchase price therefor Bynum executed and delivered to Hobbs the three notes sued on. That thereafter and before maturity of any of said notes Hobbs sold one of them to I. E. Gartin. A lien was retained both in the face of the deed from Hobbs to Bynum, and in the face of all of said notes on all the land so sold securing the payment thereof, the notes on their face each showing for what they were given. Hobbs and Gartin, as plaintiffs, brought this suit on their notes respectively, and prayed for foreclosure of lien. (For pleadings of parties, see Tr. pp. 1 to 14. For evidence on these issues under said pleadings, see Tr. pp. 15 to 43, and S. F. pp. 1 to 14, and especially S. F. pp. 1 to 5.) We feel it impossible to make reference to the portions of the statement of facts fully showing the condition of the evidence under this issue, and therefore refer the court to the entire statement of facts." The lien, as alleged and as evidenced by the promissory notes executed by appellant, was an entirety, and evidently both Hobbs and Gartin were proper parties in its foreclosure, unless appellant sustains the proposition that there was no lien. The statement made in support of the proposition cannot certainly be considered as a compliance with the rules. It is therein said that Hobbs had no legal or equitable title to the lands upon which the lien existed, but no evidence is quoted in support of the statement, nor is it definitely pointed out where any such evidence may be found in the record. If counsel for appellant, whose interest and duty it was, found it "impossible to make reference to the portions of the statement of facts fully showing the condition of the evidence under this issue," we hardly see how it can be expected of us that we do so. To say the least of it, we think the rules and many decisions require us to decline the invitation to search "the entire statement of facts." But aside from the foregoing observations, which have been tendered with a view of again admonishing counsel of the necessity of affording the appellate courts the aid contemplated by the rules, it is quite plain that the issue upon which the supposed misjoinder is based is necessarily involved in and must have been determined upon the merits, and we will therefore, without further notice of the first assignment, proceed to determine the remaining assignments, which go to the merits.

The second assignment of error goes to the action of the court in overruling appellant's general demurrer and exception to appellee's first supplemental petition, as follows: "And for further answer herein come the plaintiffs, and specially plead in answer to the defendant's plea of failure of consideration as set forth in said original answer, and say that while the land upon which the vendor's lien notes herein sued on are a lien, and which land was sold to the defendant by the said Henry Hobbs, was in truth and in fact forfeited by the Commissioner of the General Land Office after the sale of said land to defendant by the said Hobbs, said sale was practically reinstated and said land awarded to the defendant by the Commissioner of the General Land Office under the following conditions, to wit: That the Commissioner of the General Land Office, in consideration of the equities which the said defendant had in and to said land, which was purchased from said Hobbs as purchaser from Hobbs, and in consideration

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thereof withdrew said land from public sale, reduced the price of said land from five dollars per acre and sold same to the defendant for the price of two dollars per acre. That said sale as made by the Commissioner of the General Land Office to the said defendant reinstated the defendant each and every right, equity, title, and interest which he was to obtain by reason of his contract and deed of sale from the said Hobbs. Whereupon, premises considered, plaintiffs say that the defendant is estopped from pleading a failure of consideration to said notes, and plaintiffs pray for judgment as prayed for in their original petition." We think the facts alleged in this special plea were probably admissible under the general issue tendered to appellant's plea of failure of consideration, but if not, and if, as alleged in the special plea, the forfeiture was made by the Commissioner of the General Land Office after the sale of the land by Hobbs, then the lands were the subject of contract. Dowding v. Ditmore, 26 Tex. Civ. App. 606, 65 S. W. 486. And if, as further stated in the special plea, the forfeiture was substantially set aside and the former award substantially reinstated and appellant awarded the lands by reason of his purchase from appellee Hobbs, it would constitute a good defense to the plea of failure of consideration.

Under the fourth assignment it is insisted that the court should have excluded two of the notes sued upon because of the fact that they bore the indorsement of Hobbs, the contention being that such indorsement divested the title out of him; but we think this contention cannot be sustained. Appellee Hobbs was in possession of the notes alleging himself to be the owner, and the indorsement was wholly under his own control. It could have been erased without affecting the validity of the notes. In the form shown the notes could have been sued upon by any possessor, the mere possession being presumptive evidence of ownership. We know of no reason why, if necessary to our conclusion, a like presumption may not be indulged in favor of Hobb's ownership.

Appellant's fifth assignment in the brief complains of the introduction of a land office copy of the classification and appraisement of the lands in controversy because of the following indorsement: "Reappraised at former price on account of equities of present claimant, who will try to protect his interest." If appellant's objection had been confined to this indorsement, we might be inclined to consider the question he presents; but the objection extends as well to the classification and appraisement, which was clearly admissible. The bill of exception going to the whole, the objection to a part only cannot be considered. Jamison et al. v. Dooley et al., 34 Tex. Civ. App. 428, 79 S. W. 91.

The remaining assignments are as follows: "Appellant's eighth assignment of error in the record, sixth assignment in this brief: 'The trial court erred in rendering judgment against appellant and in favor of I. E. Gartin for any sum, as said judgment in this particular is contrary to the evidence and the law applicable thereto under the pleadings.' Appellant's thirteenth assignment of error in the record, seventh assignment in this brief: 'The trial court, having given judgment in favor of I. E. Gartin against appellant, erred in not rendering judgment in appellant's favor over against Henry Hobbs for said sum.' Appellant's ninth assignment of error in the record, eighth assignment in this brief: 'The trial court erred in rendering judgment against appellant and in favor of Henry Hobbs for any sum, as the judgment in this particular is contrary to the evidence and the law applicable thereto under the pleadings.' Appellant's eleventh assignment of error in the record, ninth assignment in this brief: 'The trial court erred in refusing to cancel the notes sued on, the evidence showing, as it does, that the land for which they were given as part of the purchase price was public domain at the time they were executed.' Appellant's tenth assignment of error in the record, tenth assignment in this brief: 'The trial court erred in granting a foreclosure of the supposed vendor's lien on the land in favor of appellees and against appellant, this portion of the judgment being contrary to the law and the evidence introduced under the pleadings, the evidence showing the lands to have been public domain at the time the purported lien was created.' Appellant's twelfth assignment of error in the record, eleventh assignment in this brief: 'The trial court erred in failing and refusing to give judgment in favor of the appellant and against Henry Hobbs for the $1,000 sued for in reconvention and prayed for by appellant in his pleadings, with interest thereon.'"

We think it manifest that these assignments fail to point out error, and that it is our duty to disregard them because not in compliance with the rules and many decisions. See rules 24, 25, and 26 (67 S. W. xv); Garrison v. Ochiltree County (Tex. Civ. App.) 111 S. W. 445.

Reversible error not having been pointed out, it is ordered that the judgment be affirmed.

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1. JUSTICES OF THE PEACE (§ 146*)—APPEAL FROM JUSTICE TO COUNTY COURT—FINAL JUDGMENT.

The county court got no jurisdiction on appeal from a justice, where no final judgment was entered in the justice court, but what purported to be such was a mere recital of a verdict.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 490–492; Dec. Dig. § 146.*]

2. APPEAL AND ERROR (§ 1163*)—REVERSAL—JURISDICTION BELOW.

It appearing from the record that the county court got no jurisdiction on appeal from a justice, because no final judgment was entered in the justice court, the judgment of the former court will be reversed, and the cause remanded, with direction to dismiss appeal, unless a final judgment be shown to have been entered in the justice's court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1163.*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action between George Brown and J. H. McClendon. From a judgment of the county court, on appeal from a justice, Brown appeals. Reversed and remanded, with directions.

W. H. Sewell and W. T. Potter, for appellant. W. D. Scarborough and H. N. Hickman, for appellee.

SPEER, J. Appellee objects to our considering any of appellant's assignments of error presented in his brief for the reason that no assignments were filed below. We would sustain this objection, but beyond it is the more serious question, arising from the fact that an inspection of the record discloses there was no final judgment in the justice's court, if we assume, as we must, that the cause was appealed to the county court from the justice's court. We say "assume," because there is neither an appeal bond nor other notice of appeal to give the county court jurisdiction, even though there had been a final judgment in the justice's court. What purports to be the final judgment in the justice's court is no more than a recitation that a jury impaneled in the case returned a verdict for the defendant; but there is no award or decree of any character whatever by the court based upon this finding. Besides, the recitation referred to shows that the cause was heard out of regular term time. The statute (Rev. St. 1895, art. 1575) provides that "each justice of the peace shall hold a term of his court for civil business once in each month, and may transact such business out of term time as is or may be authorized by law"; but we have not thought it necessary to inquire if in any case a cause may

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PERRY v. WI

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1. TAXATION (§ 641*)—EST
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close a lien for taxes.

[Ed. Note.—For other c
Cent. Dig. § 1304; Dec. Di

2. TAXATION (§ 647*)—LIE
JUDGMENT AGAINST AN E
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can be no judgment agains
estate.

[Ed. Note.—For other ca
Cent. Dig. §§ 1312–1315; De

3. JUDGMENT (§ 497*)—VOID
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it affords no presumption in

[Ed. Note.—For other ca
Cent. Dig. §§ 937, 938; Dec.

4. TAXATION (§ 648*)—ENF
—JUDGMENT—CONCLUSIVE
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was brought solely against
tain person, which was not
and citation was addressed
judgment rendered against
property was not bound.

[Ed. Note.—For other ca
Cent. Dig. § 1316; Dec. Di

Appeal from District
County; H. G. Hendricks,
Trespass to try title
against G. M. Perry. Ju
tiff, and defendant appe

E. C. Gray and Theodor
lant. Hoover & Taylor, f

SPEER, J. This is an
to try title brought by J.
G. M. Perry, in which a
tered by the court for the
following findings of fac
of law, which we adopt:

"Conclusions o

"First. I find that the
sy, namely, section No. 1
twelve, H. & G. N. Ry
Ochiltree county, Tex., w
lian W. Whiting, assigne
Texas, the 20th day of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to da

† Writ of error denied by Supreme Court.

"Second. I find that suit was instituted in the district court of Ochiltree county December 24, 1901, by an original petition on behalf of the state, complaining only 'of the Esta (meaning Estate) John Wylie, a nonresident citizen, hereinafter styled defendant,' to foreclose the lien for taxes on the land in controversy delinquent for the years 1900 and 1901, and that the petition in said suit was verified by the affidavit of the county attorney that the averments in the petition are true to the best of his knowledge and belief, but further find that the petition was principally upon a printed form and contained no allegations that the owner was unknown, nor did said petition allege any cause of action against an unknown owner.

"Third. I find that a notice by publication in substantial compliance with the statute was made and published on practically a prepared and printed form, but in this connection I further find that there is no affidavit in the record by the county or district attorney that the defendant was a nonresident of the state, or that the owner of said land was unknown or could not be ascertained by inquiry.

"Fourth. I find that the said citation was addressed to the estate of John Wylie, being the only defendant sued in the petition, reciting the nature of the plaintiff's demand against said defendant estate as an action to recover of the same defendant, as the owner of said lands the said taxes, and further find that the judgment is only against the estate of John Wylie, neither the petition or the judgment mentioning any legal representatives, or heirs of said estate, but further find that said judgment recites that the defendant though duly cited failed to appear.

"Fifth. I find the issuance and execution of order of sale for the land in controversy and that the defendant Perry is the grantee of the land by virtue of mesne conveyances holding under the judgment, order of sale, sheriff's deed, and tax sale.

"Conclusions of Law.

"(1) There can be no citation to an estate as an estate.

"(2) There can be no judgment against an estate as an estate.

"(3) A recitation in a judgment that an estate has been served is a void recitation and meaningless, as an estate is not an entity.

"(4) The petition being against an estate only is not suit against an entity in law, and the citation showing that it run to the estate, and to no legal representatives, and the judgment reciting that the defendant estate, though duly cited came not, afforded no presumption whatever in favor of service, and the record only showing an unsufficient affidavit, the sworn petition, and none other, I conclude that the service, judgment, and sale were void.

"(5) No other owner or person but the estate of John Wylie, which is not a person in law, having been sued in the petition, Julian W. Whiting is not bound."

The judgment of the district court is therefore affirmed.

ARNOLD v. McNINCH & RANEY.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 16, 1909.)

COURTS (§ 120*) — JURISDICTION — COUNTY COURT—INJUNCTION.

The county court, having neither original nor appellate jurisdiction of the amount in controversy, cannot enjoin a judgment of a justice for less than $100, which is manifestly the amount in controversy; there having been no actual levy, and the object of the suit being to wholly stay the operation of the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–436; Dec. Dig. § 120.*]

Appeal from Erath County Court; M. J. Thompson, Judge.

Action by McNinch & Raney against J. S. Arnold. Judgment for plaintiffs. Defendant appeals. Reversed, and suit dismissed.

J. M. Carter and R. L. Thompson, for appellant. W. H. Garrett, for appellees.

CONNER, C. J. Upon the petition of appellees the county judge of Erath county, Tex., on the 5th day of August, 1908, granted a prayer for an injunction restraining J. A. Arnold, a constable of one of the precincts of that county, from an alleged threatened levy upon appellees' property. It was alleged, in substance: That the execution had been issued by a justice of the peace of precinct No. 1 in Dallas county by virtue of a judgment against McNinch & Raney for the sum of $87.35, together with costs in the further sum of $7.40; that in the suit in which the judgment had been rendered the said defendants therein had appeared and interposed their plea of privilege (which was attached to the petition for injunction as an exhibit, and which appeared to be in all things sufficient) to be sued in precinct No. 2 of Erath county, where they resided; that said plea was "proved and not controverted in said court"; that the justice of the peace "in open court willfully and knowingly overruled said pleas of misjoinder and privilege and rendered judgment" against the plaintiffs in the injunction suit on or about June 4, 1908, for the sum of $87.35 principal and $7.40 costs, "and failed and refused to give plaintiffs notice of the action of said court." At the September term of the county court the injunction suit came on for hearing, and the court on October 1, 1908, rendered a final judgment perpetuating the temporary injunction that had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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been issued, and from this latter order or judgment this appeal has been prosecuted.

Without considering the insufficiency of the petition, we think the judgment must be reversed and the cause dismissed on the ground that the county court was without jurisdiction to issue the injunction. In the case of Foust v. Warren (Tex. Civ. App.) 72 S. W. 404, we held that the justice's court had not been clothed by the Constitution or laws with the power to issue writs of injunction and to determine issues dependent thereon, and proceeded on the assumption that the district court might in a proper case properly issue and determine the issues in a suit to enjoin the judgment of a justice of the peace. This jurisdiction of the district court, however, is that which arises under what is frequently termed the "residuary clause" of section 8, art. 5, of our amended state Constitution. See Allen et al. v. Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703. But exclusive original jurisdiction of the county court is limited by the Constitution to cases where the amount in controversy exceeds $200 and does not exceed $500. See Lazarus v. Swafford, 15 Tex. Civ. App. 367, 39 S. W. 389; Bigby et al. v. Brantley, 38 Tex. Civ. App. 44, 85 S. W. 311; State ex rel. Johnson v. Hanscom (Tex.) 37 S. W. 601; Dean v. State, 88 Tex. 295, 30 S. W. 1047, 31 S. W. 185; Wheeler & Wilson Mfg. Co. v. Whitener et al., 2 Willson, Civ. Cas. Ct. App. § 15. The latter case is directly in point; it there being expressly held that the county court was without jurisdiction to enjoin a judgment of a justice's court.

In the case before us the county court had neither original nor appellate jurisdiction of the amount in controversy, which was manifestly the amount of the justice's judgment; there being no actual levy, and the object of the suit being to wholly stay the operation of the judgment.

It is ordered that the judgment be reversed, and that the writ of injunction be dissolved, and the suit dismissed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. GERREN.†

(Court of Civil Appeals of Texas. July 3, 1909. Rehearing Denied Oct. 23, 1909.)

1. CARRIERS (§§ 283, 284*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants or others.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119–1135; Dec. Dig. §§ 283, 284.*]

2. CARRIERS (§ 341*) — CARRIAGE OF PASSENGERS — ASSAULTS ON PASSENGERS — LIABILITY.

The misconduct of a passenger assaulted by an employé of the carrier is admissible in mitigation of damages only, but where a passenger's conduct toward an employé is knowingly proffered with the specific purpose of bringing about a difficulty, and which in its probable result brings about a difficulty, it is such wrong on the passenger's part as requires the classification of his conduct as contributory negligence, though it may not amount to absolute justification for the assault which follows, and a passenger guilty of such contributory negligence cannot recover for such assault.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 341.*]

3. CARRIERS (§ 321*)— CARRIAGE OF PASSENGERS—ASSAULTS ON PASSENGERS—LIABILITY.

Where, in an action by a passenger for an assault committed by the auditor, the evidence showed the good reputation of the auditor, and the bad reputation of the passenger, that the passenger had a previous difficulty with the auditor, and was guilty of misconduct by swearing at the auditor and threatening him, and that the auditor thereafter assaulted the passenger to defend himself from threatened injury, the refusal to charge that, if the passenger was guilty of such conduct towards the auditor as would provoke a peaceable man to resent the same and the passenger provoked the auditor to attack him, there could be no recovery, was erroneous, though the court submitted the issue of self-defense, and authorized the jury to consider the passenger's conduct in mitigation of damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1121; Dec. Dig. § 321.*]

Appeal from District Court, Denton County; Clem B. Potter, Judge.

Action by T. E. Gerren against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Garnett & Eldridge, for appellant. Emory C. Smith and Joe S. Gambill, for appellee.

CONNER, C. J. Appellee instituted this suit to recover damages caused by an assault upon him December 8, 1907, while a passenger on one of appellant's passenger trains between Denton and Dallas, by one J. H. Fulkerson, appellant's train auditor, with a ticket punch, causing serious cuts, wounds, and bruises on appellee's head, on account of which he was rendered unconscious and confined to his bed for several days. Appellant, among other things, pleaded that the assault was committed by the auditor in his necessary self-defense, and, further, that appellee was guilty of contributory negligence in provoking the assault and in bringing it upon himself. The trial before a jury resulted in a verdict and judgment for appellee in the sum of $1,000, from which this appeal has been prosecuted.

Error is assigned to the court's action in refusing the following special instruction: "If you find from the evidence that T. E. Gerren was a man of large experience in dealing with his fellowmen, and if you find that plaintiff Gerren at the time of the alleged assault upon him used insulting language and was guilty of such conduct towards and to the auditor, Fulkerson, of such character

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error dismissed for want of jurisdiction.

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as would have provoked a very prudent and peaceable man to resent such conduct and language by attacking him, the said Gerren, and if you further find from the evidence that said Gerren did use insulting language and was guilty of such conduct towards and to said auditor, and if you further find that said Gerren knew that such language and conduct would provoke said auditor to attack him, and if you further find from the evidence that said Gerren used such language and conduct towards and to said auditor willfully and wrongfully with intent and for the purpose of inducing said auditor to attack or assault him, and that in consequence of such language and conduct said auditor did assault and attack said Gerren, then I charge you to find for the defendant." The evidence very plainly raised the issue of self-defense, and the auditor testified that he struck appellee because he was apprehensive of danger, and supposed that appellee was trying to draw a pistol or knife, but the issue of self-defense was submitted to the jury and determined in appellee's favor.

The court also authorized the jury to consider appellee's conduct in mitigation of the damages; so that the very serious question before us is whether appellant was entitled to the further instruction above quoted. We will not quote the testimony entire because of the profanity detailed, but we think it undoubtedly raised the issue presented in the special charge. There was evidence tending to show that for many years the auditor, Fulkerson, had maintained the general reputation of a quiet, peaceable, and inoffensive man. Witnesses testified that they had known appellee, Gerren, from 35 to 38 years, and declared that his reputation is that of a violent and dangerous man. There was evidence also to the effect that on a former occasion Gerren took offense because Fulkerson directed him to leave the ladies' coach and go into the smoker while smoking a "vile pipe"; Fulkerson testifying that Gerren on this occasion so manifested his resentment as to induce an unsuccessful effort at a passing station to call an officer in protection of the passengers. There was other evidence to the effect that on the occasion in question appellee boarded the train at Denton, and while standing on the platform remarked to a passenger, referring to the auditor and in his hearing, "That is the same damn man I had trouble with before;" that the auditor made no reply, but entered the car; that appellee followed "cussing and abusing" the auditor, saying among other things: "———, you tried to run it over me before, and I had some one with me [his daughter]," and "——— you," or "by ——— you can't run it over me this time, and I am by myself;" that the auditor still made no reply, but proceeded through the coach (appellee following, and remarking, "I don't want any such damn cattle as you running over me," and on out through the door, closing and locking it in appellee's face, appellee following to the door; that later the auditor returned to the car where appellee was to collect fares, as required by his duties, and approached appellee, and said, "Ticket, please, sir"; that appellee looked up, and said in a coarse, gruff, sarcastic manner, "I have got no ticket"; that the auditor replied, "The fare is $1.10"; that, after fumbling in his pocket some time, appellee finally got his purse out and paid the fare, saying as he did so something about overcharging him (one of the witnesses testified that the declaration was that the auditor had charged him "ten cents too much"); that, when appellee paid his fare, the auditor gave him a receipt, which appellee "wadded up" and threw on the floor, jumped up and said, "I wish ——— you had tried to charge me four cents a mile. I would like to maul you," the auditor replying, "Keep your seat. I won't bother you," to which appellee responded, "No, ——— you won't bother me, you are afraid of me, you are," "——— you, I'll put you out of this car," and, following the auditor down the aisle, took hold of his shoulder, fumbling in his pocket with the other hand, whereupon the auditor turned, and it thereafter took several of the other trainmen to take the auditor off of appellee.

Many authorities might be cited in support of the salutary rule that it is the duty of a common carrier to exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants or other persons, and the extent to which our own courts have given consideration to the question of the passenger's provocative conduct when assaulted by a railway employé is to entirely excuse the assault only when the conduct of the passenger is such as in law amounts to a justification for the assault on the ground of self-defense, but, where less than this, to admit the evidence of the passenger's provocation in mitigation of damages only. See G., H. & S. A. Ry. Co. v. La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488; St. Louis S. W. Ry. Co. of Texas v. Johnson, 29 Tex. Civ. App. 184, 68 S. W. 58. But it seems to us that the facts of this case go beyond those in the cases cited, and that, if in a given case the passenger's conduct toward the assaulting employé is highly provoking and consciously and knowingly proffered with the specific purpose of bringing about a difficulty, and which in its natural and probable sequence and results does bring about a difficulty, it constitutes such wrong on the passenger's part as requires the classification of such conduct as contributory negligence, notwithstanding it may not quite amount to absolute justification for the assault which follows. And this view has support in high authority. In the case of Peavy v. Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334, the Supreme Court of Georgia, in speaking of an appellant whom the railway's conductor had shot

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under circumstances not held to be justified, say: "The conductor would not have been brought into a state of excitement from danger and insult which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company, because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune; and, though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was in no fault for it, and it would be unjust for the plaintiff to recover of the company when he boarded its train violating the law (as we can well infer) by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol and presenting it at him, and violating the law by general disorder and misconduct throughout the transaction up to the moment he was shot. We think the court below was well warranted in granting the second new trial. While a second verdict is a sacred thing, it is less sacred than the law and the substantial justice of the case. These required that another new trial should be granted."

Our penal statutes forbid cursing and swearing and disorderly conduct in a public place which are calculated to disturb persons there assembled; and, while it is the duty of the carrier to exercise the highest degree of care in the protection of passengers that would be exercised by very careful and prudent persons under like circumstances, human nature has its limitations, patience sometimes ceases to be a virtue, and the passenger himself rests under the duty of decently demeaning himself on a train crowded with persons of all ages, sex, and condition of nerves. The truth is, and ought to be in the protection of the traveling public, that the passenger should not forget the laws of the land or the rights of other passengers, and, speaking in illustration of the thought in mind merely and without reference to the present appellee, when the agile and belligerent individual designated in the expressive vernacular of the West as "Wild and Woolly," "the bad man from Bitter Creek," gets on a loaded train, thirsting for gore, and with coarse oaths hunts for a fight —a strenuous time—the rewarding ear of the court should not be attuned to his complaint, however vociferous, if it happens that he gets just a little more than he expects of that for which he was looking. This view is, of course, in conflict with appellee's suggestion that in no event can appellant be excused, because the auditor used more force than was necessary. The question, however, is not alone whether the auditor committed a wrong, nor is the question one of comparative degree in wrongful acts, for the doctrine of comparative degrees of negligence has been rejected in this state. But the question is, as in all cases where the doctrine of contributory negligence is applied: Did appellee do wrong, and does such wrong constitute negligence which proximately contributed to the result of which he complains? If so, he is not entitled to recover, notwithstanding the wrong or negligence of his adversary, and notwithstanding his fault be less in degree. It may be that appellee was not guilty of the negligence imputed to him in the special charge, but it was for the jury, and not the court, to say. We therefore conclude that the court erred, as assigned, in refusing the special instruction.

Judgment reversed and cause remanded.

BAKER et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS et al.†

(Court of Civil Appeals of Texas. July 3, 1909. Rehearing Denied Oct. 23, 1909.)

1. CARRIERS (§ 230*) — TRANSPORTATION OF CATTLE—EVIDENCE—DEFENSES.

Where, in an action against a carrier for injuries to cattle en route, there was evidence that the inherent condition of the cattle produced the injury which resulted in their death, there was no error in presenting that phase of the defense to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.*]

2. CARRIERS (§ 228*) — TRANSPORTATION OF CATTLE—BURDEN OF PROOF.

Where, in an action against a carrier for injuries to cattle shipped, the carrier introduced evidence that the injuries to the cattle resulted from poisoning produced by improper feeding, and not from any negligence on its part, the court properly charged that the burden of proof was on plaintiffs, notwithstanding the rule that where a carrier receives cattle in good condition, and delivers them in a damaged condition, and no caretaker accompanies the shipment, the burden is on the carrier to show that the condition in which the cattle arrived was not due to its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 958; Dec. Dig. § 228.*]

3. CARRIERS (§ 230*)—LIVE STOCK—INJURIES—INSTRUCTIONS.

In an action against a carrier for injuries to cattle shipped, plaintiff could not complain of an instruction requiring that defendants must have handled the cattle with ordinary care before they would be excused from liability for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error dismissed for want of jurisdiction.

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such shrinkage and stale appearance as is usually incident to shipments of cattle when handled the length of trip plaintiff's cattle were handled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 230.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by W. J. Baker and others against the Missouri, Kansas & Texas Railway Company of Texas and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Templeton & Agerton, for appellants. Spoonts, Thompson & Barwise, for appellees.

SPEER, J. W. J. Baker and Percy Webb sued the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company to recover $988.75 as damages to a shipment of cattle shipped from Hodge, Tex., to East St. Louis, Ill., over the lines of the two defendants. The trial resulted in a verdict and judgment for the defendants, and the plaintiffs have appealed.

The following statement by appellants illustrates the issues to be decided:

"The cattle in question were placed in the shipping pens of defendants at Hodge, about 10 or 11 o'clock on the morning of the 18th of January, 1907. They remained in the pens provided by defendants at that place until about 2 o'clock in the afternoon of the same day, when they were loaded onto four cars by the agents of the defendants, and started to their destination over defendants' line of railway. According to uncontradicted testimony of defendants' train conductors, the cattle reached Denison, the first division point, at 8:45 p. m. on January 18th; they left Denison at 9:40 p. m. same date, and reached Muskogee, Okl., next division point, at 5:30 a. m. on January 19th; they left Muskogee, Okl., at 7 a. m. on the 19th, and reached Parsons, Kan., at 12:40 p. m. of same day; they left Parsons, Kan., at 2:20 p. m. January 19th and reached Sedalia, Mo., the next division point, at 12:40 a. m. on January 20, 1907. The cattle were not unloaded to be fed, watered, or rested at any time during their transit from the time they were loaded at Hodge, Tex., until they reached Sedalia, Mo. When they reached Sedalia, they were in bad condition; 16 head were down in the cars; 1 of these was dead, and the other 15 head staggered and were unable to stand up, and died in a few hours after being dragged from the cars. The remaining 83 head were weak and staggering, but when unloaded, and given an opportunity, they drank water freely. They were given feed, water, and rest at Sedalia, and at 5:30 p. m. on January 20th were reloaded onto the cars, and started on to East St. Louis. They reached Franklin Junction, the next division point, at 8:10 p. m. same date; they left Franklin Junction at 8:55 p. m. same day, and reached North St. Louis at 10:35 a. m. on January 21, 1907. Said cattle were delivered to Stockyards Company at East St. Louis at 12:25 p. m. January 21st. They were delivered to Bright Coy Commission Company, the consignees, at 1 p. m. of said date, and were sold by said company between 2 and 3 o'clock same afternoon. The 83 head of cattle weighed 71,800 pounds, and sold for $4.25 per cwt., the prevailing market price.

"The uncontroverted evidence showed that no caretaker or shipper went with the cattle, and they were in the exclusive possession and control of defendants from the time they were placed in the shipping pens at Hodge until the 83 head were delivered into the pens at East St. Louis. At the time the cattle were delivered to defendants at Hodge a written permit was given, allowing the carriers to observe the 36-hour limit as to unloading, watering, feeding, and resting them. The cattle prior to shipment had been fed and fattened on cotton seed meal and hulls, and were plentifully supplied with water at all hours up to the time they were taken out of the feed pens and put into the shipping pens at Hodge on January 18th, after which time they were not watered until after their arrival at Sedalia. An autopsy on one of the dead cattle was held at Sedalia, which disclosed the following condition, viz.: The paunch or first stomach was about two-thirds full of undigested cotton seed meal and hulls and nothing else; the second stomach was about one-fourth full of cotton seed meal and hulls and nothing else; the third stomach was so packed with cotton seed meal and hulls between its many leaves that it was impossible for its contents to be passed on to the fourth stomach; the fourth, or true digestive stomach was entirely empty. An examination was had on the other dead cattle by the party disposing of their carcasses, which revealed the fact that all the 16 head of cattle were affected alike. They were cut into, and their stomachs were found to be packed with dry cotton seed meal and hulls, so hard that it could not be cut with a knife, and perfectly dry; their stomachs had shrunk over this dry hard substance until they were only about one-fourth their natural size.

"The controverted issues are in regard to the cause or causes of the death of the 16 head of cattle, and the delay in delivery of the others at East St. Louis. The plaintiffs contend that the 16 head of cattle which were dead when they reached Sedalia, and which died shortly thereafter, all died from a lack of water while in transit, and that defendants knew, or should have known, by the exercise of an ordinary degree of care the condition of said cattle in time to have prevented said injury, and that the 83 head of cattle which were delivered at East St. Louis were delayed in transit by the negligence of defendants. The defendants answered that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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the death of the 16 head of cattle was due to the manner in which they had been fed prior to shipping same, and that this method of feeding caused nitrogenous poison to set up, which brought about their death, and that there was no delay in the delivery of the remaining 83 head."

To this statement might be added the testimony of the veterinary surgeons, which would support the implied finding of the jury that the cattle were afflicted with nitrogen poisoning produced by improper feeding.

In the first paragraph of the court's charge he defined negligence to be a failure upon the part of the defendants to use ordinary care in handling appellants' cattle. There was no request for a charge defining ordinary care, and the first assignment is therefore overruled.

The statement of the case already set out indicates that there was evidence that the inherent condition of the cattle produced the injury which resulted in their death, and there was therefore no error in presenting this phase of appellees' defense.

The ruling of the court in giving a peremptory instruction to find for the appellee Missouri, Kansas & Texas Railway Company of Texas becomes immaterial in view of our conclusions as to the nonliability of its coappellee, the Missouri, Kansas & Texas Railway Company.

Appellants' special charges Nos. 1, 2, and 3 were properly refused, because the whole charge as given to the jury assumed that it was appellees' duty to exercise ordinary care to care for and water appellants' cattle, regardless of the giving of the notice to observe the 36-hour limit.

Complaint is made by appellants that the burden of proof was placed on them to make out their case by a preponderance of the evidence; the insistence being that where, as here, a common carrier receives for transportation property which is shown to be in good condition when delivered to the carrier, and which is not delivered at destination, or which when delivered is in a damaged condition, and no caretaker or shipper accompanies the property, the burden of proof is on the carrier to show that such failure or condition was not due to its negligence. This is abstractly correct, and many authorities might be cited to support the proposition, and in a proper case—that is, where no explanation whatever is offered by the carrier—the court might perhaps instruct the jury that the burden of proof was on the defendant, or possibly that the company was absolutely liable; but in the present case the defendants have not only offered evidence which tended to explain the cause of the death of appellants' cattle, but which did satisfy the minds of the jurors that the defendants were not guilty of negligence. Certainly in such a case it is not error to charge that the burden of proof on the whole case was on plaintiffs. See F. W. & D. C. Ry. Co. v. Day (Tex. Civ. App.) 111 S. W. 664.

Appellants' criticism of special charge No. 7, asked by appellees and given by the court, is unjust, because it is therein required that the defendants must have handled the cattle with ordinary care and prudence before they would be excused from liability for such shrinkage and stale appearance as is usually or customarily incident to shipments of cattle when handled the length of trip these were handled.

The ruling of the court with respect to the testimony of the witnesses Cassidy and Bright as to the value of the cattle in East St. Louis becomes immaterial in view of the verdict and judgment against liability.

We find no error in the record, and the judgment is affirmed.

GILLEAN v. WITHERSPOON et al.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 23, 1909.)

1. TRUSTS (§ 95*) — CONSTRUCTIVE TRUSTS — FRAUD.

Where a person obtains the legal title to property in such a manner that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interest therein, equity, in order to administer complete justice, will raise a constructive trust and convert the holder of the title into a trustee for the party entitled thereto or execute the trust so as to protect the defrauded party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. § 95.*]

2. EXECUTION (§ 283*) — ISSUANCE — RECORD EVIDENCE—SUFFICIENCY.

Where, in trespass to try title to land sold under execution, there was evidence of the rendition of a judgment in the Supreme Court against sureties on a supersedeas bond on appeal, that the case was remanded, followed by docket entries showing the issuance of a "pluries" execution August 13, 1872, and various alias "pluries" executions at different dates up to April 2, 1876, and the sheriff's deed of the land in controversy which had belonged to one of the sureties, dated September 9, 1872, recited that the property was sold by virtue of an execution issued in the action, etc., such evidence, uncontradicted, was sufficient to establish the issuance of an execution on which the property was sold as a matter of law, and hence the court erred in submitting such question to the jury as a controverted issue of fact.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 283.*]

3. EVIDENCE (§ 83*) — PRESUMPTIONS — PERFORMANCE OF OFFICIAL DUTY—COSTS—COLLECTION.

Where a case is appealed and remanded, it will be presumed that the clerk of the Supreme Court obeyed the statute regulating the collection of costs, and either collected the costs before he issued the mandate on remand, or issued it without requiring the payment of costs and then issued execution therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

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4. EXECUTION (§ 320*)—ANCIENT DOCUMENTS—DEEDS.

Where a sheriff's deed to the property in controversy more than 30 years old recited a sale pursuant to an execution issued out of the office of the clerk of the district court of N. county and a levy and sale of the land thereunder, the deed conclusively established the issuance of the execution in accordance with its recitals.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 940–945; Dec. Dig. § 320.*]

5. APPEAL AND ERROR (§ 1206*)—DETERMINATION OF CAUSE—REFORMATION OF JUDGMENT—EXECUTION.

Where a judgment appealed from is reformed, and the case remanded to a district court, it is the duty of the district court clerk to issue execution for its enforcement against the defendants and the sureties on the supersedeas bond.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1206.*]

6. APPEAL AND ERROR (§ 747*)—CROSS-ASSIGNMENTS OF ERROR—NECESSITY.

Where an appellee has shown himself on the whole case entitled to an instructed verdict which is denied, he may complain and have the matter reviewed in the appellate court without a cross-assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3053–3057; Dec. Dig. § 747.*]

7. GUARDIAN AND WARD (§ 23*)—DISCHARGE OF GUARDIAN—ORDER.

An order discharging a guardian on payment of court costs, and directing execution to issue against him and his sureties was not a final discharge, without a showing that the costs were paid.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 23.*]

8. GUARDIAN AND WARD (§ 105*)—DISCHARGE OF GUARDIAN—WAIVER—SUBSEQUENT SALE OF WARD'S LAND.

Where, after a guardian had been discharged on condition that he pay court costs, it did not appear that he did so, and the court subsequently directed him to sell lands in controversy belonging to the ward, the court thereby impliedly disregarded the order of discharge, which could not subsequently be invoked to annul the order of sale.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 105.*]

9. GUARDIAN AND WARD (§ 103*) — WARD'S LAND—SALE—CONFIRMATION.

Where a sale of a ward's land by guardian under order of court was neither reported to, nor confirmed by, the court, and there was no evidence of any act on the court's part which would indicate that it had ever recognized or acquiesced in the sale as a completed act, the sale was invalid; confirmation being necessary to pass title.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 378–381; Dec. Dig. § 103.*]

10. GUARDIAN AND WARD (§ 103*)—SALE OF WARD'S LAND — APPLICATION — CONFIRMATION.

A guardian's application to sell his ward's land at private sale to a proposed purchaser, though stating the price and terms of sale and the necessity therefor, and the court's order directing the sale as applied for, did not constitute a confirmation of the sale as a completed act.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 103.*]

11. GUARDIAN AND WARD (§ 104*)—SALE OF WARD'S LANDS—INVALIDITY—RATIFICATION BY PAROL.

Where a guardian made an invalid sale of his ward's land, the ward's act, after she became a married woman, in accepting from the guardian the balance of the purchase price with full knowledge of all the facts, was not a sufficient ratification of the conveyance; she being authorized to convey her separate lands only in a prescribed method by a deed under separate acknowledgment, which could not be waived.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 104.*]

12. HUSBAND AND WIFE (§ 129*)—MARRIED WOMEN—ESTOPPEL.

A married woman cannot be estopped to assert her rights in land unless she has been guilty of some positive fraud, or some act of concealment or suppression equivalent thereto.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 129.*]

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Trespass to try title by H. C. Gillean against O. L. Witherspoon and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

W. W. Wilkinson, F. B. Stanley, and R. S. Neblett, for appellant. McClellan & Prince, Richard Mays, and Rice & Davis, for appellees.

TALBOT, J. This is an action of trespass to try title instituted by the appellant, Gillean, against the appellees, C. L. Witherspoon, Central Petroleum Company, a private corporation, G. J. Heflin, and others, to recover two-ninths undivided interest in 284.3 acres of land, a part of the William J. Cairnes one-third league, situated in Navarro county, Tex., and damages for oil charged to have been taken from said land and converted by the defendants. Julian and Ethel Andrews, husband and wife, intervened in the suit, claiming the land, but upon the conclusion of the evidence at the trial dismissed their intervention. The Central Petroleum Company vouched in appellees T. C. Stribling and R. L. Houston, as warrantors of its title, and prays, in the event plaintiff or interveners recover, that it recover of Stribling and Houston the amount of the purchase money paid them for said land by it. The defendants pleaded general and special demurrers, not guilty, and a special answer. A jury trial resulted in a general verdict and judgment for the defendants, and plaintiff appealed.

The one-third league of land, of which the land in controversy is a part, was patented to John Lockhart, assignee of W. J. Cairnes, in 1873. John Lockhart died, and his son, W. A. Lockhart, inherited from him one-fourth of said survey.

On November 24, 1871, William Sutherland recovered in the district court of Navarro county, Tex., a judgment against Leer & Hutcherson for the sum of $472.50 "gold

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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wife and informed them of the defect in the supposed guardian's deed, and advised them to sue to recover the land; that, Andrews and wife being unwilling to take the burden of litigation, Wilkinson suggested that they sell the land to Gillean, who would sue; and that, acting upon this suggestion, they made the second conveyance to Gillean for the consideration stated above, and the first deed thereupon was returned to Andrews and wife. Appellees' theory of the matter, as we understand it, is that Gillean, with full knowledge of their claim of title, by falsely representing that he owned the land in controversy and desired to cure the defect existing in his title by reason of the sale made by the guardian after the order discharging him, procured the first deed; that upon an examination of this deed he discovered it did not convey to him the right to recover damages for the oil that had been taken from the land; and that he secured the second deed for that purpose. There is testimony and there are circumstances shown in the record that will sustain either theory. The deeds from Andrews and wife to Gillean were duly acknowledged. Stribling and Houston went into possession of the land, began the development of oil, and by a regular chain of transfers from them, duly acknowledged and recorded in Navarro county, which were introduced in evidence, appellees are claiming title to the land in controversy. Independent of the foregoing claim of title, appellees claim the land under a deed from A. C. Lockhart, the sole surviving heir of W. A. Lockhart, deceased, dated March 9, 1908, which was introduced in evidence, in which the said A. C. Lockhart conveyed to appellees Witherspoon and Heflin his interest in the Cairnes survey.

The trial court instructed the jury that the sale and conveyance by J. B. Buchanan, as guardian of Ethel Wilkes, to Stribling and Houston, was "not good for the reason that he had resigned his guardianship and had been discharged some time prior to the making of the deed," but submitted to them the issue of ratification of said deed based on her settlement with Buchanan and the evidence offered to charge the title in Gillean in favor of defendants claiming under said guardian's deed; also, the issue as to whether or not an execution was issued out of the office of the district clerk of Navarro county on the judgment in favor of Sutherland against Leer & Hutcherson, and the land levied on by virtue thereof and sold to John T. Wilkes, as recited in said deed.

Appellant's first and second assignments of error are as follows: "First. The court erred in submitting in its charge to the jury for their determination any question of estoppel of Ethel R. Andrews and her husband to deny the right of defendants to the two-ninths interest vested by law in Ethel R. Andrews, and which was conveyed by her and her husband to the plaintiff, Gillean. Second. The court erred in submitting in his charge to the jury for their consideration and determination the question or issue of fact as to whether or not H. C. Gillean is or was a constructive trustee holding the title for the benefit of defendants." The several propositions urged under these assignments are, in substance: (1) That, Ethel Wilkes being a married woman, the acceptance by her of all or a part of the proceeds of the sale made by J. B. Buchanan as her guardian to Stribling and Houston in full settlement and satisfaction of all claims and demands she had against him as guardian, and the execution of a writing signed but not acknowledged, as required in the conveyance of the separate property of a wife, acknowledging the receipt of such proceeds, settlement, and release, were insufficient to show such adoption or ratification of the said Buchanan's deed as estopped her from otherwise disposing of her interest in the land; (2) that the facts of this case are and were insufficient to create or impose upon plaintiff, Gillean, or his title to the property, any character of trust available to the defendants, or either of them.

The court did not instruct the jury, as appellant seems to contend under his first assignment of error, that if Mrs. Andrews knew all the facts about the sale by J. B. Buchanan as her guardian to Stribling and Houston, and had a settlement with him in which she accepted all or a part of the purchase money received by him from Stribling and Houston for the land, and released him from all other claims or demands which she had against him as her guardian, and that it was her purpose and intent to ratify and confirm the sale made by Buchanan, such acts and conduct on her part would alone amount to such ratification and confirmation. Upon this question the court, after stating the contention of the defendants, charged the jury as follows: "Now, if you believe from the evidence that, after Ethel married, she was made aware of the fact that J. B. Buchanan had, without lawful authority, assumed to act as her guardian, and as such to convey the land to Stribling and Houston, that they had paid him for the land, and that he had used some of the money for her, and that with such knowledge she authorized R. E. Buchanan to settle with J. B. Buchanan and receive the balance of the purchase money of the land, and that she accepted said balance and intended to approve and ratify the sale made by J. B. Buchanan, and that afterwards plaintiff informed W. W. Wilkinson that he claimed under the Buchanan deed and engaged him to obtain from Mrs. Andrews a deed ratifying the Buchanan deed, and that, in carrying out his engagement, Wilkinson told Mrs. Andrews that plaintiff was holding under the guardian's deed, and thereby induced her to convey the land to plaintiff with the purpose and intent on her part to validate and make good the title

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of the person or persons claiming the land under the Buchanan deed, then plaintiff ought not to recover; but if the deed to plaintiff was not made to confirm the Buchanan deed, or if it was not made under inducement of a false statement that plaintiff was claiming under the Buchanan deed, the defendant has no equity therein, and in such case the plaintiff could surrender the deed and take another, and the fact of part of the consideration being contingent on recovery is not of interest to defendant. If Gillean or Wilkinson, acting for him, knew that the real and substantial inducement for the making of the deed was not the $50 in money therein mentioned, but a desire and purpose on the part of the grantors to validate the Buchanan deed in behalf of the persons holding under it, and that they were executing the deed to Gillean under the belief that he was the holder under the Buchanan deed, then Gillean became a constructive trustee for the persons holding under the Buchanan deed, and in such case had no right to surrender the deed he had obtained from Mrs. Andrews."

The charge, as will be noted, required the jury to find, in order to return a verdict in favor of defendants upon this phase of the case, not only that Mrs. Andrews had accepted the purchase money received by Buchanan for the land, but that, with a full knowledge of all the facts, she conveyed the land to Gillean, thinking that he was holding under the Buchanan deed, with the purpose and intent on her part to validate and make good the title of the person claiming under said deed, and we think the evidence authorized such instructions. While it is true that statements and expressions are to be found in the testimony of Mrs. Andrews and her husband tending to show that neither of them, at the time the settlement was made with J. B. Buchanan, and the $272.10 accepted in full satisfaction of demands against him as Mrs. Andrews' guardian, and at the time of the execution of the first deed to Gillean, knew from what source it was derived, and did not know of any defect in the title sought to be conveyed by the said Buchanan, and knowingly approved of the sale made by him, yet the testimony of these witnesses and that of their uncle, R. E. Buchanan, who shows himself perfectly familiar with the acts and purposes of Mrs. Andrews, taken as a whole, is sufficient to warrant the conclusion that Mrs. Andrews did in fact believe that the sale of the land in question by her guardian, J. B. Buchanan, was unauthorized, and the title held under it in some way defective; that to attack the sale would reflect upon the integrity of her uncle, and to avoid such result she was anxious to ratify, confirm, and validate his act; that appellant, with full knowledge of the defendant's claim, falsely represented to Mrs. Andrews and her husband that he owned the land under the guardian's deed, and desired their deed simply for the purpose of curing the defect in the title by reason of the unauthorized sale of her uncle and guardian; that Mrs. Andrews, believing these representations to be true, and intending to cure such defect, executed and delivered to appellant the first deed to Gillean under which he claims in this suit; and that the second deed was taken by Gillean to include the oil extracted from the land. The theory of the defendants in relation to the acquisition of the deeds by appellant from Mrs. Andrews and her husband, and his claim thereunder, is that, under the facts and circumstances shown, appellant held under said deeds as trustee in invitum for the defendants.

It is a well-recognized principle in equity that if a person obtains the legal title to property by such arts or acts or circumstances, or circumvention, imposition or fraud, that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property. Courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of the circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title and order him to hold it for the original owner or to execute the trust in such manner as to protect the defrauded party and promote the safety and interest of society. 1 Perry on Trusts, § 166. In Hendrix v. Nunn, 46 Tex. 141, Judge Moore, in discussing this subject, says: "Courts of equity, as says Judge Story, have adopted principles in regard to fraud, whether constructive or actual, exceedingly broad and comprehensive in the application of their remedial justice, and especially where there is fraud concerning property they will often interfere and administer a wholesome and sometimes even a strict justice in favor of innocent persons who are themselves without fault in the transaction. And it is unquestionably a common and familiar application of their remedial justice for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold except as trustee;" that while it is impossible to announce a formula which is applicable to and that will embrace every conceivable case in which a court of equity will hold a party to be a constructive trustee, yet upon examination it will be found "that the cases to which this doctrine has been held applicable in the 'remedial justice' of courts of equity are generally cases where there is some breach of duty or want of good faith and fair dealing on the part of the person acquiring the

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property, or of him from whom or under whom he has gotten it, of which he has actual or constructive notice, or where the property has been acquired or possession of it taken on the assumption of a trust character, or under the belief by those with whom the transaction is had, or by reason of which it was acquired or possessed, that it was taken or acquired in trust, or where it was gotten by some undue influence"—citing 2 Wash. on Real Prop. 447–451; Story's Eq. Jur. § 1255 et seq.; 2 White & T. Lead. Cases in Eq. pt. 1, p. 549. To the same effect are the cases of Satterthwaite v. Loomis, 81 Tex. 64, 16 S. W. 616; Neil v. Yager, 22 Tex. Civ. App. 628, 55 S. W. 416. We conclude the court did not err in charging the jury as he did, and the assignments will be overruled.

Appellant's assignments of error, from the third to the thirteenth, inclusive, raise practically the same questions discussed in considering his first and second assignments, and what has been said in that discussion disposes of them adversely to appellant's contention.

Under the fourteenth assignment it is contended that the court erred in submitting to the jury as a doubtful and controverted issue of fact the question as to whether or not there was in fact an execution, issued out of the office of the clerk of the district court of Navarro county, by virtue of which there was a levy and sale of the interest of W. A. Lockhart in this land, as said fact was established by uncontroverted record and other evidence and presumptions of law and fact. We have reached the conclusion that this assignment is well taken. The evidence shows that a judgment was rendered in the district court of Navarro county in favor of Sutherland against Leer & Hutcherson for the sum of $472.50, with interest thereon at the rate of 5 per cent. per month. From this judgment a writ of error was prosecuted to the Supreme Court by Leer & Hutcherson, and supersedeas bond given with W. A. Lockhart and E. Melton as sureties. This judgment was reversed or reformed by the Supreme Court, and judgment rendered in that court April 22, 1872, in favor of Sutherland against Leer & Hutcherson and W. A. Lockhart and E. Melton for $472.50, with 5 per cent. interest per month from November 27, 1871, with directions that it be certified to the district court for observance. The following unsigned entry on the margin of the Supreme Court minutes appears: "Mand. issued May 8th, 1872." On the docket of the district court of Navarro county and in the minutes of that court appears the following entries: "March term, 1872. Awaiting action of Supreme Court—July term, 1872." "Judgment reversed and reformed by Supreme Court, therefore this cause is dismissed from the docket July 10, 1872." There was no execution produced on the trial; the oral testimony showing that the original papers in the case had been lost, including the execution referred to in the sheriff's deed. The execution docket in the district clerk's office showed that "a pluries execution issued August 13, 1872, for the sum of $517.70, delivered to Jas. H. Brent, sheriff, August 13, 1872, and various alias pluries executions thereafter at different dates up to April 2, 1876." The sheriff's deed bears date September 9, 1872, and recites: "That by virtue of a certain execution issued out of the district court of Navarro county in favor of William Sutherland and against John T. Leer and George Hutcherson, as principals, and W. A. Lockhart and E. Melton, as sureties, on a certain judgment rendered on the 24th day of November, A. D. 1871, and confirmed by order of the Supreme Court at Austin, on the 8th day of May, A. D. 1872, and directed and delivered to him as sheriff of said Navarro county, commanding him that of the goods and chattels and lands and tenements of the said Leer, Hutcherson, Lockhart and Melton, to make or cause to be made certain moneys in said writ specified, that he as sheriff did on the 14th day of August, 1872, levy and seize all the estate, right, title and interest which the said parties, or either of them, had in 320 acres of the Cairnes survey." Then, after reciting the advertisement of the land for sale, and that J. T. Wilkes was the highest bidder, proceeds in the usual form to convey it to him. In addition to the foregoing evidence, plaintiff showed a partition deed, dated November 15, 1877, which was prior to the death of W. A. Lockhart, between John W. Lockhart, Lucian C. Lockhart, Narcissa M. Lockhart, who, other than W. A. Lockhart, were the sole surviving heirs of John Lockhart, deceased, and from whom the Cairnes land was inherited, and John T. Wilkes, who had purchased the interest of the said W. A. Lockhart, recognizing Wilkes as succeeding to said interest by purchase under a sheriff's deed and conveying to Wilkes in severalty the 284.3 acres of which the two-ninths interest in controversy is a part. This deed was recorded in Navarro county June 5, 1877. W. A. Lockhart died in 1883 or 1884, and there is no evidence in the record that he or his heirs asserted any claim to the land after the date of the sheriff's deed to Wilkes.

There was no substantial evidence offered in contradiction of the foregoing evidence, and the same was sufficient, in the absence of such contradictory evidence, to establish conclusively the issuance of an execution out of the office of the district clerk of Navarro county, as recited in the sheriff's deed, and the levy, sale, and purchase thereunder of the land in controversy by John T. Wilkes. The facts and circumstances relied on by appellees to show contradictory and conflicting evidence on this question are, in substance, as we understand it, as follows: That no execution nor mandate was produced on the

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trial, and no testimony of any witness that it had in fact been issued; the absence of any proof that the execution recited in the sheriff's deed was returned and of a credit of the amount of Wilkes' bid on the judgment; that the costs of the Supreme Court had been paid, or that execution had issued therefor; that the sheriff's deed recites that the execution was issued on a judgment rendered on the 24th day of November, 1871, and not on the judgment of the Supreme Court, which was the only judgment against W. A. Lockhart, when the entry on the district court docket of July 10, 1872, recites that the judgment of the district court had been "reversed and reformed by the Supreme Court, and therefore this cause is dismissed from the docket"; that the time elapsing between the date of the levy of the execution and the date of sale was only 19 days, and the execution docket of the district clerk of Navarro county shows the issuance of a number of pluries executions for amounts almost the same as the original amount of the judgment. These facts and circumstances were not of sufficient probative force, in our opinion, to raise and authorize the submission of the issues contained in the court's charge and of which complaint is made. The direction in the judgment of the Supreme Court that said judgment be certified to the district court for observance, together with the entry on the minutes of that court, that "Mand. issued May 8, 1872," and the entry on the docket of the district court of Navarro county, to wit: "Judgment reversed and reformed by Supreme Court. Therefore this cause is dismissed from the docket July 10, 1872"—furnishes conclusive presumptions, in the state of the other evidence, that the mandate of the Supreme Court was in fact issued and filed in the office of the clerk of the district court of Navarro county. The mere fact that the certified copy of the bill of costs obtained from the clerk of the Supreme Court is not marked paid, nor the costs of that court otherwise shown to have been paid, and the fact that the evidence failed to show that an execution had been issued for said costs, did not warrant the conclusion that the mandate had not in fact been issued and received by the clerk of the district court. In the absence of evidence to the contrary, the presumption must be indulged that the clerk of the Supreme Court obeyed the statute upon the subject, and either collected said costs before he issued the mandate, or issued it without requiring the payment of the costs and then issued execution therefor. Likewise, the sheriff's deed, being more than 30 years old, conclusively established, in the state of the evidence as found in the record, by its recitals that an execution had been issued out of the office of the district clerk of Navarro county, and that under and by virtue of said writ the sheriff of Navarro county levied on and sold the land in controversy to John T. Wilkes, through whom appellant claims. This deed was an important link in the chain of appellant's asserted title, and, its validity having been conclusively established, the submission of it as a controverted issue, as was the effect of the charge complained of, constitutes, in view of the general verdict rendered, reversible error. The charge of the court, as has been seen, authorized a verdict for defendants upon either of the two issues discussed, and, the verdict in their favor being a general one, we are unable to say that it was not based upon a finding that the sheriff's sale and deed to John T. Wilkes was invalid and conveyed no title. The question as to whether or not the execution was issued on the district court judgment or Supreme Court judgment was not submitted in the court's charge and should not, in our judgment, have been submitted. The mandate of the Supreme Court having been filed in the district court, the clerk of the latter court was authorized, and it became his duty, to issue, in substance, such an execution as the one under which the land in question was sold.

But it is contended by appellees that the trial court should have peremptorily instructed a verdict in their favor, because, as a matter of law arising upon the undisputed facts, the deed from J. B. Buchanan, as guardian of Ethel Wilkes, to Stribling and Houston vested the title to the land in controversy in them, and hence appellant acquired no right or title thereto by his deed from Julian and Ethel Andrews. As stated the trial court instructed the jury, in effect, that the deed of J. B. Buchanan was of no effect because he had been discharged as guardian of Ethel Wilkes some time prior to the execution of said deed, and, as appellees have not challenged the correctness of this action of the court by a cross-assignment of error, appellant insists that it cannot be reviewed by this court. We are of the opinion that where a party to a suit has shown himself entitled, upon the whole case, to an instructed verdict, and the trial court fails to give him the benefit of such instruction, he may complain and have the matter reviewed in the appellate court without a cross-assignment of error; but, however this may be, as this case must be reversed for the error of the court in submitting as a controverted issue the validity of the execution sale and deed under which appellant claims, we think it advisable, in view of another trial, that we express briefly our views upon the propositions urged in this contention.

We are inclined to the opinion that the order of the county court of Tarrant county made November 11, 1897, to the effect that J. B. Buchanan be discharged as guardian of Ethel Wilkes upon payment of court costs, and that execution issue against him and his sureties therefor, is not an absolute and final discharge. It does not appear that these costs were ever paid, and subse-

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quent to said order, upon a written application of Buchanan, in which he represented himself to be the guardian of Ethel Wilkes, and in which he purported to act as such, the said county court directed him to sell the land in controversy to Stribling and Houston, as prayed for in said application. This was a clear disregard of the supposed order of discharge and a recognition by the court of the right and authority of the said Buchanan to act as the guardian of the said Ethel Wilkes in the sale of said land. The order of discharge being thus disregarded, it cannot now be invoked to annul the subsequent order of sale under which appellees claim. Alexander's Heirs v. Maverick, 18 Tex. 179, 67 Am. Dec. 693; Poor v. Boyce, 12 Tex. 449; Thomas v. Hawpe et al., 35 Tex. Civ. App. 311, 80 S. W. 129. We think, however, there is such an utter lack of evidence to show a confirmation of the sale made under the order referred to, or recognition of it by the county court, that it cannot be said that the title of Ethel Wilkes to the land sold was thereby divested out of her and passed to the purchasers, Stribling and Houston. It has been held that a formal order of court expressly confirming the sale and directing the title to be made is not essential; that if such acts are shown upon the part of the court as would satisfy the jury that the court recognized and acquiesced in the sale as a completed sale, when the purchase money had been paid and the deed executed, the jury might infer a confirmation by the court. Robertson v. Johnson, 57 Tex. 66. In the present case, however, there was neither an order of confirmation shown, nor any act on the part of the court from which a confirmation of the sale in question could be inferred. On the contrary, it seems that it was very clearly shown that the sale was never in fact reported to the court and by it in any way confirmed. That a confirmation was necessary to pass the title of Ethel Wilkes is too well settled to admit of argument. Rev. St. 1879, art. 2593; Harrison v. Ilgner, 74 Tex. 86, 11 S. W. 1054; Swenson v. Seale (Tex. Civ. App.) 28 S. W. 143. It is true, proof thereof could be made either by the production of the order of the county court to that effect, or by showing some act of recognition on the part of the court of the sale from which confirmation could be inferred; but proof that the sale was confirmed by the court must in all cases be made.

We do not think appellees' proposition to the effect that the application of Buchanan to sell his ward's land apprised the court of the proposed purchaser, price and terms of sale, and the necessity therefor, and, the court having ordered the specific sale applied for to be made, the court by that very act granted and confirmed the sale, and therefore no report of and subsequent confirmation was necessary, can be maintained. The application did not fully state the terms of the proposed sale. It merely informed the court that an offer of $12.50 per acre had been made for the land, part cash and balance in notes secured by vendor's lien. It did not state how much was to be paid cash, nor did it state the time demanded by the proposed purchaser in which to make the deferred payments. These were matters to be agreed upon by the guardian and the purchaser, and, so far as shown, were, by the order of the court, left entirely to their discretion. The sale was made by Buchanan for $222.22 cash and three notes of the purchaser for $186.16 each, payable in one, two, and three years. Whether these terms were reasonable and fair to the ward was a question for the determination of the court upon proper inquiry after a report of such sale was made, and such inquiry and adjudication by the court could not legally be dispensed with. It is, by statute, made the duty of the county or probate court, after the expiration of five days from the filing of a report of sale by a guardian, to inquire into the manner in which such sale was made, and to hear evidence in support of or against such report, and, if satisfied that the sale was fairly made and in conformity with law, to confirm it; if not, to set it aside and order the property sold again, if necessary. But the writer is of opinion that had the terms of the sale, as consummated, been fully stated in the application, the mere granting of it would not have been equivalent to the formal order of confirmation required by the statute, nor would it have met the requirements of the decisions upon the subject, to the effect that, in the absence of a formal order expressly confirming the sale, some act on the part of the court recognizing it as a completed sale must be shown.

Furthermore, I think to hold that a confirmation could be made at the time and in the manner suggested in appellees' proposition would be to practically annul the provisions of the statute regulating such sales, and substitute therefor a mode of procedure created and authorized alone by judicial legislation. The individual views of the writer, just stated, not being deemed necessary by the other members of the court to a decision of the question under consideration, they express no opinion as to the correctness of the same. This court is also of the opinion that the guardian's deed did not operate to pass the title of Ethel Wilkes to Stribling and Houston, upon the theory that, by accepting from her guardian the purchase money or a part thereof paid him by them, with a full knowledge of all the facts, she ratified and confirmed said deed. Being a married woman at the time she settled with her guardian and received from him the purchase money paid for the land by Stribling and Houston, she could ratify or

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10. MASTER AND SERVANT (§ 259*)—PERSONAL INJURIES—PETITION—FELLOW SERVANTS.

The petition was not subject to exception because not stating that the employés by whose negligence the door was left insecure were not fellow servants, or servants subject to his control.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 837; Dec. Dig. § 259.*]

11. MASTER AND SERVANT (§ 261*)—PERSONAL INJURIES—PETITION—CONTRIBUTORY NEGLIGENCE.

The petition was also sufficient as against a special exception that defendant would not be liable where the want of a safe place did not cause the injury, but the negligent act of plaintiff, as the question could not be settled against plaintiff on the allegations of the petition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 849–854; Dec. Dig. § 261.*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by Ed Dawson against Mrs. H. M. King and others for personal injuries. From the judgment entered after sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded.

J. C. Scott, for appellant. James B. Wells, G. R. Scott, H. C. Coke, and J. J. Eckford, for appellees.

JAMES, C. J. Judgment was entered against plaintiff, Ed Dawson, upon the sustaining of demurrers to his petition and his refusal to amend. Without setting forth the petition in full, we shall state its material contents. It charged: First, that he was the employé of the defendants Mrs. King and of the Murray Company, and as such was engaged in installing a gin and cotton press in a building at Kingsville in Nueces county. That the building in which he was so employed was unsafe, and in that part thereof in which plaintiff was engaged in said work there was an elevated floor about 7 feet 6 inches from the ground, and in this floor, next to the wall of the building, was an opening which had been made or left for a flight of steps, which were necessary to enable plaintiff to properly prosecute his work with safety, but which were not provided, nor any proper means for plaintiff to go up to said floor and descend therefrom, in the necessary and proper performance of his duties. That, while plaintiff was engaged in said work on the ground of said building underneath said floor, it became necessary for him to get a hammer which he needed, and which lay on the floor overhead and near one side of the edge of said opening, and, as defendants had provided no steps or other means of reaching said floor at said opening whereby plaintiff could have easily secured said hammer without danger, plaintiff, in the necessary discharge of his duty and in the exercise of due care, and without knowledge of any danger, stepped upon a plank which was below said opening and reached for said hammer with one hand, and to assist in doing so placed his other hand on or against the lower part of a large rolling door, which covered a doorway on a level with or just above the said floor, which door the defendants, acting by their agents, servants, and employés, had negligently left so that it was not secure and fastened in such manner that it would not fall and injure plaintiff while doing his work, which fact plaintiff did not know, when the door fell upon him, inflicting the injuries complained of. To this petition the court sustained a general demurrer and a number of special exceptions.

As we read and construe this petition, we are of opinion that it contains allegations which show a cause of action. It alleges the relation of plaintiff to both of the defendants to have been that of employés; also, the particular employment, and its character. It contains allegations which can be construed to mean nothing else than that the act of getting the hammer from the floor above was a necessary one in the prosecution of his work, and that the passage or access to that floor, through the opening that led to it, was a part of the premises connected with his work. The duty of his employer or employers, in such a situation, was to have exercised ordinary care to make the premises safe for him while engaged at his work, and if they were negligent in having a door or other object in such a place and in such condition on the premises, over which his work called him, as to fall upon him and injure him while at his work, without knowledge or fault on his part, they would be liable. Webster v. Stewart Iron Works (Ky.) 104 S. W. 708. We think this is too well understood to require any extended citation of authorities. The duty of his employer in such a situation was to exercise ordinary care to have the premises safe for him while engaged in his work, and if they were negligent in having an object in such a place and in such condition as to fall upon him while he was where his work called him to go, without his knowledge of the danger, or other fault on his part, they would be liable. Webster v. Stewart Iron Works (Ky.) 104 S. W. 708. We think this is too well understood to require discussion. The employer, however, is required to exercise the above care only where injury to the employé would have been foreseen by an ordinarily prudent person. If there was no occasion by reason of his employment for plaintiff to resort to the floor above, or if the necessity of his going there for some purpose appertaining to his work would not have occurred to the mind of a reasonably prudent person in connection with this employment, there would be no liability; but this petition alleges that, and that it was necessary for him to get the

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good against a general demurrer.

Appellees undertake to defend the rulings upon the special demurrers, by the following and similar propositions: They say, first: "That the allegation that plaintiff was employed by defendants for the purpose of installing a cotton gin and press in a building at Kingsville, is not sufficient, it being the duty of the pleader when challenged by special exception to state the nature of his employment, because, if he were acting independently and according to his own discretion, judgment, or will, there would be no liability on the part of appellees." The allegation that plaintiff was in the employ of defendants for the purpose of installing the gin and press states clearly the nature of his employment and excludes the idea of any different relation.

Another proposition is: "That the petition affirmatively shows that appellant used the rolling door for the purpose of elevating himself to the floor above, a use for which it was not intended, and that as a result the door fell; said petition wholly failing to allege that the door, the falling of which caused the alleged injuries, was defectively constructed, that by proper use of it the work and use for which it was intended could not be performed." There is nothing in this proposition that is pertinent to the case.

Another proposition is: "That it was incumbent upon plaintiff to allege that the use of the door by him, as alleged by him, was necessary to the proper or necessary prosecution of the work in which he was engaged." The clear and unmistakable intendment of the allegations is to that effect.

Another proposition is: "That the act of appellant in placing his hand on the rolling door for the purpose alleged by him being voluntary, and it being self-evidently unnecessary in the discharge of any duty, appellees would not be liable for any injury resulting therefrom." The fact that it was the circumstances, were not questions to be determined by demurrer.

Another proposition is: "Appellant having assumed by his own choice an unusual method and a dangerous one, he assumed all the risk of such a method, and, the facts alleged being for the purposes of the demurrer ascertained, it is a question of law as to whether the facts were sufficient in law to establish the fact of negligence." No facts appear in the petition which would warrant the court in declaring upon demurrer that plaintiff's conduct was such as precluded recovery.

Another proposition is: "That it was the duty of appellant, when challenged by special exception, to allege what relation each appellee sustained to the building in which the alleged injuries occurred." It was sufficient to allege that the defendants were his employers. This stated the relation. It would be immaterial what relation the appellees sustained to the building if they were his employers in this work.

Another proposition is: "It was incumbent on appellant, when a special demurrer was directed thereto, to disclose the facts as to whether or not the employés whose negligent act he complains of were not his fellow servants, or servants subject to his control." It was not necessary for plaintiff to do this.

Another proposition is: "That in no event would appellees be liable to appellant for an injury caused by requiring him to work in an unsafe place when the want of safety itself does not cause the injury, but the unnecessary and negligent act of appellant was the direct cause of the injury." This was a question that could not be settled against plaintiff on the allegations of his petition.

All other propositions made in appellees' brief are equally untenable, when tested alone by the allegations.

Reversed and remanded.

FAILURE TO PRESENT POINTS—WAIVER OF ERROR.

An assignment of error in a motion for new trial, not presented in appellant's brief, will be considered as waived or abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

2. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

No possible prejudice could have resulted from striking out a paragraph of the answer, where, on the trial, the court admitted all the evidence offered by defendants on the issue thereby raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4111; Dec. Dig. § 1042.*]

3. EVIDENCE (§ 473*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

The inferences to be drawn from the facts are for the jury, not a witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220–2233; Dec. Dig. § 473.*]

4. EVIDENCE (§ 317*)—HEARSAY—REPORTS.

Reports the parties had received, as to the extent of the intoxication of another, were properly excluded as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174–1176; Dec. Dig. § 317.*]

5. APPEAL AND ERROR (§ 1042*)—OBJECTIONS BELOW.

Where, notwithstanding the court struck a paragraph of the answer, it admitted evidence on the issue thereby raised, if defendants wished to introduce additional evidence on that point they should have stated to the court that they were taken by surprise by its action in changing its ruling, and have asked for a continuance or postponement to procure such additional evidence, and, not having done so, the presumption is that they introduced all the witnesses they could obtain on that issue, and they cannot thereafter complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. § 1042.*]

6. DAMAGES (§ 40*)—BREACH OF CONTRACT—PROFITS.

Plaintiff contracted to saw into oak heading, for so much a cord, timber to be furnished by defendants, who were also to furnish the machinery, which plaintiff was to purchase at the cost price and pay for by allowing 50 cents a cord on the amount earned to be credited every two weeks, title to the machinery to remain in defendants until paid for. *Held*, that plaintiff could recover, on a breach by defendants, the profits he would have made had defendants carried out the contract, since the contract being for personal services, the profits must have been in the contemplation of the parties when it was made.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72–88; Dec. Dig. § 40.*]

7. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

A verdict is conclusive upon the Supreme Court where there is any evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. § 1001.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

C. F. Greenlee, for appellants. Manning & Emerson, for appellee.

HART, J. This is an action on contract brought by W. W. Oliver against F. W. Hurley and J. W. Ross, doing business under the firm name of Hurley & Ross, to recover damages for profits, which he alleges he was prevented from earning by the defendants' breach of the following contract:

"This agreement, made this eighth day of February, 1907, by and between Hurley & Ross, of Brinkley, Monroe county, Ark., and W. W. Oliver also of Brinkley, Monroe county, Ark.

"Witnesseth that: In consideration of the sum of $2.50 per cubic cord, the said Oliver agrees to saw, cull, split, sap, and stack on yard oak heading; said work to be done in first class manner in every respect, same as is customary at Ross' factory, and as Hurley & Ross may from time to time direct. The said Hurley & Ross agree to furnish the machinery to do said work.

"It is hereby understood that the said Oliver is to purchase said machinery from Hurley & Ross at its cost price, including freight and expenses of getting saws in place to saw, by allowing 50 cents per cord to be credited every two weeks on the purchase of said machinery.

"Hurley & Ross agree to furnish the money every two weeks to pay off said Oliver's men from the amount due said Oliver in excess of the 50 cents per cord credited on purchase price of the machinery, as hereinbefore agreed. Hurley & Ross agree to furnish a man to look after timber, each party to this contract to pay one half of this timberman's wages.

"Said Oliver agrees to keep said machinery in good repair excepting ordinary wear and tear, and to furnish all supplies.

"This contract to be effective during one year beginning with this date. Now, if the said Oliver does not faithfully perform his part of within contract, it is agreed he will forfeit to Hurley & Ross what payments may have been made on said machinery at the time of said failure, and that the machinery is the property of said Hurley & Ross until fully paid for by said Oliver in the manner as agreed above.

"Hurley & Ross,
"Pr. F. W. Hurley.
"W. W. Oliver.

"Fitch Jones, Witness."

Defendants admitted making the contract, but denied having committed a breach thereof, and denied that plaintiff could have made any profit therefrom. Among other defenses,

they interposed the following, which is called paragraph 6th:

"Defendants state that plaintiff, after entering into said contract, rendered himself incapable of the duties resting upon him, by its terms, by becoming intoxicated and continuing so on intoxicating liquors, his condition being such that a reasonable, prudent person would not intrust one in such condition with control and management of his property."

The facts briefly stated are as follows: Hurley & Ross are manufacturers of lumber at Brinkley, in Monroe county, Ark. Oliver had been engaged as a sawyer of tight barrel heading by Hurley & Ross and their predecessors in business for a period of 22 years. Hurley & Ross made an examination of the oak timber supply near Penter's Bluff in Independence county, Ark., and, wishing to obtain this timber and have it sawed into heading, made the contract which is the foundation of this action. Both Oliver and Hurley & Ross believed the mill could be operated without a line shaft, and the mill was equipped accordingly. After a trial this was found to be impracticable, and the line shaft, pulleys, and belts were ordered and directed to be shipped to Penter's Bluff to be placed on the mill. After the line shaft and pulleys had arrived and were put in their proper place for the operation of the mill, and about the time the belt arrived, but before it had been attached to the mill, Hurley & Ross, over the objections of Oliver, took the mill out and moved it away. They claim that they did this on account of the continued intoxication of Oliver. They say he became and continued intoxicated to such an extent as to render it unsafe and impracticable to leave him in charge of the mill. Oliver says they moved the mill because they found the freight rate on heading from Penter's Bluff was too high, and denies that he was intoxicated. Oliver claims that the average run of the mill would have been 20 days per month; that he could average sawing 12 cords per day, and that the expenses of running the mill would not have been more than $15 per day. He based his estimate on his past experience as a sawyer. He also testified that there was sufficient timber accessible to run the mill at Penter's Bluff for one year, which was the life of the contract. Hurley & Ross adduced testimony tending to show that his profits at best could not have been more than the wages of a sawyer, which he could have saved by doing that work himself. Hurley & Ross were to pay for the timber.

There was a jury trial and a verdict for plaintiff in the sum of $1,000. From the judgment rendered thereon, the defendants have appealed.

In his motion for a new trial counsel for defendants set out numerous assignments of error, but, in his brief, only two questions are presented for our determination, and the remainder will be considered as waived or abandoned.

The first is that the court erred in sustaining plaintiff's motion to strike paragraph 6 from defendant's answer upon the ground that the same constituted no defense to the cause of action set forth in the complaint.

The second is that the court erred in submitting the question of profits as the measure of damages to the jury. We shall consider them in the order named.

1. In response to the contention of counsel for the defendants that the court erred in striking out paragraph 6 of their answer, counsel for plaintiff say that all legal testimony offered by defendants to prove the allegations made in paragraph 6 of their answer was admitted without objection, and that this amounted to a reconsideration by the court of its former ruling in striking out that paragraph. In the case of Roach v. Richardson, 84 Ark. 37, 104 S. W. 538, it was held: "Where, without objection on plaintiff's part, defendant directed his evidence to an issue not raised by the answer, and the trial court treated the issue as thus joined, the answer will be treated on appeal as amended to correspond with the proof." Again in the case of White River Ry. Co. v. Batesville & Winerva Telephone Co., 81 Ark. 195, 98 S. W. 721, it was held: "Appellant cannot complain because the court refused to permit it to amend its answer, if the court had already permitted it to adduce all the testimony bearing upon the issue sought to be raised by the amendment."

These decisions are in accord with the uniform holdings of the court on this subject, so it may be said here that if the court admitted all the testimony offered by the defendants on the issue raised by paragraph 6 of their answer, no possible prejudice could have resulted to them from its former action in striking out this paragraph. We have made a careful examination of the record and find that all competent evidence on the question of plaintiff's intoxication, or of his excessive indulgence in intoxicating liquors, that was offered, was admitted without objection. For instance, Mr. Hurley, one of the defendants, was asked: "Q. Mr. Hurley, you stated awhile ago that you didn't want Mr. Oliver in charge of the mill when in an intoxicated condition. I will ask you if you know his disposition when he was intoxicated. A. Yes, sir; he has been on a spree, and would stay that way for a long time, and for that reason I was afraid on account of the conditions up there. He had started in a pretty good gait, and I was afraid to continue him. (Objection to the pretty good gait, ask that it be excluded.) Court: That isn't proper testimony." Here it will be observed that no objection was made to Hurley stating all the facts within his knowledge as to the nature and extent of plaintiff's intoxication, but only to his stating his conclusions from the facts to the jury. The in-

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reports they had received as to the extent of plaintiff's intoxication. The objection was proper because such testimony would be hearsay evidence. We find from an examination of the record that in every instance where the defendants offered competent evidence on the question of plaintiff's intoxication, it was admitted without objection. As we have already pointed out, this amounted to a reconsideration of its former ruling by the court, and if the defendants wished to introduce additional evidence on that point, they should have stated to the court that they were taken by surprise at the action of the court in changing its ruling, and should have asked that the case be continued, or the trial postponed, for the purpose of allowing them to procure the attendance of additional witnesses on that point. Not having done so, the presumption is that they introduced all the witnesses they could have procured on that issue, and they cannot now complain. The court in its instructions to the jury based the right of recovery upon condition that the breach of the contract was made "without the fault of the plaintiff."

2. Was a loss of the profits on account of a breach of the contract the measure of damages? The evidence of both Hurley and Oliver shows that the defendants were to furnish or pay for the timber, and that Oliver was to manufacture it into oak heading for a stated sum per cubic cord. Oliver had worked for the defendants a great many years as a sawyer. His particular line of sawing was tight barrel heading. Hurley himself testified that he knew the profits that could be made by Oliver under the contract, and that they would consist mainly, if not wholly, of the fact that he could do his own sawing. These facts and as well the contract itself shows that it was one for personal services. Hence we think that the profits were in contemplation of the parties when the contract was made. This view is strengthened by the fact that the contract provided that Hurley & Ross were to furnish the machinery to do the work, and that Oliver was to purchase said machinery at cost price and to pay for the same by allowing 50 cents per cord on the amount earned to be credited every two weeks on the purchase price of said machinery. The contract further provided that the machinery was to remain the property of Hurley & Ross until paid for. In the case of Beekman Lumber Co. v. Kittrell, 80 Ark. 228, 96 S. W. 988, it was held: "Where plaintiff entered into a contract to perform certain work for the defendant, which he was prevented from doing by the fault of the defendant, he is entitled to recover the profits opinion of the court, said: "The rule in reference to the recovery of profits is thus stated in a recent work: 'The recovery of profits, as in the case of damages for the breach of contracts in general, depends upon whether such profits were within the contemplation of the parties at the time the contract was made. If the profits are such as grow out of the contract itself, and are the direct and immediate result of its fulfillment, they form a proper item of damages.' 13 Cyc. 53, 54. Such damages 'must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages where such profits are remotely connected with the breach of contracts alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinion of parties or witnesses.' 13 Cyc. 53; Spencer Medicine Co. v. Hall, 78 Ark. 336, 93 S. W. 985."

The language of the learned judge which follows is especially pertinent as an application of these principles to the facts of the present case, and we adopt it for that purpose. It is as follows: "Now, in this case the plaintiff had entered into a contract to perform certain work for the defendant, which he was prevented from doing, as the jury found, by the fault of the defendant, and we are of the opinion that the profits which the evidence makes reasonably certain that plaintiff would have made had defendant carried out its contract may be recovered." See, also, Ramsey v. Capshaw, 71 Ark. 408, 75 S. W. 479. For a recent application of the rule, see Blumenthal & Co. v. Bridges (Ark.) 120 S. W. 974.

The contract by its terms was to be effective one year from its date. The evidence adduced by the plaintiff tends to show that he had had long experience in sawing with a mill similar to the one named in the contract under consideration, and that he had averaged sawing from 12 to 15 cords per day. His testimony also showed that it could be run on an average of 20 days per month. The price of the heading to be received by the plaintiff was fixed by the contract, and the cost of manufacturing the heading was testified to by plaintiff and his witnesses. While this testimony was contradicted by that of the defendants, it is not our province to pass upon the weight of the testimony. The verdict of the jury is conclusive upon us, if there is any evidence to warrant it. It is sufficient to say that the verdict is sustained by the evidence.

We find no prejudicial error in the record, and the judgment will be affirmed.

DOUGLASS v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. CRIMINAL LAW (§ 564*)—VENUE—CIRCUMSTANTIAL EVIDENCE.
The venue of the crime charged may be proved by circumstantial evidence.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1279; Dec. Dig. § 564.*]

2. LARCENY (§ 61*)—VENUE—EVIDENCE—SUFFICIENCY.
On a trial for horse theft, the evidence that the horse at the time it was missed ranged in the county in which the indictment was found, and that it was found in possession of accused 10 or 12 miles distant in the same county, was sufficient to justify a finding that the horse was stolen in that county.
[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 159; Dec. Dig. § 61.*]

3. LARCENY (§ 3*)—ELEMENTS—FELONIOUS INTENT.
To constitute larceny, the taking must be done with a felonious intent.
[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3–10; Dec. Dig. § 3.*]

4. LARCENY (§ 64*)—POSSESSION OF RECENTLY STOLEN PROPERTY—EFFECT.
The taking of the property and its possession is not sufficient in itself to sustain a conviction of larceny thereof, but the possession of property recently stolen raises a presumption of guilt, and is a link in the evidence against accused, and when that possession is unexplained, it is a further link in the evidence for the jury to consider.
[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170–178; Dec. Dig. § 64.*]

5. LARCENY (§ 64*)—PROOF OF POSSESSION OF STOLEN PROPERTY—EFFECT.
That accused in possession of stolen property made a distinct assertion of ownership is evidence that he intended to convert it to his own use, but where his claim is made honestly and in good faith, he cannot be convicted of larceny because of the absence of a felonious intent, but where his explanation of his possession and his claim of ownership involve a falsely disputed identity or is based on fabricated testimony, the inference of his guilt is strengthened, and his complicity in the larceny is sufficiently established.
[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170–178; Dec. Dig. § 64.*]

6. CRIMINAL LAW (§§ 741–743*)—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.
The jury is the sole judge of the weight of the evidence and the credibility of accused and his witnesses testifying in his behalf.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1705–1728; Dec. Dig. §§ 741–743.*]

7. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.
Evidence *held* to sustain a conviction of horse theft.
[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

8. CRIMINAL LAW (§§ 941, 943*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.
Newly discovered evidence, merely cumulative of the evidence of accused, or simply contradictory of testimony of the state, does not justify a new trial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2333; Dec. Dig. §§ 941, 943.*]

Appeal from Circuit Court, Miller County; George W. Hays, Judge.

Cato Douglass was convicted of horse theft, and he appeals. Affirmed.

Pratt P. Bacon, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. The defendant, Cato Douglass, was tried upon an indictment charging him with the larceny of a horse, and the jury returned a verdict of guilty and assessed his punishment at one year in the penitentiary. He seeks a reversal of this conviction upon the following grounds: (1) Because the venue was not proved; (2) because the evidence is not sufficient to sustain the verdict; and (3) because of newly discovered evidence.

The evidence tended to prove that the horse, that the defendant is charged with having stolen, was the property of W. M. Paup; that it was permitted to run on the range near what was called Clear Lake in Miller county, Ark., and that it was last seen at that place in May, 1908. Shortly after that there was an overflow in that portion of the county, and either just before, or during the time of, this overflow, the horse disappeared. The overflow continued until July following, and the horse was next found in October or November, 1908, in the possession of the defendant near the locality called Lost Prairie in Miller county, and about 10 or 12 miles from the range where the horse had been accustomed to run. When found in the possession of the defendant, the mane of the horse had been cut off, his tail pulled out, and he had been altered, and branded dimly on the shoulder; and all this had been done after the horse had disappeared from the range in May. The defendant claimed to be the owner of the horse, and that he had owned him from the time he was foaled. A number of witnesses testified on the part of the state that the horse was the property of Paup, and had disappeared in May; and a number of witnesses testified on behalf of the defendant that the horse was the property of the defendant, and raised by him. One of the witnesses testified that when he discovered the horse in the possession of defendant in the fall of 1908 and told him in effect that it was Paup's horse, the defendant became angered at him and made demonstration to fight him. It is not deemed necessary to give any further, or in any detail, the various facts and circumstances adduced in evidence; and the above only presents the general nature of the case made out against the defendant. The question as to whether the testimony relating to the claim of ownership made by defendant was bona fide or fabricated was peculiarly within the province of the jury to determine, and we cannot say that all the facts and circumstances

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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It is urged by the defendant that the venue of the offense in Miller county is not proved. It has been held by this court that the venue of the crime may be proved by circumstantial evidence, and need not be proved by direct evidence; and that it may be proved by a preponderance of the evidence. Bloom v. State, 68 Ark. 336, 58 S. W. 41; Wilson v. State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. Rep. 303; Wilder v. State, 29 Ark. 293.

The testimony in this case tends to show that the horse ranged in Miller county near Clear Lake when it was missed, and that afterwards it was found in the possession of the defendant about 10 or 12 miles distant in Miller county. This was sufficient evidence to justify a finding that the horse was taken, driven, or carried away in Miller county. It is contended on behalf of the defendant that there is not sufficient evidence to sustain the conviction herein for the reason that the evidence does not show a felonious and criminal intent on the part of the defendant. It is urged that the defendant claimed the property as his own, and even if he was mistaken in that claim of ownership, his possession of the property would not be sufficient evidence of a criminal intent to steal. This is true if his claim of ownership was made in good faith. In order to constitute larceny the taking must be done with a felonious intent; the taking of the property and its possession is only a fact, and in itself it is not sufficient to raise a presumption of a guilty intent; and standing alone it would not be sufficient to sustain a conviction of larceny. Mason v. State, 32 Ark. 238; Gooch v. State, 60 Ark. 5, 28 S. W. 510; Sutton v. State, 67 Ark. 155, 53 S. W. 890; Jones v. State, 85 Ark. 360, 108 S. W. 223. But the possession of property recently stolen does raise a presumption tending towards guilt, and is a link in the evidence against the accused, and when that possession is unexplained it is a further link in the evidence of guilt against the accused to go to a jury for its consideration. Boykin v. State, 34 Ark. 443; Blankenship v. State, 55 Ark. 244, 18 S. W. 54; Denmark v. State, 58 Ark. 576, 25 S. W. 867; Gunter v. State, 79 Ark. 432, 96 S. W. 181, 116 Am. St. Rep. 85. When the stolen property is found in the possession of the accused, and he makes a distinct assertion of title and ownership thereto, it is evidence that he intended to convert the same to his own use, and to deprive the owner thereof. If he makes an explanation of his possession by claiming to be the owner thereof, then the question to be determined is whether such claim of ownership is made honestly and in good faith. If it is made honestly and in good faith, then the possession and the claim of ownership of the property "involves a falsely disputed identity or is based on fabricated testimony, then the inference of his guilt is strengthened," and his complicity in the larceny is sufficiently established. Shepherd v. State, 44 Ark. 39; Wharton's Criminal Evidence (8th Ed.) § 758.

In the case at bar the defendant claimed to own the horse and to have owned and been in possession of it from the time it was foaled; and he introduced a number of witnesses, who testified in accord with him. If this testimony is true, the defendant is not guilty. But if this testimony is fabricated and false, then it not only sustains the contention of the state that the horse was owned by Paup, but it further sustains the contention that the defendant had the felonious intent to wrongfully convert the same to his own use and to deprive the true owner thereof. These witnesses appeared before the jury, and all the facts and circumstances of this case were detailed before them. It was peculiarly their province to pass upon these questions, and this they have done. In the course of its instructions the lower court said to the jury: "Gentlemen of the jury, if you find from the evidence in this case that this was the property of Mr. Paup, but that this party took this horse through an honest mistake believing that it was his property, though you may believe that it was the property of Mr. Paup, then you should acquit the defendant."

The jury was the judge of the credibility of defendant and the witnesses who testified in his behalf. To their testimony the jury did not give credence. The jury must have found that the horse was the property of Paup; that the defendant took the horse and carried it away, and did not raise it as he claimed; that he did not take it through any mistake, but that he set up a false claim of ownership knowingly, and fabricated testimony to sustain that false claim. We have examined the evidence and we cannot say that there is not sufficient evidence to sustain that finding of the jury. It follows, therefore, that there is sufficient evidence to sustain the verdict.

It is contended by the defendant that since the trial of the cause he discovered certain evidence material to his defense. But this evidence is wholly and entirely cumulative to that introduced by him, or simply contradictory of certain testimony on the part of the state; and, therefore, it is not sufficient ground for a new trial. White v. State, 17 Ark. 404; Wallace v. State, 28 Ark. 531; Campbell v. State, 38 Ark. 498; Walker v. State, 39 Ark. 221; Redman v. State, 40 Ark. 445; Foster v. State, 45 Ark. 328;

Hudspeth v. State, 55 Ark. 324, 18 S. W. 183; Maxey v. State, 66 Ark. 523, 52 S. W. 2; Jones v. State, 72 Ark. 404, 80 S. W. 1088.

A great number of witnesses appeared and testified in this case both on the part of the prosecution and of the defense. Every fact and phase of the case was testified to by numerous witnesses, and this alleged newly discovered evidence could shed no further light on the case. The defendant has had a full and fair trial and we cannot say that the verdict of the jury is not sufficiently sustained by the evidence.

Judgment affirmed.

BATTLE, J., not participating, absent.

WALKER v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

1. CRIMINAL LAW (§ 1151*)—CONTINUANCES—DISCRETION—APPEAL.

Refusal of a continuance will not be reviewed in the absence of manifest abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 590*)—CONTINUANCES—WANT OF PREPARATION.

Defendant killed deceased April 24, 1899, and was indicted for murder on May 1st following, his trial being set for May 26th, when he applied for a continuance on the ground that, because of his own sickness, and the illness of one of his attorneys and business engagements of the other, sufficient preparation for trial could not be made. The manner in which defendant had been unable to prepare his defense was not shown, nor did it appear that he was unable to procure or to name any witness to his counsel whose testimony was material. Only one witness saw the killing, and he testified at the trial, and defendant, in testifying in his own behalf, admitted the killing. *Held*, that the denial of the continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. § 590.*]

3. CRIMINAL LAW (§ 1166*)—APPEAL—PREJUDICE—CHANGE OF VENUE—DENIAL.

Where, according to the undisputed testimony, accused was guilty of murder in the second degree, and judgment was modified on appeal so that he received the lowest punishment authorized for the offense, he was not prejudiced by the court's denial of a change of venue.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—REFUSAL OF REQUEST.

It was not error to refuse a request to charge on reasonable doubt and the appearance of danger, fully covered by instruction given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§ 866*)—VERDICT—MISCONDUCT OF JURY—PUNISHMENT—IMPRISONMENT BY LOT.

It was error for the jury, after finding defendant guilty of murder in the second degree to fix the term of imprisonment by lot.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 866.*]

6. CRIMINAL LAW (§ 1184*)—APPEAL—MODIFICATION OF SENTENCE.

Where, on appeal from a conviction of murder in the second degree, it appeared that the jury, after finding defendant guilty, erroneously fixing his term of imprisonment at 17 years in penitentiary by lot, the court on appeal, at the state's suggestion, could cure the error by reducing the sentence to 5 years, the lowest punishment prescribed for murder in the second degree.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1184.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Joe Walker was convicted of murder in the second degree, and he appeals. Modified and affirmed.

Thomas & Lee, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. Joe Walker was indicted by the grand jury of Monroe county for the crime of murder in the first degree. He was tried before a jury, and found guilty of murder in the second degree; his punishment being assessed at a term of 17 years in the state penitentiary. He has duly prosecuted an appeal to this court.

On the 20th day of April, 1909, the defendant, Joe Walker, shot and killed Tom Walker in Monroe county, Ark. The weapon used was a shotgun, loaded with No. 2 buck shot. About a week before the killing occurred the defendant had had some hard words with his wife in regard to him correcting her son, Oliver Stephens. On account of their trouble about her boy, who was 10 years old, the defendant's wife moved away from his house. The deceased and Joel Stephens at her request assisted her in moving. On the morning of the killing the defendant went to the place in the neighborhood where his wife had removed to visit her. When he went in, he heard Tom Walker say to her that she need not be afraid of anybody. He spoke to them both. Tom Walker then went out on the fence and sat there awhile. He then stepped back, and sat down on a log in front of the house. While in the house he was told that Tom Walker was going to kill him. The defendant stayed in the house about 1½ hours. The facts in regard to the killing as testified to by the defendant are as follows: "I picked up my gun; told the chaps good-bye; kissed her and the chaps, too; told her I wanted her to come back home; walked out of the house on the steps;

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I didn't know but what he wanted to apologize to me for the way he had treated me; started on out there; started to set down on the log with him, and he said, 'You needn't bring your God d—n gun here, you God d—n son of a bitch.' He got up; probably he made a step or so coming toward me with his knife in his hand. 'You God d—n son of a bitch, I ain't afraid of you.' I just put my gun up that way and fired; didn't put it to my shoulder. When I fired, he fell back over the log, turned on his left side. I looked at him; didn't know where it hit him; thought he was going to get up; he turned over. I then went back the way I come; went to where Bob Connell was in the field; told him what had occurred; didn't go home at all. Then went to the sheriff and surrendered." Defendant further testified that Tom Walker was about 10 feet away when he was shot; that he raised up off of the log, made one step forward in a stooping position, and then the gun was fired and blew him back over the log. The defendant's stepson, Oliver Stephens, was the only other person who saw the killing. He was a witness for the state, and detailed the circumstances leading up to the killing substantially the same as the defendant. He testified that Tom Walker was sitting on the log whittling when he was shot, and that he fell over the log backwards.

Counsel for defendant first assigns as error the refusal of the court to grant their motion for a continuance. It is well settled that continuances are largely in the discretion of the court, and that discretion will not be controlled, unless there is a manifest abuse of it. Rucker v. State, 77 Ark. 23, 90 S. W. 151; Puckett v. State, 71 Ark. 62, 70 S. W. 1041, and cases cited. The motion for a continuance in this case sets up that the killing occurred on the 24th day of April, 1909; that the defendant immediately surrendered himself into custody, and was placed in jail, where he remained until the date of trial; that the circuit court convened on the 24th day of April, 1909; that he was indicted for murder in the first degree, and on the 12th day of May, 1909, the case was set for trial on May 26, 1909; that since the killing the defendant has been confined in jail, and has been sick most of the time; that during a part of the time one of his attorneys has been sick, and the others are occupied with business engagements made prior to their employment in this case; that on this account proper preparation for the defense could not be made. Testimony was introduced and heard by the court in support of his motion, and by the state to controvert the testimony in regard to defendant's sickness. It was not shown in what manner de-one eyewitness saw the killing, and he testified at the trial. The defendant testified in his own behalf, and admitted the killing. It is not shown that he was deprived of any evidence which might possibly have secured him an acquittal, and we cannot say that the court abused its discretion in not granting his motion for a continuance.

Counsel for defendant next insist that the court erred in not granting their motion for a change of venue. They contend that the court arbitrarily refused to grant the motion, upon proper application therefor, and that the refusal falls within the rule announced in Ward v. State, 68 Ark. 466, 60 S. W. 31, and other cases in this court, where it is held that it is error arbitrarily to refuse to grant a change of venue asked by the defendant upon the ground that the court knows that defendant can get a fair and impartial trial in the county. No prejudice could have resulted to the defendant from the refusal of the court to grant his motion for a change of venue; for, according to the undisputed testimony in the case, which is above abstracted, he was guilty of murder in the second degree. See Duncan v. State, 49 Ark. 550, 6 S. W. 164. As the judgment will be modified to the extent of giving him the lowest punishment therefor for the reasons hereinafter given, no prejudice resulted to him. Jones v. State, 88 Ark. 579, 115 S. W. 166; Warren v. State, 88 Ark. 322, 114 S. W. 705; Hamby v. State, 72 Ark. 623, 83 S. W. 322.

Counsel for defendant complains that the court erred in not giving certain instructions asked by them on the subject of reasonable doubt and the appearance of danger. It is not necessary to set out these instructions or to discuss them, for these questions were fully covered by other instructions given by the court.

Counsel for defendant also complains that Oliver Stephens was permitted to detail a conversation had between the deceased and the wife of the defendant in the absence of the defendant. An examination of the record does not bear out their contention, but expressly shows that he was not permitted to detail the conversation, but only to state that on the morning of the killing the deceased came to where his mother was staying to see her about a rent note.

The record shows that the jury found the defendant guilty of murder in the second degree, but decided his term of imprisonment by lot. The Attorney General confesses that this was error, but urges that this did not affect the finding of the jury that the defendant was guilty of murder in the second degree, and furnishes no reason why the verdict in that respect should be set

aside. The Attorney General asks that the precedent made in the case of Williams v. State, 66 Ark. 264, 50 S. W. 517, a precisely similar case, be followed, and that the sentence be remitted to 5 years, the lowest punishment for murder in the second degree. Because the defendant might have been prejudiced by this method of arriving at the term of imprisonment, this will be done.

It is therefore ordered that the judgment be modified so as to allow the sentence to stand for 5 years' imprisonment only, and that the judgment so modified be affirmed.

WARE v. STATE.

(Supreme Court of Arkansas. Oct. 11, 1909.)

1. CRIMINAL LAW (§ 376*)—EVIDENCE—CHARACTER OF ACCUSED.
The prosecution cannot resort to accused's bad character as a circumstance from which to infer guilt.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836–843; Dec. Dig. § 376.*]

2. CRIMINAL LAW (§ 377*)—EVIDENCE—ACCUSED'S GOOD CHARACTER.
Accused may offer in his defense evidence as to his good character.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836–840; Dec. Dig. § 377.*]

3. CRIMINAL LAW (§ 380*)—EVIDENCE—CHARACTER OF ACCUSED—HOMICIDE.
In a prosecution for homicide, defendant claimed that in an altercation with deceased over his illicit relations with defendant's wife defendant shot deceased in self-defense. The state introduced evidence that defendant had illicit relations with deceased's daughter which were wholly unknown to deceased. *Held*, that the evidence of the state was not admissible to show the bad character of defendant.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.
Nor was such testimony admissible to prove one offense by showing another, as there was no connection between them.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

5. CRIMINAL LAW (§ 369*)—EVIDENCE—RAISING ANOTHER ISSUE.
Such testimony was also inadmissible because it raised another and different issue than that presented by the indictment which would call for the introduction of other evidence.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

6. CRIMINAL LAW (§ 380*)—EVIDENCE—GOOD CHARACTER—REBUTTAL.
Such testimony could not be made admissible by the fact that defendant after its introduction offered evidence to show his good character, since the evidence was not limited to general reputation, but related solely to a specific act.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.*]

7. WITNESSES (§ 337*)—DEFENDANT AS WITNESS—IMPEACHMENT.
Nor was such testimony admissible to impeach defendant who was a witness for himself, since impeaching evidence coming from the state must go to his general character.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1129–1148; Dec. Dig. § 337.*]

8. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
The evidence in the case not showing conclusively that defendant was not acting in self-defense, the admission of such incompetent evidence tended to disparage his testimony relating thereto, and was therefore prejudicial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

9. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
In a case where the uncontroverted testimony shows that the defendant is guilty of the degree of crime of which he is convicted, the error in permitting incompetent testimony is not prejudicial to accused, but, if the facts are disputed and if the proof is controverted, then that view of the testimony most favorable to defendant should be taken, and, if then the incompetent testimony would have a tendency to disparage this controverting evidence, its admission would be prejudicial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

Appeal from Circuit Court, Calhoun County; Geo. W. Hays, Judge.

Mose Ware was convicted of voluntary manslaughter, and he appeals. Reversed and remanded for new trial.

C. L. Poole, Thornton & Thornton, and Davis & Pace, for appellant. Hal L. Norwood, Atty. Gen., C. A. Cunningham, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. The defendant, Mose Ware, was tried in the Calhoun circuit court upon an indictment charging him with the crime of murder in the first degree by killing one Craft Wood. He was convicted of voluntary manslaughter, and prosecutes this appeal to obtain a reversal of the judgment upon that conviction.

The evidence on the part of the state tended to prove that the defendant was a colored school teacher, and the deceased, Craft Wood, was a colored preacher, and they lived for a number of years about one mile from each other. Upon the morning of January 22, 1907, the deceased was riding upon a horse along the road by the home of the defendant, and there was shot and killed. On the same day, and very shortly after the killing the defendant voluntarily surrendered to parties in the neighborhood, who took him to the sheriff of the county. To the sheriff the state proved that he made the statement that the deceased had been having wrongful relations with his wife, and that he had written deceased a note to leave, which deceased had refused to do, and that he had shot the deceased. But the sheriff did not claim that the defendant told him all the particulars of the killing. There was no one present at the time of the killing save the defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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and deceased. The prosecution proved by the wife of the deceased that a short time before the killing the defendant had written to deceased a note asking him to leave and charging him with wrongful relations with defendant's wife; and by several witnesses the prosecution proved that the defendant made the statement that the trouble was all about his wife. There were some other slight circumstances indicating that a breach of the friendly relations between these parties had occurred on this account; and the sole and only motive for the killing which the evidence on the part of the state indicated was the alleged illegal relations of deceased with the wife of defendant. The defendant testified in his own behalf that, when the deceased passed along the road at his house, a controversy arose between them about the wrongful relations between deceased and defendant's wife and about deceased leaving; that in the controversy the deceased started to draw a pistol from a pocket of his overcoat, and had pulled it partially out of the pocket, and was attempting to draw it for the purpose of killing him, when the defendant shot the deceased with his shotgun. Briefly, but sufficiently, the above present the testimony showing the manner and the cause of the killing as claimed by the prosecution on the one hand and as urged by the defendant on the other. It is not considered necessary to further detail the evidence because from this it can readily be determined whether the court committed an error in permitting the introduction of the testimony which we will now refer to, and whether such error was so prejudicial as to deprive the defendant of a fair and impartial trial.

In its examination in chief, and before the defendant had introduced any testimony, the state introduced as a witness Bell Wood, who testified that she was a daughter of the deceased; that a number of months after the killing the defendant gave her $10 for the purpose of sending her out of the state; that she was an unmarried woman, and the mother of two illegitimate children, and that the defendant was the father of one of these bastard children; that the defendant had thus had illegal relations with her, and debauched her. And in the same connection she stated that she had never told the deceased of any such wrongful relation with the defendant, that she had never told any one of it, and no one had ever spoken of it; that her father, the deceased, did not know it and had never heard of it, and neither by her testimony or by any testimony was any circumstance shown by which it could be found that this alleged relation with her by the defendant was in any way the cause of or connected with this killing. Let us then see if under the circumstances of this case there was any legal ground for the introduction of this testimony, or in what way it could throw light, if any, on the cause or manner of this killing. It is conceded that the deceased had never heard of this alleged relation, and had never in any way referred to it or in any way connected the defendant with his daughter; and that nothing had ever occurred that caused even a mention of the daughter between deceased and defendant. The sole and only motive for the killing which is advanced by the testimony of the state is the alleged illegal relation between deceased and the wife of defendant; and there is not a tittle of testimony which shows that the alleged relation of defendant with deceased's daughter was the cause of or the motive of the killing. This testimony could not throw any light on the question as to who was probably the aggressor, for the reason that it is conceded that deceased knew nothing of the alleged relation, and that, therefore, no difficulty could have arisen between them from that cause. The sole effect, if not the purpose, of this testimony, was to attack the character of the defendant. The question therefore presented is whether this testimony was admissible to prove the bad character of the defendant. The defendant occupies a twofold relation to this case. He is the defendant; and he was a witness in his own behalf. It is uniformly held that the prosecution cannot resort to the accused's bad character as a circumstance from which to infer his guilt. This doctrine is founded upon the wise policy of avoiding the unfair prejudice and unjust condemnation which such evidence might induce in the minds of the jury. If such testimony should be admitted, the defendant might be overwhelmed by prejudice instead of being tried upon evidence affirmatively showing his guilt of the specific offense with which he is charged. 1 Greenleaf on Evidence (8th Ed.) §§ 14b, 14q; 1 Wigmore on Evidence, § 57. And so, too, it is held that one offense cannot be proved by the evidence of the commission of another offense, unless the two are so connected as to form a part of one transaction. But as wholly independent acts the commission of one offense cannot be shown by evidence of the commission of another. And the introduction of such testimony is also inadmissible because it raises another and different issue which would call for the introduction of other testimony upon such issue, and thus would involve the true and specific issue presented to the jury for its determination, whether the defendant was guilty of the specific crime charged in the indictment. Dove v. State, 37 Ark. 261; Endaily v. State, 39 Ark. 278; Ackers v. State, 73 Ark. 262, 90 S. W. 1173; Allen v. State, 68 Ark. 577, 60 S. W. 956. But a defendant on trial for a crime of any grade is entitled to offer in his defense evidence as to his good character. Such evidence is permitted as to and should be limited to such character as would show that it would be unlikely that the defendant would commit the crime with which

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he is charged. 1 Wigmore on Evidence, § 56; 1 Greenleaf on Evidence, § 146; Kee v. State, 28 Ark. 155; Edmonds v. State, 34 Ark. 720; Maclin v. State, 44 Ark. 115. After the defendant has offered testimony of his good character in his own aid, the prosecution may by way of rebuttal offer evidence of his bad character. The object of permitting the prosecution to introduce such evidence is not for the purpose of showing the bad character of the defendant; but it is for the purpose of refuting his claim that he has a good character, and thus to prevent the defendant from imposing a false character upon the jury. But, as is said in the case of State v. Laxton, 76 N. C. 216: "This right of reply, however, is only coextensive with the privilege of the defendant, and is limited to evidence of general reputation." The prosecution is not permitted even on rebuttal to show specific acts of misconduct. The testimony that is here permissible is similar to that testimony of general reputation which is allowed in order to impeach a witness. 1 Greenleaf on Evidence, p. 39; 1 Wigmore on Evidence, § 56; Commonwealth v. Hardy, 2 Mass. 317. The testimony of Bell Wood was therefore not admissible in order to show the bad character of the defendant.

After the state had introduced this testimony and rested, the defendant introduced evidence of his good character; and, even though it should be considered that the testimony of Bell Wood was only introduced out of regular order in the progress of the trial, and simply on that account was not objectionable, nevertheless, it was still inadmissible because it was not limited to evidence of general reputation, but related solely to an alleged specific act of immorality. And for the same reason this testimony was not admissible for the purpose of impeaching the defendant as a witness in the case. As a witness in the cause he could have been cross-examined, and upon his cross-examination, like any other witness, he could have been asked as to specific acts for the purpose of discrediting his testimony as a witness. But, as is said by the Court of Appeals of New York: "It is well settled that for the purpose of impairing the credit of a witness by evidence introduced by the opposite party such evidence must go to his general character." Newcomb v. Griswold, 24 N. Y. 298. As is said in case of Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41, in such event "proof of specific acts of immorality is not competent." 1 Greenleaf on Evidence, § 461; Acts 1905, p. 143. It therefore follows that this testimony of Bell Wood was incompetent, and that it was an error to admit its introduction. But, although it was an error to admit the introduction of this testimony, it does not necessarily follow that this error was prejudicial to the rights of the defendant; and it was not prejudicial if it did not deprive him of a fair and impartial trial under all the testimony adduced in the case. In a case where the uncontroverted testimony shows that the defendant is guilty of the degree of crime of which he is convicted, the error in permitting the introduction of incompetent testimony is not prejudicial to the rights of the defendant. This is based upon the ground that, viewing such incompetent testimony in any light, the jury could not have rendered a verdict of acquittal. Levy v. State, 70 Ark. 610, 68 S. W. 485; Taylor v. State, 72 Ark. 613, 82 S. W. 495; Darden v. State, 73 Ark. 315, 84 S. W. 507; Daniels v. State, 76 Ark. 84, 88 S. W. 844; Clingan v. State, 77 Ark. 141, 91 S. W. 12. But the contrary of this proposition is also true. If the facts are disputed, and if the proof is controverted, then that view of the testimony should be taken which is favorable to the defendant; and if, in such view of the case, the incompetent testimony would have a tendency to disparage this controverting evidence on the part of the defendant, then its admission would be prejudicial. Whit v. State, 74 Ark. 489, 86 S. W. 284. In this case the defendant was a witness in his own behalf, and the sole witness who testified as to the manner and circumstances of the killing. He testified to a state of facts which showed that he acted in his necessary self-defense; and, if his testimony is true, he was not guilty of manslaughter. The physical facts proved by the evidence are not sufficient to show conclusively that the testimony of the defendant as to the circumstances of the killing is not true. The evidence proved that some of the shots entered the shoulder of the deceased; that one shot entered his head, somewhat on the side of his head and just back of the ear; and that some shot entered his back. But the deceased was at the time on his horse, and testimony as to the tracks of the horse indicated that the horse plunged and probably wheeled about, so that it is possible that the deceased may have been drawing a pistol in a manner and while in a position to shoot the defendant, and the defendant acting on such appearances fired his gun at deceased, and at the instant of doing so the position of deceased changed so that he received the shot in the parts of the body as shown by the evidence. The defendant had the legal right to have the jury pass on his testimony together with the other testimony in the case and these circumstances, and to determine the facts. The undisputed testimony, therefore, does not show that the defendant did not act in his necessary self-defense; and therefore it does not appear from the uncontroverted testimony that he was guilty of the crime of which he was convicted. Now, this incompetent testimony was of a nature to discredit the defendant as a witness and to cover him with a moral turpitude that may have led the jury to accept it as a link in fixing on the defendant a criminality in the commission of this act. The testimony was of such a na-

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weight of the testimony is to the effect that the deceased had no pistol and was unarmed, and that the defendant did not kill him in necessary self-defense. But under the law the defendant had the right to testify as a witness, and he had the legal right to have that testimony presented to the jury unassailed by any unfair prejudice or by any incompetent testimony discrediting him. What credence the jury might have given to his testimony unaccompanied by this discredit, or to what extent they may have been influenced by testimony tending to show that the defendant had debauched the daughter of the man he was charged with having killed, we cannot say; but unquestionably this testimony had the tendency to affect and influence the jury to the detriment of the cause of the defendant. If it was illegal to admit this testimony, its admission was calculated to deprive the defendant of that absolutely fair trial under the law, to which he was entitled. The testimony was incompetent, its admission was an error, and this error was prejudicial.

We find no other error in the case.

For the error in admitting the testimony of Bell Wood, the judgment of the Calhoun circuit court is reversed; and this cause is remanded for a new trial.

MISSOURI & N. A. R. CO. v. STATE.

(Supreme Court of Arkansas. June 28, 1909.)

1. RAILROADS (§ 103*)—DUTY TO FENCE—CONSTRUCTION OF STATUTE.

A statute requiring a certain railroad company to fence its right of way in certain counties, and imposing a penalty for violation, every day which the company shall fail to comply with the provisions being made a separate offense, was aimed at the line of railroad described, and not at the particular corporation which owned and operated it, and is in the nature of a police regulation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 762; Dec. Dig. § 103.*]

2. CONSTITUTIONAL LAW (§ 210*) — EQUAL PROTECTION OF LAWS—APPLICABILITY TO CORPORATIONS.

Corporations fall within Const. U. S. Amend. 14, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, and states cannot, by arbitrary classification based upon no difference which bears a reasonable and just relation to the act or business regulated, place burdens upon one class of persons not shared by others.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 680; Dec. Dig. § 210.*]

3. CONSTITUTIONAL LAW (§ 70*) — SPECIAL ACTS—LEGISLATURE AS JUDGES OF NECESSITY.

The Constitution permits special legislation when general laws cannot be made applica-

POWERS—ENCROACHMENT ON LEGISLATION—STATUTES—REASONABLENESS.

The legislative exercise of the police power must be reasonable, and whether it is reasonable is for the courts to determine, but the necessity for the exercise of the power in a given case is addressed to the discretion of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 130, 131; Dec. Dig. § 70.*]

5. CONSTITUTIONAL LAW (§ 241*) — EQUAL PROTECTION OF LAWS—VALID CLASSIFICATION.

The Legislature may, in the exercise of the police power, determine that conditions are such, along a certain railroad, in certain counties, that the track should be fenced in a particular manner, and enact to that effect, and the fact that there are other railroads in that portion of the state, and that another railroad traverses one of the counties, does not make the enactment an arbitrary classification; and it is not violative of Const. U. S. Amend. 14, forbidding a state to deny to any person within its jurisdiction the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 700; Dec. Dig. § 241.*]

6. RAILROADS (§ 103*)—REPAIRS—CONSTRUCTION OF STATUTE.

The penalty applies to a failure or refusal to repair the fence, so as to keep it in the condition required by the statute, as well as a failure to fence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 762; Dec. Dig. § 103.*]

Appeal from Circuit Court, Boone County; Brice B. Hudgins, Judge.

The Missouri & North Arkansas Railroad Company was convicted of violating a statute requiring the fencing of its right of way, and appeals. Affirmed.

W. B. Smith and J. Merrick Moore, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. The Missouri & North Arkansas Railroad Company appeals from judgments of the circuit court of Boone county in two cases, assessing penalties against it for alleged violations of a statute enacted by the Legislature in 1905 requiring the St. Louis & North Arkansas Railway Company to fence its right of way in the counties of Carroll, Boone, and Searcy, in this state. The appellant is a railroad corporation, and succeeded to all the rights, franchises, and property of said St. Louis & North Arkansas Railway Company by purchase from a commissioner of the United States Circuit Court in a mortgage foreclosure suit. The statute was enacted in 1905 (Acts 1905, p. 410), but was made to take effect on September 1, 1906, and appellant received its deed of conveyance from the commissioner on June 26, 1906. The first section of the statute reads

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hereinafter provided." The second section requires that the fence shall be built on both sides of the roadbed, so as to prevent stock from crossing the track, and specifies how the fence shall be constructed. Section 3 requires the company to make gates at private crossings and stock guards at public crossings, and further provides that the company shall not be required to fence the track in cities or towns or at places where natural barriers render it impossible for stock to go upon the track. Section 4 requires the company to keep the fence and stock guards in good repair, and makes it liable for double damages in case stock is injured or killed on the track when the fence is not in good condition, but provides that, when the fence is kept in good repair, the company shall not be liable for killing or injuring stock. Section 5, which prescribes the penalty, is as follows: "That if said railroad company shall fail, refuse or neglect to comply with the provisions and requirements of this act, it shall be deemed guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, be fined not less than fifty dollars nor more than five hundred dollars, and every day said railroad company shall fail to comply with the provisions of this act shall be a separate offense."

1. The statute in question took effect after the appellant became the owner of the line of railroad described therein. It cannot well be contended, and is not contended here, that the statute, if valid, does not apply to appellant as the owner of the railroad. The statute was aimed at the line of railroad described, and not at the particular corporation which owned and operated it. It is in the nature of a police regulation applicable to a certain line of railroad.

2. It is contended that the statute is violative of that part of the fourteenth amendment to the Constitution of the United States which forbids that a state shall "deny to any person within its jurisdiction the equal protection of the laws." Corporations fall within this provision, and are entitled to its protection. It is insisted that the statute singles out one line of railroad, and imposes upon the owner of it the unequal burden of fencing the track when similar burdens are not placed on other railroad companies. Decisions of the Supreme Court of the United States are relied on, holding that states cannot, by arbitrary classification, based upon no difference which bears a reasonable and just relation to the act or business regulated, place burdens upon one class of persons not shared by others. Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting v. Kansas City Stockyards, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. In the Cotting Case supra, a statute of Kansas of the company, among other regulations, and the court held that the classification was arbitrary and unjust, and denied to that company the equal protection of the laws. In that case the regulation of rates, etc., was found to be such as would have applied to any other company engaged in similar business, and that the classification was not based upon any distinction between the business of that company and that of other companies in the same business. The statute now under consideration falls within a different principle. It is a special act, applicable to a given locality; that is to say, to a particular line of railroad running through a certain locality. It is purely local in its operation. The selection of this line of railroad is necessarily the selection of a given territory over which the statute is to operate, and it implies a determination by the lawmakers of the question of necessity for such provision as a protection to the property along that particular route. Now, the Constitution of this state permits special legislation when general laws cannot be made applicable, and this court has repeatedly held that the Legislature is the sole judge of the necessity for a special statute. Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; Davis v. Gaines, 48 Ark. 370, 3 S. W. 184; Carson v. Levee District, 59 Ark. 513, 27 S. W. 590; Railway Company v. Grayson, 72 Ark. 119, 78 S. W. 777; Waterman v. Hawkins, 75 Ark. 120, 86 S. W. 844; Hendricks v. Block, 80 Ark. 333, 97 S. W. 63. The legislative exercise of the police power must be reasonable, and whether or not such legislation is reasonable is a question for the courts to determine; but the necessity for the exercise of the power in a given case is a matter addressed to the discretion of the Legislature. La. & Ark. Ry. Co. v. State, 85 Ark. 12, 106 S. W. 960; 2 Tiedeman on State and Federal Control, p. 987.

It is not contended that a statute requiring railroad companies to fence their tracks is not a proper exercise of the police power, nor that it places an unreasonable or unnecessary burden upon the appellant company in this instance to fence its track. The only complaint is that this company should not be singled out and compelled to do that which other railroad companies in the state are not required to do. The answer which we make to the contention is that the Legislature has determined, it is presumed after due investigation, that the conditions are such along the route of this railroad that the track should be fenced in a particular manner pointed out in the statute for the protection of live stock, and, maybe, for the better security of human life, in the operation of trains. The particular reasons which prompted the Legislature in arriving at this

decision we are not called upon to inquire into. The fact that there are other railroads in that portion of the state, and that another railroad traverses one of the counties mentioned in the statute, does not stamp the enactment as an arbitrary classification. Different conditions, calling for different regulations, may exist in the same county, and, as we have already said, the Legislature alone can inquire into and determine the necessity of putting into force a police regulation in a given locality. The Supreme Court of the United States in Erb v. Morasch, 177 U. S. 585, 20 Sup. Ct. 819, 44 L. Ed. 897, has, we think, announced the principle which controls in this case. There the court upheld as a valid exercise of police control an enactment regulating the speed of trains on all railroads save one in Kansas City. The court said: "If there were nothing in the record beyond the mere words of the ordinance, we are of the opinion that the contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts, crossing or along streets constantly traveled upon by foot passengers and vehicles, while others may pass through remote parts of the city, where there is little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which will permit the fencing of the tracks, and where the tracks are in fact fenced. Under those circumstances, a different regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of the legislation, state or municipal, if the ordinance stood by itself, the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

3. The track was fenced by the St. Louis & North Arkansas Railroad Company before the appellant acquired title to the property, and in each of the two cases before us the appellant is charged with having permitted the fence to remain out of repair so that its condition was not such as the statute requires. It is urged that the penalty applies only to the failure to fence the track, and not to failure or refusal to repair it so as to keep it in the condition required by the statute. We construe the act to prescribe a penalty for failure or refusal to comply with any of the requirements of the act; and one of the requirements is to keep the fence and stock guards in good repair. A separate penalty is prescribed for each day's failure or refusal to comply. The statute measures the offense by the period of time, viz., by the day, and not by the number or extent of breaches.

The judgment in each case is affirmed.

KANSAS CITY SOUTHERN RY. CO. v. CARL.

(Supreme Court of Arkansas. June 14, 1909.)

1. CARRIERS (§ 185*)—CARRIAGE OF GOODS—LOSS OF FREIGHT—ACTIONS—PRESUMPTIONS.

Where the initial carrier receives goods for transportation to another state by a connecting carrier, in absence of contrary evidence it is presumed that the goods were lost en route through the negligence of the last carrier, and the burden is on it to show that the loss did not occur on its line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 835; Dec. Dig. § 185.*]

2. CARRIERS (§ 150*)—CARRIAGE OF GOODS—CONTRACTS AGAINST LOSS BY NEGLIGENCE.

Public policy forbids a common carrier from exempting itself by contract from damages for loss by its own negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 654; Dec. Dig. § 150.*]

3. CARRIERS (§ 180*) — FREIGHT — CONTRACT—LIMITING CONNECTING CARRIER'S LIABILITY—VALIDITY.

The Hepburn amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) makes interstate carriers liable for loss or injury to property caused by it, prohibits contracts exempting the carrier from the liability thereby imposed, and provides that the carrier issuing the freight receipt or bill of lading may recover from the carrier on whose line the injury occurred any damages it may be required to pay the owner. *Held*, that the act made invalid all contracts limiting a carrier's liability for loss of freight, and an initial carrier could not contract to limit the liability of a connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 820; Dec. Dig. § 180.*]

4. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR — PREJUDICIAL EFFECT — JUDGMENT CORRECT ON MERITS.

Where the judgment was correct under the undisputed evidence, no errors in instructions could have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by J. M. Carl against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for loss of a box of household goods shipped from Lawton, Okl., to Gentry, Ark. The suit was brought before a justice of the peace in Benton county, Ark., and judgment was rendered in favor of the plaintiff. The case was duly appealed to the Benton cir-

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cuit court. On a trial anew in that court, the plaintiff testified that on October 8, 1907, he delivered to the Chicago, Rock Island & Pacific Railway Company at Lawton, Okl., two boxes and one barrel, containing household goods, and that he signed a contract and received a bill of lading. The goods were consigned to himself at Gentry, Ark. He received the barrel of goods, and also one of the boxes; but one of the boxes was never received. The value of the goods as testified to by the plaintiff exceeded the sum of $75. The defense of the railway company was that the goods were shipped upon a contract between the plaintiff and the Chicago, Rock Island & Pacific Railway Company and its connecting carriers; that the defendant is one of the connecting carriers, and is entitled to the benefit of all the provisions of said contract; that said contract contained a stipulation that in consideration that the plaintiff would receive the lower of two freight rates, in case of loss, said goods should be valued at $5 per cwt.; that all of the goods received weighed 400 pounds; that there was delivered to the plaintiff by the defendant 300 pounds of said goods. The jury returned a verdict for plaintiff for $75, and the defendant has appealed from the judgment rendered.

Read & McDonough, for appellant.

HART, J. (after stating the facts as above). Counsel for appellant urge that upon the undisputed evidence the court should have directed a verdict for appellant. They rely for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss. They contend that the stipulations restricting the liability in case of loss were made for their benefit as well as for the benefit of the initial carrier, and base their contention on our decisions to that effect in the cases of St. L., I. M. & S. Ry. Co. v. Weakly, 50 Ark. 406, 8 S. W. 134, 7 Am. St. Rep. 104; St. L. & S. F. R. Co. v. Burgin, 83 Ark. 502, 104 S. W. 161, and cases cited. But in making their contention they have not taken into consideration the effect of the Hepburn amendment (Act June 29, 1906, c. 359, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which became effective on June 29, 1906, a date prior to the time the contract in question was made. That part of the Hepburn act which applies to the present case is contained in section 7, which reads as follows: "That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." "That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." The undisputed evidence shows that the initial carrier received the property for transportation from a point in one state to a point in another state, and the presumption in the absence of evidence to the contrary was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier. The section of the Hepburn act above quoted makes the carrier liable "for any loss, damage or injury to such property caused by it * * * and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." The express terms of the act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason, a statute may prohibit it from making stipulations in a contract which provide for such partial exemption. If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it could not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose line the loss occurs the amount of the loss it may be required to pay the owner. "The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier." In the Matter of Released Rates, 13 Interst. Com. R. 550.

In the case of St. Louis Southwestern Ry. Co. v. Grayson & Seitz (Ark.) 115 S. W. 933, we held that a restriction of the liability of a carrier to loss upon its own line is violation of the Hepburn act, making the initial

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the decision cited the case of Smeltzer v. St. L. & S. F. R. Co. (C. C.) 158 Fed. 649. The validity of this clause of the Hepburn act has also been sustained by the Court of Appeals of the state of Georgia in the case of Southern Pacific Company v. Crenshaw Bros., 5 Ga. App. 675, 63 S. E. 865. Therefore we hold that the contract in question was prohibited by the terms of the Hepburn act, and is invalid in so far as it attempts to limit the liability of the carrier in case of loss caused by it. This case is distinguished from the case of St. L., I. M. & S. Ry. Co. v. Furlow (Ark.) 117 S. W. 517, and St. L. & San Francisco Rd. Co. v. Keller (Ark.) 119 S. W. 254, where we held that a stipulation in a contract for an interstate shipment which required notice in writing of the loss to be given within a specified time, if reasonable, was not in conflict with the provisions of the Hepburn act. The stipulation in question there did not exempt the carrier from any liability imposed by the Hepburn act. They were mostly rules or regulations adopted by the carrier for the purpose of securing it from fraud and imposition. Having held the contract of shipment invalid in so far as it restricted the liability of the carrier as to the value of the goods shipped in case of loss because such restriction was in violation of the provisions of the Hepburn act, the cause stands as if the Chicago, Rock Island & Pacific Railroad Company had accepted the goods for shipment from Lawton, Okl., to Gentry, Ark., and the appellant was the last carrier of the goods. "Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of proof is on it to show that the loss did not occur on its line." To the same effect, see St. L. S. W. Ry. Co. v. Birdwell, 72 Ark. 502, 82 S. W. 835; K. C. So. Ry. Co. v. Embry, 76 Ark. 589, 90 S. W. 15; Midland Valley Rd. Co. v. Hale, 86 Ark. 483, 111 S. W. 646. In this case the undisputed evidence shows that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by appellant, the last carrier, and lost through its negligence. Hence, under the undisputed evidence as disclosed by the record, appellant was liable for the amount recovered. The judgment being right upon the undisputed testimony, no prejudice could have resulted to appellant from any instruction given by the court. St. L. S. W. Ry. Co. v. Grayson & Seitz, supra. Therefore it will not be necessary to discuss the correctness of the instructions given by the court, and the judgment will stand affirmed.

(Supreme Court of Arkansas. Oct. 11, 1909.)

1. CRIMINAL LAW (§ 1151*) — APPEAL — REVIEW—DISCRETION OF COURT.

It is only where there has been an abuse of discretion by the trial court in refusing a continuance that the appellate court will disturb the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENCE OF WITNESS.

Four or five days before his trial accused handed to the clerk of the court a list of his witnesses, containing the name of a witness whose address was in another county. The clerk issued a subpœna directed to the sheriff of the other county, and delivered it to the deputy sheriff of the trial county, who mailed the subpœna in an envelope directed to "officer at" the address given by accused. The writ was never returned. *Held*, that the court did not abuse its discretion in refusing to postpone the trial because of the absence of such witness for want of diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335–1341; Dec. Dig. § 598.*]

3. CRIMINAL LAW (§ 595*)—CONTINUANCE—GROUNDS—MATERIALITY OF EXPECTED EVIDENCE.

In a prosecution for obtaining property under false pretenses consigned to a railway company, accused expected to prove by an absent witness that, after he obtained the property from the agent of the railway company, he offered to to return it to such agent. There was undisputed evidence that after such agent ceased to be the agent of the company accused offered to return the property to her successor on condition that the freight charges which he had paid be refunded to him. *Held*, that it was not an abuse of discretion to refuse a continuance to secure the presence of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323–1327; Dec. Dig. § 595.*]

Appeal from Circuit Court, Cross County; Frank Smith, Judge.

Lee Clampett was convicted of obtaining property under false pretenses, and appeals. Affirmed.

Smith & Smith, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant, Lee Clampett, stands convicted of the crime of obtaining property under false pretenses; the charge being that he obtained from the agent of the railway company at Cherry Valley, in Cross county, Ark., upon the false and fraudulent representation that he was then the holder of a bill of lading therefor, a lot of personal property which had been consigned to the Merry Machine Works. The evidence establishes the fact that appellant had ordered from the last-named concern at Memphis, Tenn., the property in question (a lot of machinery and appliances for a sawmill), which was shipped from Memphis to Cherry Valley, Ark., to the order of the shipper, and

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the latter sent the bill of lading, attached to a draft on appellant for the purchase price of the property, to a bank at Cherry Valley, to be delivered to appellant on payment of the draft. Appellant paid the freight charges, and received the property from the agent of the railway company, and hauled it to the mill without paying the draft, and without procuring the bill of lading and surrendering it to the agent of the railway company. He has never paid for the goods at all. The railway agent testified that appellant represented that he held the bill of lading, and that the consignment of freight was delivered to him on the faith of such representation. Appellant denied that he made any such representation; his contention being that he was not aware of the property having been consigned to the shipper's order. This was the issue involved in the trial of the case. The evidence was conflicting, but the jury has settled the issue by the verdict.

Appellant relies for a reversal of the case on the alleged error of the court in overruling his motion for continuance of the case to the next term in order to procure the attendance of an absent witness, Tom Stevens by name. He set forth in his motion what he alleged to be the testimony of the absent witness, and the court in overruling the motion required of the prosecuting attorney an admission before the jury that the witness would give the testimony thus set forth. This was read to the jury as the testimony of the absent witness.

The court in passing on the motion for continuance heard testimony as to the diligence of the appellant and his attorney in attempting to procure the attendance of the absent witness. It appears from said testimony that the only thing done by appellant or his attorney was to hand to the clerk, four or five days before the trial, a list of his witnesses containing the name of this witness, with the word "Smackover" written opposite, indicating his residence to be at that place. Smackover is a railroad station in Union county, and the clerk issued a subpœna directed to the sheriff of that county, and delivered the same to a deputy sheriff of Cross county. The last-named officer mailed the subpœna in an envelope directed to "Officer at Smackover." The writ was never returned, and nothing was ever heard of it. The deputy sheriff stated that he was informed by Tom Stevens' father, who resided at Cherry Valley, that the witness resided at Smackover. This court has repeatedly held that the matter of postponement of trials is left to a considerable extent to the discretion of trial judges. This must necessarily be so, as the trial judge who hears such motion is in a much better position than the appellate court to determine whether or not the motion is made in good faith, and that an honest, diligent effort has been made to prepare for trial. It is only when it appears that there has been an abuse of discretion by the trial judge that the appellate court will disturb such ruling. Now, in the present instance, we cannot say that the trial court abused its discretion in refusing to postpone the trial of the case. Proper care had not been exercised by the appellant or his attorney in sending the subpœna to an officer who would serve it promptly. The Cross county deputy sheriff was blamable for not sending it to the proper officer in Union county; but appellant was not free from blame, as it does not appear that he took pains to give directions for forwarding the writ. He should not have relied on the officer entirely without specific directions to send it properly in order to get it served in time. However honest, intelligent, and well-meaning public officers may be, they are often without the experience which suggests to them the best course to pursue in obtaining the speedy service of process; and a proper degree of diligence on the part of those interested in the service requires that they give directions under circumstances similar to those shown to exist in this instance. Courts must hold litigants to a strict degree of care and diligence in preparing for trial. Otherwise the orderly dispatch of the business of the court would be hindered.

This subpœna should have been sent to the sheriff of Union county to whom it was directed, with information as to where the witness could be found in his county. If this had been done, doubtless the writ would have been served and the witness present when the case was called. The only disputed point in the testimony of the absent witness is that appellant some time after he obtained the property from the agent of the railway company (Miss McLin) offered to return it to her. He was, of course, entitled to prove this as tending to show good faith and a lack of criminal intent on his part. It was proved by undisputed evidence, however, that after Miss McLin ceased to be the agent of the company at Cherry Valley, and was succeeded by Stevens, appellant offered to return the property to the latter as such agent on condition that the freight charges which he had paid be refunded to him.

Upon the whole, we are of the opinion that appellant was accorded a fair trial, and was convicted upon sufficient evidence. So the judgment is affirmed.

McDONALD v. SHAW et al.

(Supreme Court of Arkansas. July 12, 1909. On rehearing. Oct 25, 1909.)

1. WILLS (§ 778*)—RIGHTS AND LIABILITIES OF DEVISEES—"ELECTION."

An "election" in equity is a choice which a person is compelled to make between the ac-

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resting upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same instrument from having effect according to its construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2004; Dec. Dig. § 778.*

For other definitions, see Words and Phrases, vol. 3, pp. 2336–2339.]

2. WILLS (§ 490*)—CONSTRUCTION—PAROL EVIDENCE TO SHOW TESTATOR'S INTENT.

To require an election by a devisee between taking property devised to her and retaining property of hers as devised to others by testatrix by use of the general descriptive words "one-half of all my estate," intent of the testatrix to dispose of that which was not hers should appear on the face of the will itself; and, when it appears that she was seised of property which answered the descriptive words, parol evidence is not admissible to show that she believed that she owned other property, which in fact belonged to the devisee, and intended to devise it by her will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1050; Dec. Dig. § 490.*]

3. WILLS (§ 786*) — RIGHTS OF DEVISEES — ELECTION FOR INCOMPETENT — DUTY OF COURT TO MAKE.

It is the duty of the court to make an election for an incompetent person only when it becomes necessary, and hence, in an action in behalf of an imbecile to recover land belonging to her by inheritance from her father, but which her mother had willed to defendants and another person, the court was not required to make an election for the imbecile to take either the property willed to the other person, or certain property willed her by her mother; the other person not being a party to the suit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2040; Dec. Dig. § 786.*]

4. WILLS (§ 800*) — RIGHTS OF DEVISEES — ELECTION.

The basis of the doctrine of election being that a person cannot assume two inconsistent positions and accept and reject under the same instrument, a person, in making an election to take under a will, can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2074; Dec. Dig. § 800.*]

On Rehearing.

5. APPEAL AND ERROR (§ 1190*)—DISPOSITION OF CAUSE—REMAND FOR FURTHER PROCEEDINGS.

Where an action to recover land for plaintiff's ward, which had been inherited from the ward's father, and which the defendants claimed as devisees of the ward's mother, where the case was transferred from the circuit to the chancery court, and the judgment of the chancery court was reversed for error in making an election for the ward that she should conform to her mother's will, so that defendants would retain the property in question, and defendants in their answer had claimed reimbursements for improvements made on the property and for taxes, the case should be remanded to the chancery court for a complete adjudication of the parties' rights, and not to the circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4645; Dec. Dig. § 1190.*]

guardian of Ella Hare, an imbecile, against Till Shaw and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Winchester & Martin (Ira D. Oglesby, of counsel), for appellant. Read & McDonough, Brizzolara & Fitzhugh, Youmans & Youmans, and Joseph M. Hill, for appellees.

McCULLOCH, C. J. Ella Hare, who is, and has been since she was an infant of tender years, an imbecile, instituted separate actions by her guardian against certain defendants to recover possession of real estate in the city of Ft. Smith, title to which is asserted for her by inheritance from her father, John Hare, who is shown to own it at the time of his death. The defendants filed separate answers and cross-complaints, praying that the actions be transferred to the chancery court. They each alleged, in substance, that they held the property in controversy, and claimed title thereto, by purchase and conveyance, one from the devisee under the last will of Mary A. Hare, mother of Ella Hare, and the others from the administrator of the estate of said Mary Hare; that said Mary Hare by will devised property of her own to Ella Hare, and also devised property of Ella Hare to others, and that said Ella Hare should therefore be put to an election whether she would take her own property and repudiate her mother's will, or conform to said will and permit the defendants to keep the property conveyed to them. The prayers of the cross-complaints were that the court should make such election for Ella Hare on account of her incapacity to elect for herself. The cases were transferred to the chancery court and consolidated, and on final hearing the court made an election for Ella Hare that she should conform to the will of her mother, thus permitting the defendants to keep the property devised to their grantor. The guardian of Ella Hare appealed to this court.

The facts of the case are practically undisputed. John Hare and his wife, Mary A., came to Ft. Smith in 1852. They were members of the Roman Catholic Church, belonging to the parish of the Church of the Immaculate Conception, one of the two Catholic churches of Ft. Smith. They had one child, Ella, who was in infancy rendered an imbecile by a stroke of paralysis. She is now about 35 years of age, and is unable to walk without assistance, or to care for herself, and has but a small degree of intelligence. She is in the care of the Catholic Sisters in a convent at Ft. Smith. When she was a small child, her father died, in 1883, leaving an estate consisting of $2,028.05 personal

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property and a large amount of real estate, which was then valued at $26,000, including the property now in controversy. He left a will devising all his property to his wife, Mary A. Hare, the will being in due form in all other respects, but omitting to mention the name of his child, Ella, or to make any provision for her. Mrs. Hare then owned no real estate. Among other tracts of land owned by John Hare was one of 470 acres in sections 1 and 2, township 7 N., range 31 W., worth about $6 or $7 per acre. It is admitted that the title to this property was in John Hare; but after his death the record shows that for some reason or other his wife, Mary Hare, accepted a quitclaim deed from one Carnall, describing and conveying the property. It is not shown that Carnall had any title to convey. The will of John Hare was probated, and Mrs. Hare administered on his estate and closed the same up with an order of the probate court vesting all the above estate of John Hare in her. She exercised acts of ownership over the same after her husband's death. She built houses on some of it and sold some of it.

The evidence tends to show that Mrs. Hare was never advised that the last will of her husband was ineffectual to devise his property to her, on account of omitting the name of their child. After her husband's death Mrs. Hare accumulated personal property which, at the time of her death, was valued at $1,347.87, and real estate valued at $9,800, exclusive of improvements which she had placed on the property owned by her husband. She died in 1893, leaving a will in due form which, in addition to making certain minor bequests, contains the following clauses:

"After all my just debts and funeral expenses are paid, I give and bequeath to the boy Paul, whom I have raised, 80 acres of land described as follows, said 80 to be taken out of my lands I own in township 7 north, range 31 west, the 80 to be in one body, Paul to have choice and also the sum of one hundred dollars. * * *

"I give, devise and bequeath to the convent of the Sisters of Mercy at Fort Smith, known as Saint Ann's Convent, one half of all of my estate, real and personal, after deducting the legacies and bequests mentioned in this my last will and testament, for the support and maintenance of my daughter, Ella Hare, during her life, and after the death of my said daughter, Ella Hare, I give, devise and bequeath to the said Sisters of Mercy the said half of my estate, real and personal, for the purpose to educate poor Catholic children.

"I give, devise and bequeath to the pastor of the parish of the church of the Immaculate Conception of Fort Smith, in the state of Arkansas, half of all of my estate, real and personal, to be used by the said pastor for the said purposes of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

This will was construed, and its provisions sustained, in McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952. "The boy Paul" referred to in the will was Paul Herring, who was an orphan reared by Mrs. Hare. After the death of Mrs. Hare the Catholic Sisters took charge of Ella, and have given her all the care that loving solicitude could suggest. There is no doubt that they are attempting to carry out the provisions of Mrs. Hare's will, in spirit as well as in letter.

Under the statutes of this state (Kirby's Dig. § 8020) the will of John Hare was void as to his child, Ella, whose name was omitted therefrom. As to the child he is deemed to have died intestate, and the title to his property passed to her as the sole heir. There is no disagreement between learned counsel in this case as to the general principles requiring election in cases of this kind. A concise statement of such principles may be found quoted from Bispham's Principles of Equity, § 295, in the opinion of this court, delivered by Mr. Justice Smith in the case of Fitzhugh v. Hubbard, 41 Ark. 64, as follows: "An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere, by title paramount, to prevent another part of the same instrument from having effect according to its construction. He cannot accept and reject the same instrument." The Virginia Court of Appeals, in Gregory v. Gates, 30 Grat. 83, states the same doctrine in somewhat different language, as follows: "The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." It is further conceded to be settled that: "It is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it. In either case,

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if the party whose property is given away decides to take against the will, he must relinquish his legacy under the will." 2 Underhill on the Law of Wills, § 736.

The real controversy arises concerning the application of the rules of evidence—whether parol evidence is admissible to show that Mary A. Hare by her will attempted to dispose of property which belonged to Ella Hare as sole heir of her father, John Hare. The defendants claim the right to show, by evidence dehors the will of Mary Hare, that she intended by the words in her will "all of my estate, real and personal" to describe the property of Ella Hare; and to do so they adduced parol evidence tending to show that Mrs. Hare claimed to own the property, believed herself to be the owner, and exercised acts of ownership over it. On the other hand, learned counsel for the plaintiff insist on adherence to what they assert to be the settled rule of evidence that "the intent of the testator to dispose of that which is not his ought to appear on the face of the will itself," and that when it appears that the testator was seised and possessed of property which in fact answered the descriptive words "all of my estate," parol evidence should not be admitted for the purpose of showing, in order to require an election on the part of the devisee, that the testator believed she owned other property which in fact belonged to such devisee, and intended to devise it by her will. In other words, they insist that where the testator in the will uses merely the general descriptive terms "all of my property," it may be shown what property she owned, but that the inquiry must there stop. We think that the authorities fully sustain this contention.

This court in Fitzhugh v. Hubbard, supra, which is clearly in line with all the authorities on the subject, said: "You may show the condition of the subject-matter and the surrounding circumstances so as to place the court in the position of the testator. But his purpose to put the devisee to his election must appear from the will itself."

In Blake v. Bunbury, 1 Vesey, Jr. 523, which was a case of election under a will, it was said that "the intent of the testator to dispose of that which is not his ought to appear on the will, with such explanation, however, of the prima facie appearance as the law admits," meaning, of course, the rule permitting evidence identifying the property called for by the descriptive terms used. In Clementson v. Gandy, 1 Keen, 309, the substance of the opinion by Lord Lansdale, Master of the Rolls, appears in the syllabus as follows: "Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible." Lord Eldon in Doe v. Chichester, 4 Dow. 76, which is cited with approval in 1 Jarman on Wills (6th Ed.) p. 469, said: "It must appear on the face of the will that the testator proposes that there should be an election, and as to what subjects." In Webber v. Stanley, 16 C. B., N. S., 698, the Court of Common Pleas announced the general rule that under a general devise of "my manor house," and "all of my manor farms, lands," etc., in a certain county where there was property which fitted every particular of the description, and on which every word of the devise could have full effect, the meaning of the words could not be enlarged by extrinsic proof. The English cases are discussed at length in Jarman on Wills, at the page indicated above, and the prevailing rule shown there as contended for by counsel for plaintiff. An interesting discussion of the subject may also be found in the notes of Hare & Wallace to the case of Noys v. Mordaunt, beginning on page 510 of White & Tudor's Leading Cases in Equity (volume 1). They state the prevailing rule, and cite numerous English cases to sustain it, as follows: "In order to raise a case of election there must appear in the will or instrument itself a clear intention, on the part of the author of it, to dispose of that which is not his own." The only English case declaring a different doctrine is Pultney v. Darlington, 2 Ves. Jr. 544, which has been expressly disapproved by many of the greatest judges of that country.

The American cases are equally harmonious, and of the same purport. In Havens v. Sackett, 15 N. Y. 365, Chief Justice Denio gives the following statement of the law (quoting from the syllabus): "In order to raise a case for election under a will a clear and decisive intention of the testator must be manifested by the will itself, to dispose unconditionally of that which did not belong to him. If his expressions will admit of being restricted to some interest in property belonging to, or disposable by, the testator, they will not be held to apply to that over which he had no disposing power." In Miller v. Springer, 70 Pa. 269, Judge Sharswood, speaking for the court, said: "A general devise of the testator's real estate has always been held to show an intention to give what strictly belongs to him, and nothing more, even if the testator had no real estate of his own upon which the devise could otherwise operate. 1 Jarman on Wills, 393. Nor can evidence dehors the will be admitted to show that the testator considered the land in question to belong to him, and intended it to pass under the will." Judge Mitchell, delivering the opinion of the Supreme Court of Minnesota, in Sherman v. Lewis, 44 Minn. 107, 46 N. W.

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318, laid down the law on the subject as follows: "The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will; also that, even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of, the presumption being that he did not intend it to apply to that over which he had no disposing power; also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift (citing cases). And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments—that is, to show the condition of the subject-matter and the surrounding circumstances, so far as to place the court in the position of the testator—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence dehors the instrument." The Virginia Court of Appeals, in Wootton v. Redd, 12 Grat. 196 (quoting the syllabus), said: "Though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge nor extend it." The same court, in the case of Gregory v. Gates, supra, said: "In order to raise a case of election, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own." And again that court, in Penn v. Guggenheimer, 76 Va. 839, held that "generally, when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as 'all my lands,' or 'all my estate,' no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own." Judge Story clearly announced the same doctrine as follows: "A case of election cannot ordinarily arise where property is devised in general terms, as a devise of 'all my real estate in A.,' which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own, subject to that charge." 2 Story, Eq. Jur. 1087. Prof. Pomeroy also reached the same conclusion. 1 Pomeroy's Eq. Jur. 473, 474.

The diligence of learned counsel has not brought to light a single case directly holding the contrary view. We assume that there are none. They rely mainly upon certain general observations of Mr. Wigmore in his work on Evidence, expressing views as to the general growth of the law of evidence on this subject. But that learned author does not undertake to show that the rule announced by the various authorities hereinbefore cited is erroneous. Counsel also rely to some extent on the decision of this court in Fitzhugh v. Hubbard, supra; but the doctrine announced in that case by no means reaches to the point raised in this. There the testator in general terms released the debt of a certain party to him, and it appeared that the only debt which the party had ever owed him was a note which he had previously assigned to the testator's wife, who was also a beneficiary under the will. It was held competent in that case to show these facts in order to give some effect to the language of the will; otherwise the entire bequest would have been void. In the present case the devise was for the benefit of Ella Hare, and was in the language "one-half of all of my estate," and the testator owned property which fitted the language. We find it nowhere announced that evidence is inadmissible to show the circumstances with which the testator was surrounded in order to explain the language which he used, or to identify property which he intended to devise. But the description of the property cannot be entirely supplied by evidence dehors the will, where there is nothing in the language of the will itself to point out what property is meant; nor, where the language does point out the property, and some is found which answers the description, can the description be enlarged by parol testimony. We are therefore of the opinion that the parol testimony was inadmissible for the purpose of showing that Mrs. Hare intended to convey the property which Ella Hare held by inheritance from her father, and that no case was made out for an election.

It is further insisted by counsel for plaintiff that the devise of 80 acres of land to Paul Herring was a specific devise of property owned by Ella Hare, and that that called for an election. We do not deem it necessary for the purposes of this case to determine whether the devise to Paul Herring was sufficiently specific to indicate an intention, on the part of the testator, to devise property which belonged to Ella Hare, and which called for an election. If it be conceded that such was the case, the defendants are in no position to demand an election, because the position of Ella Hare, the claimant by inheritance from her father, is inconsistent with the rights of Paul Herring. Paul Herring is not a party to this suit, and no controversy has arisen with him. It is the duty of the court to make an election for an infant or other incompetent person only when it becomes necessary. 2 Underhill on Wills, 737. Now, if hereafter the guardian of Ella Hare should, under orders of the court, seek to recover from Paul Herring the property devised to him, then a case for election may arise as to that individual. These defendants can never inject themselves into that

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with Paul Herring the necessity for an election should arise, the court could either elect for Ella Hare to conform to her mother's will so far as to leave Paul Herring undisturbed in his rights thereunder, or could elect for her to take from him the property so devised, and render compensation to him out of the property devised to Ella Hare under her mother's will. In no event can the other devisee under the will of Mrs. Hare, or the grantees of such devisee or the purchaser from Mrs. Hare's administrator, be interested in that controversy. If Mary Hare had attempted by her last will to devise to them property which was owned by Ella Hare, then they would be in position to require of Ella Hare an election whether she would abide by the will or repudiate it, but such is not the case. Since we hold that none of the property claimed by them was described in the will, what interest have they in any election made by or for Ella Hare, or in requiring her to make an election at all? If an election should be made by or for Ella Hare, that would not involve the property in controversy which is owned by her, and is not affected by the will of her mother, for if the court in a proper proceeding should elect for her to abide by the will of her mother, she would only have to relinquish her claim to that portion of her property which is given to others under the will. That portion of her property which is not covered by the terms of the will, regardless of the source of her title, would not be affected by an election, for her claim to it is not inconsistent with the terms of the will; and she can conform to every provision of the will without relinquishing any of the property in controversy, because the testatrix did not by the terms of the will purport to devise it. The basis of the doctrine of election is that a person cannot assume two inconsistent positions—he cannot accept and reject under the same instrument. Fitzhugh v. Hubbard, supra. It follows, therefore, that in case of an election a person can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency.

The chancellor erred in declaring an election. The decree is reversed, and the cause remanded, with directions to remand the case to the circuit court for further proceedings not inconsistent with this opinion.

On Rehearing.

Learned counsel for appellees have again argued the questions pressed upon us on the original consideration of the case, but after careful re-examination of those questions, we are convinced that we reached the correct circuit court, the chancery court be directed to retain the case for further proceedings. Appellees in their answer claimed reimbursement for improvements made on the property in controversy, and for taxes paid thereon. After the case was transferred to the chancery court, the several parties entered into the following stipulation, viz.: "It was further stipulated and agreed by the respective parties in open court that, if the court should find against the said defendants and cross-plaintiffs on the issues made by their answers and cross-complaints, the said respective causes should then be referred to a master to take testimony as to the mesne profits due plaintiffs, if any, from said defendants, respectively, and as to the amounts due defendants, respectively, for improvements made and taxes paid, if any, by them, or either or any of them, upon the property in controversy in said several cases." Now, aside from this stipulation, we are of the opinion that the chancery court having properly assumed jurisdiction for the purpose of considering the defense interposed by appellees, it should retain it for the purpose of completely adjudicating the rights of the parties, concerning the subject-matter of the controversy. It is proper, therefore, that the controversy as to the amount of mesne profits, if any, to be recovered by appellant, and the amount of reimbursement, if any, to be recovered by appellees, should be determined in the chancery court. We do not mean to decide, however, at this time, whether or not appellees are entitled to any reimbursement, for that question has not been presented, and was not decided below. We merely leave that matter open for further consideration in the court below.

Other matters are set up in the cross-complaints of some of the appellees, viz., the claim by some of them who purchased from the administrator of the estate of Mary A. Hare, to subrogation against the property of that estate for the amount of purchase price paid, and also the claim of the Sisters of Mercy against Ella Hare for an accounting of the amounts paid out for her benefit. But these matters we do not think are germane to this controversy, and find no proper place in this litigation. If causes of action exist, they should be made the subject of separate suits.

The judgment of this court is therefore modified so as to change the directions; and the decree of the chancery court is reversed, with directions to enter a decree in accordance with this opinion, and for further proceedings not inconsistent herewith. It is so ordered.

The chancery court has power to appoint a master to assist it in taking testimony, etc., as well inherently as under Kirby's Dig. § 633.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 63; Dec. Dig. § 35.*]

2. Reference (§ 48*)—Powers of Master.

A master can only act upon the matters expressly referred to him, so that a master, appointed under an order directing him to take testimony as to the value of fruit trees and report the evidence, was not authorized to make a finding as to such value.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 75; Dec. Dig. § 48.*]

3. Reference (§ 99*)—Powers of Master.

If a master is appointed by consent of the parties, with directions to report his findings, the report has the same force as a verdict, while the findings of a master appointed without consent are merely advisory, and, under Kirby's Dig. § 6337, providing that a master's report shall stand good unless it appears that it was erroneous, it is the court's duty to examine the report and evidence, and make a different finding if the master's finding is not sustained by the evidence.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 150–155; Dec. Dig. § 99.*]

4. Appeal and Error (§ 1009*)—Findings—Conclusiveness—Equitable Case.

The chancellor's findings of fact will be sustained if not against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3972; Dec. Dig. § 1009.*]

Appeal from Logan Chancery Court; J. V. Bourland, Chancellor.

Action by Frank L. Johnston against J. C. Claypool. From a decree for plaintiff, defendant appeals. Affirmed.

Robert J. White, for appellant. Anthony Hall, for appellee.

FRAUENTHAL, J. The plaintiff below, Frank L. Johnston, instituted this suit against the defendant, J. C. Claypool, seeking to recover upon a note given for the balance of the purchase money of certain land. The defendant admitted the purchase of the land and the execution of the note, but alleged that the plaintiff had fraudulently induced him to purchase the land by falsely representing that at the time of the purchase there were 2,500 healthy, bearing apple trees upon the land. He sought a recoupment by reason of the false representations or a rescission of the contract of sale. Upon a trial of the cause below the chancery court found "that the defendant is entitled to recoup in this action against the plaintiff the value of 1,300 bearing apple trees from four to six years old; that the testimony as to the value of said trees is insufficient for the court to find their value," and it did order and decree "that the issues as to the deception as to the amount for the purpose, and when such testimony shall be taken the master will make report to the next term of this court, to which this cause is continued." At the following term of the court the master filed a report in which he stated that he had taken the testimony of 10 witnesses, which was reduced to writing and filed. He further reported that the witnesses had experience in fruit culture, and that a majority of the witnesses who testified at the instance of the defendant fixed the value of the trees at $1 each, and that a majority of the witnesses who testified at the instance of the plaintiff fixed such value at 25 cents each, and, "relying wholly upon the testimony, I find the value of said 1,300 apple trees to be 50 cents each, making a total of $650." Thereafter a motion was made to quash the depositions of certain witnesses on the ground that notice of the taking thereof had not been given, and to direct the master to take further testimony. This motion was sustained by the court. At the following term the master reported that he had taken the depositions of from 20 to 30 witnesses, which he filed. He also reported that he "would value four to six year old apple trees of all the different varieties and classes generally, diseased and otherwise, on the mountain in the vicinity of the Claypool place at 50 cents each"; that this was his former report. But that he found that the "testimony of the defendant's witnesses were taken as to the value of healthy, bearing six year old apple trees," whereas the judgment of the court provided that the defendant was entitled to recoup "the value of 1,300 bearing apple trees from four to six years old," and that, taking the judgment of the court as a basis, and considering the testimony of all the witnesses, he now finds the value of the trees to be 75 cents each, or $975, for the 1,300 trees. Exceptions were filed by the plaintiff to this latter report, and these exceptions were by the court sustained. The court thereupon found the fair and equitable value of bearing apple trees four to six years old to be 50 cents each, and that defendant is entitled to recoup $650, for the value of the 1,300 trees; and the court rendered a decree in accordance with that finding. From this decree the defendant prosecutes this appeal.

The only question involved in this appeal is the value of the 1,300 trees and the action of the chancery court in finding that value. That court has the power within its sound discretion to appoint a master for the purpose of assisting it in the proceedings be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore it, as, for example, to take testimony or to state accounts, etc., and this power is also given it by statute. 14 Cyc. 435; Kirby's Dig. § 633. The master derives his authority from the order thus appointing him, and he has no authority other than that conferred upon him by the court, and should make no inquiry or finding beyond the matters that are expressly referred to him. The master is the representative of the court in regard to the matter thus referred to him, and is wholly subject to the court's control, and should follow its orders. 17 Ency. of Pleading & Practice, 1020; 16 Cyc. 440; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; 17 Ency. P. & P. 1035; Young v. Rose, 80 Ark. 513, 98 S. W. 370. In this case the clerk was appointed master for the purpose of taking testimony as to the value of said trees and to report that evidence. The order did not direct him to determine the facts as to the issue, or to report his determination of the value of the trees. In so far, therefore, as he made a report as to his finding of the value of the trees he took an action not conferred upon him by the order. The court could have so directed him, if it had seen fit to do so; and, while the court did not strike such finding from the report, but even considered it, nevertheless it did not make an order directing such finding. The court has the power to appoint a master upon its own motion; or it can, at the request of and by the consent of the parties, refer matters to a master for his finding. If such appointment is made at the request of and by the consent of the parties, with specific directions for a report of findings, then the report of such master as to findings of fact has the same force and efficacy as the verdict of a jury. But that is only when the report is made by a consent referee or master. Greenhaw v. Combs, 74 Ark. 336, 85 S. W. 768; Paepcke-Leicht Co. v. Collins, 85 Ark. 414, 108 S. W. 511.

As is said in the case of Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289: "A distinction is drawn between the findings of a master under the usual order to take testimony and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself." But where the master is appointed by the court upon its own motion, as is said in the case of Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, "the information which he may communicate by his findings in such cases upon the evidence presented to him is merely advisory to the court, which it may accept and act upon or disregard, in whole or in part, according to its own judgment as to the weight of the evidence." When the court of its own motion deems it fit or necessary to refer to a master any matter for the purpose of aiding or facilitating the court in the proceedings incidental to the cause, it is the duty of the court to review the findings of such master. The findings of the master do not become effective until they are approved by the court. In regard to the report of a master it is provided by section 6337, Kirby's Dig., that: "The report shall stand good, except such parts as are excepted to, unless it shall appear on the face of the report or from the evidence in the cause that it is erroneous." In such case it is not only the province, but the duty, of the court to examine the report and the evidence and to pass its own judgment thereon. The findings of the master are highly persuasive, and should not be lightly disregarded. 17 Ency. P. & P. 1054. But where in the opinion of the court the evidence is not sufficient to warrant the findings made by the master thus appointed, the court will not sustain or approve them; but it may take such action therewith as it may deem in its own sound discretion to be right, subject to a review upon appeal if that discretion is abused. In this case we cannot say that the court has abused its discretion in refusing to confirm the second report of the master as to his findings of value, even if it should be held that the master had the authority to make such findings.

The master made two reports. In his first report he made a finding that the value of each tree was 50 cents, and seems to have placed that value on "four to six year old apple trees of all the different varieties or classes generally, diseased or otherwise." In his second report he says that he arrived at the above value in the light of testimony of witnesses on the part of the defendant as to the value of "healthy, bearing six year old apple trees," whereas the order of the court only directed that testimony should be taken as to the value of "bearing apple trees from four to six years old." In his first report he took into consideration, as a requisite of the character of the tree, that it should be healthy, and in his second report he did not take this requisite into consideration; and yet by his second report he values the trees higher than by his first report. The court had before it two findings as to the value of the trees made by the master, and we cannot say that the chancellor under these circumstances was not justified in taking the value as found in the first report rather than in the second. Under these circumstances, therefore, we do not think that the court did lightly disre-

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gard the second report of the master. Nor can we say that the weight of the evidence is against the finding of the chancellor. A number of witnesses testified as to the value of the trees, and there is quite a variance in the values placed thereon by them. But after an examination of their testimony, we cannot say that the finding of the chancellor is not sustained by the weight of the evidence. And the finding of facts by the chancellor will be sustained on appeal if it is not against the preponderance of the evidence. Whitehead v. Henderson, 67 Ark. 200, 56 S. W. 1065; Brown v. Wyandotte & S. E. Ry. Co., 68 Ark. 134, 56 S. W. 862; Greer v. Fontaine, 71 Ark. 605, 77 S. W. 56; Sulek v. McWilliams, 72 Ark. 67, 78 S. W. 769; Hinkle v. Broadwater, 73 Ark. 489, 84 S. W. 510; Norman v. Pugh, 75 Ark. 52, 86 S. W. 833.

The decree of the lower court is affirmed.

C. H. SMITH TIE & TIMBER CO. v. WEATHERFORD.

(Supreme Court of Arkansas. Oct. 11, 1909.)

1. SALES (§ 364*)—ACTION ON CONTRACT—INSTRUCTIONS.

In an action for a balance on an account for cross-ties, stave bolts, etc., delivered to defendants under an alleged contract, that the price should be 23 cents a tie for the first lot, which should be increased to the prevailing price at the time of their respective deliveries where defendants claimed that they during the progress of the transaction agreed to increase the price above 23 cents, but that it was a gratuity which they were not required under the original contract to pay, a charge that if defendants, after the original contract was entered into, voluntarily gave plaintiff a bonus amounting in all to 30 cents as the whole price for first-class ties, then defendant was under no legal obligation to make such a gift, and plaintiff could not recover the 30 cents on any ties on which it was not voluntarily given, was properly refused, as ignoring plaintiff's contention and as calculated to mislead the jury to believe that even though they accepted plaintiff's contention as true, if the prices were voluntarily increased by defendant, the increased prices could not be recovered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.*]

2. TRIAL (§ 261*)—INSTRUCTIONS PARTLY ERRONEOUS.

A party cannot complain of the refusal to give a charge unless it is correct in every particular.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

3. SALES (§ 81*) — CONTRACT — DELIVERY — PRICE.

Where a contract for sale of railroad ties called for their delivery on a railroad right of way, and for payment of the market price when delivered, the seller was entitled to a reasonable time in which to make deliveries and to any increase in price occurring during that time, the price at the date each tie was made not governing, but he could not rightfully withhold delivery after making the ties to wait an increase in prices.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 81.*]

4. SALES (§ 88*)—CONTRACT—ACTIONS—QUESTION FOR JURY.

What would constitute a reasonable time under the circumstances of the case was a question for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 249; Dec. Dig. § 88.*]

5. SALES (§ 181*)—CONTRACTS—ACTIONS—DELAY IN DELIVERY—BURDEN OF PROOF.

The burden to prove negligent or wrongful delay in delivering the ties after they were manufactured was on defendants.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

6. TRIAL (§ 295*)—ABSTRACT INSTRUCTIONS—EFFECT OF CHARGE AS A WHOLE.

The rule that it is prejudicial error to give an abstract instruction which might be construed as an intimation from the court that there was some evidence on that issue, when there was in fact none, is not inflexible, and, where it appears that no prejudice could have resulted, the verdict will not be set aside; and in an action for a balance due on an account, where the court charged that, if the parties had a final settlement, plaintiff was bound by it, and could not recover for any difference that might have been due him at that time, though more than the amount paid at the settlement, an additional charge that the settlement would not apply to business after the settlement, if not based on evidence, was not reversible error, it not being possible that the jury could have been misled thereby into disregarding the settlement.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

7. ALTERATION OF INSTRUMENTS (§ 27*)—BURDEN OF PROOF.

In an action for balance due on an account, where defendants pleaded settlement in full, it devolved on them to prove it, and, having introduced a check from them to plaintiffs acknowledging payment in full, it devolved on them to prove that the check contained words acknowledging acceptance of the amount in full satisfaction when it passed through plaintiffs' hands; that being denied by plaintiffs.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 27.*]

8. SALES (§ 355*)—ACTIONS—PLEADING—VARIANCE.

Where a complaint set forth a cause of action on an itemized account for the price of ties, stave bolts, and piling, and alleged that defendants employed plaintiff on a certain date to make and deliver such articles, the fact that the evidence showed that the agreement with reference to the stave, bolts, and piling was made on a subsequent date was not a material variance; the gist of the action being the sale of the material described in the exhibited account.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 355.*]

9. SALES (§ 354*) — CONTRACTS — ACTIONS — PLEADING—ADMISSIONS.

In an action for a balance due on 35,930 railroad ties alleged to have been delivered to defendants under a contract requiring delivery on a railroad right of way, a statement in the answer that defendants denied that they received 35,930 ties, but admitted that they received 33,024, and that they paid for their hauling and for the making of 35,460, leaving a balance due to them of 2,436 paid for by defendants, but never delivered by plaintiff, was equivalent to an admission that 33,024 ties had been delivered, as the acceptance of the ties was a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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waiver of delivery by plaintiff at the place named in the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 354.*]

10. TRIAL (§ 255*)—DUTY TO ASK FOR SPECIFIC INSTRUCTIONS.

An instruction that defendant admitted the delivery of all the timber except 2,436 crossties did not deprive defendants of the right to claim credit for the expense of hauling, but, if they feared that the instruction would have that effect, they should have asked for a specific charge that the expense of hauling to the stipulated place of delivery should be deducted from the amount which would have been due had delivery been made at the agreed place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. § 255.*]

Appeal from Circuit Court, Searcy County; Brice B. Hudgins, Judge.

Action by L. E. Weatherford against the C. H. Smith Tie & Timber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Crump, Mitchell & Trimble and Jos. M. Hill, for appellant. Pace & Pace, for appellee.

McCULLOCH, C. J. This is an action instituted by the plaintiff, L. E. Weatherford, against defendants Smith and others as partners, under the firm name of C. H. Smith Tie & Timber Company, on account for railroad ties and stave bolts and piling manufactured by plaintiff for defendants and alleged to have been delivered to them. The amount of balance alleged to be due on the account is $2,398.34, and on the trial below before a jury the plaintiff recovered $1,800.

It is alleged in the complaint that in July, 1905, the plaintiff was employed by defendants to make ties, stave bolts, and piling out of timber which had been purchased by him from them; that for the first lot of ties he was to receive 23 cents each, and for subsequent lots the current prices at the time of the respective deliveries. The account exhibited with the complaint shows a debit of $12,032.21, with payments thereon aggregating $9,633.87, leaving an unpaid balance of $2,398.34, the amount sued for; and it shows an aggregate of 35,930 ties claimed to have been delivered by plaintiff. The defendants in their answer alleged that they had paid the plaintiff for 35,460 ties, but that they had received only 33,024, leaving 2,436 ties which they had paid for, but which had never been delivered. They further alleged that they had had a final settlement with plaintiff, and that plaintiff had given a receipt acknowledging payment in full. The case was tried before a jury on conflicting evidence, and the result, as before stated, was a verdict and judgment for plaintiff in the sum of $1,800.

It appears from the evidence that the defendants were engaged in the business of supplying ties to a railroad company, and owned timber on two tracts of land. They engaged plaintiff to make ties and deliver them on the right of way of the railroad company, and agreed to let him have the timber at the prices they had paid for it, to purchase other tracts of timber for him, and to charge the price thereof to him as an advance on ties to be delivered, as well as to advance him money to pay for cutting and hauling the ties. Afterwards they agreed also to take stave bolts and piling. The only point of difference between the parties, as far as concerns the contract, was as to the price to be paid for the ties. The plaintiff testified that he was to receive the ruling current prices for ties after the first lot delivered, for which he was to receive 23 cents each; and the defendants contended that they were only to pay 23 cents each for all ties delivered. The defendants admitted that during the progress of the transactions between them they agreed to increase the price of ties above the stipulated sum of 23 cents, but that this was a bonus or gratuity which they were not required under the original contract to pay. Both sides introduced testimony in support of their respective contentions. They also testified in support of their respective contentions with reference to the alleged settlement in full. One of the defendants testified that he made a compromise and final settlement with the plaintiff and paid him $150, which he said the plaintiff accepted in full satisfaction of all his demands; that the payment was made by two checks, one for $100 and the other for $50, the latter check containing in writing on its face the words "settlement in full for all lands and ties cut up to this date"; and that the plaintiff accepted the check with this written on its face and collected the same. The plaintiff denied that the amount was paid in full settlement, and testified that the words above quoted were not on the check when it passed through his hands. The defendants introduced in evidence the check containing the words quoted above. Numerous errors of the court are assigned, which will be discussed in the order presented in argument.

1. The court refused to give the following instruction at defendant's request: "No. 4. You are instructed if defendants, after the original contract was entered into, voluntarily gave plaintiff a bonus amounting in all to 30 cents as the whole price per first-class ties, then, in fact, defendant was under no legal obligation to make such a gift, and the plaintiff cannot recover in law for said 30 cents on any ties on which same was not voluntarily given." Doubtless the defendants intended by this instruction to have the law declared to be that if, under the original contract with plaintiff, they were only to pay 23 cents each for all the ties delivered, they were not, without a new consideration, bound by their agreement to in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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crease the price to 30 cents per tie. But the instruction falls far short of expressing this idea with sufficient clearness for jurors of ordinary intelligence to understand it. It entirely ignored the plaintiff's contention that the price of ties furnished from time to time was to be increased to the prevailing or current price at the time of the respective deliveries; and it was calculated to mislead the jury into believing that, even though they accepted the plaintiff's contention as true, if the prices were voluntarily increased by the defendants, the increased prices could not be recovered. The words, "voluntarily gave plaintiff a bonus amounting in all to 30 cents," do not clearly express the idea intended to be conveyed, and might have had a misleading effect upon the minds of the jurors. The meaning of the latter part of the instruction is also far from being clear. It says that the plaintiff "cannot recover in law for said 30 cents on any ties on which same was not voluntarily given." A party cannot complain at the refusal of a court to give an instruction unless it is correct in every particular. The court, no doubt, would have given an instruction on the subject if a correct one had been requested; for the law as contended for by defendant's counsel was declared in another instruction. After setting forth the issues in the case, the court gave this to the jury: "No. 10. You are instructed that the burden is on the plaintiff to show that he had a contract with defendant by which defendant was to pay the prevailing market price for ties; that he furnished ties under that contract. If you so find, your verdict will be for the plaintiff in whatever sum to be due him by a preponderance of the evidence." With this instruction before them, the jury were properly advised as to the law on this feature of the case.

2. Error is assigned in the refusal of the court to give the following instruction: "No. 1. You are instructed that under the terms of the agreement that when the plaintiff had made a tie that the date of its making marks the time of the prevailing price, if you find that the plaintiff held up ties purposely or negligently, and that the plaintiff could not hold same until there was a rise in the market price. The date of making such ties, being in the exclusive knowledge of the plaintiff, must be shown by him; if not so shown, the original lowest price paid, as shown, will govern." And also in striking the following from instruction No. 12, requested by the defendants: "If you should further find that he cut and kept them in the woods a longer time than he should have done, and you find that the ties had in the meantime risen in value, and you cannot arrive accurately at the true date at which ties ought to have been delivered, then I instruct that the plaintiff ought not to recover more than the lowest sum paid because he cannot fraudulently or negligently take advantage of his own wrong." Instruction No. 1 was erroneous in several particulars. In the first place, it was not correct to say that the date each tie was made marked the time for fixing the price to be paid. The contract called for the delivery of the ties on the railroad right of way, and, if the plaintiff correctly stated the terms of the contract, he was entitled to the market value at that time. He could not rightfully withhold delivery after the making of the ties to await an increase in prices; but he was entitled to a reasonable time in which to make his deliveries, and he was entitled to any increase in prices occurring during that time. What constituted a reasonable time under the peculiar circumstances of the case was a question for the jury to determine. Nor was it correct to instruct the jury, as requested, that, if the plaintiff failed to show the date of making the ties, he could only recover the minimum price under the contract. The plaintiff was only bound to show the date of delivery and the ruling prices at the time thereof. It devolved on the defendants to prove negligent or wrongful delay in delivering the ties after they were manufactured. The omitted portion of the twelfth instruction above quoted was also erroneous in saying that the plaintiff was not entitled to recover more than the minimum price if he failed to prove accurately the true date of making the ties. The instruction would have cut the plaintiff off from a recovery of more than the minimum price for any of the ties notwithstanding he proved the increase in price merely because he could not show the date of making the ties.

3. The court gave the following instruction concerning the alleged final settlement: "No. 13. The court instructs the jury that, if you find from the evidence plaintiff and defendant had a final settlement and defendant paid plaintiff $150, then the plaintiff is bound by settlement, and could not recover for any difference that might have been due him to the said time although it might have been more than said $150, *but you are further instructed that said settlement, if you find that there had been one, would not apply to business after said settlement.*" The part in italics was objected to on the alleged ground that there was no evidence of business transacted between the parties after the date of the alleged settlement. If it be conceded that there was no such evidence, we fail to see how the instruction could have had a prejudicial effect. The jury could not by the abstract instruction have been misled into disregarding the settlement. It has often been held by this court that it is prejudicial error to give an abstract instruction which might be construed as an intimation from the court that there was some evidence on that issue when there was in fact none. St. L. & S. F. Ry. Co. v. Townsend, 69 Ark. 380, 63 S. W. 994; St. L., I. M. & S. Ry. Co. v. Woodward, 70 Ark. 441, 69 S. W. 5; Harris Lbr. Co. v.

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Morris, 80 Ark. 260, 96 S. W. 1067; Fordyce v. Key, 74 Ark. 19, 84 S. W. 797; Ark. & La. Ry. Co. v. Stroude, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130. But the rule thus announced is not an inflexible one; and, where it can be seen that no prejudice could have resulted from the giving of such an instruction, the verdict will not be set aside. It is only where it can be seen that prejudice might have resulted that a reversal follows. Miller v. Nuckolls, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. (N. S.) 149, 113 Am. St. Rep. 122; Railroad Co. v. Cable (Ark.) 117 S. W. 550. The distinction will be found by a comparison of the cases above cited.

The court also gave the following instruction over the defendant's objection: "No. 14. The burden of proof is upon the defendant to show that such a final settlement was had between the parties, if any, must outweigh the evidence tending to show that he (no) such settlement was made." This instruction is not complete, and there is a manifest error in copying it into the transcript. Learned counsel for the defendant in their argument have presented this instruction as having told the jury in substance that the burden of proof was on the defendant to show that a final settlement had been made between the parties. They say that an instruction to that effect was erroneous, and in conflict with the principle announced in Decker v. Laws, 74 Ark. 286, 85 S. W. 425. We do not think so. The case above referred to was quite similar to the instant case. The defendant in that case, as in this one, claimed to have consummated a settlement in full with a check containing words acknowledging payment in full. But the plaintiff denied that the check contained those words when it passed through his hands. In that state of the proof the court instructed that, if the check contained those words when it was given and accepted, the burden was on the plaintiff to show that the check was not given and accepted as full payment; but that the burden of proof was on the defendant to show that those words were contained at the time plaintiff accepted it. This court approved those instructions, and in the opinion said: "As appellants were claiming a special benefit from certain words in the $50 check, the burden was upon them to prove that Laws was bound by these words. The check was a special phase of the case introduced and relied upon by appellants, and it was correct to place the burden upon that particular question upon appellants; for Laws denied in his proof that the check contained any such words when he signed the check. There is nothing antagonistic or inconsistent in the two instructions. If Laws really signed the check with the words 'in full payment of all demands' in it when he signed, then the burden was upon him to show that these words were not intended as full payment, as they purported to be, as the court told the jury in instruction numbered 2. But, on the other hand, if the check did not have the words 'in full of all demands' when Laws signed same, then he was not bound by them, and the burden was upon appellants, in order to get the benefit of these words, to show that Laws signed the instrument containing them." And again the court said: "The words, 'in full payment of all demands,' being contested, the question as to when, by whom, and with what intent they were written was left to the jury upon the whole evidence, with the burden upon him who produced and claimed the benefit of the instrument to prove it, and the burden left with the plaintiff to establish his claim." So in the present case, having pleaded settlement in full, it devolved on the defendants to prove it. It also devolved on them to prove that the check contained words acknowledging acceptance of the amount in full satisfaction when it passed through plaintiff's hands; that being denied by the plaintiff. It was an essential part of their defense of payment. They would have been entitled to an instruction, as in Decker v. Laws, if they had requested one, to the effect that, if the plaintiff accepted the check with these words in it, then the burden would be on him to show that the check was not accepted as full payment. But the defendants did not ask for such an instruction, and cannot now complain because none was given.

4. It is next insisted that the court erred in admitting evidence to sustain a contract for furnishing stave bolts and piling, which was not declared on in the complaint. The contention is not well founded. The complaint set forth a cause of action on an itemized account for the price of ties, stave bolts, and piling. It is true that the complaint alleged that the defendants employed the plaintiff on a day in July, 1905, to make and deliver ties, stave bolts, and piling, and the evidence shows that the agreement with reference to the stave bolts and piling was made on a subsequent date. But this variance was not material, as the gist of the action was the sale of the material described in the exhibited account; and the variance as to the date of sales was not fatal. The evidence tended to establish the allegations of the plaintiff, viz., that the plaintiff had sold certain quantities of stave bolts and piling to the defendants; and they could not have been misled by the variance, and they do not claim to have been misled. In the answer filed in the case they met the issue tendered in the complaint concerning the stave bolts and piling by admitting the sale and delivery of the same, and pleading that they had paid for same at the time of the delivery.

5. The final contention of the defendants is that the court erred in giving the following instruction: "No. 7. The court instructs the jury that the plaintiff sues the defendant on an alleged contract in which suit he alleges that the defendants are indebted to him

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in the sum of $2,398.34 for timber by plaintiff as defendant. *The defendant admits the delivery of all the timber except 2,436 crossties.*" The part in italics is objected to on the alleged ground that it incorrectly stated the defendants' admission to be that all of the timber except 2,436 cross-ties was delivered, when, in fact, they only admitted that they had received the ties in the woods, but that the same were not hauled to the stipulated place or delivered, and that they had to do the hauling at their own expense. Their answer on this point reads as follows: "The defendants deny that they received 35,930, but admit that they received 33,024, and claim that they paid for the hauling of the same and for the making of 35,460, leaving a balance due to the tie company of 2,436 ties, paid for by defendants, but never delivered by plaintiff." We think the court was correct in its interpretation of the defendant's admission. The acceptance of the ties in the woods amounted to a waiver of delivery by the plaintiff at the place named in the contract. But they were entitled to credit for the additional expense of hauling. This instruction did not deprive them of the right to claim credit for the expense of hauling. If they feared such a prejudicial effect on the minds of the jury, they should have asked for a specific instruction saying that the expense of hauling the ties to the stipulated place of delivery should be deducted from the amount which would have been due the plaintiff had the ties been delivered at the agreed place.

Judgment affirmed.

CARROLL et al. v. CARROLL et al.

(Supreme Court of Arkansas. Oct. 11, 1909.)

1. LIMITATION OF ACTIONS (§ 102*)—TRUST RELATION.

Limitations do not affect the rights of the cestuis que trust so long as the trust relation continues.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 494; Dec. Dig. § 102.*]

2. LIMITATION OF ACTIONS (§ 72*)—INFANCY—ACCOUNTING.

Where a wife is before death the owner of a homestead which descended to her children, and the father, after her death, collects the rents of the homestead, the children are barred by limitations from suing to compel an accounting for such rents where for more than three years after reaching majority they take no action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 390; Dec. Dig. § 72.*]

3. LIMITATION OF ACTIONS (§ 102*)—TRUST RELATION—INFANCY.

In such case the father was not a trustee of the children in collecting the rent so as to suspend limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 495; Dec. Dig. § 102.*]

4. ESTOPPEL (§ 68*)—POSITION IN JUDICIAL PROCEEDING—INFANCY.

Where an infant, a party to a suit to compel his father to account for property and rents arising therefrom, which property was claimed to belong to the deceased wife, petitions during minority to dismiss the suit against the father and the petition is not withdrawn after his majority, but remains in the record for nearly two years thereafter, and until final decree in the case, he must be held to have elected to abandon the prosecution of the suit, and to be in no position to complain of the decree.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 165; Dec. Dig. § 68.*]

5. HUSBAND AND WIFE (§ 133*)—SEPARATE PROPERTY—GIFT OF HUSBAND—SUFFICIENCY OF EVIDENCE.

In an action to compel a husband, after his wife's death, to account for property and mortgages which were in the name of the wife, evidence *held* to show that the husband acquired the property and mortgages with his own money and did not intend to give it to his wife, though he put it in her name.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487–494; Dec. Dig. § 133.*]

Appeal from Logan Chancery Court; J. V. Bourland, Chancellor.

Suit by J. D. Carroll and others against Jerry Carroll and others to compel an accounting as to certain property, mortgages, and rents. From a decree for defendants, complainants appeal. Affirmed.

Robt. J. White, for appellants. Anthony Hall, for appellees.

HART, J. On December 20, 1905, Jerry Carroll instituted an action in unlawful detainer against his son J. D. Carroll in the Logan circuit court for the Northern district to recover possession of certain lots in the town of Paris, Logan county, Ark. On the 23d day of December, 1905, J. D. Carroll, Walter L. Carroll, a minor, by his next friend, J. D. Carroll, and May Davis, born Carroll, instituted an action in equity against Jerry Carroll their father and Sue Misner, born Carroll, in the Logan chancery court for the Northern district.

The complaint alleges, in substance, that the plaintiffs and the defendant Sue Misner are the children and heirs at law of Mrs. Mollie Carroll, who died intestate in Logan county, Ark., on the 8th day of July, 1887; that at the date of her death Mrs. Mollie Carroll was the wife of the defendant Jerry Carroll, and was the owner of certain lots in the town of Paris, Logan county, Ark., which comprised her homestead; that she had about $1,600 in cash and a mortgage on certain real estate situated in said Logan county executed in her favor by Charles Wood for several hundred dollars; that the defendant Jerry Carroll took possession of this personal property and also of the homestead. They ask that the defendant Jerry Carroll be required to account to them for the money that came into his hands at the death of their mother; to account for the Wood mortgage and for the rents of the homestead. They state that Sue Misner is made a party defendant in order that her rights may be

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preserved. On January 4, 1906, J. D. Carroll filed his answer to the unlawful detainer suit, denying the rental contract, and claiming title in himself and the other heirs. He also filed a separate answer and petition as next friend of Walter Carroll, asking that he be made a party defendant, setting up substantially the same allegations as those in his complaint in the chancery suit, and, in addition, that said J. D. Carroll was holding possession of the homestead under petitioner Walter Carroll, and not under said Jerry Carroll. By consent the unlawful detainer suit was transferred to equity, and consolidated with the chancery suit.

At the February term, 1906, of the chancery court Jerry Carroll filed his answer, in which he denied all the allegations of the complaint, except that he admitted that the title to the homestead was in his wife at the date of her death, but averred that his right to curtesy therein was paramount to the homestead interest of his children. He pleaded the three-year statute of limitations against the plaintiffs J. D. Carroll and May Davis. Sue Misner filed an answer disclaiming any interest, and asked that it be dismissed as to her. At the February term, 1906, of said chancery court, Walter Carroll filed a petition, in which he stated that he signed an instrument authorizing the suit against his father, Jerry Carroll, without understanding its purport, and stated that he did not intend to authorize the bringing of suit in his name. His petition further states that he has no knowledge of his own as to what property his mother owned at her death, but does not believe that his mother was the owner of the money and mortgage which was the foundation of the chancery action. He states that he believes that his father's claim of ownership thereof is true, and asks that the suit be dismissed in so far as he is concerned.

The case was heard before the chancellor upon the pleadings and depositions filed in the cause. The chancellor found that the town lots which comprised the homestead, though purchased by Jerry Carroll with his own means, was intended as a gift to his wife, Mollie Carroll, and that the legal title to the same was vested in her by deed from the grantor, and that the legal effect of which was to devolve by descent the reversionary interest in the said children, dependent upon and postponed by the estate by curtesy of her husband, the defendant Jerry Carroll. The chancellor further found that Mollie Carroll deceased was not the owner of the money or mortgage debt which is a part of the subject-matter of this litigation; that J. D. Carroll occupied the homestead under a rental contract from the defendant Jerry Carroll, and there was due and unpaid thereon the sum of $240. A decree was therefore entered in favor of the defendant, Jerry Carroll; and the case is here on appeal.

It is insisted that the homestead of the mother descended to the minor children under the Constitution of 1874 for the reason that the acquisition of the land and the death of the mother occurred after the Constitution of 1874 was adopted, and that their father's right to curtesy must yield to their superior right of homestead. Conceding this to be true, it does not help them. The appellants J. D. Carroll and May Davis were born, respectively, on November 19, 1874, and May 25, 1879. They commenced this suit on the 23d day of December, 1905, and at that time were aged, respectively, 31 and 26 years. Hence they do not contend that they were entitled to the possession of the homestead, but do insist that their father should account to them for the rents thereof during the period of their minority after the death of their mother. But their father has pleaded the statute of limitations against them, and his plea must be sustained. Of course, it is well settled in this state that the statute of limitations does not affect the rights of he cestuis que trust so long as the trust relation continues, but in this case the father was not their trustee in collecting rents from the homestead, and the statute of limitations began to run when they reached the age of 21 years, and barred so much of their cause of action as asked for an accounting of the rents collected from the homestead. Walter Carroll was born November 1, 1885, and the decree in this case was entered on September 30, 1908, at which time he only lacked 2 months of being 23 years of age. He had during the period of his minority filed his petition asking that the suit against his father be dismissed. This petition was not withdrawn after he became of age, but remained as a part of the record for nearly two years thereafter, and until the final decree was rendered. After filing his petition to dismiss the action, he took no further part in the prosecution of the suit. After reaching the age of 21, he had the legal right to have his cause of action dismissed. He exercised that right by abandoning the prosecution of it, and is now in no attitude to complain of the decree of the court.

Appellants adduced evidence tending to show that, while Jerry Carroll and Mollie Carroll lived in Texas, she had inherited some money; that afterwards they removed to Arkansas, and that her money was used in conducting a business at Paris, Ark., where they resided from 1880 to the date of her death in 1887; that the money and mortgage in controversy was the proceeds of that business. The appellant J. D. Carroll testified substantially that these facts were admitted to him by his father immediately after his mother's death, and that his father told him that the money would be invested for the benefit of his children, who were then minors. On account of his confidence in his father, he states that no attempt was made to collect from him this money until the year 1904.

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Jerry Carroll testified in his own behalf. He admitted that his deceased wife received $500 from her brother and guardian while they lived in Texas, but says that, on account of misfortune overtaking them, they spent this for medical bills and other family expenses; that soon after they came to Arkansas the last of it was spent; that in June, 1871, he went to work for a railroad company as lineman, and by the time they moved to Paris in 1880 he had accumulated between $1,200 and $1,300 as a result of the savings from his labor; that he purchased the homestead for $500, and had the title taken in the name of his wife for the protection of herself and their children; that he went into business with the remainder; that the business prospered, and the money and mortgage in controversy were the proceeds of that business; that he was for the most part a hard-working and careful business man, but would sometimes get on a spree, which would last two or three days, and on this account made his wife the custodian of his money. For the same reason he said that the Wood mortgage was taken in her name, but there was no intention that it should be her separate property, but it was understood that it was to remain his property; that, when she realized that she was soon to die, his wife returned to him the money and the Wood mortgage. Other testimony was adduced by both parties to corroborate their respective contentions, but it is not necessary to state it in detail.

The chancellor found the issues in this respect in favor of appellee Jerry Carroll, and a careful consideration of the testimony leads us to believe that his finding was correct. It seems to us that Jerry Carroll made a plain and reasonable statement of how he acquired the property in controversy, and of the struggles made in acquiring it. The only substantial contradiction to it is his admissions to the contrary as testified to by his son J. D. Carroll. These admissions are denied by Jerry Carroll, and his denial is corroborated by other circumstances adduced in evidence. The evidence also shows that in June, 1905, J. D. Carroll rented the homestead from the agent of Jerry Carroll, and agreed to pay as rent therefor the sum of $6 per month. The rent amounted in the aggregate to the sum of $240, for which amount judgment was correctly rendered against J. D. Carroll in favor of Jerry Carroll.

We find no prejudicial error in the record, and the decree is therefore affirmed.

GREEN v. STATE.

(Supreme Court of Arkansas. Oct. 11, 1909.)

1. RAPE (§ 51*)—EVIDENCE—SUFFICIENCY.

In view of Kirby's Dig. § 2005, defining rape as carnal knowledge of a female forcibly and against her will, and section 2006, declaring that proof of actual penetration shall be sufficient, *held* that evidence was insufficient to support a conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

2. INDICTMENT AND INFORMATION (§ 190*)—OFFENSES INCLUDED IN CHARGE OF RAPE.

An assault with intent to rape is included in the charge of rape, and a conviction may be had of the former under an indictment for the latter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 603; Dec. Dig. § 190.*]

3. RAPE (§ 53*) — EVIDENCE — SUFFICIENCY — ASSAULT WITH INTENT TO RAPE.

Evidence *held* to show a defendant charged with rape was guilty of assault with intent to rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78–81; Dec. Dig. § 53.*]

4. CRIMINAL LAW (§ 1184*)—APPEAL AND ERROR — DISPOSITION OF CASE — MODIFYING JUDGMENT.

Where on appeal the uncontradicted evidence shows accused guilty of assault with intent to rape, and not rape, of which he was convicted, an order will be entered setting aside the judgment and affirming the judgment convicting him of the lesser crime, unless the state elects to take a new trial, in which event the judgment will be reversed and the cause remanded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195–3200; Dec. Dig. § 1184.*]

Appeal from Circuit Court, Van Buren County; Brice B. Hudgins, Judge.

Abe Green was convicted of rape, and he appeals. Reversed.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. Abe Green was indicted for the crime of rape. He was tried before a jury, found guilty, and sentenced to death. He has duly prosecuted an appeal to this court.

The testimony is correctly abstracted by the Attorney General as follows: Eura Webb, the prosecuting witness, testified: "My name is Eura Webb. I am 14 years of age. I know the defendant. I went over to Mr. Malone's after some hoes and goobers. I started back home and met Abe Green. He spoke to me, and asked me where Pa was. I told him at home plowing, and he got behind me, and grabbed me around the neck and started with me out in the bushes. And that is the last I know. He was choking me. I don't know exactly how far we were from home or Malone's The next time I remembered anything I was in my brother's field. There was a string around my neck. I don't know how I got it off. My neck and face were bloody when I got there. My brother, Ellis, took me to Mr. Malone's. This was in Van Buren county, three or four weeks ago. Afterwards I was sore on my back and neck, in the small of my back. I had a bruised place on the back of my leg [indicating]. I had a string around my neck, but don't

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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know where I took it off, nor what I did with it; that was down in the woods. I was thoroughly conscious that the string was there, and that I was choking. The first I remember after that was in Ellis' field. I didn't look at the string when I took it off; haven't any idea how I got it off; haven't seen it since. My private parts were not sore. There was a scratch on the back part of my leg above the knee [shows the court how large]. I couldn't see it, but my mother told me it was there. She examined me the next day. My underskirt was torn down at the hem [shows the court the rent was about 8 or 9 inches long]. I don't know whether it was torn when I met the defendant or not. The first thing I remember after he took me into the bushes was that I was in Ellis' field. I knew there was a string around my neck because I was lying down and choking. I got it off while I was on the ground. When I took it off I fell with my head in my lap." Martha Webb testified: "Eura Webb is my daughter; I know Abe Green. My daughter was assaulted on Monday, the 10th day of May, about three weeks ago. I live near Formosa, in Van Buren county, Ark. Mr. Malone lives about a mile from us in the same county and state. The road between our houses is in the same county and state. Eura left home about 8 o'clock. The next I saw of her was about 10 o'clock. They had started to Mr. Malone's house when I got there. She was bruised up; her neck was red as blood; her underskirt was torn into the hem; and she had a scratch on her leg, about so long [indicating 6 inches], and two splotches on her clothes in front. They were on her bottom skirt; were stiff white splotches, right in front [indicates to the court they were about 1½ inches square]. The mark on her leg look like the print of finger nails [indicates that it was 5 or 6 inches long]. Her neck was black, and there was the print of a string around it where it had buried itself in her neck. There was blood on her neck and her top dress and waist. I didn't examine her clothes until Tuesday morning about sunup. There was no blood on her underclothing, and her leg looked like it had been freshly scratched. My daughter was 14 years old the 19th of February, 1909. She was fully developed into womanhood, and had her first monthly sickness on the 13th day of April, 1909." Other testimony was introduced to show that in the bushes where the prosecuting witness says the defendant was dragging her there appeared the prints of the heel of a woman's shoe as if made by a person lying down, and close to it appeared the toe prints of a man's shoe. The defense introduced Dr. Russell, a practicing physician, as a witness, who testified that he did not think a girl of 14 could have intercourse for the first time without being sore; that the soreness is caused by the entering and dilation of the parts.

The only question raised by the record is, Was there sufficient evidence to support the verdict? We are convinced there was not. Rape as defined by our statute is the carnal knowledge of a female forcibly and against her will. Kirby's Dig. § 2005. Proof of actual penetration into the body shall be sufficient to sustain an indictment for a rape. Kirby's Dig. § 2006. The prosecuting witness says that the defendant grabbed her around the neck, and started with her into the bushes; that she became unconscious and does not remember anything more until she regained consciousness, and found she was in her brother's field. The record does not disclose that any examination was made of her private parts to ascertain if they had been bruised or had become inflamed, as tending to show penetration of her body. The prosecuting witness herself testified that she felt no soreness there. Dr. Russell stated that he thought soreness would result from sexual intercourse with a girl 14 years old. There is no testimony whatever to indicate that penetration of her body had been made, unless it can be inferred that such act was accomplished because a stiff white splotch was found on her underskirt and toe prints of a man's shoe and the heel prints of a woman's shoe in the soft earth where the defendant had dragged her. We do not think this was sufficient to show that there was penetration of her body. In connection with the prosecuting witness' testimony it is ample to show an assault with intent to rape of a most aggravated character. An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former under an indictment for the latter. Pratt v. State, 51 Ark. 167, 10 S. W. 233.

Therefore, the uncontradicted evidence showing that the defendant was guilty of an assault with intent to rape, under the rule established in the cases of Jones v. State, 88 Ark. 579, 115 S. W. 166, Hamby v. State, 72 Ark. 623, 83 S. W. 322, and Vance v. State, 70 Ark. 272, 68 S. W. 37, and other cases decided by this court, an order will be made setting aside the judgment for rape, and affirming the judgment for assault with intent to rape, with the punishment fixed at 21 years in the state penitentiary, unless the Attorney General shall, within 15 days, elect to take a new trial. In which event the judgment will be reversed, and the cause remanded for a new trial.

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JAMES, Auditor, et al. v. BLANTON et al.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. TAXATION (§ 730*)—TAX SALES—PURCHASE BY STATE—TITLE ACQUIRED.

Ky. St. 1909, § 4152 (Russell's St. § 6010), provides for the sale of lands for taxes to the state in case there is no individual bidder, and section 4154 (section 6014) declares that if the land is not redeemed within two years allowed therefor the fee-simple title shall vest in the state, county, and district, jointly, in proportion to the tax due each, and that the revenue agent, under the Auditor's direction, may, after the two years have expired, sell the land, collect the purchase money, and pay to the county or district the amount of tax due each. *Held* that, where the state bids in land at a tax sale under such section, it acquires a lien on the land for the tax and penalty until the expiration of the two-year term, when, if the land is not redeemed, the fee-simple title vests in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463; Dec. Dig. § 730.*]

2. TAXATION (§ 727*)—DELINQUENT LAND—SALES TO STATE—STATUTES—VALIDITY.

Ky. St. 1909, § 4154 (Russell's St. § 6014), conferring on the state a lien on land bid in for it at tax sales for the amount of taxes due and penalty, and conferring on the state a fee-simple title to such land as is not redeemed within two years, is valid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 727.*]

3. TAXATION (§ 734*)—TAX SALES—SALES TO STATE — NOTICE TO OWNER — OMISSION OF COUNTY ATTORNEY.

A county attorney's omission to notify the owner of delinquent tax land sold to the state for taxes of such sale within 50 days, and his omission to institute proceedings to recover possession within 30 days thereafter, as required by Ky. St. 1909, § 4153 (Russell's St. § 6013), does not affect the state's title to the land in case it is not redeemed within 2 years, as such section only provides an additional remedy by which the state may acquire its taxes or obtain possession of the land.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 734.*]

4. TAXATION (§ 736*)—TAX SALES—SALES TO STATE—LIMITATIONS.

Where land was bid in by the state for delinquent taxes on April 24, 1893, and the fee-simple title vested in the state 2 years thereafter on the owner's failure to redeem the land, such title was not lost by limitations until after the expiration of 15 years from April 24, 1895.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 736.*]

5. TAXATION (§ 581*)—DELINQUENT TAXES—COLLECTION—DEMAND.

Under the express provisions of Ky. St. 1909, § 4149 (Russell's St. § 6008), no demand is required of a nonresident before the sheriff may distrain for taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 581.*]

6. TAXATION (§ 652*)—DELINQUENT TAXES—SALE OF LAND—PURCHASE BY STATE—BILL TO RESTRAIN SALE.

Where the fee-simple title to land sold to the state for taxes and not redeemed had vested in it, a petition to restrain the state's officers from selling the land, which failed to aver either that the taxes had been paid or that the land had been redeemed, was fatally defective.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1329; Dec. Dig. § 652.*]

7. TAXATION (§ 699*)—TAX SALES—REDEMPTION AFTER EXPIRATION OF REDEMPTION PERIOD.

Ky. St. 1909, § 4152 (Russell's St. § 6010), provides that, in the redemption of land sold to the state for taxes, the county clerk, at any time within two years after the sale, or until the revenue agent under the Auditor's direction assumes charge of a collection by sale or otherwise, is vested with authority to collect the delinquent taxes, interest, and penalties; and section 4154 (section 6014) allows the revenue agent 15 per cent. for the collection and payment of delinquent taxes, interest, etc. *Held* that, notwithstanding the fee-simple title to land sold to the state for taxes vests in the state on the expiration of the two-year redemption period, such title is subject to be devested by the payment of the taxes by the delinquent prior to the sale of the land by the revenue agent.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 699.*]

8. TAXATION (§ 823*)—SALE FOR TAXES—VACATION—LIEN.

Ky. St. 1909, § 4036 (Russell's St. § 5928), providing that, where a sale of land for taxes is set aside, the purchaser shall have a lien for the taxes and costs paid by him for which the property is liable, with legal interest from the time of payment, which may be recovered by the owner, is applicable to sales of land bid in for the state, as well as sales to individuals.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 823.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Suit by J. B. Blanton and others against Frank P. James, Auditor, and another, to restrain defendants from making a sale of certain property in controversy for taxes. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

James Breathitt, Atty. Gen., and John F. Lockett, Asst. Atty. Gen., for appellants. J. S. Luscher, for appellees.

HOBSON, J. In April, 1893, the sheriff of Franklin county sold certain property of Mrs. Alice Blanton at public sale to make the taxes due the state and county for the year 1892; and, no one else bidding, the property was bid in for the state. Similar sales were made in the years 1895 and 1896. In the year 1908 the property was sold in a suit against Mrs. Blanton, and was bought by J. B. Blanton and others. In January, 1909, James A. Violett, a state revenue agent, acting under the direction of the Auditor, advertised the land for sale for the taxes for 1892, 1895, and 1896, for which the property had been bid in by the state at the sheriff's sales above referred to. Thereupon J. B. Blanton and others brought this suit to enjoin the Auditor and Violett, as revenue agent, from making the sale of the property for the taxes, alleging in their petition that they were the owners of the property by reason of their purchase at the judicial sale; that more than 15 years had elapsed since the cause of action accrued in favor of the state as to the taxes for

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1892, that more than 5 years had elapsed since the accrual of the cause of action as to the taxes for 1895 and 1896, and that the whole claim was barred by limitation; that since 1896 the property had been assessed and the taxes paid year by year by Mrs. Blanton and those claiming under her; and that the commonwealth is estopped now to claim the ownership of the land. The petition also contained this allegation: "Plaintiffs say that the commonwealth of Kentucky did not, nor did any of its agents, employés, or representatives, within 30 days or at any other time, after the alleged sale for the alleged taxes was made, ever institute any proceeding to recover possession of said property or collect the alleged tax. Plaintiffs state that the alleged tax claimed to be due on said land was never demanded of them, or Mrs. Alice B. Blanton, or any one else, either by mail or otherwise; that said alleged sale for said alleged tax was null, void, and of no effect."

The Auditor filed a demurrer to the petition, which was overruled. He then filed an answer, in which he admitted the purchase of the property by the plaintiffs in the proceeding against Mrs. Blanton, but pleaded that at the time of their purchase the records of the county clerk's office showed the sheriff's sale of the land and the purchase by the state, and that they took the property with notice of the state's rights. He admitted that Mrs. Blanton and those claiming under her had been in possession of the property since its purchase by the state, and had paid the annual taxes for the years since 1896, and that no proceeding had been instituted by the state to recover the land or the taxes. He alleged that he was only endeavoring on behalf of the state to collect the taxes, interest, and penalties, and offered to release all right or title of the state to the property upon the payment of the taxes. The circuit court sustained a demurrer to the answer, and perpetuated the injunction which had been granted by the clerk. The commonwealth appeals.

The ruling of the circuit court was apparently based upon the ground that the commonwealth, by its purchase of the land at the tax sale, acquired only a lien upon it for its taxes, and that this lien which is created by statute was barred by the limitation of 5 years. It has been held that taxes are claims created by statute, and are barred after 5 years from the time the cause of action accrued. On the other hand, if the title to the property vested in the commonwealth by the tax sale, then its right of action was not barred until 15 years after it accrued. In holding that the state acquired only a lien by virtue of its purchase at the tax sale, the circuit court apparently followed Husbands v. Polivick, 128 Ky. 652, 96 S. W. 825, 29 Ky. Law Rep. 890. The effect of a tax sale will depend upon the statute under which it is made. The sales in question in that case were made for the year 1884, and were necessarily governed by the law then in force. The court in its opinion quotes the provisions of these statutes, and shows that under them the Legislature only intended that the state should acquire a lien for the taxes by its purchase at the tax sale. But in that opinion it was clearly intimated that the Legislature might provide otherwise if it saw fit to do so. The present statutes are materially different from the statutes then in force. Sections 4152, 4153, and 4154, Ky. St. (Russell's St. §§ 6010–6014), under which the sales here in controversy were made, provide as follows:

"Sec. 4152. If no one will bid for and purchase such land at the amount of tax, the charges due and the cost of sale, including the cost of advertising, it shall be the duty of the sheriff or collector to purchase the same for the state of Kentucky, for the amount of tax due and the commission thereon, and shall make return to the county clerk, who shall record the same in a book kept for that purpose, and the clerk shall certify the same to the Auditor of Public Accounts, and the sheriff or tax collector shall have a credit for the same in his settlement with the Auditor. The clerk shall have a fee of twenty-five cents for making such entry. The owner of such real estate, his representatives, heirs or assigns, shall have the right to redeem the same from the state, or any other purchaser at any time within two years after the day of sale, by paying the purchase money, with interest at the rate of thirty per cent. per annum, and, in addition, fifteen per cent. upon the total amount of the purchase price and the amount of the clerk's cost if any. The state shall have the right of possession of lands purchased by it at any time after the expiration of thirty days from the giving of the notice provided for in the next section, and the purchaser other than the state, shall have the right of possession of lands purchased by him at any time after the expiration of six months from the giving of the notice provided for in the next section. In the redemption of lands sold to the state for delinquent taxes at any time within the period of two years after the sale, or until the revenue agent, under the direction of the Auditor, assumes charge of the collection by sale or otherwise, the county clerk is hereby vested with the authority to collect such delinquent taxes, interest and penalties as prescribed by law, and he shall make report thereof to the Auditor as often as the latter officer may require, and not less than once in every thirty days; and he shall pay into the treasury all moneys collected by him as herein authorized on the first day of every month, and oftener if required by the Auditor.

"Sec. 4153. It shall be the duty of the county attorney for each county within fifty

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days after sale, to notify the owner of the land purchased by the state, county and district of such purchase; and if the land so purchased be not redeemed within thirty days from such notification, he shall institute a proceeding for the recovery of possession of such land; and if such land be redeemed after such proceedings are instituted, the owner shall, in addition, pay the cost of such proceedings. The failure of the county attorney to give such notice and institute such proceedings within the time specified shall subject him to a fine of twenty dollars for each offense; and it is hereby made the duty of the county judge to report each and every such failure to the circuit court, at its next term thereafter, whereupon the circuit judge shall cause to issue a rule against said county attorney to show cause, if any, why said fines shall not be entered up against him; and such fine, when collected, shall be for the benefit of the state. In every case where such lands are redeemed from the state, county and district at any time within the period of two years allowed for redemption, the county attorney shall have as his commission, when he attends to his duties, twenty per cent. of the amount of the money paid to redeem such land, but if he fail to attend to such duties, he shall receive no commission, and the whole of the redemption money shall belong to the state, county and district. It shall be the duty of the purchaser other than the state, county and district, within fifty days after the sale, to give notice in writing, to the owner of the land purchased by him, of such purchase, and if such land be not redeemed within six months after such notice, he may institute such proceedings for the recovery of the possession of such land.

"Sec. 4154. If the land be not redeemed within the two years allowed for that purpose, the fee-simple title thereto shall vest absolutely in the state, county and district, each having a joint interest therein, in proportion to the tax due them respectively; and if said lands purchased by the individuals be not redeemed within two years allowed for that purpose, the fee-simple title shall at once vest in such individual. The revenue agent, under the direction of the Auditor of Public Accounts, may, after the two years for redemption have expired, advertise and sell at public sale any of said lands forfeited to the state, and the Auditor may convey said lands by deed to the purchaser, and he shall pay to the county or district, or both, the amount of such tax due each. The revenue agent shall be allowed fifteen per centum for the collection and payment into the treasury of said delinquent taxes, the fifteen per centum to be collected from the delinquent or purchaser, as well as the fee for advertising."

It will be seen that by section 4154 it is expressly provided that, if the land is not redeemed within the two years allowed for that purpose, the fee-simple title thereto shall vest absolutely in the state, county, and district, each having a joint interest therein in proportion to the tax due them, respectively, and that the revenue agent, under the direction of the Auditor, may, after the two years allowed for redemption have expired, sell the land, collect the purchase money, and pay to the county or district the amount of tax due each. The language of the section shows an unmistakable intention on the part of the Legislature to change the rule theretofore existing, and to declare that, when the state bids at a tax sale, it shall take a fee-simple title to the land, if not redeemed within two years. When the state has purchased land under these statutes at tax sales, the state has a lien on the land for the taxes and penalties until the two years allowed for redemption have expired; but, if the land is not redeemed within the two years, the fee-simple title then vests in the state. The statute is valid.

It is the duty of the county attorney, under section 4153, to notify the owner of the land within 50 days after the sale and to institute proceedings to recover possession of the land within 30 days thereafter. It is his duty to comply with this statute, and if he fails to comply with it he is subject to a fine of $20 for each offense; but his breach of duty in no wise affects the right of the state, in case the land is not redeemed within 2 years. Section 4153 merely provides an additional remedy by which the state may require the taxes paid at once, or get possession of the land; but the failure of its officer to institute this proceeding does not place the delinquent taxpayer in any better position than he would be if the proceeding was not provided for. The purpose of the provision is simply to secure a more prompt collection of the state revenues. That this is what the Legislature contemplated is shown by the provision that, in every case where the lands are redeemed at any time within two years, the county attorney shall have a commission of 20 per cent. when he attends to his duties, and a further provision that, if the land is not so redeemed, the fee-simple title shall vest in the state. The Legislature foresaw that cases might occur where the county attorney might neglect his duty, and intended that his neglect of duty should not give the delinquent taxpayer an advantage over the state. Commonwealth v. Rosenfield, 118 Ky. 374, 80 S. W. 1178, 82 S. W. 433, 25 Ky. Law Rep. 2229, 26 Ky. Law Rep. 726.

We therefore conclude that the commonwealth by the tax sales in question acquired a fee-simple title to the land, and not a mere lien on it, when it was not redeemed within two years after the sale. The first sale having been made on April 24, 1893, the fee-simple title vested in the state April 24, 1895; so this action, which was brought in Jan-

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uary, 1909, was brought within 15 years after the title vested in the state.

The taxes for the year 1892 were levied under an act practically the same as the present statute. See Gen. St. 1888, pp. 1077, 1078. The previous statutes contained no such provisions. It is not material that the taxes in question were not demanded by mail or otherwise. By section 4149, Ky. St. (Russell's St. § 6008), the sheriff may distrain without demand after the 1st day of July of the year for which the tax is due. It is not averred that Mrs. Blanton was a resident of Franklin county, and no demand is required except in case of a resident. It is not averred that the taxes have been paid, or that the land has been redeemed. No facts are alleged sufficient to invalidate the tax proceedings.

It will be observed that by section 4152 it is provided that, in the redemption of land sold to the state for delinquent taxes, the county clerk at any time within two years after the sale, or until the revenue agent under the direction of the Auditor assumes charge of the collection by sale or otherwise, is vested with authority to collect the delinquent taxes, interest, and penalties. It will also be observed that by section 4154 the revenue agent shall be allowed 15 per cent. for the collection and payment into the treasury of the delinquent taxes, the 15 per cent. to be collected from the delinquent or purchaser, as well as the fee for advertising. From this provision it is manifest that the delinquent taxpayer is allowed to pay the taxes, with interest and penalties, after the expiration of two years, and until the sale by the Auditor's agent, and thus save his land. The fee-simple title is vested in the state, but is subject to be divested on the payment of the taxes by the delinquent, and if the taxes are paid the title revests in the owner; for it is only where the land has been sold by the revenue agent that the Auditor may convey it by deed. The power given the county clerk to collect the taxes after the time for redemption has expired would otherwise be meaningless. So, also, would the provision that the revenue agent shall be allowed 15 per cent. where the money is collected from the delinquent. The statute was plainly intended to give the delinquent an opportunity to pay the revenue agent and thus arrest the sale of his land. It is presumed that the sheriff did his duty, and the burden under the present statutes is on the taxpayer to show that he did not do so. Alexander v. Aud, 121 Ky. 105, 88 S. W. 1103, 28 Ky. Law Rep. 69.

The petition stated no facts entitling the plaintiffs to relief. The demurrer to it should have been sustained. On the return of the case to the circuit court, either party may be allowed to amend his pleadings if he desires to do so. Section 4036, Ky. St. (Russell's St. § 5928), is as follows: "Whenever any person shall purchase property sold for delinquent taxes, and the sale shall be set aside because of any irregularity, the purchaser shall have a lien on the property for the amount of taxes and cost paid by him, and for which the property is liable, with legal interest from the time of such payment, which may be recovered from the owner of the property or person owning the same." This section applies no less to sales at which land is bid in for the state than to sales to others.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

JAMES, Auditor, v. LUSCHER.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Suit by August Luscher against Frank P. James, as State Auditor, etc., to restrain defendant from selling certain property in controversy for taxes. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Jas. Breathitt, Atty. Gen., and John F. Lockett, Asst. Atty. Gen., for appellant. J. S. Luscher, for appellee.

CARROLL, J. This record presents the identical questions passed on by this court in James, Auditor, v. Blanton (decided October 14, 1909) 121 S. W. 951. Following the opinion in that case, the judgment herein is reversed, with directions to conform to the opinion in the Blanton Case.

HOWARD v. HENDERSON TRACTION CO.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

DAMAGES (§ 97*)—PERSONAL INJURIES.

In a personal injury case, a recovery may be had for all pain endured as a proximate result of the injury, whether endured before the trial, or such as it is reasonably certain plaintiff will thereafter endure.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 233, 234; Dec. Dig. § 97.*]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by D. A. Howard against the Henderson Traction Company. From a judgment granting inadequate relief, plaintiff appeals. Reversed, and remanded for a new trial.

Clay & Clay, for appellant. Yeaman & Yeaman, for appellee.

LASSING, J. Appellant, D. A. Howard, was a passenger upon one of appellee's cars in the month of August, 1907, and the car became unmanageable, or apparently so, and he jumped therefrom in order to avoid being injured, and, in jumping, fell or was thrown to the ground, and sustained the injuries for which he instituted a suit against the railway company, alleging that its agents and servants in charge of the car were guilty of negligence in its management. Issue was

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joined upon the material allegations of the petition, and a trial before a jury resulted in a verdict in favor of appellant for $1,250. This verdict was set aside by the trial court, and a new trial awarded. Upon the second trial appellant recovered a verdict for $195. Being dissatisfied therewith, he prosecutes this appeal, and seeks to reverse the judgment predicated thereon.

Several reasons are assigned why the judgment should be reversed, but upon a careful examination of the record we find that but one error was committed by the trial court of which plaintiff might justly complain. In the instruction on the measure of damages the court authorized a recovery for any pain and suffering that plaintiff had endured, but failed to incorporate in said instruction a clause authorizing a recovery for any pain and suffering that he might thereafter endure as a direct result of the injury. Plaintiff's counsel at the time asked that such an instruction be given, or that the instruction on the measure of damages be so corrected as to embrace this idea. The court refused to give such an instruction, and in its deliberation the jury was limited to the consideration of such pain and suffering only as the plaintiff had endured as the direct result of said injury from the date thereof up to the date of the trial; and although plaintiff testified that the hand still pained him when held in certain positions, and at certain seasons, and the inference might properly be drawn therefrom that such pain and suffering would, at least for a time, continue, yet under the plain instruction of the court the jury was not authorized to award any damages on account thereof. It is true the wound in plaintiff's hand at the time of this second trial had entirely healed, and the court may have been impressed with the idea that but little, if any, suffering or inconvenience would thereafter be experienced by plaintiff because of the injury; still this was a question which should have been left for the determination of the jury, and in submitting the case the court should have drawn his instructions so as to present plaintiff's case as warranted by the pleadings and the evidence. This he failed to do, and we cannot agree with appellee's counsel that this was an inconsequential error.

This court has so often held, in personal injury cases, that a recovery may be had for all pain and suffering endured as a direct or proximate result of the injury that a citation of the authorities is deemed unnecessary. In all cases where this question has arisen, a recovery has been permitted, where the facts justified a recovery at all, not only for the pain and suffering endured before the trial, but for such as the evidence shows it is reasonably certain the plaintiff will thereafter endure as the direct or proximate result of the injury, and in an instruction upon this point the plaintiff is as much entitled to have the jury told that he may recover for pain and suffering which he may thereafter endure as he is that he may recover for such pain and suffering as he has theretofore endured; and it will not do for the trial judge, where there is any substantial evidence showing that there is likelihood that the plaintiff will still continue to suffer because of the injury, to refuse to give to the jury an instruction such as was asked in this case.

For his failure so to do, the judgment is reversed, and the cause remanded for a new trial, and further proceedings consistent herewith.

ATKINSON et al. v. HAGER et al.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

VENDOR AND PURCHASER (§ 308*)—DEFECTIVE TITLE—PAYMENT OF PURCHASE MONEY.

A purchaser, who has received a conveyance with a covenant of warranty, and has been put in possession, and not evicted, cannot resist payment on the ground that the title is defective, unless vendor is insolvent, or a nonresident, or has practiced actual fraud; and where none of these conditions exist he must look to the warranty in the deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 877–899; Dec. Dig. § 308.*]

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Action by S. E. Hager, administrator, and others, against J. Frank Atkinson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

D. D. Sublett, for appellants. H. V. McChesney, for appellees.

NUNN, C. J. This action was instituted by appellees against appellants to recover a judgment on a note for $300, with a credit of $41.97. The note was executed for the balance of the purchase price of a tract of land conveyed to appellants, which conveyance they had accepted, and had taken possession of the land. Appellants answered, admitting the validity of the note, but claimed that they were entitled to an additional credit of $25, and alleged that one Arnett and wife were setting up claim to a portion of the land conveyed to them, and that loss of the amount claimed by the Arnetts, without stating what it was, would depreciate the value of the land by $100 or more, and asked that the Arnetts be made parties to the action. A demurrer was filed to this answer, which was sustained, except as to the additional credit of $25 claimed therein, and appellees filed a reply, denying the right to this additional credit. Appellants were given 20 days in which to file an amended answer. They failed to do this, but offered an amended answer some time after the 20 days had expired,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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and the court rendered a judgment in behalf of appellee for the amount of the debt as alleged in the petition, and ordered the land to be sold in satisfaction thereof.

By the last amendment the defense stated was that a part of the land was claimed by the Arnetts, and that appellees knew of the claim at the time they conveyed the land to them, and failed to give them any information thereof, and that the loss of that part claimed by the Arnetts would damage them in the sum of $150. They did not claim, however, that they were not placed in possession of the whole of the land sold them; nor did they claim that they had been evicted therefrom, or from any part thereof; nor did they state that there was an action pending against them by the Arnetts for the purpose of evicting them; nor did they claim that appellees were insolvent, or nonresidents of the state. They simply stated that the Arnetts claimed a portion of the land, without describing what character of title they claimed under, and without stating that the Arnetts' title was superior to theirs. A purchaser, who has received a conveyance with covenant of warranty, has been put into possession, and not evicted, cannot resist the payment of the purchase money on the ground that the title is defective, unless the vendor is insolvent, or a nonresident of the state, or unless actual fraud had been practiced by the vendor. In cases where none of the above conditions exist, the vendee must look to the warranty contained in the deed. Trumbo v. Lockridge, 4 Bush, 415; Buford's Adm'r v. Guthrie, 14 Bush, 690; English v. Thomasson, 82 Ky. 280.

For these reasons, the judgment of the lower court is affirmed.

CINCINNATI, N. & C. RY. CO. v. COOKE.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. DAMAGES (§ 133*)—LOSS OF SERVICES.

Plaintiff's daughter, eight years old, fell over a pile of rails, breaking her arm and otherwise injuring herself. She was sick for some time, and at the trial she could not use her arm well. There was a compound fracture near the elbow, which left the arm crooked and weakened, and from the fact that it was near the elbow she not only suffered more, but there was greater danger of a permanent weakening of the arm. The physician's bill was $75. *Held*, that a verdict for plaintiff of $825 for loss of his daughter's services, physician's bill, etc., would not be disturbed by the Court of Appeals as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 368, 369, 386–395; Dec. Dig. § 133.*]

2. APPEAL AND ERROR (§ 1004*)—REVIEW—AMOUNT OF VERDICT.

In an action for the loss of the services of plaintiff's child, physician's bills, etc., owing to an injury, unless the damages are so large as to result from passion or prejudice, the verdict will not be disturbed by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Robert B. Cooke against the Cincinnati, Newport & Covington Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. J. Crawford, for appellant. Horace W. Root and B. F. Graziani, for appellee.

HOBSON, J. Ida Cooke, a little girl eight years old, fell over a pile of rails, ties, and other things, breaking her arm and otherwise injuring herself. This suit was filed by her father, Robert B. Cooke, to recover for the loss of her services and expenses of physician's bill and nurse, etc. The proof in the case is practically the same as in the case of Cincinnati, Covington & Newport Railway Co. v. Ida Cooke (decided September 30, 1909) 121 S. W. 467. In that case a judgment in favor of the child was affirmed. In this case there was a verdict and judgment in favor of the father for $825. The question as to whether a peremptory instruction should have been given is settled by the opinion in the case referred to. There was no error of the court in the admission of evidence, and the instructions given the jury correctly submitted the case.

The chief question made on the appeal is that the verdict is palpably excessive, the result of passion and prejudice on the part of the jury. The physician's bill amounted to $75, so that the amount allowed the father for the loss of services and other things is $750. The child was sick for some time, and at the trial her arm was still so that she could not well use it. It was a compound fracture near the elbow. The arm was left crooked and weakened from the fracture. From the fact that the break was so near the elbow, she not only suffered more, but there was greater danger of a permanent weakening of the arm. In view of all the evidence, we do not see that we can disturb the verdict on the ground that it is excessive.

There is no mathematical criterion by which damages may be measured in this class of cases, and it is only where they are so large as at first blush to strike the mind as the result of passion or prejudice that this court will interfere. In Baxter v. St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70, a verdict for $2,000 was sustained in an action brought by a father for loss of services resulting from the broken leg of a son. In Scamell v. St. Louis Transit Co., 108 Mo. App. 504, 77 S. W. 1021, a verdict for $1,-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

623, 87 S. W. 84, a verdict in behalf of a father for $1,000 was sustained.

Judgment affirmed.

LOUISVILLE, H. & ST. L. RY. CO. v. BASKETT.

(Court of Appeals of Kentucky. Sept. 30, 1909.)

1. APPEAL AND ERROR (§ 1195*)—FORMER DECISION—LAW OF THE CASE.

Where, on a prior appeal, the Court of Appeals held that the railroad company's successor was liable for its vendor's breach of covenant, such decision constituted the law of the case on a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. RAILROADS (§ 72*)—COVENANTS RUNNING WITH THE LAND.

Where plaintiff conveyed certain land to a railroad company for a right of way in consideration of the grantee's covenant to construct a station thereon, such covenant ran with the land and bound the grantee's successor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168–178; Dec. Dig. § 72.*]

3. VENDOR AND PURCHASER (§ 230*)—COVENANTS RUNNING WITH THE LAND—NOTICE TO PURCHASER.

Where defendant succeeded to the right of way of a railroad company, conveyed by deed in which the grantee covenanted to construct and maintain a station on the land, and defendant had such deed, which came into its possession at the time of its purchase, recorded shortly before plaintiff instituted suit for breach of such covenant, defendant was charged with notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 508–511; Dec. Dig. § 230.*]

4. RAILROADS (§ 72*)—RIGHT OF WAY—STATION—COVENANT TO CONSTRUCT—BREACH—MEASURE OF DAMAGES.

In an action for breach of a railroad company's covenant in a deed to construct a station on the land in consideration of the conveyance, the grantor's measure of damages was the additional value, if any, which would have accrued to plaintiff's adjoining lands, but for the railroad's breach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 178; Dec. Dig. § 72.*]

5. RAILROADS (§ 72*)—RIGHT OF WAY—STATION—COVENANT TO MAINTAIN—BREACH—EVIDENCE.

In a suit to recover additional value which would have accrued to plaintiff's adjoining lands, but for the breach of a railroad company's covenant to construct and maintain a station on land conveyed to it for a right of way, evidence of the price received for lands lying across the railroad from those of plaintiff and on a part of which defendant erected its station, that should have been established on the strip purchased of plaintiff, was admissible.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

6. RAILROADS (§ 72*)—RIGHT OF WAY—COVENANTS—BREACH.

Where a deed to a railroad right of way provided that the deed was executed in consideration of the railway company's agreement to establish and maintain a station on the strip constituted a covenant on the part of the railroad company to construct and maintain its station on the strip conveyed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

7. RAILROADS (§ 72*) — RIGHT OF WAY—BREACH OF COVENANT—DAMAGES—EXCESSIVENESS.

Where, in a suit for breach of a railroad company's covenant to construct and maintain a station on land conveyed to it for a right of way, some of the witnesses testified that plaintiff's adjoining land would have been increased in value by the construction and maintenance of the station 10, 15, or 25 per cent., a verdict allowing plaintiff $1,350, which was not so much as it would have been, had the jury adopted the 25 per cent. estimate, was not so excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 72.*]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by John Jesse Baskett against the Louisville, Henderson & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. P. Helm and Yeaman & Yeaman, for appellant. Clay & Clay, for appellee.

SETTLE, J. This is the second appeal in this case. The opinion on the former appeal fully states the facts and will be found in 104 S. W. 695, 31 Ky. Law Rep. 1035.

The relief originally sought by appellee in the action was the cancellation of a deed of date April 6, 1889, by which he and his father, Jesse Baskett, conveyed appellant's vendor, St. Louis & Texas Railway Company, a strip of land 60 feet by 1,200 feet, in the town of Baskett, Henderson county. The deed recites: "That for and in consideration of the agreement of the said railway company to establish and maintain a station on the strip of land hereafter described, the said grantors hereby sell, * * * to have and to hold, * * * to be used in connection with said railway and for no other purpose." The ground urged in the petition for the cancellation of the deed was that the sole consideration for its execution was the undertaking of the grantee to erect and maintain a station on the strip of land conveyed; that the rights and title of the grantee in the land had by it been sold and conveyed to its successor, the Louisville, Henderson & St. Louis Railway Company; and that neither the grantee nor its successor had ever established or maintained a station on the land as required by the covenant of the deed.

The circuit court upon the hearing rendered a judgment whereby appellant was given the right to pay appellee $800 by the sec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ond day of the succeeding term, or then submit to a judgment canceling the deed and restoring to appellee the land. Appellant having declined to pay the $800, a further judgment was entered canceling the deed and requiring the delivery to appellee of possession of the land. Appellant prosecuted an appeal from the judgment, and on October 10, 1907, that judgment was reversed by this court in the opinion rendered on the former appeal. In the opinion it is said: "The railway company cannot keep the land and not comply with its obligation or pay Baskett damages for the breach. But the measure of damages to Baskett is not the value of the land. If the company had complied with the obligation, he might have received a benefit therefrom much greater or much less than the value of the land, and, whether greater or less, the value of this benefit is the measure of compensation to which he is entitled. In other words, the measure of compensation is such a sum as will reasonably compensate Baskett for what he has lost by the breach of the contract by the railroad company. If the railroad company should now build a station on the strip, the measure of damages will be compensation for the loss already sustained. If the company does not build a station and maintain it, the measure of damages is laid down in Louisville, etc., Railway Company v. Whipps, 118 Ky. 121, 80 S. W. 507, 25 Ky. Law Rep. 2312. * * * On the return of the case to the circuit court, an opportunity will be allowed both parties to take further proof, and, if either party demands it, a jury trial may be had to assess the damages for the breach by the railroad company of the agreement."

After the return of the case to the circuit court, the parties amended their pleadings to conform to the suggestions contained in the opinion. Under the issues thus formed the relief sought by appellee was the recovery against appellant of damages for a breach of the covenant in the deed referred to, arising out of its failure to erect and maintain a station upon the land conveyed, as in the deed provided. On the trial of the case the jury returned a verdict in favor of appellee for $1,350 damages, upon which judgment was duly entered. Appellant applied for a new trial, which was refused; hence the present appeal.

First, it is insisted for appellant that it is in no wise responsible for the failure of its vendor, the Louisville, St. Louis & Texas Railway Company to establish and maintain the station on the land conveyed it by appellee for that purpose; that appellant purchased the land without notice of the contract whereby its vendor undertook to establish the station thereon; that no lien existed upon the land for the enforcement of the undertaking to establish the station, and appellee's claim for damages arising from such failure was not asserted against appellant's vendor when or after it became insolvent, or at the time its property and effects were purchased by appellant. This question was in effect settled adversely to appellant's contention on the former appeal; but, if this were not true, the contention as a legal proposition is unsound. The covenant in the deed by which appellant's vendor obligated itself to establish the station runs with the land, and was of itself sufficient to charge appellant with notice of the undertaking of its vendor, and the fact that the station was not erected or maintained on the land was further notice to appellant that its vendor had violated the covenant. Besides, it is not denied or averred in appellant's answer to the original petition, or that filed to the amended petition, that it did not, at the time of its purchase of the roadbed, track, and all other property of the former railroad company, have notice of the deed made it by appellee and his father, and of the covenant as to the station contained therein, as well as the grantee's violation of the same. "A covenant by a railroad company, in consideration of the grant of a right of way through land, to erect a flag station convenient to the grantor's house, * * * runs with the land, and binds the grantee's assignee who has notice." Lou. & P. V. Electric Railway Company v. Whipps, 118 Ky. 121, 80 S. W. 507, 25 Ky. Law Rep. 2312; Sutherland on Damages, vol. 2, § 576.

The deed to appellant's vendor, containing the covenant in question, while not of record at the time of appellant's purchase of the land, admittedly then came into its possession, which gave it the requisite notice of the covenant that the time within which the station could be established had not then expired, and imposed upon it the duty of complying with the undertaking the vendor had failed to perform. Appellant had the deed recorded shortly before appellee instituted this action, thereby manifesting its purpose to retain the strip of land, notwithstanding it and its vendor's breach of the covenant as to the erection and maintenance thereon of the station. Appellant cannot claim under the deed and against it, or keep the land, yet refuse to establish the station thereon, without incurring liability for the damage resulting to appellee therefrom. Under the circumstances it was bound to perform the contract of its vendor. This appellant has not done, and as such failure on its part also constitutes a breach of the covenant, and the only consideration for the deed was the covenant to establish and maintain the station upon the strip of land conveyed, appellee is entitled to damages for its breach; the measure of recovery being the additional value, if any, which would have accrued to appellee's adjoining lands but for the breach. Lou. & P. V. Elec. Ry. Co. v. Whipps, 118 Ky. 121, 80 S. W. 507, 25 Ky. Law Rep. 2312; Sutherland on Damages, vol. 2, § 630; Lou., Henderson & St. Louis

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Ry. Co. v. Baskett, 104 S. W. 695, 31 Ky. Law Rep. 1035. The measure of damages above indicated was properly given by the court below in its instructions to the jury.

It is, however, contended by appellant that the court on the trial improperly allowed the appellee to prove what the lands of Kimsy, lying across the railroad from appellee's, and on a part of which appellant erected its station that should have been established on the strip purchased of appellee, sold for. It is sufficient to say that the admissibility of such evidence in cases like this has been approved by this court. Lou. & P. V. Elec. Ry. Co. v. Whipps, 118 Ky. 121, 80 S. W. 507, 25 Ky. Law Rep. 2312; City of Paducah v. Allen, 111 Ky. 361, 63 S. W. 981, 23 Ky. Law Rep. 701, 98 Am. St. Rep. 422; Railway v. Clark, 121 Mo. 169, 26 S. W. 192, 906, 26 L. R. A. 751.

Objection is also made by appellant to instruction 1, given by the court, because of its assumption of the fact that the covenant in the deed from appellee to appellant's vendor compelled appellant to establish a station upon the strip of land it conveyed, and of the further fact that the failure of the latter to establish the station thereon constituted a breach of the covenant. In thus expressing the instruction the court did not err. The facts assumed were shown by the deed and determined by the opinion on the former appeal, and in setting them forth in the instruction the court did but follow the opinion and in fact obey its directions.

Finally, it is contended by appellant that the verdict is excessive, and was superinduced by passion or prejudice on the part of the jury. Manifestly, the amount fixed by the verdict is liberal; but, as the appellee's evidence showed that the value of his land, adjoining the strip upon which appellant should have erected its station, would have been greatly increased by the establishment thereon of the station—some of the witnesses saying 10, some 15, and others as much as 25, per cent.—we are unable to declare that the verdict is extravagantly excessive; and the fact that the jury did not adopt the as 25, per cent.—we are unable to declare raised the verdict to perhaps $1,800, indicates to our minds that they were not influenced by passion or prejudice.

Upon the whole case, we find no reason for disturbing the verdict. The judgment is therefore affirmed.

EVANS' ADM'R v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. DEATH (§ 17*)—NEGLIGENCE OF TELEPHONE COMPANY—FAILURE TO TRANSMIT MESSAGE.

The negligent failure of a telephone company to connect a messenger dispatched to call a doctor for a person who had sustained an accidental gunshot wound with the doctor's telephone, thereby depriving such person of medical attention, is too remote to constitute it a proximate cause of the death; it not appearing that, but for the negligence, the death would not have resulted.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 19, 21; Dec. Dig. § 17.*]

2. ACTION (§ 2*)—GROUND OF ACTION—CONJECTURE.

A thing not susceptible of being proved cannot be made the basis for a recovery in an action at law, as it would base the recovery on conjecture alone.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 2.*]

Appeal from Circuit Court, Oldham County.

"To be officially reported."

Action by Ernest Evans' administrator against the Cumberland Telephone & Telegraph Company. From a judgment of dismissal, rendered after sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Lloyd W. Gates, Edwards, Ogden & Peak, and S. E. Dehaven, for appellant. Fairleigh, Strauss & Fairleigh, for appellee.

O'REAR, J. Ernest Evans sustained an accidental gunshot wound in the leg, producing considerable hemorrhage. A messenger, who was dispatched to call a doctor, applied at a pay station of the appellee, and asked that he be furnished telephone connection with the doctor's residence, offering to pay the required toll. It is alleged that owing to the negligence of the operator there was a failure to make the connection with the doctor's telephone, in consequence of which he did not get the message, and Evans was thereby deprived of his services. It is further alleged that, if the connection had been made, the doctor would or could have got to the patient in time to have stanched the flow of blood and have saved his life; but, as the doctor did not get there, the patient for the lack of medical attention bled to death. This is a suit at law by the administrator of Ernest Evans against the telephone company to recover $25,000 damages for the alleged negligent destruction of the intestate's life. A demurrer was sustained to the petition. An amended petition was allowed. In the amendment it was averred that the doctor mentioned was the nearest doctor available, or who could have been secured by the decedent at that time. Evans was about four miles from the doctor's residence. A general demurrer was sustained to the petition as amended, and, plaintiff electing to stand by the cause of action as stated, his petition was dismissed. He appeals.

We think the alleged negligence too remote in law from the fact of the decedent's death to constitute it a proximate cause of the death. Nothing appears that, but for the alleged negligence, the death would not have resulted. The injury to the young man was

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it alone, could have prevented the death, a different state of case would be presented. But the office of the message was to set in motion an entirely new and independent agency, the result of which is purely speculative. It does not necessarily follow that the doctor would or could have got to the young man before he died. Nor does it necessarily result that, if the doctor had got there, he could have saved the life of the youth. It is true, both propositions are alleged in the petition. But neither is susceptible of proof. A thing not susceptible of being proved cannot be made the basis for a recovery in a lawsuit. That would be to base the recovery upon conjecture alone, which is never allowed.

The lower court followed the opinion in Lebanon, Louisville & Lexington Telephone Company v. Lanham Lumber Company (Ky.) 115 S. W. 824. The principle announced in that case is adhered to.

Judgment affirmed.

LE MOYNE v. ROUNDTREE.

(Court of Appeals of Kentucky. Oct. 21, 1909.)

ADVERSE POSSESSION (§ 96*)—POSSESSION OF TRESPASSER—EVIDENCE.

Evidence that one owning land gave it to his son-in-law with other conterminous land which he did not own, and the son-in-law entered on the latter land which was rough, uninclosed, mountain land and inclosed a few acres, and occasionally cut timber and tan bark on the part uninclosed, but did not claim to any well-defined boundary, is insufficient on which to base adverse possession of such land other than the inclosed portion, since a trespasser cannot obtain possessory title unless he claims to a well-marked boundary.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533–536; Dec. Dig. § 96.*]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by John V. Le Moyne against Enos A. Roundtree to recover possession of land. From a judgment for defendant, plaintiff appeals. Reversed.

Chas. H. Rodes and Gillis & Gillis, for appellant. R. S. Rose and Tye & Siler, for appellee.

BARKER, J. This action involves the title to 143½ acres of land in Whitley county, Ky. It was begun by the appellant, John V. Le Moyne, filing a petition in the Whitley circuit court describing the land in question by metes and bounds, alleging himself to be the owner and entitled to the immediate possession thereof, and that he had been ousted from his *lawful* possession by the appellee (defendant) *Enos A.* Roundtree. The appellee filed an answer, pleaded title in himself by prescription. The affirmative allegations of the answer were denied and the issues thus completed. A trial by jury resulted in a verdict in favor of the defendant (appellee), and of the judgment based upon this verdict the appellant complains.

The first question involved on this appeal is the correctness of the trial court's ruling in refusing to grant the appellant's (plaintiff's) motion for a peremptory instruction to the jury to find for him at the close of the evidence. The appellee made no sort of claim to the land except by prescription, and the appellant established a complete and perfect paper title, which was in no wise denied or impeached by any evidence for appellee. The question, then, recurs: Was there sufficient evidence of adverse possession for the statutory period by appellee to warrant the court in submitting his claim to the jury? Except as to a small part (some 10 or 12 acres) of the land sued for which appellee testified to having fenced in and held and used, he showed no possession which would ripen into a title by the expiration of the statutory period. In 1890 he says that his father-in-law, Tom Meadors, put him in possession of a house on the Creekmore survey which the latter owned, and told him he could have it and the surrounding land, consisting of certain fields. He understood his father-in-law to make him a present of the land. The Creekmore survey was conterminous to the land in question, the public road, however, running between the two tracts. The possession which Meadors gave to his son-in-law is thus described by appellee himself: After having stated that his father-in-law gave him the land in controversy which he did not own, and a part of his own land, he was asked this question: "What did Tom Meadors say about this land in question? A. He just waved his hand up that way, and said I could have all that land. Q. Did he give you this land? A. Yes, sir; that is what I understood him. Q. What did you do, if anything, toward taking possession of the land or improving it? A. In the spring of 1890 I fenced up ten to twelve acres of it, and cleared a half or three-quarters of an acre." The witness does afterwards say that he claimed all of the land to a well-defined boundary, but showed on cross-examination that he knew nothing of the lines, and more especially showed that he did not know whether the lines of the tract were marked or not. It was conceded that Tom Meadors, the father-in-law of appellee, neither had any sort of title to the land in controversy nor claimed to have. He did own, however, several boundaries of land lying contiguous to it, among which was the

Creekmore survey. It is also conceded that the house, of which Tom Meadors gave appellee the possession, was not on any part of the land involved in this litigation, but was on the Creekmore tract which was separated from the land in dispute by a public road. Appellee having no title or shadow of legal claim to the land in dispute, he could only obtain a possessory title by actual occupancy with claim of ownership for the full term of 15 years. The property was rough, uninclosed mountain land; and, while appellee shows that he occasionally cut timber and tan bark, and committed other occasional acts of trespass, he had no sort of actual occupancy except of the ten or twelve acres he says he inclosed.

In Interstate Inv. Co. v. Bailey, 93 S. W. 578, 29 Ky. Law Rep. 468, we said: "Actual possession to oust the owner must be an actual occupancy, as by residence upon, or cultivation, or inclosure of the premises claimed. It is the pedis possessio of the law, a foothold upon the land, a possession in fact, an actual physical entry. Such a possessor by his acts and claim sets the statute of limitation to running, because he has not only effectually ousted any other claimant, thereby giving to him a cause of action, but its notorious character is so calculated to direct attention of any other claimant as to raise the presumption that he does know of it, and imposes on him the duty to recover his own in timely season, or thereafter be heard no more to assert his right to it." In Ohio & Big Sandy R. R. Co. v. Wooten, 46 S. W. 681, 20 Ky. Law Rep. 383, it was said: "It seems to us that the well-settled rule of law in this state is that actual occupancy of the tract or parcel of land is necessary to enable a plaintiff without title to recover against a trespasser, and also that actual occupancy for the statutory period is necessary to vest title in the occupant, in the absence of paper title; that mere claim of ownership, with frequent cutting and removing of timber from the tract of land, does not constitute actual occupancy or possession within the meaning of the law." In Barr, etc., v. Potter, 57 S. W. 479, 22 Ky. Law Rep. 418, the following language is used: "The court also erred in refusing to instruct the jury that a mere claim of ownership, with occasional cutting of timber on the land in controversy or removing it therefrom, by those under whom defendant claims, and the building of a cabin thereon without actual residence upon the land, or without inclosing it, or cultivating it, was not such adverse possession as could be added to the time defendant had actually resided upon the land so as to defeat the plaintiff's right of recovery." In Fuller v. Keesee, etc., 104 S. W. 700, 31 Ky. Law Rep. 1099, this court, speaking through Judge Hobson, said: "To say he held in adverse possession all the land in this great boundary by simply laying claim to run with the top of the cliffs would be to ignore the reasons for the rule protecting the bona fide occupants of land who hold it in adverse possession. He had, as the record shows, no shadow of title, and he gained possession only of so much of the land in controversy as he cleared or inclosed." And in Kountze v. Hatfield, 99 S. W. 265, 30 Ky. Law Rep. 592, we said: "It may be conceded that their adverse holding extended to the full limit of the land cultivated or inclosed by fence. But outside of that their holding does not go. * * * Appellant traces his title to the land in controversy back to the commonwealth, while appellees rest their claim entirely on adverse possession." To the same effect are Floyd v. Louisville & Nashville R. R. Co., 80 S. W. 204, 25 Ky. Law Rep. 2149; Helton v. Strubbe, 62 S. W. 12, 22 Ky. Law Rep. 1919; Mann v. Cavanaugh, 110 Ky. 787, 62 S. W. 854, 23 Ky. Law Rep. 238. The cases cited by appellee do not militate against the principle here enunciated. We have never held that a mere trespasser could obtain a possessory title unless he claimed to a well-marked or well-defined boundary. His possession must be such as gives the world, and especially those in interest, notice of the extent of his claim; and then, if the owner stands by and allows the trespasser to occupy and claim his property for the full term of fifteen years, he loses it, and the trespasser, under the statute, obtains title to the extent of his possession. The appellee had no such possession as is necessary to the acquisition of title by prescription, and what he did upon appellant's land, according to his own testimony, did not give notice of his adverse holding, except to the few acres he inclosed. A wrongdoer cannot acquire title to another's land by occupancy without giving notice for fifteen years of what he is doing and claiming.

Upon the conclusion of the evidence, the court should have sustained appellant's motion for a peremptory instruction to the jury to find for him for the whole tract sued for, except 10 or 12 acres which appellee says he fenced up, and submitted to the jury only the question as to whether or not the appellee did use and occupy this inclosure continuously and adversely under a claim of ownership for 15 years.

Judgment reversed for further procedure consistent with this opinion.

ROBERTS v. THOMAS.

(Court of Appeals of Kentucky. Oct. 22, 1909.)

1. FALSE IMPRISONMENT (§ 3*)—DISTINGUISHED FROM MALICIOUS PROSECUTION.

False imprisonment lies where the imprisonment is without legal authority, and, where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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it is valid or apparently so, the remedy is by malicious prosecution.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. MALICIOUS PROSECUTION (§ 16*)—ELEMENTS OF.

To render a person liable for malicious prosecution, he must have acted maliciously and without probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19–22; Dec. Dig. § 16.*]

Appeal from Circuit Court, Henry County.

"To be officially reported."

Action by Keel Roberts against W. J. Thomas. Judgment for defendant, and plaintiff appeals. Affirmed.

Edwards, Ogden & Peak and Peak & Holland, for appellant. Willis & Todd, W. P. Thorn, and Moody & Barbour, for appellee.

HOBSON, J. Keel Roberts filed his petition in the Henry circuit court, in which he sought to recover damages in the sum of $10,000 against W. J. Thomas. Thomas filed a demurrer to the petition, which the court sustained. Roberts thereupon filed an amended petition. The court sustained the demurrer to the petition as amended. The plaintiff declining to plead further, the petition was dismissed, and he appeals.

The facts stated in the petition are these: Thomas subscribed and swore to an affidavit before the judge of the Shelby quarterly court in which Roberts was charged with the crime of unlawfully confederating and banding together with one John W. Thomas, Jr., and going forth armed for the purpose of intimidating and alarming another person or persons. By this affidavit Thomas caused the judge of the quarterly court to issue a warrant of arrest against Roberts for the crime. Roberts was arrested under the warrant of arrest in Henry county on March 3, 1909, and was confined in the Shelby county jail until March 7th, when he executed a bond before the judge of the quarterly court, and was released on bond. Thereafter he was tried before the judge of the quarterly court and was acquitted, and the charge against him was dismissed. It was alleged in the petition that all of this was done unlawfully, wrongfully, willfully, forcibly, and against the plaintiff's will and consent. In the amended petition it was charged that all this was done wrongfully and without probable cause. The affidavit filed by Thomas with the judge and the warrant of arrest issued by the judge which was in proper form were made part of the petition.

There is a well-marked distinction between an action for false imprisonment and an action for malicious prosecution. An action for false imprisonment may be maintained where the imprisonment is without legal authority. But, where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution. The want of lawful authority is an essential element in an action for false imprisonment. Malice and want of probable cause are the essentials in an action for malicious prosecution. The petition shows that the plaintiff was not arrested without lawful authority. He was arrested under a warrant of arrest legally issued by the proper officer. The person who procured the warrant to be issued and thus caused the arrest is liable to an action for malicious prosecution if he acted with malice and without probable cause. But he is not liable for procuring the warrant to be issued and executed unless he acted with malice and without probable cause. 19 Cyc. 321, 7 Am. & Eng. Encyc. of Law, 664; Gordon v. West, 129 Ga. 532, 59 S. E. 232, 13 L. R. A. (N. S.) 549, and cases cited. In the case of Southern Railway Co. v. Shirley, 121 Ky. 865, 90 S. W. 597, 28 Ky. Law Rep. 860, this distinction is pointed out. In that case Shirley was arrested without a warrant of arrest and without legal authority. His arrest was unlawful. In this case the plaintiff was arrested under a legal warrant and he was legally held in custody. In the case of Reynolds v. Price, 56 S. W. 502, 22 Ky. Law Rep. 5, the arrest was also without legal authority. It is not averred in the petition that Thomas acted with malice and without probable cause in swearing out the warrant. Malice is essential to the cause of action for malicious prosecution, and, this not being averred, the circuit court properly sustained the demurrer to the petition.

Judgment affirmed.

FORSYTHE et al. v. LEXINGTON BANKING & TRUST CO.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. BILLS AND NOTES (§ 499*)—CREDITS—BURDEN OF PROOF.

In an action on notes, the burden was on defendant to prove credits claimed by him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695–1697; Dec. Dig. § 499.*]

2. PLEADING (§ 257*)—AMENDMENT—UNNECESSARY AMENDMENTS.

Where the answer alleged that a certain sum was included in a note by mistake, an amendment to the answer alleging that such sum represented an attorney's fee paid by plaintiff in trying to collect a debt from defendant prior to his adjudication in bankruptcy, was properly refused; the only question being whether that sum had been included by mistake.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 764; Dec. Dig. § 257.*]

3. USURY (§ 31*)—SALE OF PROPERTY—MATTERS INCLUDED IN CONSIDERATION.

Since a creditor who purchased an insolvent debtor's property at the bankruptcy sale could resell it at any price he saw fit, an agreement between the creditor and debtor that the former should purchase the property and resell it to the debtor for the price paid, plus an at-

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torney's fee paid out in attempting to collect a debt from the debtor prior to his adjudication in bankruptcy, was valid, and was not usurious for including the attorney's fee.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 74, 77; Dec. Dig. § 31.*]

4. Trusts (§ 336*)—Enforcement—Rights of Beneficiaries.

If a verbal trust to convey property on certain terms was legal, the beneficiary must enforce it according to the terms of the agreement, and cannot enforce the trust as he thinks it should have been established by the agreement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 497; Dec. Dig. § 336.*]

5. Trusts (§ 41*)—Enforcement—Burden of Proof—Terms of Trust.

In an action on mortgage notes, executed under an agreement by which plaintiff was to purchase certain property of defendant upon a bankruptcy sale, and resell it to defendant for the price paid plus the amount of an attorney's fee paid in attempting to collect a debt against defendant, the burden of showing that the trust to resell the property was different from that shown by the notes and mortgage was upon defendant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. § 41.*]

6. Continuance (§ 20*)—Grounds—Absence of Attorney.

Where defendant had three attorneys, and the procuring of certain material testimony did not require the personal attendance of one of them, his absence was not ground for a continuance on the ground that it prevented defendant from procuring such testimony.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 57; Dec. Dig. § 20.*]

Appeal from Circuit Court, Mercer County.

"Not to be officially reported."

Action by the Lexington Banking & Trust Company against Samuel Forsythe and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Fox & Jackson and T. H. Hardin, for appellants. E. L. Hutchinson and E. H. Gaither, for appellee.

BARKER, J. The appellee, the Lexington Banking & Trust Company, is the successor of the National Exchange Bank of Lexington, Ky., and as such successor became entitled to all of its assets, including the choses in action involved herein. On the 21st day of October, 1908, it filed in the Mercer circuit court its petition seeking judgment against appellant Samuel Forsythe on two notes, one for $30,000, subject to certain credits set out in the petition, and the other for $8,206.92, with interest at 6 per cent. from March 1, 1907, until paid, subject to certain credits therein set out; and for the enforcement of a mortgage lien, given to secure the notes, upon a farm in Mercer county, Ky., belonging to the appellant, containing 511 acres. On February 3, 1909, the appellant filed an answer, which he also styled counterclaim and set-off, in which he admitted the execution and delivery of the notes and mortgage as described in the petition, but alleged, first, that by mistake there was included in the original notes, of which those sued on were renewals, the sum of $700 which he did not owe, and that the debt sued on was subject to a credit of $611 which the plaintiff had failed to give him.

The transaction out of which the present litigation grew was as follows: The firm Forsythe & Curry, of which appellant was a partner, was indebted to appellee's predecessor, the National Exchange Bank, in the sum of $5,000. The firm became insolvent, and on their own petition were adjudged bankrupts. Among the assets of the bankrupts was the farm in question, which belonged to appellant Forsythe. This farm was to be sold in the bankruptcy proceedings, subject to the contingent right of dower of Addie L. Forsythe, the wife of appellant. Concerning this sale the officers of the bank and the appellant had an agreement. The precise terms of this, however, constitute the first issue in this case. Appellant alleges that the agreement was that, if the bank purchased the farm at the bankruptcy sale, it was to resell it to him for the amount which it paid at the sale, plus the sum of $5,000, which Forsythe & Curry owed it, with all accrued interest, subject to all proper credits, including whatever dividend or distribution the bank received in the bankruptcy proceedings as the creditor of Forsythe & Curry. The bank contends that the agreement was that if it purchased the farm at the coming sale, it was to resell it to Forsythe for whatever it paid for it, plus its debt of $5,000 with accrued interest and all expenses that it had incurred in enforcing or trying to enforce the collection of its claim from Forsythe & Curry, which included an attorney's fee to the bank's lawyer in Harrodsburg, Ky., where the proceedings were taken. Both parties agree that the bank purchased the farm at the bankruptcy sale for the sum of $34,476.82; that after this purchase the parties in interest met and calculated the sum due according to the agreement for the resale; that this was ascertained to be $40,307.87, being the amount paid by the bank for the farm at the bankruptcy sale, plus its debt of $5,000 and accrued interest, and its expense account in attempting to collect its debt of $5,000 from Forsythe & Curry. In pursuance of its contract the bank then sold the farm to the former owner, the appellant, for $40,307.87, for which he executed and delivered to it three notes, for $13,436.95 each, payable in 6, 12, and 18 months, respectively, from date. These three notes are the originals, of which the notes sued on are renewals. On the 18th day of March, 1909, the bank filed a reply, in which it controverted all the material allegations of the answer, thus placing in issue the defendant's right to a credit of $700, as set up in the first paragraph of the answer, and his right to a credit of $611, as set up in the second paragraph. After making these denials, the bank made

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verted in an affirmative way the two claims for credits set up in the answer, and in reality the issues were completed when this pleading was filed. Subsequently, in May, 1909, the defendant filed a rejoinder in which he unnecessarily controverted the affirmative matter in the reply above mentioned.

Although the burden of proving this right to the credits claimed was upon the defendant, the plaintiff proceeded to prove up its claim by taking the depositions of its officers and directors. After this evidence was in, the defendant tendered an amended answer, purporting to make that pleading conform to the proof, in which he explains that there had been included in the computation of $40,307.87 an attorney's fee of $700 paid to one Roach by the bank as a fee for his services in trying to collect the $5,000 from Forsythe & Curry prior to their adjudication as bankrupts. This the court refused to allow to be filed. This ruling we think was correct. It was immaterial under what head the $700 was included. The answer alleged that the sum of $700 was included by mistake, and, if this was true, the defendant was entitled to that credit. The real question was: Had the sum of $700 been included by mistake in computing the price at which the bank was to sell the farm back to Forsythe? And to establish the affirmative of this issue the burden was on the defendant.

We cannot subscribe to the position of appellant, that the inclusion of the attorney's fee was illegal, although made in accordance with the agreement between the parties for the resale. It must be borne in mind that the bank had a right to buy the assets of the partnership for whatever these brought at public outcry. It was under no obligation to Forsythe, in the absence of a positive agreement so to do, to resell him this property at any price, and certainly none to resell it to him for a less sum than it was worth. It had a right to make itself whole if it could by the purchase. The appellant's position is that the officers of the bank verbally agreed to sell him the property, and in this way a trust was established enforceable in equity, although the transaction was verbal and involved the sale of realty. Now, conceding that the appellant had a right to establish this verbal trust and enforce it, he is required to enforce the trust that was created. He cannot enforce a trust which he thinks ought to have been established. He must either enforce the trust actually created, or he must fail entirely. Appellant cannot say that this debt includes usury because it includes the attorney's fee in addition to the debt of $5,000. It also includes the sum which the bank paid at the judicial sale; and this will not be accounted as usury. The parties by their at that price or not at all. We conclude, then, that the bank had a right to make itself whole, and to say upon what terms it would resell the property, if at all, to the defendant. The parties met and reduced their agreement to writing by the execution of the notes and the mortgage. The burden of showing that the trust was different from that shown by the notes and mortgage was upon the defendant; and, he having failed to in any way establish his version of the agreement, his defense on that point fell to the ground.

Appellant contends that the case should have been continued for certain reasons which he set up in an affidavit, and which was fully controverted by the affidavits of the officers of the bank. The court on the issues so raised found the facts to be as the bank officers testified. This was a pure question of fact, and we have no doubt the trial court decided it correctly.

Appellant also insists that the case should have been continued in order to enable him to prepare for trial, saying that because of the absence of one of his attorneys, and of his own necessary absence from the state, he was prevented from introducing the evidence necessary to establish his claim to the credit of $611 alleged in the answer. The establishment of this credit was by the record of the bankruptcy proceedings in the federal court at Frankfort, Ky. There was no reason shown why that could not have been done long before the case was called for final submission. The absence of Mr. Fox constituted no ground for a continuance. The defendant had two other attorneys, and there was nothing so difficult in getting the proof of the payment to the bank of $611 as its pro rata in the bankruptcy proceedings as made the personal attendance of Mr. Fox necessary.

The issues having been completed in March, the case stood ready for submission at the May term of the court. We think the trial court did not err in refusing to continue the case, or in giving judgment for appellee as prayed for in the petition subject to admitted credits.

Judgment affirmed.

ARNETT v. CARDWELL, Police Judge.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. COURTS (§ 480*)—CONFLICTING JURISDICTION.

Civ. Code Prac. § 284, provides that no injunction shall be granted to stay the proceeding on a judgment of a justice of the peace or of a county court, if the value of the matter in dispute does not exceed $25. Section 285 provides that an injunction to stay proceedings on a judgment must be brought in the court where the judgment was rendered. A judgment was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

recovered against plaintiff in the police court, which he sought to enjoin, on the ground that the ordinance under which the judgment was recovered was invalid. *Held* that, in a suit the main purpose of which was to have an ordinance declared invalid, and the injunction prayed for was only incidental to the main relief asked, sections 284 and 285 have no application, and that the circuit court had jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec Dig. § 480.*]

2. MUNICIPAL CORPORATIONS (§ 594*)—ORDINANCES—VOID FOR UNCERTAINTY.

While a town ordinance which prescribes a penalty for its violation may leave a margin for the discretion of the court so that the fine or imprisonment imposed may be graded in proportion to the aggravation of the circumstances, it is void for uncertainty, where it only prescribes for a minimum, and not for a maximum, penalty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1318; Dec. Dig. § 594.*]

Appeal from Circuit Court, Breathitt County.

"To be officially reported."

Suit by Joseph D. Arnett against T. P. Cardwell, Jr., Police Judge, to have an ordinance adjudged invalid, and to enjoin the collection of a replevin bond. From an order denying relief, plaintiff appeals. Reversed and remanded.

G. W. Fleenor and E. C. Holliday, for appellant. W. S. Hogg, for appellee.

CLAY, C. The board of trustees of the town of Jackson, Ky., enacted the following ordinance: "Be it ordained by the board of trustees of the town of Jackson, Ky., as follows: That it shall be unlawful for any person to sell within the corporate limits of the town of Jackson, Ky., any drink known as Malt Meade or Beerine, and any person violating this ordinance shall, upon conviction, be fined not less than ten ($10.00) dollars for each offense, and each sale shall constitute a separate offense. This ordinance shall take effect from and after its publication. [Signed] R. T. Davis, Chairman. M. S. Crain, Clerk." Thereafter six warrants were issued against Joseph D. Arnett, charging him with violation of the above ordinance. He was tried before appellee, T. P. Cardwell, Jr., police judge of Jackson, and fined $10 and costs for each offense, the costs amounting to $6. Thereafter appellee replevied the fines and costs, amounting to $98, all of which were put in a single replevin bond. Appellant instituted this action against appellee, T. P. Cardwell, Jr., police judge of Jackson, Ky., and the town of Jackson, to have the aforesaid ordinance adjudged invalid, and to enjoin the collection of the replevin bond. The lower court denied the relief prayed for; hence this appeal.

Appellee took the position below that appellant's application for injunction should have been made in the police court, as that court rendered the judgment. He also contended that even the police court had no jurisdiction, as the amount in controversy did not exceed $25. See sections 284 and 285 of the Civil Code of Practice. The circuit court agreed with appellee. Our conclusion, however, is that sections 284 and 285 have no application to a case like this. Here the main purpose of the suit is to have declared invalid the ordinance in question. The injunction prayed for is incidental only to the relief asked. This distinction was made by this court in the case of Boyd et al. v. Board of Council of the City of Frankfort, 117 Ky. 199, 77 S. W. 669, 25 Ky. Law Rep. 1311, Moody v. City of Williamsburg, etc., 121 Ky. 92, 88 S. W. 1075, 28 Ky. Law Rep. 60, and Combs v. Sewell, etc., 59 S. W. 526, 22 Ky Law Rep. 1026.

The next question is: Is the ordinance void? It will be observed that the ordinance provides a minimum penalty, but not a maximum penalty. In ordinances and by-laws the penalty must be certain. The old English rule was that the precise amount should be fixed. This rule was followed in New Jersey. State v. Zeigler, 32 N. J. Law, 262. North Carolina holds to the same doctrine. State v. Worth, 95 N. C. 615. For a while Alabama had the same rule. Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441. The latter case was afterwards overruled. Huntsville v. Phelps, 27 Ala. 55. According to the decided weight of authority, it is proper for penal ordinances to leave a margin for the discretion of the court, so that the fine or imprisonment imposed may be graded in some proportion to the aggravation of the circumstances. Thus the ordinance may provide that the fine shall not be less than a named sum, nor greater than a specified amount; or that the imprisonment shall not be less than a specified time, nor greater than a time named; or that the fine shall not exceed a named sum, or the imprisonment extend beyond a specified time. McQuillen on Municipal Ordinances, § 175. The ordinance in question does not conform to the general rule. While it prescribes a minimum fine, it does not fix a maximum, thus leaving to the court the power to impose any fine in excess of $10. The ordinance is therefore void for uncertainty. It follows that appellant is entitled to the relief prayed for.

We deem it unnecessary to pass upon the other questions raised.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. GORMLEY.

(Court of Appeals of Kentucky. Oct. 21, 1909.)

1. CARRIERS (§ 210*)—CARRIAGE OF STOCK—INJURIES IN UNLOADING—NEGLIGENCE.

If a carrier's agent ordered plaintiff to unload a horse at a place where no proper facilities were provided for unloading, it was immaterial, upon plaintiff's right to recover for in-

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Cent. Dig. § 924; Dec. Dig. § 210.*]

2. APPEAL AND ERROR (§ 1201*)—AMENDMENT—TIME OFFERED.

Where an action was begun in 1907, and the mandate directing a reversal on appeal was issued June 18, 1908, and on October 29th the case was set for retrial on February 10th next, but was not called for trial until February 22, 1909, there was no abuse of discretion in denying amendment to the answer alleging contributory negligence, offered on the latter date; no reason appearing why defendant did not offer the amendment sooner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4679; Dec. Dig. § 1201.*]

3. CARRIERS (§ 228*) — SHIPMENT OF LIVE STOCK—DAMAGES.

In an action against a railroad company for damages for injuries to a horse in unloading it, evidence *held* to sustain a verdict for plaintiff for $2,000.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by W. C. Gormley against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Shelby, Jas. J. Donohue, Chas. H. Moorman, and Benjamin D. Warfield, for appellant. Smith & Smith and A. R. Burnam & Son, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 109 S. W. 346, 33 Ky. Law Rep. 188. This opinion was afterwards extended, and the extension may be found in 111 S. W. 289, 33 Ky. Law Rep. 802. The circumstances under which the cause of action arose were fully set out in the former opinion. It will be unnecessary, therefore, to detail them again. On the former appeal this court held that the whole case, so far as appellant's negligence was concerned, turned on the point as to whether or not appellee voluntarily undertook to unload the horse from the car at Coal Creek, or whether he did so under the order and direction of appellant. Upon the return of the case it was again tried, and a verdict rendered for the second time against appellant for the sum of $2,000, and the railroad company again appeals.

We deem it unnecessary to go into any extended discussion of the question as to whether or not there was a variance between the proof and the cause of action alleged. It is immaterial whether appellant undertook by the contract of shipment to ship the horse to Harriman, Tenn., or to Coal Creek, if as a matter of fact its agent ordered appellee to unload the horse at Coal Creek. The point is also made that the verdict was excessive. Upon this issue several witnesses testified that the horse in question prior to the time of the injury was one of the most valuable green trotters in Kentucky; that since the injury he has been valueless for racing purposes. On the contrary, it was shown by appellant that the failure of the trial court to permit it to file an amended answer pleading contributory negligence on the part of appellee's attendant in charge of the horse. The accident to the horse took place in the year 1906. This action was originally instituted early in the year 1907. It was tried by the circuit court of Madison county, and judgment rendered in favor of appellee for the sum of $2,000. It was then appealed to this court. The appeal was filed December 14, 1907. The mandate directing a reversal was issued June 18, 1908. The amended pleading was not offered to be filed between that time and the next February term of the court. On the 29th day of October, 1908, the case was assigned for trial on the 10th day of the next February term of the court. On the 8th day of February the case was reassigned to the 19th day of that term. The case was called for trial on February 22, 1909. It was then that the amended answer was offered, and the court refused to permit it to be filed. The facts of the case were all brought out on the former trial, and were within appellant's knowledge. Had it offered the amended answer upon the filing of the mandate, or within a reasonable time before the calling of the case, this would have given appellee full opportunity to prepare the case with reference to the issue made in the amended answer. Appellant has shown no reason for not filing the amended answer sooner. Having failed to file it until the case was called for trial, we are of opinion that the court did not abuse its discretion in refusing to permit it to be filed.

With this issue out of the case, the instructions of the trial court conformed to, and were authorized by, our former opinion. There was a sharp issue of fact as to whether or not appellant's agent offered to the man in charge of the horse to return the car with the horse in it to Jellico, and as to whether or not the man in charge of the horse declined that offer. There was also a sharp issue as to whether the man in charge of the horse was ordered by the agent to unload the horse from the car at Coal Creek, or undertook of his own volition, and without an order from appellant's station agent, to unload the horse. Upon this point we are unable to say that the finding of the jury was flagrantly against the evidence.

horse after the injury showed a pretty fast gait in several races. While this evidence tends to show that the horse was still valuable for racing purposes, it is not conclusive that the horse, if not injured, would not have been far more valuable. In view of the evidence of several reputable gentlemen, who were acquainted with the horse and his performances, and with the injury he received, to the effect that the injury at least rendered him far less valuable for racing purposes, and in view of the finding of two juries fixing appellee's damages for the injury at $2,000, we are not disposed to disturb the verdict on the ground that it is excessive.

Judgment affirmed.

WILLIAMSON et al. v. MAYNARD et al.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. WILLS (§ 364*)—PROBATE—APPEAL—TIME OF TAKING PROCEEDINGS.

Ky. St. 1909, § 4850 (Russell's St. § 3976), limits the time to appeal from a judgment of the circuit court probating a will to one year. *Held* that, if an appellant from such a judgment was unavoidably delayed in preparing his transcript, he should, within the year, apply to the appellate court for an extension of the time to file the transcript, as prescribed under Civ. Code Prac. §§ 738, 740, 758, and that, on failure to do so, the appeal may be dismissed if not taken within the prescribed time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 828, 829; Dec. Dig. § 364.*]

2. WILLS (§ 371½*)—PROBATE—APPEAL—DISMISSAL—TIME OF TAKING PROCEEDINGS.

That the limitation of one year prescribed by Ky. St. 1909, § 4850 (Russell's St. § 3976), for taking an appeal from a judgment of the circuit court probating a will, has expired, may be raised by motion upon a proper plea made at or before the time the case is submitted on the merits.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 371½.*]

Appeal from Circuit Court, Pike County.

"To be officially reported."

Action by B. F. Williamson and others against W. H. Maynard and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

S. M. Cecil, W. H. Flannery, J. F. Butler, Jas. M. Roberson, Hager & Stewart, and W. S. Harkins, for appellants. N. J. Auxier, York & Johnson, and F. W. Stowers, for appellees.

O'REAR, J. This is an appeal from the judgment of the Pike circuit court, finding the paper in contest to be the last will of C. W. Williamson. The final judgment became effective in October of 1907. This appeal was prosecuted January 25, 1909. Appellees have interposed and rely upon the plea of limitation of one year in such cases. In avoidance of the plea appellants assert that parts of the record were lost, and that because of that fact and other unavoidable casualty they were not able to have the transcript of the record filed in this court within one year from the time the final judgment was entered.

Section 4850, Ky. St. (Russell's St. § 3976), limits to one year the period within which appeals may be prosecuted to this court from judgments of the circuit court probating wills. If some casualty delayed the appellants in having the transcripts prepared within that time, they should, during that year, and while this court still had jurisdiction of the matter, have applied to this court for an extension of the time within which to have filed the transcript. Sections 738, 740, 758, Civ. Code Prac; Hernstein v. Depue, 65 S. W. 805, 23 Ky. Law Rep. 1498; Bush v. Lisle, 86 Ky. 504, 6 S. W. 330, 9 Ky. Law Rep. 667.

It was held by this court in the case of Duff v. Duff, 103 Ky. 348, 45 S. W. 102, 20 Ky. Law Rep. 52, that the statutory bar of one year in will cases may be available to the appellee by motion based upon proper plea, and made at or before the case is submitted on the merits. Such was the practice in this case, and the court has no option but to sustain the plea and motion.

Appeal dismissed.

COMMONWEALTH v. FERGUSON.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. FALSE PRETENSES (§ 36*)—INDICTMENT.

Under Ky. St. 1909, § 1208 (Russell's St. § 3474), making criminal the obtaining of money, property, or other thing by false pretense, it is not necessary that the indictment charge that the person to whom the false pretense was made sustained any loss, and an indictment charging defendant with obtaining money by falsely representing that he was of age, and thereby inducing the prosecuting witnesses to purchase land of him, was not defective, though impliedly admitting that the witnesses afterwards obtained a good title to the land.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 48; Dec. Dig. § 36.*]

2. FALSE PRETENSES (§ 7*)—INFANTS—REPRESENTATION AS TO AGE.

Under Ky. St. 1909, § 1208 (Russell's St. § 3474), making criminal the obtaining of money, property, or other thing by false pretenses, a statement by a minor that he is of age is a false statement, if made to induce another to enter into a contract that he would not have otherwise entered into, and the one to whom the statement is made is induced to, and does, part with his money or property on the faith of it.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 7.*]

Appeal from Circuit Court, Morgan County.

"To be officially reported."

Ambrose Ferguson was indicted for obtaining money by false pretenses. From a judgment sustaining a demurrer to the indictment, the Commonwealth appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and John W. Waugh, for the Commonwealth. S. M. Nickell and A. N. Cisco, for appellee.

CARROLL, J. The only question in this case is whether or not the lower court ruled correctly in sustaining a demurrer to the following indictment: "The grand jury of Morgan county, in the name and by the authority of the commonwealth of Kentucky, accuse Ambrose Ferguson of the crime of obtaining money by false pretense, committed as follows: The said defendant, Ambrose Ferguson, on the 23d day of March, 1908, in the county and circuit aforesaid, did unlawfully, willfully, and feloniously, and by falsely representing and pretending to K. S. Lykins and S. M. Freese that he, the said Ferguson, was 21 years of age on the 26th day of March, 1904, and able to contract for himself, and did thereby induce and procure the said Lykins to purchase and take conveyance from him (Ferguson) of a certain tract of land in Morgan county, Ky., and to pay him therefor the sum of $2,400, when in truth and in fact he was under 21 years of age at that time, and he well knew same, and said statements and representations when so made by him were false and fraudulent, and known to him to be false at the time, and were made by him with the intention of defrauding the said Lykins and Freese, and that they did not get said land under the said conveyance, but were induced and did pay to the said Ferguson the sum of $2,400 believing and, by reason of said statements, not knowing the same to be false, against the peace and dignity of the commonwealth of Kentucky." We are not accurately advised as to the grounds upon which the demurrer was sustained. It may have been because the indictment failed to charge that Lykins and Freese suffered any loss by reason of the fraudulent representations made to them by Ferguson, or upon the ground that a false statement made by an infant as to his age does not come within the statute. But, whatever the reason that influenced the lower court, his ruling was erroneous, as in our opinion the indictment was sufficient.

It will be observed that the indictment charges that Lykins and Freese did not get the land under the conveyance made to them by Ferguson at the time they paid the $2,400, but impliedly admits that they afterwards obtained a good title to the land, and so we will assume that they did not suffer any loss. It is not necessary that an indictment for false pretense shall charge that the person to whom the false pretense was made sustained any loss. Section 1208 of the Kentucky Statutes (Russell's St. § 3474), describing the crime of obtaining money or property by false pretenses, reads as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." Under this statute it is the obtention by fraudulent pretenses of money or property that may be the subject of larceny that constitutes the offense. When the owner is induced to, and does, part with his property by reason of the false and fraudulent statement or pretense, the offense in this particular is completed. It is wholly immaterial whether he actually or ultimately suffers a loss or not. If he should regain his property, or the person obtaining it or another should fully compensate him, it would not lessen the offense, or prevent the commonwealth from prosecuting and convicting the offender.

Although this precise question has not, so far as our investigation goes, been heretofore passed upon by this court, it has often been considered by courts of last resort in other jurisdictions, and the rulings are entirely uniform. Thus, in People v. Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594, Genung by false pretenses procured Conly to sign a note. In passing upon an objection to the indictment similar to the one made in this case the court said: "It was suggested upon the argument that the indictment was bad in not charging loss or prejudice to have been sustained by Conly. * * * The offense is complete when the signature is obtained by false pretenses with the intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained." In Commonwealth v. Coe, 115 Mass. 481, in considering a prosecution for obtaining money and property under false pretenses under a statute substantially like ours, the court said: "The offense consists in obtaining property of another by false pretenses. The intent to defraud is the intent, by the use of false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. The offense is complete when the money or property has been obtained by such means, and would not be purged by subsequent restoration or repayment." In People v. Bryant, 119 Cal. 595, 51 Pac. 960, in disposing of a similar question, the court said: "If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some manner not then contemplated. It is not necessary to show that the property has been absolutely lost to him in order to sus-

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tenses and representations, and the offense is complete when by means of such false pretenses the fraud thereby intended is consummated by obtaining possession of the property sought, * * * notwithstanding the defrauded party may recover the value of the property in a civil action against him." And so in the case of People v. Cook, 41 Hun (N. Y.) 67, the court said: "In the case at bar the representations, alleged to have been made with intent to cheat and defraud the party who was thereby induced to part with his money, were that the note presented was made by a particular person, when in fact it was not, but was made by another having the same name. The obtaining money by such means was clearly within the statute, and the indictment contains all the elements of crime required by its provisions, although there is no allegation that the maker of the note was less responsible than the person represented as the maker. * * * The purpose of the statute is to protect against imposition, and not to permit guilt to depend upon the uncertainty of the determination of the question whether any pecuniary injury necessarily resulted in some view which might be taken of the situation." Likewise, in Lowe v. State, 111 Ga. 650, 36 S. E. 856, it is said: "The crime, then, was certainly complete when the accused failed to pay for the goods after the prosecutor had become aware of his misrepresentations, and demanded payment of him. * * * The fact that he afterwards settled with the accused for the value of the goods is not pretended as a settlement of the crime that had been committed, even if the parties had authority to settle such a crime; but it must be construed simply as a settlement of a civil liability, one, who for the purpose of deceiving another and obtaining credit, makes a false and fraudulent representation to the effect that he has purchased and has become the owner of valuable property, and who in this manner defrauds the person to whom the representation is made of money or other thing of value, is guilty of being a cheat and swindler; and a settlement between such wrongdoer and the person defrauded, made after the commission of the offense, and the arrest of the former upon a warrant charging him therewith, constitutes no bar to his conviction thereof upon an indictment subsequently returned. As well might it be said that one guilty of larceny could escape prosecution by returning the stolen goods after being arrested for the offense." In Commonwealth v. Schwartz, 92 Ky. 510, 18 S. W. 775, 13 Ky. Law Rep. 929, 36 Am. St. Rep. 609, it was ruled that if a person obtains a loan of money from another by false pretense of an existing fact, although he is by a person that he is over 21 years of age, when in fact, as he well knows, he is not, is a false statement within the meaning of the statute, if it be made for the fraudulent purpose of inducing a person to enter into a contract or engagement that he would not have entered into if he had known that the person was an infant, and the person to whom the statement is made is induced to, and does, part with his money or property on the faith of it. An infant's contract is voidable at his election. Generally speaking, he may or may not perform it. Persons who deal with an infant may or may not suffer loss, depending upon the election of the infant to perform the contract or avoid it. But whether loss is sustained or not is not important, nor is it material that the infant may be estopped from relying on his infancy to defeat the contract. It is the fact that a false statement was made to obtain the property, and that on the credit of it the property was obtained, that constitutes the gist of the offense. Whenever a person is induced to part with his money or property by fraudulent and false statements or existing or past facts, no matter in what the fraudulent statement consists, the statute has been violated. The purpose of the law is to suppress cheating and fraud. It is a broad statute, and embraces all persons who "by any false pretense, statement, or token, with the intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny." Lefler v. State, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300; Barton v. People, 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 302, 25 Am. St. Rep. 392; 2 Bishop's New Criminal Law, § 414. There is no exception in favor of infants. The infant of mature years is placed on the same footing as the adult. If an infant by falsely and fraudulently representing that he is the son of A., when in fact he is not, and this is unknown to C., who on the faith of his statement advances him money which he would not have done had he known the truth, he is guilty of the offense denounced. And so an infant who appears and represents himself to be of age, or makes any other false and fraudulent statement upon the faith and credit of which he obtains money or property, is equally guilty. In each case he has been enabled to procure the money or property by reason of the false statement. People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240. It is not important in what the false statement consists, so that it relates to some material past or existing fact, and is calculated to, and does, deceive. Bishop's New Criminal Law, §§ 433–436; 2 Wharton's Criminal Law, § 1186; Commonwealth v. Grady, 13 Bush, 285, 26 Am. Rep. 192; Commonwealth v.

Wherefore the judgment is reversed, for proceedings consistent with this opinion.

SNADON v. SALMON.

(Court of Appeals of Kentucky. Oct. 21, 1909.)

1. COVENANTS (§ 79*) — COVENANT OF WARRANTY—BREACH—ACTIONS.

A grantee who has been evicted, or who has suffered such a loss as entitles him to sue on a covenant of general warranty, may sue a remote grantor who conveyed the land with warranty, and he is not confined to an action against his immediate grantor, but a grantee seeking to recover on a warranty in a deed made by a remote grantor, with knowledge of the fact that the conveyance was not intended to pass the title, but was only a mortgage, takes the place of the immediate grantee of the grantor whom he sues, and can occupy no better position than such grantee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 78; Dec. Dig. § 79.*]

2. COVENANTS (§ 73*)—COVENANT OF WARRANTY—BREACH—ACTIONS.

An agreement between a grantor in a deed with covenant of warranty, and the grantee therein, by which the latter relieves the former of liability on the covenant, does not operate as an estoppel on a subsequent or remote grantee or prevent him from suing on the warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 74; Dec. Dig. § 73.*]

3. COVENANTS (§ 79*) — COVENANT OF WARRANTY—BREACH—ACTIONS.

A purchaser purchased with notice of the character of the conveyance his vendor took. At the time of the conveyance to the vendor his grantor was not invested with title or possession, but both remained in the original owner. The vendor knew when he took the conveyance that the grantor only had a mortgage. *Held*, that the purchaser could not sue on the covenant of warranty in the deed by the grantor to the vendor, for he took the position of the vendor who could not recover on the covenant in the deed to him.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 79.*]

4. COVENANTS (§ 102*)—COVENANT OF WARRANTY.

A covenant of warranty presupposes that the title to the property is conveyed, and, where the title was not intended to pass, the grantee, if evicted, has not suffered any loss because he had no title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157–168; Dec. Dig. § 102.*]

Appeal from Circuit Court, Todd County.

"To be officially reported."

Action by W. H. Salmon against George Snadon. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss petition.

S. Walton Forgy, for appellant. Selden Y. Trimble and Perkins & Trimble, for appellee.

CARROLL, J. In 1899 Albert Jennings conveyed with covenant of general warranty to W. H. Salmon. After Salmon obtained title to the land, he brought suit against Jennings, who was in possession, to recover it, and succeeded in the lower court. From the judgment Jennings prosecutes an appeal to this court, and in an opinion that may be found in 98 S. W. 1026, 30 Ky. Law Rep. 168, it was held that the deed executed by Jennings to Snadon was in fact a mortgage to secure a debt due by Jennings to Snadon. In the course of the opinion the court further said: "Fort got from Snadon no better title than Snadon had. The facts that Snadon told Fort put him on notice as to the condition of the title if he did not know them before. The only title that Fort got he got from Snadon, and Snadon had nothing but a mortgage. Salmon lived in 250 yards of Jennings, and, aside from the proof showing that he had notice of the infirmity of the title, the fact that Jennings was living on the land, giving it in for assessment in his own name and paying the taxes, was sufficient to put him on inquiry. On the whole case we are satisfied that the deed to Snadon should be treated as a mortgage, and we are also satisfied that the $73 paid by Jennings to Fort covered everything that was due upon the land." Upon a return of the case the petition of Salmon was in accordance with the opinion of this court dismissed, and a judgment entered adjudging Jennings his costs. Thereupon Salmon brought this suit against Snadon upon the covenant contained in his deed to Fort, basing his action upon the ground that, as he purchased from Fort, he was entitled to the benefit of the covenant contained in the deed made by Snadon to Fort. The lower court rendered a judgment in favor of Salmon, and Snadon appeals.

There is no doubt that a vendee who has been evicted, or who has suffered such a loss as would entitle him to maintain an action upon a covenant of general warranty, may bring his action to recover damages for the breach against a remote vendor who conveyed the land with covenant of warranty. He is not confined to an action against his immediate vendor. Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. Law Rep. 640, 11 L. R. A. 240; Hunt v. Orwig, 17 B. Mon. 74, 66 Am. Dec. 144; Cummins v. Kennedy, 3 Litt. 118, 14 Am. Dec. 45. But, when a vendee seeks to recover on a warranty contained in a deed made by a remote vendor, with full knowledge of the fact that the conveyance was not intended to pass the title, he takes the place of the immediate vendee of the vendor whom he sues, and can occupy no better position than did such vendee. If, as between A. and B., A. was not liable on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

conveyances would not increase his responsibilities or obligations to vendees with such notice beyond what they were when he conveyed. Of the correctness of this proposition we think there can be no doubt. If a vendor could be held liable upon a covenant by a remote vendee, who purchased with notice of the fact that his conveyance was not intended to pass title, when he could not be held by his immediate vendee, it would follow that his liability would attach, not by virtue of his act or deed, but because of the act or deed of some other person with whom he had no privity of contract whatever. But, if one conveys a title with covenant of warranty, and at the time or afterwards enters into some agreement or arrangement with his vendee by which as between them he is relieved of liability on his covenant or that would estop his vendee from looking to the warranty for indemnity, this would not operate as an estoppel on a subsequent or remote vendee, or prevent him from maintaining an action on the warranty. It is only when the remote vendee is chargeable with notice of the facts that work an estoppel on the person whose place he takes that he will not be permitted to assert any claim that such person could not make.

Assuming, then, that Salmon, who purchased with notice of the character of conveyance Fort took and who consequently occupies no better position than Fort did, is remitted to the rights and remedies of Fort, the question naturally arises, Could Fort, if he had been evicted, have maintained an action against Snadon upon the covenant contained in his deed? Snadon only had a mortgage on the land. At the time of the conveyance to Fort he was not invested with either the title or possession; both being in Jennings. Fort got from Snadon no better title than Snadon had, and Fort knew when he took the conveyance from Snadon that he only had a mortgage. If Snadon had been evicted, he could not recover on the covenant contained in the deed made by Jennings, and so it follows that Fort could not recover on the covenant contained in the deed made to him by Snadon, as neither Jennings nor Snadon conveyed the title. A covenant of warranty presupposes that the title to the property is conveyed. If, in fact, the title does not and is not intended to be conveyed, of course, the vendee, if evicted, has not suffered any loss because he had no title to lose. As said in Tiedeman on Real Property, § 624: "But, in order that a covenant may run with the land to assignees, the grantee must by the conveyance acquire the actual or constructive seisin. If at the time of the conveyance the grantor had neither notice of defects in the title. Here the title did not and was not intended to be conveyed. It may be conceded to be settled law that the mere fact that the vendee has notice of defects in the title at the time of his purchase will not estop him from recovering on a covenant contained in the deed he accepted. Jones v. Jones, 87 Ky. 82, 7 S. W. 886, 9 Ky. Law Rep. 942; 11 Cyc. 1066. But this principle has no application to the facts of this case. To permit Salmon to recover against Snadon on account of the warranty contained in the deed to Fort would be to permit Salmon, who must be treated as having notice of the character of the conveyances, to occupy a better position than Fort did, and to disregard the rights of Snadon as between himself and Fort.

The judgment is reversed, with directions to dismiss the petition.

CINCINNATI, N. O. & T. P. RY. CO. v. STROSNIDER.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. CARRIERS (§ 277*)—PUNITIVE DAMAGES—ABUSE OF PASSENGER.

Punitive damages are recoverable where a conductor, in the presence and hearing of the other passengers, cursed and threatened in an inexcusable manner a passenger who had boarded the train not knowing that it did not stop at the station to which he had a ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082–1084; Dec. Dig. § 277.*]

2. CARRIERS (§ 277*)—EXCESSIVE DAMAGES.

A verdict of $750 was not excessive, where a conductor, in the presence of the other passengers, cursed and threatened in an inexcusable manner a passenger who had boarded the train not knowing that it did not stop at the station to which he had a ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082–1084; Dec. Dig. § 277.*]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

Action by Walter Strosnider against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

N. L. Bronaugh and John Galvin, for appellant. Everett B. Hoover, Robert Harding, and E. V. Puryear, for appellee.

CARROLL, J. The appellee purchased at Nicholasville, Ky., a round-trip ticket on appellant's railroad from Nicholasville to Lexington and return. On his return from Lexington to Nicholasville, he boarded a through passenger train that did not stop at Nicholasville; the first stop after leaving Lexington being Danville, some 20 miles south of Nicholasville. Appellee testified that when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he got on the train he supposed it stopped at Nicholasville, and did not have any notice to the contrary. On the other hand, the brakeman, who was assisting passengers to get on and off the train at Lexington, testified that appellee was permitted to board the train upon his statement that he was going to Danville. Shortly after the train left Lexington, the conductor, on his way through the train collecting tickets, was handed by appellee his Nicholasville ticket. Thereupon the conductor, without sufficient, or, indeed, any, excuse or provocation, cursed and abused appellee in a loud and outrageous manner for getting on a train that he (appellee) knew did not stop at Nicholasville. He also threatened to kick his head off if appellee attempted to get off the train at High Bridge, a place near Nicholasville, at which the train did not stop, but ran at a low rate of speed. There is really little, if any, dispute in the record as to the language and conduct of the conductor towards appellee. Upon a trial of the case the jury awarded appellee, who was carried to Danville, the train not stopping at Nicholasville, $750 in damages.

The court instructed the jury that they should not allow appellee any damages because he was taken to Danville, instead of being permitted to get off at Nicholasville, but that they might award in their discretion punitive damages. It is insisted by counsel for appellant that the court erred in instructing the jury that they might award punitive damages, and also that the verdict is excessive. Both of these contentions are without merit. The conductor, in the presence and hearing of the other passengers, cursed, abused, and even threatened, in a violent and inexcusable manner, appellee, who had not been guilty of any offense other than ignorantly getting on a train that did not stop at the station for which he had a ticket; and it was not only proper to instruct the jury that they might allow punitive damages, but right that the jury should award them. Under the aggravating circumstances of this case the damages are not excessive.

The judgment of the lower court is affirmed.

SOUTHERN RY. CO. v. A. M. E. CHURCH'S TRUSTEES OF HARRODSBURG.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION OF WATER OF CREEK BY RAILROAD—NATURE OF LIABILITY.

In an action against a railroad for damages caused by obstruction of water of a creek by a bridge on its road replacing a former structure, an instruction making liability depend on whether the new bridge obstructed the water to a greater extent than the old one was not the issue which should have been submitted, as it was liable only in the event that the bridge obstructed the passage of water accumulating from such ordinary and usual rainfalls in the vicinity as might have been anticipated by persons of ordinary experience and prudence, and it was not liable for overflows caused by extraordinary rains or floods; i. e., such as were unusual in the vicinity and could not have been anticipated by such persons.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 218; Dec. Dig. § 171.*]

2. WATERS AND WATER COURSES (§ 178*)—OBSTRUCTION OF WATER OF CREEK BY RAILROAD—MEASURE OF DAMAGES.

Where only two overflows, occurring some months apart and lasting only a short time, are complained of in an action for obstructing overflow of a creek by a bridge on a railroad, the damage caused thereby is not within the rule applicable when the injury is permanent, and the measure of damages as to personal property destroyed is its market value, and as to personal property injured is the difference between such value before and after the injury, and the measure of damages to a church building is such sum as is sufficient to restore it to its former condition, and such further sum as will compensate for the diminution in the value of its use during the continuance of the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251, 255; Dec. Dig. § 178;* Damages, Cent. Dig. §§ 276½, 282.]

Appeal from Circuit Court, Mercer County.

"Not to be officially reported."

Action by the African Methodist Episcopal Church's Trustees of Harrodsburg, Ky., against the Southern Railway Company, for damages caused by obstruction of water of a creek by a bridge. From a judgment for plaintiffs, defendant appeals. Reversed.

Humphrey & Humphrey, E. P. Humphrey, and E. H. Gaither, for appellant. C. E. Rankin, for appellees.

CLAY, C. Prior to the year 1888, appellees, the trustees of the A. M. E. Church of Harrodsburg, Ky., were the owners of a lot in that city on which they had erected a church building. In the year 1888 appellant's grantor acquired possession of a strip of land running through the city and cutting off from appellees' land a small corner for use as a right of way. Payne's creek runs through said city and across appellees' land to appellant's right of way, placing appellees' property with reference to the stream above appellant's. The latter's right of way, at the point where it crosses the stream, runs from southwest to northeast, making the crossing a diagonal one. In addition there is a slight turn in the stream just where it strikes appellant's right of way, thus making the stream run almost lengthwise of the right of way for a distance of 100 to 125 feet. Appellant's grantor, in building its road, erected a trestle upon wooden bents across the stream in question. In the fall of 1907 appellant replaced the trestle with stone abutments and steel bridging. In order to do this it built a long stone wall or abutment on the north side of the stream, and a short wall on the south side. Then it

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built an abutment 4 feet wide in the center of the stream to sustain the woodwork. Charging that appellant had so constructed the bridge that it did not leave room for the water in the creek to pass through the opening left for it, but caused it to back up and overflow appellees' property, and to injure the carpets, pews, seats, and other furniture therein, and also the church building itself, appellees brought this action to recover damages. The jury returned a verdict in their favor for $250, and the railroad company appeals.

The chief error assigned is the failure of the trial court to properly instruct the jury. The instructions given are as follows:

"If you believe from the evidence in this case that the defendant so constructed the present bridge across the stream below the property of the plaintiff that it obstructed and withheld the water in times of freshets to a greater appreciable extent than the trestle and bridge that it maintained at said point theretofore, and that by reason thereof the water was backed upon the premises of the plaintiff and into the buildings thereon, and injured the same, then you will find for the plaintiff in damages not exceeding the sum of $1,000.

"The measure of damage, if any, awarded to plaintiff, will be the difference in the fair market value before the erection of said bridge and the fair market value thereafter, if it is less than theretofore, and if you believe from the evidence that the difference is attributable to the water being so backed upon and onto the building situated upon the property. Unless you so believe from the evidence, you will find for the defendant."

It will be observed that instruction 1 makes appellant's liability depend upon whether or not the new bridge obstructed the water to a greater extent than the old bridge. This was not the issue which should have been submitted to the jury. Appellant was liable only in the event that the new bridge obstructed the passage of water that accumulated from such ordinary and usual rainfalls in that vicinity as might have been anticipated by persons of ordinary experience and prudence. It was not liable for the overflows of appellees' land which were caused by extraordinary rains or floods; i. e., such floods or rains as were of such unusual occurrence in that vicinity as could not have been anticipated by persons of ordinary experience and prudence. Wallingford v. Maysville & Big Sandy Ry. Co., 107 S. W. 781, 32 Ky. Law Rep. 1049; City of Louisville v. Knighton, 100 S. W. 228, 30 Ky. Law Rep. 1037, 8 L. R. A. (N. S.) 478.

The record in this case shows that only two overflows are complained of. These occurred some months apart and lasted for only a short length of time. That being the case, the facts do not bring it within the rule applicable to cases where the injury is a permanent one. It is not a case where a permanent structure, for instance, is built in the street, and its very presence tends to depreciate the value of the adjoining property. Nor is it a case where the water is so permanently diverted as to constitute a permanent nuisance. That being the case, the measure of damages, where personal property is destroyed, is the market value of such property. Where the personal property is only injured, it is the difference between its market value before the injury and its market value after the injury. In the case of the church itself, the measure of damages is such sum as is sufficient to restore the property to the condition it was in prior to the injury, and such further sum as will compensate the party seeking damages for the diminution in the value of the use of the property during the continuance of the injury. Pickerill v. City of Louisville, 125 Ky. 229, 100 S. W. 873, 30 Ky. Law Rep. 1239; Wallingford v. Maysville & Big Sandy Ry. Co., 107 S. W. 781, 32 Ky. Law Rep. 1049.

Some complaint is made of incompetency of certain questions and answers with reference to the market value of the property injured. In this connection we call attention to the case of Illinois Central R. Co. v. Smith, 110 Ky. 203, 61 S. W. 2, 22 Ky. Law Rep. 1655, where the proper method of interrogating the witnesses upon issues similar to those involved in this action is pointed out by this court.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

HUDSON'S HEIRS v. HUDSON'S ADM'R.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. DEEDS (§ 95*)—CONSTRUCTION—INTENTION OF PARTIES—LANGUAGE OF INSTRUMENT.

The intention of the parties to a deed must be arrived at from the language used therein, in the absence of any mistake or oversight of the draftsman.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241–254; Dec. Dig. § 95.*]

2. HUSBAND AND WIFE (§ 14*)—DEEDS TO—CONSTRUCTION—ESTATES CONVEYED.

The caption of a deed showed that husband and wife were each granted a half interest in the land. The granting clause was silent on the subject of the title conveyed, but the habendum clause recited, "To have and to hold to the said (husband and wife) to them, her heirs or their assigns forever." The deed showed on its face that the wife bought the land and paid the price which had been derived from a sale of land given her by her father. *Held*, that the deed gave to the husband and wife the use and joint occupancy of the land for life, and reserved to them the right to join in a sale thereof, and on their death, without a sale, the land passed to the wife's heirs.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 14.*]

3. DEEDS (§ 97*)—CONSTRUCTION—GENERAL RULES.

The habendum clause in a deed is controlled by the caption and granting clause, unless it ap-

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pears from the language of the whole deed that it was intended that the habendum clause should control or limit the right taken under the caption or granting clause.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 270; Dec. Dig. § 97.*]

Appeal from Circuit Court, Owen County.

"Not to be officially reported."

Action between S. A. Hudson's heirs and S. A. Hudson's administrator. From a judgment for the latter, the former appeal. Reversed and remanded.

Chas. Strother, for appellants. W. A. Lee, for appellee.

NUNN, C. J. The determination of this case depends upon the construction of the following deed: "This indenture made and entered into in the year of our Lord one thousand eight hundred and eighty by and between John D. White and Nancy White his wife, of the county of Owen and state of Kentucky of the first part, and Silas A. Hudson and Zerelda E. Hudson of the county and state aforesaid of the second part, Witnesseth: That the party of the first part has this day sold to the party of the second, a tract or parcel of land being in the county of Owen and state of Kentucky on the waters of Main Eagle creek and bounded as follows: * * * Containing fifty two acres and three poles, for the consideration of four hundred and sixteen dollars in hand paid by Zerelda E. Hudson, the proceeds of the sale of her lands by her father John White deceased the receipt of the purchase price is hereby acknowledged by the first part. To have and to hold to the said S. A. Hudson and Zerelda E. Hudson to them her heirs or their assigns forever; and party of the first part for themselves, their heirs or assigns will forever warrant and defend the title to same lands free from the claim of anybody claiming by, through or under them, and against the claim or claims of any and all persons whatsoever." It is agreed that Silas A. Hudson was married twice, and that Zerelda was his second wife; that he had five children by his first marriage and seven by his second; and that he and his first and second wife are dead. This contest arises as to the division of the property among his children. The children of the second wife, Zerelda, claim that they inherit all of the tract of land described in the deed above copied. There is no difference among them in the division of the property left by Silas and his first wife. The lower court decided that Silas A. Hudson died the owner of the fee-simple title to one-half of the land described in the deed, and that all of his children took an equal part therein. The children of his second wife controverted this claim, and alleged that their father had only a life estate in one-half of the land, and that, when he and their mother died, they took the land in remainder. The intention of the parties to the conveyance must be arrived at from the language used therein, as there is nothing in the pleadings to show any mistake or oversight on the part of the draftsman. It appears in the caption of the deed that Silas A. Hudson and his wife, Zerelda, were each conveyed a one-half interest in the survey of land in fee simple, and, if there was nothing else in the deed showing a different intention of the parties, the lower court's judgment would be correct. The granting clause is silent upon this subject, but the habendum clause is as follows: "To have and to hold to the said Silas A. Hudson and Zerelda E. Hudson to them her heirs or their assigns forever." To our minds this shows an intention on the part of the parties to the deed to limit the estate of Silas A. Hudson therein to a life estate. The meaning of the clause just copied is that Silas A. Hudson and his wife, Zerelda, were to have the use and joint occupancy of the land while they lived, and also reserved to them the right to join in a sale thereof, but, if they should die without selling it, it should go to her heirs.

Appellees contend, and we suppose the lower court took their view of it, that the pronoun "her" was inserted by a mistake of the draftsman, and that it was meant to insert in lieu thereof the word "their." There was no allegation in the pleading of that kind, nor was there any proof to support it, and the reason and equity of the matter controverted it. It appears upon the face of the deed that Zerelda bought the land and paid the purchase price which was derived from a sale of land given her by her father, and therefore it is very reasonable that she would desire the land to go to her children alone, after she and her husband were through with it, rather than to have his children by his first wife share in a part of it equally with her children. In the case of McFarland, etc., v. Hatchett, 118 Ky. 423, 80 S. W. 1185, 26 Ky. Law Rep. 276, the following deed was construed: "This indenture made and entered into this 20th day of October, 1883, by and between W. P. Robinson and Jennie Robinson, his wife, of the first part, and Sarah Hatchett (colored), wife of Roland Hatchett (colored) of the second part, and all of Henderson county, Ky., witnesseth: That for and in consideration of the sum of $60.00 in hand paid, the receipt of which is hereby acknowledged, and the note of the party of the second part executed and delivered to the party of the first part for the sum of $65.00, due six months after date and bearing 6 per cent. interest, the party of the first part sells and hereby conveys to said Sarah Hatchett and her children, a certain lot of ground situated in the city of Henderson

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(here describing the property). To have and to hold to her, the said Sarah Hatchett and her children, with covenant of general warranty." The husband, Roland Hatchett, claimed to own a life estate in the house and lot, and sought to defend the action for possession of the children of Sarah Hatchett by claiming that his wife, Sarah Hatchett, took a fee-simple title under the conveyance. The court differed with him, and in discussing the matter used the following language: "In the case under consideration, Sarah Hatchett, the grantee in the deed named in the caption, paid for the land, and she had the right to control the form of it and especially the parties who should take under it, and it is presumed that she intended that her children should take the remainder in fee, reserving to herself the life estate; and we are constrained to hold that the words 'and her children,' as used in the granting and habendum clauses, were used as words of purchase rather than as words of inheritance." In the case at bar, Zerelda Hudson, the wife, having paid the purchase money for the land, had the right to control the form of the conveyance, and to say who should take under it. Appellees' counsel contend that the rule is that the habendum must give way and be controlled by the caption and the granting clauses. This is the general rule, unless it be made to appear from the language of the whole deed that it was intended that the habendum clause was to control or limit the right taken under the caption or granting clause. There is nothing in the granting clause in the conveyance before us contradicting the habendum, and there is nothing in the caption showing what estate or interest in the land was intended to be conveyed to her husband, Silas A. Hudson, and, if there had been nothing in the habendum showing a different intention, the language of the caption would have conveyed to him a half-interest in the land in fee simple. The caption in the Hatchett deed passed the property to Sarah Hatchett, and she would have taken the fee simple if it had not been shown in the habendum that it was intended that she should only have a life estate. In the case of Bodine's Adm'rs v. Arthur, etc., 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 162, the court construed a deed in which the habendum clause was very similar to the one in the case at bar. In that case the court said: "It is clear judging from the whole conveyance and attendant circumstances that the grantors intended the habendum to operate as an addendum or proviso to the conveyancing clause, and to control the same to the extent of limiting the estate conveyed to Mrs. Bodine to a life estate, remainder to her children begotten by R. W. Bodine." See, also, the case of Hall, etc., v. Wright, etc. (the opinion in which was delivered October 12, 1909) 121 S. W. 672, and the cases there cited.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

RUNYONS et al. v. BURCHETT.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. PLEADING (§ 435*) — SUFFICIENCY — AIDER BY VERDICT.

In an action against a seller of standing timber for a deficiency in the timber which had been paid for, an answer alleging for a counterclaim that the buyer unlawfully cut and removed from the land timber which did not belong to him, that 800 or more trees which belonged to the seller were removed, and that each tree was worth $1.50, was sufficient after verdict and judgment for the seller to state a cause of action on a counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1481; Dec. Dig. § 435.*]

2. APPEAL AND ERROR (§ 525*)—RECORD—INSTRUCTIONS—BILL OF EXCEPTIONS.

Instructions cannot be considered by the appellate court where they are not made a part of the record by bill of exceptions or by order of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2376; Dec. Dig. § 525.*]

3. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—COUNTERCLAIM—EVIDENCE.

In an action against a seller of standing timber for a deficiency in timber, which had been paid for, evidence *held* to justify a verdict for the seller on his counterclaim based on the buyer taking trees not included in the contract of sale.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. § 3.*]

Appeal from Circuit Court, Floyd County.

"To be officially reported."

Action by H. M. Runyons and another against T. H. Burchett, in which he filed a counterclaim. From a judgment for defendant on his counterclaim, plaintiffs appeal. Affirmed.

Walter S. Harkins and Jas. Goble, for appellants. May & May, for appellee.

HOBSON, J. On August 18, 1902, a written contract was entered into between T. H. Burchett of the first part, and A. L. James of the second part, which among other things contained the following provisions: "Party of the first part does this day bargain and sell to party of the second part all the white oak and chestnut oak belonging to him. Party of the second part do bind himself to mark said timber from twenty inches clear the bark at a ordinary stump, with all trees that will make a clean log 30 feet long. Second party agrees to pay first party $1.00 per tree. Party of the second part binds himself to begin to brand said timber 24th day of August. Second party agrees to brand as speedy as possible until trees are branded. When done branding second party is to pay

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for said timber." After the writing was entered into, Burchett and James went upon the land with their helpers and measured and marked with a cross-mark with a hatchet the trees which were accepted under the contract. After this had been done James sold the trees to S. W. Patten for $1.25 apiece; and, to save the cost of making two deeds, he and Burchett executed a deed to Patten, the granting clause of which is as follows: "That for and in consideration of one dollar per tree, in hand paid to the said Thomas H. Burchett; and the further consideration of twenty-five cents per tree in hand paid to the said A. L. James, for thirty-three hundred and eighty-six white and chestnut oak trees, branded with an 'X' cut with a hatchet on the said trees, now standing on the land of the said Thomas Burchett, on Buffalo creek, Floyd county, Kentucky, and on the Clerk branch and Wolf branch of said Buffalo creek, including all the land owned by the said Burchett on the waters of Buffalo creek. The said trees to be twenty inches in diameter inside of bark, reasonable stump high, and thirty feet and upward in length, the said trees now being marked with the 'X' in the bark, by the party of the second part." Patten sold the trees to the American Car & Foundry Company for $1.75 apiece, that company agreeing to take all trees 20 inches in diameter clear of bark and 24 feet long. It then went into the woods and began cutting the timber. It cut off the land 2,534 trees which came up to the contract; also 490 trees which were branded, but were not 20 inches in diameter at the stump clear of bark. Thereupon this suit was filed by Patten and H. M. Runyons, who was a partner with him in the deal, against Burchett to recover for the deficiency in the timber which had been paid for upon the basis that there were 3,386 trees filling the contract. Burchett filed an answer in which he denied that there was a deficiency, and alleged that the plaintiffs and those claiming under them had cut and taken 800 of his trees not included in the contract, which were of value $1,200, and this he pleaded as a counterclaim. The allegations of the reply were controverted, and a trial was had before a jury which resulted in a verdict and judgment in favor of Burchett for $400. The plaintiffs appeal.

It is insisted that the allegations of the plaintiffs' answer are not sufficient to state a cause of action on the counterclaim. The allegation on the original answer is as follows: "Defendant says * * * that plaintiffs unlawfully cut and removed from this defendant's land 800 or more trees which belonged to this defendant, and that said trees were worth $800.00, and he is entitled to recover the value thereof on his counterclaim herein." But he thereafter filed an amended answer which was in these words: "The defendant Thomas H. Burchett amends his original answer and counterclaim herein by leave of the court, and for amendment says that the allegation that the value of the 800 trees taken by the plaintiffs that were not branded and did not belong to them, instead of being stated at $800 should have been stated at $1,200, or $1.50 per tree." The reply filed by the plaintiffs to the amended answer is as follows: "The plaintiffs for reply to amended answer of defendant filed herein September 9, 1908, say it is untrue, and they deny that defendant's answer should have stated that the 800 trees which were taken by the plaintiffs which were not branded and did not belong to them, instead of being stated at $800, should have been stated at $1,200, or $1.50 per tree. They deny that they took any trees which did not belong to them which were worth $1,200, or any other amount, or were worth $1.50 per tree." It is manifest that the amended answer and the reply made up an issue as to whether the plaintiffs had cut 800 trees or any other number from the land which were not branded, and did not belong to them, and, if there was any doubt of this, the pleading is certainly good after verdict and judgment. Hill v. Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. Law Rep. 1053.

It is also insisted that the court misinstructed the jury, but this matter is not so presented by the record that we can consider it. The instructions given by the court are not embodied in the bill of exceptions, or made part of the record in any way. The bill of exceptions contains these words: "Here copy instructions Nos. 2, 3, 4"—also as to other instructions these words: "Here copy said instructions." It has been often held that, although the instructions may be copied elsewhere in the record by the clerk, they cannot be considered by this court where they are not made part of the record by bill of exceptions or by order of court. Forest v. Crenshaw, 81 Ky. 51; Johnson v. Postal Telegraph Co., 50 S. W. 1, 20 Ky. Law Rep. 1821; Housman v. Long, 66 S. W. 821, 23 Ky. Law Rep. 1994. We have examined, however, the instructions copied in the record, and find no substantial error in them. The question whether the plaintiffs had cut trees which they had not bought, and whether there was a deficiency in the trees bought below 3,386, the number specified in the deed, and if a deficiency, how much, were so submitted to the jury that under the evidence before them they could not have been misled.

Lastly, it is earnestly insisted that the verdict of the jury is palpably against the evidence. In this we cannot concur. There was evidence warranting the jury in concluding that the plaintiffs had cut from 400 to 800 trees that were not branded or included in the contract. It was admitted that the plaintiffs had cut and taken away 2,534 trees which filled the contract. It was also admitted that they had cut and taken away 490 trees which were branded, but which

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were not 20 inches in diameter at the stump clear of bark. There was also evidence warranting the jury in concluding that there were yet standing on the land and not cut 400 branded trees; thus showing that there were 3,424 trees branded if these figures are correct, while the deed only called for 3,386 trees. The proof for the plaintiffs was to the effect that the 490 trees which were less than 20 inches in diameter were taken by them under an agreement with Burchett that they were to be counted two for one. But he denies this, and under all the circumstances we cannot say that the jury were not warranted in accepting his version of the transaction. We are satisfied from the evidence that there were a number of trees which were branded which were not twenty inches in diameter at the stump clear of bark; but inasmuch as the jury were warranted in finding that the plaintiffs had cut and carried away three or four hundred more trees than they had bought, we cannot say that the verdict in favor of the defendant for $400 is palpably against the evidence.

Judgment affirmed.

STEVENS et al. v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

PAWNBROKERS (§ 4*) — LICENSES — SALE OF PISTOLS.

The license ordinance of a city in one section provided for a pawnbroker's license, and in another section for a license to sell pistols at retail. *Held*, that the taking out of a pawnbroker's license did not authorize the pawnbroker to sell pistols at retail without taking out a license for the sale of pistols.

[Ed. Note.—For other cases, see Pawnbrokers, Dec. Dig. § 4.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Fred E. Stevens and others brought suit against the City of Louisville to restrain such city from prosecuting plaintiffs for selling pistols at retail without a license. Their petition was dismissed, and they appeal. Affirmed.

Chatterson & Blitz, for appellants. Clayton B. Blakey and Elmer C. Underwood, for appellee.

HOBSON, J. The license ordinance of the city of Louisville among other things contains the following:

"Section 1. That hereafter the following licenses shall be paid into the sinking fund of the city of Louisville for the purposes of the sinking fund, for doing the business, following the callings, occupations and professions, or using or holding, or exhibiting the articles hereinafter named in the city of Louisville in addition to the ad valorem taxes heretofore levied or hereafter to be levied on any species of property in the city of Louisville."

"Sec. 66. Every person, firm, or corporation whose business is to take or receive by way of pledge pawn or exchange any goods, wares or merchandise, or any personal property whatever, as security for the payment of money lent thereon, other than banks or trust companies, shall be deemed a pawn broker and shall pay a license of three hundred and fifty dollars per year."

"Sec. 72. Every person, firm or corporation who sells pistols at retail shall pay a license of one hundred dollars per year."

"Sec. 106. Any person, firm or corporation violating any of the provisions of this ordinance, where a different fine has not been provided, shall be fined not less than five dollars nor more than one hundred dollars for each offense. Each day the violation is continued shall constitute a separate offense."

Appellants are pawnbrokers in the city of Louisville, and took out license as such; but they did not take out license to sell pistols at retail. The city was threatening to institute prosecutions against them, and they thereupon brought this suit the purpose of which was to obtain an injunction or prohibition restraining the city from prosecuting them for selling pistols at retail without license. The circuit court dismissed their petition, and they appeal.

The only question we deem it necessary to consider on the appeal is the validity of section 72, as to pawnbrokers. It is insisted for appellants that as they have taken out license as pawnbrokers to require them to take out a license to sell pistols at retail will be to tax them twice on their business, and the case of Newport v. Fitzer (Ky.) 115 S. W. 742, is relied on. In that case there was a city ordinance which required the payment of $20 for a license for peddling when carried on with a wagon, and $10 if carried on on foot. There was also another ordinance requiring the payment of $3 by the owner of a vehicle for the right to use it upon the streets. It was held that, as the $20 was paid for the privilege of peddling with a wagon, this necessarily carried with it the right to use the wagon on the streets, as there could be no peddling with a wagon unless the wagon was run on the streets, and that, therefore, it must be presumed that the $3 tax was levied on vehicles not otherwise licensed. That is not this case. The business of a pawnbroker may be carried on without selling pistols at retail. Sections 66 and 72 are to be read together. The license under section 66 authorizes the pawnbroker to carry on the business, and to deal in all those things for which no special license is required. But, if a pawnbroker wishes to deal in those things which can only be sold at retail under a special license, then, in or-

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that a pawnbroker who had taken out a license as such might carry on under this license the business of retailing other goods of any kind for the sale of which a special license is required by the ordinance of the city. Such a construction of the ordinance would defeat the manifest purpose of the council in requiring a special license for the retailing of certain things, and it would enable a pawnbroker under one license to carry on any kind of retail business he pleased without the payment of a special license tax. To illustrate: If he may sell pistols without paying the special tax, he may upon the same principle sell playing cards, whisky, cigars, tobacco, soft drinks, and all other things for which a special license may be required.

Judgment affirmed.

MONONGAHELA RIVER CONSOL. COAL & COKE CO. v. KRAMER.

(Court of Appeals of Kentucky. Oct. 28, 1909.)

DAMAGES (§ 132*)—EXCESSIVE—PERSONAL INJURIES.

Plaintiff was struck by iron rails projecting from a wagon. A physician appointed by the court, and whose examination was made nearly a year after the accident, testified that plaintiff complained of pain in the region of the ninth and tenth ribs, but that she found nothing wrong except a displacement of the uterus, which she thought was due to another cause. A physician who had known plaintiff for 20 years, and saw her 4 days after the accident, testified that he found her extremely nervous, with a great deal of pain in her side; that he discovered what he thought was a broken rib; that she had increased temperature, and accelerated pulse, and trouble about her breathing. Another physician, who saw her about the same time, testified to the accelerated pulse, but that he then thought she would be all right in a few days. Another physician, who examined her about a year after the accident, testified that he found increased temperature and accelerated pulse, and also under the X-ray a fracture of the rib, and that he found a curvature of the spine. Up to the accident, plaintiff had been a healthy woman, but from that time, according to her testimony, she had been weak; and her testimony was confirmed by others. *Held*, that a verdict of $900 was not against the weight of testimony.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Sallie E. Kramer against the Monongahela River Consolidated Coal & Coke Company and others. Judgment for plaintiff, and defendant company appeals. Affirmed.

Gibson, Marshall & Gibson, for appellant. Bennett H. Young, for appellee.

and teams. On May 4, 1907, one of its wagons was sent in charge of a teamster to the wharf to haul some iron rails. The iron was placed on the wagon so that it projected beyond the wagon some four or five feet. Sallie E. Kramer, who lived on Thirty-First street, was sweeping her pavement with her back to the wagon as it came along. While she was thus engaged the driver drove so close to the sidewalk that the projecting iron struck her in the back and knocked her down. She brought this action to recover for her injuries, and recovered a verdict and judgment for $900. The coal company appeals.

Practically the only ground relied on for reversal is that the amount of the recovery is excessive, the result of passion and prejudice on the part of the jury. The instructions submitted the case to the jury with admirable clearness, and are free from error. There was no error in the admission or rejection of evidence. The only question to be considered on the appeal is the amount of the verdict. Dr. Florence Brandeis, who was appointed by the court to examine Mrs. Kramer, testified that she complained of pain and tenderness in the region of the ninth and tenth ribs, but that she found nothing wrong with her except a displacement of the uterus, which she thought was due to another cause. The examination made by Dr. Brandeis was made about April 1, 1908, or nearly a year after the injury. On the other hand, Dr. Pell, who had known Mrs. Kramer for 20 years and saw her 4 days after the accident, testified that he found her extremely nervous, with a great deal of pain in her side; that he discovered what he thought was a broken rib; that she had increased temperature and accelerated pulse, and a trouble about her breathing, which he thought was due to the pain in her side. Dr. Montgomery, who also saw her once about the same time, testified to the accelerated pulse, but said that he then thought she would be all right in a few days, and did not return. Dr. Pope, who had examined her about a year after the injury, testified that he found increased temperature and accelerated pulse, also an enlarged place that was dark under the X-ray, showing a fracture of the rib; that there was inflammatory trouble at that point, and the muscles were rigid and contracted in the region of the seventh, eighth, ninth, and tenth ribs. He also testified that he found a curvature of the spine. Up to the time of her injury, the plaintiff had been a healthy woman. From that time, according to her testimony, she had been weak, and not as she was before. Her health had been bad, and she has only been able to work half as much as before. Her nervous

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who testified on the trial as to her condition after the injury. If we take the testimony of Dr. Brandeis and Dr. Montgomery alone, the verdict is entirely too large; but, if we take the testimony of Dr. Pell and Dr. Pope alone, a much larger verdict might well have been rendered. Their testimony is sustained by the people who knew Mrs. Kramer, who saw her the evening of the accident, and who had seen her from time to time since. The jury are the judges of the credibility of the witnesses, and we cannot say that their finding is against the weight of the testimony.

Judgment affirmed.

BRODIE v. HOOK.

(Court of Appeals of Kentucky. Oct. 28, 1909.)

1. ELECTIONS (§ 139*)—NOMINATIONS—TIME FOR FILING CERTIFICATE.

Ky. St. § 1456 (Russell's St. § 4015), requiring certificates and petitions of nomination to be filed with the clerk of the county not more than 60 and not less than 15 days before election, is mandatory, and the clerk has no right to place the name of a candidate upon the ballot, the certificate for which has been filed within 15 days of the date of election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 139.*]

2. MANDAMUS (§ 154*)—SUFFICIENCY OF PETITION.

A petition for mandamus to the county clerk to compel him to place petitioner's name on the official ballot alleged that petitioner's name was omitted by mistake from the original certificate of nomination, and that another certificate was prepared in which petitioner's name was inserted; that the clerk refused to place petitioner's name on the ballot; that the clerk discovered the omission of petitioner's name from the first certificate, and took it from the box where he kept such certificates, and put it in a different box where it was not likely to be found; that he did this to conceal the omission from petitioner. *Held* not sufficient to justify mandamus, the time having elapsed within which under Ky. St. § 1456 (Russell's St. § 4015), certificates should be filed before the amended certificate was filed, as the petition does not allege that the act of the clerk concealed from him the omission of his name from the original certificate, or that petitioner was prevented from seeing the certificate by reason of the change, or that he ever called on the clerk to produce it, and was refused, or that the removal of the certificate from one box to the other was in any way hurtful to him.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

Barker and O'Rear, JJ., dissenting.

Appeal from Circuit Court, Breckinridge County.

"To be officially reported."

Mandamus by J. C. Brodie against William F. Hook to compel the latter to place his name upon an official ballot. Writ denied, and plaintiff appeals. Affirmed.

NUNN, C. J. In the month of August, 1909, the Republicans of Breckinridge county held a convention to nominate candidates for the various offices of the county to be voted for at the election to be held November 2, 1909. The chairman and secretary prepared and signed a certificate showing the persons nominated for the respective offices, in due form, and same was filed with the county court clerk of that county within the time prescribed by the statutes, but it failed to be stated in the certificate who was nominated, if any one, for the office of circuit court clerk. Matters stood thus until October 19, 1909, at which time the same chairman and secretary prepared another certificate reciting the nominees of the August convention, in which they inserted the name of appellant as the nominee for the office of circuit court clerk but the county court clerk refused to regard it and place appellant's name upon the ballots. Appellant then instituted this action for a mandamus requiring him to place his name upon them. The facts above stated were alleged in the petition, and also that his name was left out of the first certificate by oversight of the chairman and secretary. He also averred that the county court clerk discovered the omission of his name from the first certificate, and charged that he then took the certificate from the box where he kept all such certificates, and put it in a different box where it was not likely to be found, and that this was done to conceal the same from appellant. While we must concede this allegation as true, the case having gone off on demurrer, it is justice to the clerk to say that he denied it.

We have a case before us in which it is conceded that the certificate declaring appellant's nomination was filed within 15 days next before the election to be held November 2, 1909, with a bare pretense that his failure to file it 15 days before the election was caused by the clerk changing the first certificate, which did not contain his name, from its place of deposit to another box in his office. He did not allege that he made any effort to see the certificate or request anyone to examine it for him, or that anyone was prevented from examining the certificate by reason of any act of the clerk, or that the clerk at any time failed to produce the certificate when called upon for it; nor is there any allegation in the petition that the removal of the certificate from its original place of deposit to another was in any way hurtful to appellant. It is provided by section 1456, Ky. St. (section 4015, Russell's St.), that: "Certificates and petitions of nomination herein directed to be filed with the clerk of the county shall be filed not

the election to be held November 2, 1909; but, if the statute is merely directory, he had the right to put it on. In 15 Cyc. 338, it is said: "Statutory provisions in regard to the time of filing certificates of nomination are mandatory, and a certificate offered after the time limited is properly rejected"—and in support of the rule are cited cases from California, Kansas, New York, and Ohio, but cite none holding the contrary.

In the case of Griffin v. Dingley, 114 Cal. 481, 46 Pac. 457, the court held the statute of that state in regard to filing certificates of nominations to be mandatory. The statutes of that state declare that the certificate should be filed not less than 30 days before the day of the election. The court in that case said: "To hold that it (the certificate) could be filed 28 days before the day of election would be in manifest disregard of the provisions of the statute." In that case the candidate offered his certificate of nomination 28 days before the election, when the statute said "it shall be filed not less than thirty days before the election." In the case of Hollon v. Center, etc., 102 Ky. 119, 43 S. W. 174, 19 Ky. Law Rep. 1134, this court construed our statute above quoted. In that case Center and others, who were candidates for the county offices in Wolfe county, sued Hollon, the county court clerk, to mandamus him to place their names upon the ballots. The lower court granted the writ, and Hollon appealed. All the candidates filed with the clerk certificates of their nomination, except James R. Ross and John Creech. All the certificates were filed within the period prescribed by the statute, except G. W. Sally's and J. F. Sample's, which were not offered until the 19th day of October, less than 15 days before the election, exactly what was done in the case at bar with reference to appellant's certificate. The certificates of the other candidates filed were defective, in that they did not state the place of residence of the candidates nor of the chairman and secretary of the convention; nor did the chairman and secretary acknowledge the same before an officer authorized to administer an oath. The court in that case decided that these defects in the certificates could be supplied by other evidence or by the clerk, if he had personal knowledge of the facts omitted in the certificates, that the statute, in respect to the defects named, was merely directory, and not mandatory; but with reference to the certificates of Sally and Sample, which were filed October 19th, less than 15 days before the election, the court determined that

election, and reversed the case as to these appellees and also as to the two parties who failed to file any certificates. Bouvier's Law Dictionary defines the word "mandatory" as follows: "In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void. Directory statutes must be obeyed, but, if not, do not invalidate the act."

In view of these authorites, and it seems that there are none to the contrary, we are of the opinion that appellee was correct in refusing to print appellant's name on the ballots to be voted at the election to be held November 2, 1909. We are of the opinion that the General Assembly enacted this mandatory provision requiring the certificates and petitions of nomination to be filed not less than fifteen days before the election, so as to give the clerk that much time to prepare and have the ballots printed and distributed among the polling places in the county before the day of the election, and without being annoyed by litigation by someone attempting to get some name on or off the ballots, and without being importuned by candidates and their friends for that purpose. The statute makes it obligatory upon all persons who desire to be candidates at an election to see to it that their certificates of nomination, or the necessary papers entitling them to have their names placed on the ballots to be voted, are filed not less than fifteen days before the election. If they neglect to do this, they must suffer the loss. Of course, the rule would be otherwise if the clerk fraudulently or otherwise wrongfully prevented the filing of the certificate or petition within the time required by the statute. It is true that appellant alleged that the clerk changed the first certificate from one box to another for the purpose of concealing it from him, but it is not alleged that it was concealed from him, or that he was prevented from seeing it by reason of the change, or that he ever called on the clerk to produce it and was refused, or that he had anyone else to do so with a like result, or that he ever looked in the box where such certificates were usually kept and failed to find it; nor does he allege that the removal of the certificate from one box to another was in any way hurtful to him.

For these reasons, the judgment of the lower court must be affirmed.

BARKER and O'REAR, JJ., dissent.

VEYANCES BY HEIRS—DEBTS OF INTESTATE—"BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION."

Under Ky. St. 1909, § 2087 (Russell's St. § 3863), providing that any estate aliened by the heir or devisee before suit brought shall not be liable to the creditors of decedent in the hands of a bona fide purchaser for a valuable consideration unless action is instituted within six months, a "bona fide purchaser for a valuable consideration" is one who in good faith buys the land and pays therefor.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 490; Dec. Dig. § 134.*

For other definitions, see Words and Phrases, vol. 1, pp. 825–830; vol. 8, p. 7591.]

2. DESCENT AND DISTRIBUTION (§ 134*)—CONVEYANCE BY HEIRS—DEBTS OF INTESTATE—BONA FIDE PURCHASER.

Under said section, that the purchaser was judge of the circuit court and had notice of the pendency of an action against the ancestor to recover a money judgment did not prevent his being a bona fide purchaser; the suit not seeking to subject the land.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 490; Dec. Dig. § 134.*]

3. DESCENT AND DISTRIBUTION (§ 143*) — DEBTS OF INTESTATE—ACTION AGAINST PURCHASER—LIMITATIONS.

Under said section, one purchasing land in good faith from the widow and heirs of the deceased owner and paying therefor acquired title, unless an action to subject the land to debts was filed within six months after it descended.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. § 143.*]

4. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—INVITING ERROR.

Where, in an action to recover land, an amended reply and rejoinder, though unnecessary, were filed without objection, and the parties elected to set forth their respective titles, and it appeared from the pleadings that defendants had no title, they could not on appeal complain, where the court decided the issue presented in such pleadings without objection on their part.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3596; Dec. Dig. § 882.*]

5. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR.

Though an amended reply was improperly filed to prevent the case going to the jury, the case will not be reversed and remanded for a jury trial on an issue playing no part in the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4106; Dec. Dig. § 1041.*]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by the executor of Robert Boyd, Sr., and others, against Nathan Buchanan and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 115 S. W. 222; 120 S. W. 295.

Tye & Siler, for appellants. H. C. Clay, for appellees.

an answer pleading that they were in possession of the first tract named in the petition, but were not in possession of the second tract. They denied plaintiff's title to the first tract and pleaded title in themselves. Thereafter R. Boyd, Sr., filed a reply denying the affirmative allegations of the answer. Subsequently, and without objection on behalf of the appellants, plaintiff amended his reply and set forth the sources of his title. He pleaded: That the tracts of land described in the petition were conveyed to him on August 14, 1889, by Juda Leforce and Lee Leforce. That Juda Leforce was then the widow of D. H. Leforce, who had theretofore died intestate in Whitley county, Ky. That Lee Leforce, the other grantor in the deed, was the only child and heir of D. H. Leforce. That at the death of the latter he was seised in fee simple of the tracts in controversy. That by reason of D. H. Leforce's intestacy the legal title thereto descended on his death to Lee Leforce, subject to the dower rights of Juda Leforce. That plaintiff purchased said lands from Juda Leforce and Lee Leforce in good faith and for a valuable consideration then paid by him to them. That on the date of said deed, to wit, August 14, 1889, each of the grantors therein duly acknowledged and delivered the same to the plaintiff, and he thereby became the owner of the fee-simple title to each of said tracts of land. Said deed was duly lodged for record and recorded on the 20th day of August, 1889, in the clerk's office of the Whitley county court. A copy of the deed is filed with the amended reply. In said reply it is further alleged: That on the 13th day of September, 1893, the appellants, in an action which was then pending in the Whitley circuit court wherein they were plaintiffs, and others, including the heirs of D. H. Leforce, were defendants, an amended petition was filed by the plaintiffs, by which for the first time the plaintiffs in that action sought to subject to the payment of the claim which they were asserting against the estate of D. H. Leforce the land in controversy; that nearly four years theretofore, for a valuable consideration paid by the plaintiff, Juda Leforce and Lee Leforce had conveyed the lands in question to him by deed of general warranty; that, in the action wherein appellants were plaintiffs and said Juda Leforce and others were defendants, an order was made by the Whitley circuit court at its January term, 1894, directing that the land in question be sold to satisfy the claim of appellants against the estate of D. H. Leforce; that in obedience to that order the first named of the tracts described in the petition was sold by the master commissioner on March 5, 1894; that J. S. G. Farris became the purchaser thereof

for the benefit of appellants; that thereafter a deed was made to the appellants. It is further charged that the last conveyance is the only semblance of title which the appellants have to the tract first named, and that they purchased the same subject to notice of plaintiff's prior purchase of said land in good faith from the widow and heirs of D. H. Leforce.

Thereafter appellants, Nathan Buchanan and others, filed a rejoinder to plaintiff's reply, wherein they pleaded: That in 1881 they instituted an action against D. H. Leforce to recover judgment for many hundred dollars; that said action remained on the docket of the Whitley circuit court until the death of D. H. Leforce, which occurred on the 3d day of May, 1887; that after the death of D. H. Leforce, and within six months thereof, said action against D. H. Leforce was revived against Lee Leforce, his only child and heir at law, and the administrator of said D. H. Leforce; that said action was thereafter transferred to the equity side of the court's docket, and an amended petition filed, by which it was sought to settle the estate of D. H. Leforce and to sell his land for the purpose of paying their debt; that the plaintiff in this action failed to cause his deed to be recorded in the clerk's office of the Whitley county court, or failed to have it indexed in the index of records of deeds in said clerk's office; and that appellants had no knowledge of the existence of said deed, and said deed was not in fact recorded in the clerk's office of the Whitley county court as required by law. It is further pleaded: That by the action to settle the estate appellants had a lien upon the land in controversy to secure the payment of their debts, which lien was prior and superior to the rights of plaintiff; that said lien was enforced by a sale of said land, and they became the purchasers thereof; that said sale was confirmed by order of the Whitley circuit court, and a deed of conveyance made by the commissioner of said court. It is further charged: That plaintiff was judge of the Whitley circuit court in which such action was pending from January, 1886, until January, 1893, and had notice of the pendency of said action; that plaintiff took title to said land subject to the rights and liens of appellants and all other creditors of D. H. Leforce. Plaintiff filed a demurrer to the foregoing rejoinder, which was sustained by the court. Appellants then declined to amend their rejoinder or otherwise plead further. Judgment was then entered in favor of plaintiff. From that judgment this appeal is prosecuted. Robert Boyd, Sr., died after the rendition of the foregoing judgment, and the case has been revived against his heirs.

It will be observed that the rejoinder admits that the amended petition, by which the appellants sought to subject D. H. Leforce's land to the payment of his debts, was not filed within six months after the death of said Leforce. Moreover, the rejoinder does not deny that appellants had notice of the fact that R. Boyd, Sr., had actually purchased the land in question from the widow and heir at law of D. H. Leforce. The question, then, arises: Did appellants acquire a good title to the property in question by their purchase under such circumstances?

Section 2087, Ky. St. (Russell's St. § 3863), is as follows: "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject the same." It will be observed that the foregoing section provides that any estate aliened by the heir or devisee shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject the same. While it appears from the rejoinder that the original action of appellants against D. H. Leforce was revived within six months, it further appears that the amended petition seeking to subject the land was not filed within the required time. Under that section a "bona fide purchaser for a valuable consideration" is one who in good faith buys the land and pays therefor. The fact that R. Boyd, Sr., was a purchaser for a valuable consideration, was not denied by the rejoinder, and the fact that he was judge of the circuit court and had notice of the pendency of the original case of appellants against D. H. Leforce did not make him any the less a bona fide purchaser for a valuable consideration. In that suit it was not sought to subject the land. Having bought the land in good faith, and having paid for it, he was entitled to it, unless an action to subject the land was filed within six months after it descended to D. H. Leforce's widow and heirs. Parks v. Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. Law Rep. 1043. No such action having been filed, he acquired title under the deed made to him by Juda Leforce and Lee Leforce.

But it is insisted: That the petition, answer, and reply made an issue as to the ownership of the land; that the subsequent pleadings, consisting of the amended reply and rejoinder, in which R. Boyd, Sr., and appellants set forth their respective titles, were mere surplusage, and the court erred in determining the controversy by those pleadings instead of trying the case upon the issues which had been completed by the petition, answer, and reply. In support of this position, it is insisted that appellants might, under the general issue, have shown adverse possession for the statutory period. As ap-

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rest that adverse possession can play no part in this case. Moreover, even though the filing of the amended reply and rejoinder was unnecessary, yet where each of these pleadings was filed without objection, and the parties elected to set forth their respective titles, and it is apparent from the pleadings that appellants have no title, they cannot now complain because the court decided the issue which was presented in such pleadings without objection upon their part.

But it is argued that the amended reply was filed for the purpose of preventing the case from going to the jury. That may be true; but it is perfectly manifest that, with the question of adverse possession eliminated, the only other question in the case was one of law. Under these circumstances, substantial justice does not require that this case be reversed and remanded for a trial by jury upon an issue which it is apparent from the record plays no part in the case.

Judgment affirmed.

BARNHILL et al. v. SHARON et al.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

WILLS (§ 532*) — BENEFICIARIES — SUBSTITUTION—"SISTER."

Ky. St. § 2064 (Russell's St. § 3841), provides that where a devise is made to several as a class, and one or more shall die before, and another or others shall survive, testator, the share or shares of those dying shall go to his or their descendants, or, if none, to the surviving devisees. Section 4841 (section 3964) provides that if a devisee dies before testator, or is dead at the making of the will, leaving issue who survive testator, such issue shall take as the devisee would have done. Testator devised the remainder, after a life estate in land, to his brothers and sisters. He had one sister who died without issue, before he did, and a half-sister who died before the will was made, leaving issue who survived him. *Held*, that the will must be construed to mean "sisters" as a class, which being the case, the devise was controlled by section 4841, and the descendants of the half-sister took the share she would have had she survived testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1191–1197; Dec. Dig. § 552.*

For other definitions, see Words and Phrases, vol. 7, pp. 6522, 6523.]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Action by Ida Barnhill and others against Henry Sharon and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

J. C. B. Sebree, for appellants. Ford & Ford, for appellees.

CLAY, C. Appellants, Ida Barnhill and others, who are the children and grandchildren of Mary Elizabeth Williamson, who died before the said will was made and left surviving her the three children, a daughter, Ida Barnhill, the plaintiff, and the plaintiff Arthur Barnhill is her husband, Rosa Ann Barnhill, who married the plaintiff Jno. E. Barnhill and died, leaving as her only children the plaintiffs Ethel, Mary, and Ward Barnhill, and another daughter, Artymacy Barnhill, now dead, who married plaintiff Joe Sutton, and of that marriage she left the following children: The plaintiffs Claud, Cambridge, Mary, Sindy, Arthur, and Pearl Sutton, all infants except Claud and Cambridge and have no guardian, curator, or committee, and they sue by their father and next friend, the plaintiff Joe Sutton. Plaintiffs say that they as the only children and grandchildren of the said Mary Elizabeth Williamson, are entitled to one-fifth of said land, and the defendants are entitled to the other four-fifths in equal shares. Wherefore plaintiffs pray that commissioners be appointed to make partition of said land among the plaintiffs and defendants. That one-fifth of said land be allotted to plaintiffs. The plaintiff John E. Barnhill is the guardian of his children, Esther, Mary, and Ward."

The will of Thomas Sharon, referred to in the petition, is as follows:

"May 17, 1897.

"I, Thomas J. Sharon, of the county of Scott and state of Kentucky, do this day

situated in Scott county, Ky. The court sustained a demurrer to the petition, and it was dismissed. Ida Barnhill and others appeal.

The petition is as follows: "The plaintiffs state: That one Thos. Sharon, on the ——— day of 190— departed this life testate, a resident and citizen of Scott county, Ky., having first made and published his last will in writing, a certified copy of which is filed herewith, marked 'W,' and which was duly probated and admitted to record in the clerk's office of said county. At the time of his death he was the owner of a tract of land in said county of about 47 acres bounded and described as follows: Adjoining the land of Henry Sharon on the west, Hugh Sharon and Annie Morris on the south, Jas. N. Sharon on the east, and Patsy Williamson on the north. That by the said will said testator devised said land to Mary Sharon, his wife, for life, remainder to his brothers and sisters. That on the ——— day of January, 1909, his wife, the said Mary Sharon, the said life tenant, departed this life. That the four defendants who survive are his only brothers he ever had. That said testator had one sister, who died before the testator died, without issue or parents, and a half-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

make and publish this my last will and testament:

"(1) I give and bequeath to my wife, Mary A. Sharon, all my estate, both real and personal, to have and to hold the same during her lifetime.

"(2) And the real estate to go to my brothers and sisters, at the death of my wife.

"(3) I do hereby appoint and make my wife, Mary A. Sharon, my sole executrix without giving any bond.

"(4) I further order my executrix to pay my just and honest debts, and funeral expenses.

"In testimony hereof I have this day set my hand in the presence of

"Thomas J. Sharon.

"Witnesses: John Morris.
"John F. Cox.
"W. O. Barnhill."

In the case of Fuller v. Martin, 96 Ky. 500, 29 S. W. 315, 16 Ky. Law Rep. 576, the will of George W. Robinson was before this court for interpretation. After directing the sale of his personal property and the application of the proceeds to the payment of his debts, the will is as follows: "Second. After the payment of my debts and funeral expenses as above provided for, I give and bequeath to my brothers and sisters all my real and personal property to be divided equally between them. * * *" The testator then appoints certain friends as executors of his will. In its opinion is first set forth section 1, art. 2, c. 50, of the General Statutes of 1883 and section 18, c. 113, of the General Statutes of 1888, which are the same as sections 2064 and 4841 of the Kentucky Statutes (sections 3841, 3964, Russell's St.) and are as follows:—

"Sec. 2064. When a devise is made to several as a class or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the devisor. A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise."

"Sec. 4841. If a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will."

The court then uses the following language: "These statutes, however, cannot aid us until we first determine who are the devisees or legatees meant to be described by the words in question. The words of first statute, 'when a devise is made to several as a class,' require the ascertainment of the class before we can say that the descendants of a member of the class shall be substituted as a devisee; and so with the words, 'if a devisee or legatee dies before the testator, or is dead at the making of the will,' etc., the question must first be determined who is the devisee or legatee under the will before we can substitute the issue. The statute in effect leaves the question where we found it. It is conceded that, if the testator meant to include his dead brothers and sisters by the words 'brothers and sisters,' then these children take what their parents would have taken. It seems to us that, as the words used cannot be applied as a description of living objects, the testator must have meant to describe all his brothers. He could not properly describe his living brother as 'brothers,' and, if effect be given the language used, we must suppose that the testator, knowing that the issue of the dead brothers and sisters took by substitution, meant to include all his brothers and sisters as a class, the dead as well as the living. By this construction all those who are the natural objects of the testator's love partake of his bounty, and not a part only." In support of the construction adopted in the above case, this court relied upon the case of Huntress v. Place, 137 Mass. 409, and upon Jarman on Wills (6th Ed.) vol. 2, p. 713.

From an examination of the will and facts of the above case, it will be seen that the question involved in the case at bar is substantially the same. In the will under consideration the testator uses the words "brothers and sisters." In order to give the word "sister" any meaning at all, it must be made to include more than one sister. It is contended by appellees that the petition does not allege that the sister who died before the testator, and the half-sister, whose descendants have instituted this action, are the only sisters that the testator ever had. We are inclined to the opinion that this fact is immaterial. There is nothing in the will to show that the testator intended to limit his estate to his full-sisters. We must construe the will to mean "sisters" as a class. That being the case, the devise is controlled by section 4841 of the Kentucky Statutes. Under that section it is immaterial that Mary Elizabeth Williamson was dead at the time of the making of the will, if as a matter of fact she was included in the class "sisters." As it appears from the petition that the full-sister died without issue or parents, her share passed under section 2064 to the surviving devisees under the will.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the petition.

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discovered evidence unless it would change the result if produced.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

2. Appeal and Error (§ 1195*)—Reversal—New Trial—Newly Discovered Evidence—Effect.

A decision on appeal that a new trial should have been granted for newly discovered evidence constitutes a holding that the evidence newly discovered is sufficient to change the result, so that, in the absence of contradictory evidence on retrial, if the newly discovered evidence is produced and the case is otherwise practically the same, the trial court is bound to come to the conclusion opposite to that arrived at on the former trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

3. Witnesses (§ 159*)—Transaction with Person Since Deceased—Payment.

A debtor was incompetent to testify as against the executor of his deceased creditor to a transaction with the creditor wherein it was claimed that the debtor paid a specified amount of the debt, receiving a receipt therefor, part of which had been destroyed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 681; Dec. Dig. § 159.*]

4. Appeal and Error (§ 1195*)—Law of the Case—Decision on Former Appeal.

A decision on former appeal that certain witnesses who had seen a receipt alleged to have been executed by plaintiff's testator, part of which had been lost, could testify that it was for $350, constituted the law of the case on retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

5. Lost Instruments (§ 8*) — Contents — Proof.

Where, in a suit on a note by the holder's executors, defendant claimed an unindorsed payment of $350 and produced scraps of a receipt, the balance of which had been destroyed, proved to have been executed by testator and appearing to be for $50 only, the inference to be drawn therefrom was overcome by the testimony of four witnesses who had seen and read it when it was complete that it acknowledged the receipt of $350.

[Ed. Note.—For other cases, see Lost Instruments, Dec. Dig. § 8.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by G. B. Million's executors against Thomas Million. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

See, also, 104 S. W. 768, 31 Ky. Law Rep. 1156.

J. C. & D. M. Chenault, for appellant. J. A. Sullivan and S. M. Wallace, for appellees.

HOBSON, J. On November 13, 1886, Thomas Million executed to G. B. Million his note for $750, borrowed money, due in 12 months, and to secure the note he and his wife executed a mortgage on their farm. The note was not paid when due, and suit was brought on it in 1889. The number of credits indorsed on the note were admitted by the petition. By his answer Thomas Million pleaded that he had paid on the note $350 on January 3, 1889, which had not been credited on the note, for which a receipt had been executed to him by G. B. Million. He produced several scraps of paper which he said was the receipt, and had been worn thus from carrying it in his pocketbook. On one of the scraps the word "fifty" could be seen, and on the back of one of them was this, "$350.00." The signature was gone, but tops of letters could be seen. Part of the date was gone, but the figures "188" were left. The defendant proved by T. B. Myse that on December 7, 1896, he paid some money to Thomas Million which was credited on the note; that, when this credit was put on the note, Thomas Million said that they had better put that other credit on while they were there. G. B. Million answered, "I have receipted to you for that." From the way they talked it seemed a considerable little amount, and while they were talking some one came and plucked G. B. Million by the arm. He then said they would fix it some other time. Thomas Million seemed very anxious to have it fixed. There were no credits put on the note after this date. John Baker testified that in the year 1891 Thomas Million showed him a receipt which purported to be signed by G. B. Million for $350. It was shown him because he was proposing to buy the land, and wished to know the amount of the mortgage on it. There was some other evidence tending to show that G. B. Million had executed a receipt to Thomas Million for money paid on a note when he did not have the note with him. On a submission of the case on this evidence, the circuit court credited Thomas Million by $50, of date January 3, 1889, as he could read the word "fifty" in the scraps, but declined to give any further credit. Thomas Million filed grounds for a new trial, alleging that he had just learned that he could prove by F. C. Maupin and William Gabbard that they had seen the receipt and had read it, and that it was a receipt for $350. The court overruled the motion for a new trial, and Thomas Million appealed to this court. On the appeal it was held that a new trial should have been granted on account of the newly discovered evidence, and the judgment was reversed. See Million v. Million's Ex'rs, 104 S. W. 768, 31 Ky. Law Rep. 1156. On the return of the case to the circuit court, the defendant took the depositions of Maupin, Gabbard, and William Todd, who testified practically to the facts stated in the former opinion of this court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he appeals.

After the defendant had taken the proof of the three witnesses referred to, the plaintiffs took three depositions; but these threw little light on the controversy, as they only went to show that a certain man whom Thomas Million thought was present at the conversation testified to by Myse was not there. In other words, they simply showed that Thomas Million, being under the impression that a certain man was the person who had plucked G. B. Million by the arm, had talked with him, and tried to get him to recollect the occurrence, when he insisted that he was not there and did not know anything about it. This would not show that the occurrence did not occur as stated by Myse. It would only show that Thomas Million was mistaken as to who the bystander was.

The evidence of Todd is the same as that of Gabbard. When the case was here before, we held that this newly discovered evidence was of sufficient force to warrant a new trial. The rule is that a new trial will not be granted on account of newly discovered evidence unless if produced it would change the result. The holding of this court that a new trial should have been granted on account of the newly discovered evidence was therefore a holding that the newly discovered evidence was sufficient to change the result, and, there being no contradictory evidence introduced, the case being otherwise practically as it was when here on the first appeal, it necessarily follows from the opinion then delivered that the credit for $350 of date January 3, 1889, should have been allowed. To hold otherwise is to say that a new trial should not have been granted on account of the newly discovered evidence. It is shown by the proof, and was held by the circuit court, that Thomas Million did hold a receipt for money paid on the note of date January 3, 1889; for the court gave him credit by $50 paid on that date. The only question really in dispute on the appeal is the amount of this receipt. A part of the paper has been lost, and the thing to be proved is the contents of the lost paper. The witnesses did not know the handwriting of G. B. Million, but they testified that the paper which they saw was signed in his name in an irregular scrawling hand, and, being shown his admitted signature on the back of the note sued on, said the signature to the receipt looked like that signature. As G. B. Million is dead, Thomas Million cannot testify to any transaction with him, and the contents of the lost paper may be shown by the best evidence that is reasonably attainable. That the evidence of these is not competent to show that G. B. Million executed the receipt to Thomas Million; but the existence of the receipt being established, and the only question being whether it was a receipt for $50 or $350, the testimony of these witnesses may be received as to the contents of the paper they saw; for the evidence is sufficient to raise a presumption that the paper they saw was the paper in controversy.

The circuit court based his judgment upon the ground that the scraps produced were parts of a receipt for $50, and that this was apparent from them. We have examined the scraps with some care, and, while they lend some color to this conclusion, the inference to be drawn from the scraps is not sufficient to overthrow the testimony of four witnesses who saw the paper and read it when it was complete; and we are satisfied from all the proof that the scraps are the remnants of the paper which the four witnesses read.

Judgment reversed, and cause remanded for a judgment as above indicated.

PADUCAH COOPERAGE CO. v. PADUCAH VENEER & LUMBER CO.

(Court of Appeals of Kentucky. Oct. 22, 1909.)

1. QUIETING TITLE (§ 44*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action between parties owning the north half and south half of a lot to quiet title to a strip of land claimed by both near the middle of the lot, evidence that plaintiff's president saw and knew of the erection by defendant, seven years before, of a boiler room, on a part of the strip in controversy, and made no objection thereto, was material as bearing on the question of defendant's possession of the ground and the understanding of the parties as to the true location of the line separating the lot of plaintiff from that of defendant.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.*]

2. WITNESSES (§ 140*)—COMPETENCY—EFFECT OF DECEASE OF PARTY IN INTEREST.

Civ. Code Prac. § 606, providing that no person shall testify for himself concerning statements of a person deceased at the time testimony is offered, does not prevent an agent from testifying for his principal as to transactions had by him as such agent through the agent of another, although the agent of the other person be dead at the time of the giving of such testimony, where it appears that the agent has no personal interest in the business of his principal.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 140.*]

3. QUIETING TITLE (§ 47*)—INSTRUCTIONS.

Evidence, in an action to quiet title, *held* insufficient to warrant submission to the jury of defendant's claim of possession of the land in controversy.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 47.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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and there is a dispute as to the location of the line separating the two parts, a claim by one of them for more than 15 years that the strip in controversy is its property will not give title to the strip, in the absence of inclosure or actual occupancy thereof adversely to all others.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77–81; Dec. Dig. § 14.*]

5. TRIAL (§ 139*)—TAKING CASE FROM JURY —DIRECTING VERDICT.

Where, in an action to quiet title, the issue is as to the true location of a line separating the land of plaintiff from that of defendant, and there is some evidence to support the location of the line contended for by defendant, the case should go to the jury, although the weight of the evidence seemed to show the true location of the line was the one claimed by plaintiff.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 139.*]

6. QUIETING TITLE (§ 36*) — ANSWER — DESCRIPTION OF LAND.

Under Civ. Code Prac. § 125, subsec. 2, providing that in an action for the recovery of land the answer must so describe the land that it may be identified, an answer is sufficient which claims the whole of the ground in controversy, the petition having given a particular description of the land, and the answer in effect adopting such description; and it would be only in the event that defendant claimed only a part of the ground in dispute that it would be necessary for the answer to describe such part so that it may be identified.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 36.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Paducah Cooperage Company against the Paducah Veneer & Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. D. Mocquot, for appellant. Wheeler, Hughes & Berry, for appellee.

SETTLE, J. This action brought by appellant against appellee raises a controversy as to the ownership of a strip of ground in the city of Paducah. The strip of ground is of triangular shape, and begins at a point on Meyers street, extends a distance of 30 poles, and has a width of, perhaps, 30 feet at the end of the 30 poles. The trial in the circuit court resulted in a verdict and judgment in favor of appellee. In the motion and grounds for a new trial filed by appellant in that court, it was contended that numerous errors were committed by the court to its prejudice, and it now insists that these alleged errors entitle it on this appeal to a reversal of the judgment.

One of appellant's contentions is that the trial court erred in permitting Sowell, appellee's manager, to testify that Kilgore, at the time appellant's president, saw and knew of appellee's erecting seven years ago Kilgore was dead at the time of its admission. The testimony was material because of its bearing on the question of appellee's possession of the ground in controversy, and also on the matter of the understanding of the parties as to the true location of the line separating the lot of appellant from that of appellee, for the failure, under the circumstances, of appellant's president to object to the erection of appellee's boiler house upon the ground in controversy, allowed the presumption that it was not included within the lines of appellant's deed, and amounted in some sort to a recognition on his part of appellee's right thereto. The admission of the testimony in question was not error. Section 606, Civ. Code Prac., does not prevent an agent from testifying for his principal as to transactions had by him as such agent with the agent of another, although the agent of the other person be dead at the time of the giving of such testimony. It does not appear that appellee's manager, Sowell, had any personal interest in the appellee corporation. He, therefore, incurs no financial loss, nor gains any material benefit by the result of the litigation. An examination of the following authorities will show that this court has frequently recognized the competency of such evidence: Cobb's Adm'r v. Wolfe, 96 Ky. 418, 29 S. W. 303, 16 Ky. Law Rep. 591; F. & C. Co. v. Goff, 30 S. W. 626, 17 Ky. Law Rep. 214; Brooks v. Spain, 60 S. W. 184, 22 Ky. Law Rep. 1178; Lyon's Ex'r v. Bank, 78 S. W. 454, 25 Ky. Law Rep. 1668.

Appellant also contends that the trial court erred in instructing the jury. But one instruction was given. It is as follows, viz.:

"Gentlemen of the Jury: It is undisputed in this case that the plaintiff, Paducah Cooperage Company, is the owner of the north half of lot No. 24 in the city of Paducah, Ky., and that the defendant, Paducah Veneer & Lumber Company, is the owner of the south half thereof, and that the plaintiff and defendant have paper titles and deeds to their respective halves of said lot from the same common grantor, and that the defendant has the oldest deed, and the court now instructs you that if you shall believe from the evidence in this case that the strip of land in controversy in this suit is embraced by, or included in, plaintiff's deed, then the law is for the plaintiff, and you will find for it said strip of ground in controversy, unless you shall believe from the evidence that said strip of land is also embraced by, or included in, defendant's deed; or that defendant, and those under whom it claims, was at any time, before the bringing of this suit, for a period of as much as 15 years,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the actual, continuous, adverse, and peaceable possession of said south half of said lot No. 24 by having buildings or inclosures thereon, and claiming to a marked boundary or dividing line between plaintiff's and defendant's part of said lot, which marked or division boundary included the land in controversy in this suit; then and in either of these events, and if you shall so believe, the law is for defendant, and you will so find."

We have reached the conclusion that the instruction contains one error. It should not have submitted to the jury the question of appellee's claim of possession, as there was no evidence upon which to base it. It is true that appellee's answer, after denying appellant's title and alleging title in itself to the ground in controversy, pleaded the statute of limitations based on its alleged actual, adverse possession of the ground to a well-defined marked boundary for more than 15 years before the institution of appellant's action, but the evidence did not prove such possession or any other, except to a small part thereof occupied by its boiler shed for a period of 7 years. According to the evidence, appellee about 7 years ago rebuilt its mill, following a fire, at which time its boiler house was so constructed as to extend upon and occupy from 11 to 13 feet of the ground in controversy; its first actual adverse possession of the ground in dispute then began and has since continued, but back of that time no actual or adverse possession on its part of the ground was shown. Therefore its plea of the statute was unavailing. We do not overlook the fact that appellee as far back as 1884 caused Postlethwaite to survey its entire lot; that the latter then attempted to so establish a line between appellee's lot and that of appellant as to apparently include the land in controversy in the lot of appellee, and that stakes were driven in the ground, and perhaps a cottonwood tree marked on the bank of the Tennessee river to indicate the line attempted to be established; but it does not appear from the evidence by what, if any, title papers this work was done, or that appellant's vendor and then owner of its lot adjoining appellee's was present or had any notice thereof. Postlethwaite is dead, and no plat or other evidence of the survey in question was left by him; the stakes placed by him have long since been removed and the cottonwood destroyed, and the evidence as to where stakes and cottonwood stood was quite indefinite. There was some evidence tending to prove that appellee, since the surveying of Postlethwaite was done, has made claim to the ground out to the line staked by Postlethwaite, but it failed to prove any actual possession by it of the ground in controversy, except what has been occupied 7 years ago by the boiler house of the mill.

It is true appellee has for more than 15 years had the actual and adverse possession of that part of lot 24 conveyed by its deed, but, unless the ground in controversy is in fact covered by the deed, such possession as it had did not extend to or include it. If it is not embraced by the boundary of appellee's deed, the latter, by merely claiming it to the line staked by the surveyor, could have acquired no right to it as against the title of another without an inclosure or actual occupancy thereof adversely to all others for as much as 15 years.

It is admitted that appellant and appellee derived title from a common source; that by the plat recorded by the vendor, as well as the deeds to them, the ground owned by appellant is one half of lot 24, and that owned by appellee the other half of lot 24; that each deed purports to convey the same quantity of ground, and that appellee's deed is the elder of the two. Eliminating the question of possession from the case, it is manifest that the only issue that should have been submitted to the jury was as to the true location of the line separating the lots of appellant and appellee. As appellee's deed antedates that of appellant, it goes without saying that, if the ground in controversy is a part of the lot conveyed by its deed, the jury should have found for it; but on the other hand, if it is included in the boundary contained in the deed to appellant, the verdict should have been for the latter. Looking to the evidence on this issue, we find that that of appellant, consisting in the main of the surveys shown by the three plats found in the record, and the testimony of the surveyors by whom they were made, strongly conduces to prove that the ground in question is a part of its lot and embraced by its deed. It further appears from the evidence that, by including the ground in controversy, appellant's lot will contain the precise quantity its deed purports to convey; but if it is added to appellee's lot, it will be found to exceed by perhaps as much as its size the quantity the deed of appellee purports to convey. On the other hand, appellee's claim to the ground in controversy finds some support in the evidence as to the Postlethwaite survey and the fixing of the line by him, evidence as to the building of the boiler house upon the ground in controversy with the knowledge and apparent acquiescence of appellant's president, Kilgore, and other evidence as to appellee's possession of the part occupied by the boiler house after that time; the evidence as to appellant's acquiescence in the erection of the boiler house being competent as tending to show that both parties understood the true line between their lots to be located as claimed by appellee. While it is apparently true that the weight of the evidence conduced to prove that the true location of the line separating the lot of appellant from that of appellee is as claimed by the former, as there was some evidence to support appellee's location of the line, the case should have gone to the jury; therefore, the peremptory instruction asked by appel-

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ry are instructed that it is admitted plaintiff and defendant derived title, each to its own lot, from a common source, and that defendant's deed antedates that of plaintiff. And if the jury believe from the evidence that the deed of the plaintiff embraces the strip of ground in controversy, and it is not embraced in the deed of the defendant, they should find for the plaintiff. But on the other hand, if the jury shall believe from the evidence that the strip of ground in controversy is embraced in the deeds of both plaintiff and defendant, or in the deed of defendant alone, they should find for the defendant."

As previously intimated, an instruction on the question of adverse possession will not be necessary or proper, unless appellee should introduce proof showing actual occupancy, or an inclosure of the ground in controversy for the statutory period. Indeed, in the state of case here presented, if the ground in controversy is not embraced in appellee's deed, but is included in that of appellant, the only possession that would defeat appellant's title is such as appellee could have acquired by an inclosure of the ground, or actually occupying it, for the statutory period, no proof of which was made on the trial in the circuit court. Except as to the small part of it covered by appellee's boiler house for seven years, it has had no other possession of the ground in controversy that appellant has not had and exercised, and neither has claimed title to or possession of it, except upon the ground that it was embraced by its deed, and therefore the possession of each has been and is limited to the true location of the line of division between the lots.

The case is, we think, governed by the rule announced in that of Holmes v. Herringer, 13 S. W. 359, 913, 12 Ky. Law Rep. 22, in the opinion of which it is said: "For as both parties claim under the same patent, no question of superiority arises in the case. Nor has either acquired any legal advantage by adverse possession of the land in contest, for both parties having the undisputed title to and possession of two adjoining tracts, respectively owned by them, must be regarded as claiming and holding up to the division line, whereever that may be, until one or the other, by actual inclosure, takes possession beyond. It is true appellee did have the disputed land under fence when the action was commenced by appellant, but as there is no evidence whatever showing it had been inclosed 15 years, he acquired no right thereby."

It is further contended by appellant that its motion for a judgment non obstante should have been sustained by the trial court. We decline to accept appellant's view of that matter. The motion was bottomed upon the idea ing the question of whether the objection to the answer should have been presented by a demurrer or motion to make more specific, we do not think the pleading defective, for, as amended, it claimed for appellee title to, and alleges his possession of, the whole of the ground in controversy. The petition of appellant gave a particular description of the part in controversy. The answer in effect adopts this description and claims the whole of it as described. This was a sufficient compliance with the provisions of section 125, subsec. 2, Civ. Code Prac. If in the answer appellee had claimed only a part of the ground in dispute, then it would have been necessary for the answer to state what part of it was claimed, and "so describe such part that it may be identified." But as already stated, it claimed the whole of it as described in the petition.

The views we have expressed make it unnecessary to consider the refused instructions. On account of the error in the one instruction given, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

BURGE v. CHESTNUT et al.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. TENANCY IN COMMON (§ 46*)—PURCHASE OF INTEREST OF OTHER TENANT—FORECLOSURE OF LIEN ON INTEREST — DIVISION BEFORE FORECLOSURE.

While if one tenant in common mortgages his interest in land, the other tenant may, under certain circumstances, require a division thereof before the mortgage is foreclosed, such is not the rule where one tenant in common purchases the interest of the other tenant; and where a tenant in common made improvements on his half interest, purchased the other tenant's interest, and gave purchase-money notes therefor, thus taking to himself the entire title to the property, he could not have an artificial division thereof into half interests, with himself alone, against the holders of the notes before foreclosure thereof.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

2. MORTGAGES (§ 488*)—FORECLOSURE—SALE—DIVISION OF PROPERTY—DETERMINATION BY COURT.

Under the express provisions of Civ. Code Prac. § 694, the court before ordering the sale of real property for payment of a debt, may determine from the pleadings whether the property can be divided without materially impairing its value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1417; Dec. Dig. § 488.*]

3. CONTINUANCE (§ 23*)—GROUNDS—MATTER NOT IN CONTROVERSY.

In proceedings to foreclose a lien on a half interest in land, the whole of which was owned by defendant, a continuance to take proof as to alleged improvements on the half interest not covered by the lien was properly refused;

the improvements being no longer a matter of controversy.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 68–71; Dec. Dig. § 23.*]

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by S. D. Chestnut and others against H. H. Burge and others. From the judgment, defendant Burge appeals. Affirmed.

Wright & McElroy, for appellant. Thos. W. Thomas and Nat A. Porter, for appellees.

CLAY, C. In 1878 B. W. Burge, the father of H. H. Burge and C. E. Burge, conveyed to J. O. Burge, in trust for his sons, four tracts of land. It was provided in the deed that these lands were to be divided between his sons when the oldest reached 21 years of age. There were four tracts of land conveyed by the deed: The first consisting of 130 acres, from which 12 acres were afterwards sold off, the second consisting of 140 acres, the third of 18 acres, and the fourth of 8 acres. There was another tract of land adjoining the home tract, containing 52 acres. This land is not in controversy. In 1897 H. H. Burge mortgaged his undivided one-half interest in the 130—less 12—acre tract to Mrs. Bates. This mortgage was foreclosed by her, and the undivided one-half interest of H. H. Burge was sold. H. H. Burge became the purchaser. D. W. Wright was his surety on the sale bond. At maturity of the bond Mrs. Bates, to whom it was made payable, transferred it to D. W. Wright. On October 30, 1901, H. H. Burge mortgaged his undivided one-half interest in the three tracts of land, known as the home place and containing 166 acres, to Margaret Winans. On January 26, 1902, J. O. Burge, trustee, and C. E. Burge and wife sold and conveyed to H. H. Burge the undivided one-half interest to C. E. Burge in the four tracts of land—the 118 acres, the 140 acres, the 18 acres, and the 8 acres. The consideration was $2,500, which was evidenced by the notes of H. H. Burge. These notes were sold and transferred to various persons, who are now parties to this action. On January 9, 1906, H. H. Burge and wife mortgaged their undivided one-half interest in the 118-acre tract to D. W. Wright, for the purpose of securing him in the payment of a note for $500, which Wright had signed as surety for H. H. Burge. On October 25th H. H. Burge and wife executed an additional mortgage on his undivided one-half interest in the three tracts of land containing 166 acres, and known as the home place, to D. W. Wright to secure him in the payment of a note to the Citizens' Bank for $350. On February 5, 1909, S. D. Chestnut filed suit against H. H. Burge and wife, D. W. Wright, and Margaret Winans, to enforce a lien for the purchase-money notes executed by H. H. Burge for the purchase of the undivided one-half interest of C. E. Burge in the various tracts of land. On February 23, 1909, H. H. Burge filed an answer, setting up the various liens and mortgages on the tracts of land in question. He further states in his answer that the 118-acre tract of land is some distance from the other land; that the home place of 166 acres and 52 acres additional are all adjoining tracts constituting 218 acres of land; that the home place is now divided by the Dishman Mill road into two parts; that the home place will bring more money when sold if divided into two farms. He further pleads that, prior to the time of the purchase of his brother's interest, he notified the latter that he was going to make improvements on his half of the land; that he did make lasting and valuable improvements by building a house for his family, barns, and other buildings, costing about $1,200. The answer further concludes with a prayer that the 118 acres of land be sold as one tract; that the remaining tract of land be divided into two parts, quality and quantity considered; that parties be appointed to make said division, and to allot to him (H. H. Burge) that part of the land upon which he had made the improvements; that in making said allotment and dividing said land H. H. Burge shall not be charged with the improvements made by him. The court, at the May term, entered judgment directing that the 118 acres of land be sold separately; that the 140, 18, and 8 acre tracts be sold separately and as a whole, and that the best bid be accepted. H. H. Burge alone prosecutes an appeal from this judgment. It is his contention that the court erred in not appointing commissioners and dividing the lands, quality and quantity considered, and allotting to him that part upon which the improvements had been erected, without charging him for such improvements. While it is true that, if one tenant in common mortgages his interest in a tract of land, the other tenant may under certain circumstances require a division of the land before the mortgage is foreclosed, this is not the rule where one tenant in common purchases the interest of the other tenant. In this case appellant, H. H. Burge, owned an undivided one-half interest in all the tracts of land. Upon certain tracts there were certain liens. Thereafter he purchased his brother's entire undivided one-half interest for the price of $2,500. He thus became the owner of all the tracts. In fixing the purchase price for his brother's one-half he must have taken into consideration the value of the improvements that he himself had made on the land. Any claim for improvements that he had as against his brother was necessarily settled when he bought out his brother's interest. While it is true that the lien notes given for his brother's undivided one-half interest are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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not a lien upon his own undivided one-half interest, yet it is also true that the purchaser of these notes had a lien upon the interest so sold which is an undivided interest in every acre of land that was sold. Where one of two tenants in common has purchased the interest of the other tenant, and given notes for the purchase money, thus taking to himself the entire title to the property, he cannot, of course, as against the holder of the note, have an artificial division of the property made with himself alone. His brother C. E. Burge is not a party to this suit, and is not interested in the property. H. H. Burge cannot have a division as between himself and his brother, nor can he have an artificial division with himself alone. Furthermore, the 52 acres of land not being involved in this controversy, the court had no right to take them into consideration in determining how the various tracts of land should be sold. It was not error to enter judgment when the court did, for there were in fact no issues to be decided by the court.

The court did not violate section 694 of the Civil Code of Practice in ordering the sale. He had a right to determine the matter from the pleadings. We are unable to say that he erred because he did not take in the 52 acres not involved in the controversy and divide the home place into two farms.

Nor was it error to refuse to grant a continuance, for the only purpose of the continuance was to take proof as to the alleged improvements, which are no longer a matter of controversy.

We are unable to see how H. H. Burge was prejudiced by the judgment of sale. He alone appeals.

Judgment affirmed.

BELL v. POWERS.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. BOUNDARIES (§ 3*)—DESCRIPTION—CALL FOR MARKED LINE.

The second call of the D. survey recited: "Thence with James H. Burnett's old line south 25 east 250 poles to his corner a pine." The Burnett line between the point where the call "south 25 east 250 poles" began to the pine was not a straight line, but traversed four lines and three marked corners not recognized in the D. survey. *Held*, that the call for the line was for the well-known, marked, and defined line of a prior survey which would control the call for courses and distances, so that the D. survey included all the land up to such line as delineated, especially as the law in force when the land was surveyed did not require the surveyor to go over the ground, and mark the lines and corners when the survey bounded on an ancient marked line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 25–29; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—EVIDENCE—PLAT.

A plat of surveys is not admissible to control a description where the survey calls for the line of an old established patent running from one known point to another known and fixed point.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 27; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 3*)—DESCRIPTION—"LINE."

That the description of a survey called for the marked "line" of another survey between designated points which was not a straight line but consisted of four lines and three marked corners was immaterial; the word "line" being often used for the plural, and vice versa, and the singular being also sufficient to describe the exterior boundary of the survey line called for between the designated points.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4168–4169.]

Appeal from Circuit Court, Wayne County.

"Not to be officially reported."

Action by W. C. Bell against M. W. Powers. Judgment for defendant, and plaintiff appeals. Affirmed.

Duncan & Bell and O. H. Waddle & Son, for appellant. Harrison & Harrison, for appellee.

LASSING, J. W. C. Bell filed a suit in the Wayne circuit court, in which he alleged that he was the owner of about 10 acres of land in Wayne county which M. W. Powers had unlawfully taken and withheld possession thereof from him for some 10 months or more, to his damage in the sum of $4,000. He prayed for a recovery of the land with damages. The defendant answered, denying ownership in the plaintiff, and claiming himself to be the owner of the entire tract. Later, by amended answer, he disclaimed ownership of about four acres, and set up title in himself to the remainder of the tract. The case was tried before the court without the intervention of a jury, and, having heard the evidence, the court found in favor of the defendant and dismissed the petition, giving to plaintiff judgment for his costs up to the date of the filing of the amended answer, and defendant judgment for costs thereafter. Being dissatisfied with this finding and judgment, the plaintiff Bell appeals.

The plaintiff claims ownership under a survey made December 5, 1894, by one Reuben Davis for 10 acres, which survey was assigned to him, and upon which a patent was issued by the commonwealth on the 6th of December, 1907. The defendant claims under a survey made by one William Dobbs August 14, 1858, upon which a patent was issued for the 63 acres on the 18th of May, 1859. The trial judge found that the Dobbs survey covers the land in question, and this is the sole point of dispute. At the time the Dobbs survey was made one James H. Burnett was the owner of a tract of land lying to the west of the Dobbs survey, and it is the contention of appellee that the west

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boundary line of the Dobbs survey is the east line of this Burnett land, whereas it is the contention of appellant that the west line of the Dobbs survey does not run with the east line of the Burnett land, and that, in fact, it is some distance from the Burnett land and far enough away from it to include the land in dispute between it and the Burnett land. The boundary lines of the Burnett land are well established and known lines, and the corners thereof, so far as necessary for determining this litigation, are marked, so that there is no difficulty whatever in identifying the corners and fixing the true boundary line of the Burnett land. The difficulty arises out of the construction that is placed upon the second call in the Dobbs survey, which is as follows: "Thence with James H. Burnett's old line south 25 east 250 poles to his corner a pine." The Burnett line between the point where the call "south 25 east 250 poles" begins to the pine and corner in said Burnett line is not a straight line, but runs as follows: "South 38 east 102 poles to a Spanish oak and poplar; thence south 10 west 84 poles to two poplars, thence south 45 east 112 poles to three chestnuts, thence south 80 east 26 poles to a pine." So that on the Burnett line between the point where the call "south 25 east 250 poles" starts and the ending of said call, to wit, the pine, there are four lines and three marked corners which are not recognized in the Dobbs survey. Appellee insists that, as the Dobbs survey calls for the old Burnett line, the course and distance named must give way and the line be followed. Whereas, appellant insists that, even though the survey does call for the Burnett line and this line is a well-known, marked, and defined line, still the course and distance, when considered in connection with the plat, exercise a controlling influence, and clearly show that it was not intended that this survey should run with the old Burnett line, or, rather, appellant insists that controlling influence should be given to the plat, and that the line in dispute from the beginning point should be run to the pine in such a way as to make the survey most nearly resemble the plat. This can be done in any one of three ways: First, by starting at the beginning point and running to the Spanish oak and poplar on the call "south 38 east," instead of "south 25 east," and from there to the pine on a straight line without regard to the distance; second, that the line should be run from the starting point "south 25 east 250 poles" and from that point, being a straight line, to the pine; or, third, that it should be run regardless of either course or distance from the beginning point to the pine in a straight line. It is true that, if this line were established in any one of these three ways, the body of land would more nearly resemble the plat than it does by following the line of the old Burnett survey as called for. But the trouble with appellant's contention is that, in order to maintain his position, he has to reject what is by all text-writers and courts regarded as superior evidence in establishing land titles and lines in favor of a class of evidence which is only resorted to in the absence of better evidence.

In Morgan v. Renfro, 124 Ky. 314, 99 S. W. 311, 30 Ky. Law Rep. 533, this court stated the importance in which the various descriptions for locating lines are to be taken in the following language: "Therefore, marked corners—i. e., those clearly identified, and which are notorious objects—are seized upon as the most satisfactory; then natural objects not marked, such as a stream, a ridge, a cliff, or the like, for they, while not so exact, are nevertheless reasonably sure to afford satisfactory evidence of the location of the patent at or near that point; then calls for the lines of other patents, which are of record, and which are susceptible of definite and certain location; then course; and then distances, in the order named." All of these are really means to an end—the ascertainment of what the surveyor actually did. When that alone is determined, the matter is settled, and complaint cannot be made that the order of the various tests has been disregarded, for that is a matter in which there is no intrinsic merit. But experience and reason have taught very surely that under ordinary circumstances the observance of the order named is apt to lead to a correct determination of the real question: Where did the surveyor, acting possibly half a century ago, actually locate the survey? Now, applying this test in order that we may determine what the surveyor, in locating the Dobbs survey, actually did in 1848, the record shows that he began at the point, A, in the Lewis Foust survey and ran to the point, B, in the Burnett line, evidenced on the map by a black oak and a white oak, and that from this point he did not actually run the line out to the pine, but, being in a way familiar with the general law of the land, the surveyor estimated that by following the call "south 25 east 250 poles" along the old Burnett line the pine tree would be reached, and William Dobbs, who had the survey made, says, in giving his understanding of his description in his survey, "Why, yes; that is the way I wanted it, that is the way I called it, and that is the way it went." He clearly understood that his survey ran to and with the Burnett line. He exercised acts of ownership over the land up to the Burnett line all along between the Foust corner and the pine, and cut timber upon this land, and in 1900, before any litigation had commenced and before the appellant had procured his patent, in making a deed to one William Foster, the vendor of appellee, he described his land as running by metes and bounds with the Burnett line, thus giving further

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evidence, if such was needed, of the fact that he regarded his survey as running with the Burnett line. Not only did Dobbs regard the Burnett line as the true dividing line between his and Burnett's land, but the neighbors generally and those familiar with the lines in that locality looked upon the Burnett line as the true dividing line between these farms. Thus the presumption which this court in the case of Morgan v. Renfro, supra, said would be indulged, that patentees of vacant land make their entry and survey with reference to elder surveys which are known, is strengthened by the positive evidence of Dobbs that the survey and patent in this case was so made, and people living in that locality have testified that it was so regarded and understood.

There is another reason for holding that the old Burnett line is the true dividing line, and that is that the surveyor did not actually run out the lines of the Dobbs survey beyond the point where it came in contact with the Burnett line. The law then in force required the surveyor actually to go over the ground and mark the lines and corners, except where the survey bound on a water course or an ancient marked line. If, as contended by appellant, the Dobbs survey is not to be run with the lines of the Burnett patent, then the surveyor failed to discharge his duty; whereas, if the Burnett line, which was a well known and recognized and established line, is to be accepted as the dividing line, then there was no necessity for his actually going over the ground beyond this point. The fact that he failed to do so is another evidence that this line was to be accepted as the dividing line between the two patents, for it must be presumed that he knew the law and understood the obligations which it imposed upon him in the faithful discharge of his duty.

The plat is sometimes admitted as evidence where there is no other controlling influence, as said by this court in the case of Brashears v. Joseph, 108 S. W. 307, 32 Ky. Law Rep. 1139. But its use as evidence has no place in a case like that under consideration, for here we have a survey calling for the line of an old and established patent, running from one known point in the line of said patent to another known and fixed point, and the necessity for the use of a plat is therefore entirely obviated. Nor is material that in the Dobbs survey the word "line" rather than "lines" is used, for the singular is often used for the plural, and vice versa, and besides the surveyor had in mind the exterior boundary of the Burnett line between these designated points, and looking at it in that light the use of the word "line" was grammatically correct.

The judgment of the lower court was correct, and is therefore affirmed.

CHESAPEAKE & O. RY. CO. v. LANG'S ADM'X.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE AFTER DISCOVERED PERIL.

Direction to find a verdict for defendant in an action against a railroad company for the killing by a train of its section hand while riding by permission a velocipede on its tracks was properly refused; the evidence for plaintiff being that no warning of the approach of the train was given, that deceased was ignorant of its approach, and that it might have been checked, if not stopped, after he was seen by the engineer, in time to avoid the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1020; Dec. Dig. § 286.*]

2. EVIDENCE (§ 539½*)—OPINIONS—QUALIFICATION OF WITNESSES.

Witnesses, while not knowing the engine or cars of a train, having run other trains, are competent to testify as to the distance within which such a train could be stopped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2351; Dec. Dig. § 539½.*]

3. MASTER AND SERVANT (§ 236*)—INJURY TO SECTION HAND ON TRACK — LIABILITY OF COMPANY.

The place on a railroad track where a section hand riding a velocipede by permission was struck by a train being outside the town, and where the presence of persons was not to be expected, the company was liable only in case there was negligence after his peril was discovered; it having been incumbent on him to keep a lookout for, and get out of the way of, trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 723–742; Dec. Dig. § 236.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

There being no evidence that the peril of a section hand on the track was discovered by any one except the engineer of the train which struck him, instructions as to "agents and servants" of the company in control and management of the train having discovered him, and not used proper care to prevent the injury, should use the word "engineer" in place of the words "agents and servants."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

5. MASTER AND SERVANT (§ 137*)—INJURY TO SECTIONMAN ON TRACK—CARE REQUIRED OF ENGINEER.

The engineer of a train, on discovering the peril of a section hand on the track, was not bound to use the utmost diligence to prevent his injury, but only such care as might be reasonably expected of a person of ordinary prudence under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 274, 277; Dec. Dig. § 137.*]

6. MASTER AND SERVANT (§ 293*)—INJURY TO SECTION HAND ON TRACK—DUTY OF ENGINEER—INSTRUCTIONS.

In place of the words "promptly used all the means in his power" in the instruction, in an action against a railroad company for the killing of its section hand by its train, that if the train was being run by the engineer in an ordinarily careful and prudent manner, and, after discovering decedent's peril, he "promptly used all the means in his power" to prevent the accident, defendant was not liable, there should

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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have been inserted the words "used ordinary care in the exercise of all reasonable means at his command consistent with the safety of the train."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.*]

7. MASTER AND SERVANT (§ 248*)—INJURY TO SECTION HAND—LIABILITY NOTWITHSTANDING SERVANT'S NEGLIGENCE.

Though a section hand was guilty of negligence in going on the track with his velocipede knowing that a train was coming, the company was liable for his death from being struck by the train, if, after it discovered his peril, it did not exercise ordinary care to avoid injuring him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 801; Dec. Dig. § 248.*]

8. MASTER AND SERVANT (§ 210*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a section hand riding a velocipede on the track, knowing of the approach of a train, jumped off, and was safe from the train, and then trying to get his velocipede off the track, when it was too late for those in charge of the train to do anything to avoid injuring him, was struck and killed by it, he assumed the risk, and the company was not liable, unless he had reason to believe the velocipede endangered the train, and he used such care as may be reasonably expected of a person of ordinary prudence situated as he was.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554–556; Dec. Dig. § 210.*]

9. PLEADING (§ 20*)—DISJUNCTIVE ALLEGATIONS—INJURY TO SERVANT—NEGLIGENCE AFTER KNOWLEDGE OF PERIL.

The allegation in the petition for death of a section hand struck by a train that the persons in charge of the train saw or could have seen by ordinary care his danger is only one that they could have seen, and does not involve one that they saw his peril.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 43; Dec. Dig. § 20.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Mason County.

"To be officially reported."

Action by Anthony A. Lang's administratrix against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Worthington, Cochran & Browning, for appellant. Thos. D. Slattery, for appellee.

HOBSON, J. Anthony A. Lang was a section hand in the service of the Chesapeake & Ohio Railway Company. It was a part of his duty to act as track walker between South Ripley and Dover, a distance of about six miles. One of his duties was the lighting of the signal and switch lights between these points, and to save time he was allowed to use a velocipede. On December 19, 1905, he had been to South Ripley, and was returning to Dover, where he lived. Just before the road reaches Dover it passes over a trestle. While Lang was going over this trestle, a rapid moving passenger train came up behind him, knocking him off the track and killing him. This suit was brought by his personal representative to recover for his death, on the ground that those in charge of the engine and train perceived his danger, and, after perceiving it, could by proper care have avoided killing him. There was a verdict and judgment in the plaintiff's favor for the amount sued for, $2,000, and the railroad company appeals.

One witness, who lived about 100 feet from the railroad track and about 800 feet east of the trestle, testified that he was sitting in his room, and saw Lang go by on the velocipede. He seemed to be going along very leisurely. The witness then got up and went into his kitchen, and just as he got into the kitchen he heard the whiz of the passenger train. He was uneasy about Lang, for he had seen him pass, so he stepped to the window to see if he had gotten across the bridge, and, as he reached the window, he saw him at the end of the bridge, and the witness could only see him halfway across the bridge. The train was only about 100 feet behind decedent when the witness last saw him. The train did not whistle or give any signal until after it had gotten beyond the bridge. Another witness testified that she lived just west of the bridge. She was tired and went to the window. She saw Lang going by, and watched him until he got about across the bridge. While she was standing there the train came along. She looked until it got close to him. She turned her eyes, and the train struck him. The window at which she was standing faced the bridge. She also testified that there was no whistle or ringing of the bell until after Lang was struck. Lang did not look back, so far as she saw. The train was an extra, consisting of an engine and three baggage cars, running at the rate of 45 or 50 miles an hour. There was proof on behalf of the plaintiff that it could have been stopped in 400 or 500 feet.

The conductor of the train testified that he was in the rear car, and that the engineer whistled and put on the emergency brakes on the curve before reaching the straight track approaching the trestle. The track was straight for about 800 feet east of the point where Lang was struck. The engineer testified that he was two or three rail lengths west of the distance signal when he first saw Lang. A rail length is 33 feet. The distance signal was 780 feet from the point where Lang was struck; so, according to his testimony, Lang was about 700 feet from him when he saw him. He said he saw Lang when he came around the curve into the straight track. The fireman was busy shoveling coal, and did not see him at all at that time. The engineer testified that he at once set his emergency brakes and blew the alarm whistle; that Lang was at about the end of the viaduct, and got off the velocipede, and was trying to pull it from the track, when he was struck and killed. The fireman testi-

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were working on the track a little below the trestle testified that no warning of the approach of the train was given until after Lang had been struck; and two persons walking east along the track, who passed Lang a short distance from the trestle, gave similar testimony.

It is insisted for the defendant that the court should have instructed the jury peremptorily to find for it; but we cannot concur in this conclusion. If a signal of the approach of the train had been given, Lang might have protected himself by jumping from the velocipede. The evidence for the plaintiff was that no warning of the approach of the train was given, and that Lang was struck when he was proceeding along in ignorance of the approach of a train behind him. In addition to this, there was evidence tending to show that the train might have been checked, if not stopped, in time to avert the catastrophe. While the witnesses who testified for the plaintiff did not know this engine or these cars, they had run other trains and were competent to testify as to the distance within which such a train could be stopped. The evidence shows that Lang was seen by the engineer when he came around the curve into the straight track, and, if he had whistled then, Lang could, at least, have jumped from the velocipede. It is true the testimony for the company is to the effect that the engineer did blow the whistle then, but the great weight of the evidence is to the effect that no whistle was blown until after Lang had been struck and the train was some feet west of the point at which the accident occurred.

The court gave the jury these instructions:

"(1) The court instructs the jury that if they believe from the evidence that the decedent, Anthony Lang, was on the 19th of December, 1905, while riding on a velocipede on the track of defendant's railroad, killed by being run into by an engine of defendant as described in the proof, and if they further believe that at the time of such injury and killing he was upon the track in the usual course of his employment by said railroad company, and that the agents and servants of said railroad company in control and management of the train after discovering the peril of decedent Lang failed to use the utmost diligence to prevent his injury, then they will find for the plaintiff.

"(2) If the jury believe from the evidence that at the time of the killing of decedent, Lang, the train was being run by the agents and servants of the defendant railroad in an ordinarily careful and prudent manner, and that after the discovery of the decedent, Lang's, peril they promptly used all the means in their power to prevent the injury, then they will find for the defendant.

standing the defendant may have been guilty of negligence, still the law is for the defendant, and the jury will so find.

"(4) If the jury finds for the plaintiff, they should assess the damages at such sum as will fairly compensate the estate of the decedent for the destruction of his power to earn money, not to exceed, however, the sum of $2,000, the amount claimed in the petition.

"(5) The jury are instructed that the rate of speed of defendant's train prior to the time its engineer saw the peril of Lang was not negligence. Defendant had the right to run its train at the speed that it was running."

The court did not err in telling the jury that the defendant was only responsible in case there was negligence after the peril of Lang was discovered. The point at which he was struck was one where the presence of persons on the track was not to be expected. It was outside of the town limits, and there was no reason why the presence of persons at this point should be anticipated. It is true Lang was not a trespasser. He had a right to be on the road with a velocipede; but it was incumbent on him to keep a lookout for trains and get out of their way. Those in charge of the train had no reason to anticipate his presence on the trestle, and were not required to keep a lookout for him. But they were required to exercise proper care to avoid injuring him after his peril was discovered. There was no evidence that his peril was discovered by any one but the engineer, and in instructions 1 and 2, in lieu of the words "agents and servants," the court should have used the word "engineer." The engineer was not required to use the utmost diligence to prevent his injury after he discovered his peril. He was required to exercise such care as might be reasonably expected of a person of ordinary prudence under the circumstances. The court, therefore, erred in telling the jury that the company was liable if the engineer failed to use the utmost diligence to prevent the injury.

In the second instruction, in lieu of the words "promptly used all the means in their power," the court should have inserted these words, "used ordinary care in the exercise of all reasonable means at his command consistent with the safety of the train." Hovius v. Cincinnati, etc., Ry. Co., 107 S. W. 214, 32 Ky. Law Rep. 786; Flint v. Illinois Central R. R. Co., 88 S. W. 1055, 28 Ky. Law Rep. 1.

The defendant introduced proof on the trial to the effect that Lang, before leaving the last station, received warning from the station master that this passenger train was coming, and it is insisted for the railroad company that, if he received this warning, he was guilty of negligence in going upon

the track with his velocipede in front of the passenger train. But, although he was guilty of negligence in thus going upon the track, the defendant would still be liable if, after it discovered his peril, it did not exercise ordinary care to avoid injuring him; and, as the plaintiff cannot recover in any view of the case except for negligence after his peril was discovered, no instruction should be given based upon this evidence. There was proof for the defendant to the effect that Lang, after he knew of the approach of the train and after he had jumped from his tricycle and was safe from the train, lost his life in an effort to get his tricycle off the track. When he did this, it was too late for those in charge of the train to do anything more than they had already done to avoid injuring him; and, if with knowledge of the approaching train and when he was safe from it he thus put himself in danger in an effort to save the tricycle when it did not endanger the train, he cannot recover. The proof for the plaintiff does not sustain this view of the transaction, but it is supported by the proof for the defendant. A person may lawfully imperil his life to protect the lives of the persons on a train. In lieu of the third instruction, the court will tell the jury that if they believe from the evidence that Lang jumped from the tricycle, and when he was at a point of safety, with knowledge of the approach of the train, undertook to take the tricycle off the track and thus lost his life, he took the risk and the defendant is not liable, unless he had reason to believe the tricycle endangered the train, and he used such care as may be reasonably expected of a person of ordinary prudence situated as he was. Nelling v. Chicago, etc., Ry. Co., 98 Iowa, 554, 67 N. W. 404; Wright v. Southern Railway Co. (C. C.) 80 Fed. 260; Illinois Central v. Jackson, 65 S. W. 342, 23 Ky. Law Rep. 1405; Louisville & Nashville R. R. Co. v. Molloy's Adm'x, 122 Ky. 219, 91 S. W. 685, 28 Ky. Law Rep. 1113; Barber v. Cincinnati, etc., R. R. Co., 21 S. W. 340, 14 Ky. Law Rep. 869; Becker v. Louisville & Nashville R. R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. Law Rep. 1893, 53 L. R. A. 267, 96 Am. St. Rep. 459.

We see no other prejudicial error in the record. The petition is defective, in that it does not aver that those in charge of the train saw the peril of the deceased, and, after perceiving it, were negligent as therein alleged. The allegation that they saw or could have seen by ordinary care is only an allegation that they could have seen. On the return of the case the plaintiff may amend her petition.

Judgment reversed and cause remanded, with directions for a new trial consistent with this opinion.

NUNN, C. J., dissenting.

BURCH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—QUESTIONS OF FACT.

The Court of Appeals is without warrant to reverse a conviction which there is any evidence to support.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 1037*)—RESERVATION OF ERROR—ARGUMENTS OF COUNSEL.

Alleged improper argument by the commonwealth's attorney pointed out for the first time on a motion for new trial will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Nelson Burch was convicted of killing another, and he appeals. Affirmed.

J. Franklin Wallace and Chas. M. McDonald, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. This appeal is from a judgment sentencing appellant to 21 years in the penitentiary for the killing of one George Cary. The killing occurred in a grocery store, the back part of which was used as a saloon, in the city of Lexington. Burch was employed to work in the grocery and saloon. Cary resided just across the street and visited the grocery often after supper. It seems that appellant and Cary had not been on very good terms for some time previous to the killing. Appellee's proof shows: That, immediately preceding the killing, Cary was sitting on the end of a counter near the partition between the grocery and saloon; that appellant entered, and said to him: "George, get off that counter. You know the white folks don't want you to sit there." Cary answered him, "I will when Mr. Hogan tells me to." Hogan was a clerk in the grocery and saloon. This language passed between them two or three times, and then appellant said to him, "If you don't get off, I will make you fall off," or "I will knock you off," one or the other, and grabbed Cary and jerked him off of the counter, appellant drawing his pistol, which Cary made several efforts to grab, but failed, and appellant fired and shot Cary through the heart, killing him almost instantly. Appellant denies that Cary was on the counter, or that he used the language attributed to him. His version was: That he entered the room, and Cary said to him, "Yes, you are a G—— d——n s—— b——, and I am going to fix you while you are here," and struck him in the breast a terrible blow and knocked him against a post that stood near the stove; that Cary then put his hand toward his hip pocket, and appellant shot

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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him. Appellant introduced testimony showing that his reputation for peace and order was good.

If the testimony introduced by commonwealth was true, appellant was guilty of a greater offense than that for which he was convicted, and we are not authorized to reverse a judgment in a criminal case when there is any evidence upon which to base the verdict of the jury and the court's judgment.

The instructions given were as favorable to appellant as could have been asked, and his counsel makes no complaint concerning them. The reversal is asked on account of alleged improper argument by the commonwealth's attorney to the jury. This alleged error appears only by an affidavit of counsel filed with the motion for a new trial. It does not appear in the bill of exceptions. An alleged error pointed out for the first time in a motion for a new trial will not be considered on an appeal, but errors committed during the trial that are excepted to and made a part of the bill of exceptions can be considered. Redmon v. Commonwealth, 82 Ky. 333; Vinegar v. Commonwealth, 104 Ky. 106, 46 S. W. 510, 20 Ky. Law Rep. 412; and Webb v. Commonwealth, 111 Ky. 643, 64 S. W. 451, 23 Ky. Law Rep. 883. If we were authorized to consider the matter referred to, we would deem it sufficient to say that the language attributed to the commonwealth's attorney was trivial and immaterial.

We have examined the record with care, and find no error prejudicial to the substantial rights of appellant was committed upon the trial below.

Therefore the judgment is affirmed.

GARRARD et al. v. KENDALL.

(Court of Appeals of Kentucky. Oct. 27, 1909.)

1. WILLS (§ 775*)—LAPSED LEGACIES.
Under Ky. St. 1909, § 4843 (Russell's St. § 3966), making property embraced in any devise which fails pass as intestate property, unless a contrary intention appears in the will, property devised to one who died before testator passed at testator's death as if no will had been made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997–2000; Dec. Dig. § 775.*]

2. WILLS (§ 601*)—PROPERTY DEVISED—ESTATE PASSING—FEE.
A devise of property to testator's wife to use or dispose of as she saw fit being conflicting with a subsequent provision that if any property was left at her death it should be equally divided among his children, the first devisee took the fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340–1350; Dec. Dig. § 601.*]

3. WILLS (§ 548*)—ESTATE PASSING—REMAINDERS—"DIE WITHOUT CHILDREN."
A will gave testatrix's husband her property for life, and provided that upon his death it should be divided equally among her daughters, and if any of them should die without children their part should be divided equally among the remaining children. *Held*, that the provision as to "death without children" referred to death before the life tenant died, when the property was to be divided, so that the share of a child dying without issue after the life tenant's death would not go to the other devisees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. § 548.*

For other definitions, see Words and Phrases, vol. 3, p. 2057.]

4. WILLS (§ 629*)—VESTING OF ESTATE—POLICY OF LAW.
The law favors the vesting of estates.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

5. WILLS (§ 597*)—ABSOLUTE OWNERSHIP—POLICY OF LAW.
In case of doubt, the law favors the fee rather than a lesser estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1319; Dec. Dig. § 597.*]

6. WILLS (§ 697*)—CONSTRUCTION—ACTIONS—RIGHT OF ACTION.
Equity will not entertain a suit to construe a will brought by persons who have no interest therein and can obtain nothing by its interpretation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1671; Dec. Dig. § 697.*]

Appeal from Circuit Court, Fleming County.

"Not to be officially reported."

Action by Nellie McDowell Garrard and others against M. H. Kendall. From a judgment for defendant upon demurrer to the petition, plaintiffs appeal. Affirmed.

Jno. B. McCartney, for appellants. Worthington & Cochran, A. S. Kendall, and B. S. Grannis, for appellee.

NUNN, C. J. This litigation involves the construction of the wills of Lucien McDowell and Evaline B. McDowell. The will of Lucien McDowell, the husband, was executed November 11, 1891, and, omitting the formal parts, is as follows:

"(1) I wish all my just debts and funeral expenses paid.

"(2) All my remaining property of whatever kind, real, personal and mixed, I hereby bequeath to my beloved wife, Evaline B. McDowell to be used as she sees fit for her comfort and support.

"(3) If any portion of said property should be left at her death it is to be equally divided among my children, or if they should be dead their children, if they have any. My granddaughter, Winn McDowell, is to stand in her father's place and to be an equal heir with my own children. But if she should die without heirs then her share to be equally divided among the other heirs.

"(4) All the property that shall revert to my daughters or to my granddaughter under this will is to be for their sole use and benefit free from any indebtedness incurred by their husbands if they have any."

The will of his wife, Evaline B. McDowell,

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was made February 11, 1892, and that part to be considered is as follows:

"(1) I wish my husband, Lucien McDowell, to have the control and management of my estate during his life if he should survive me, he is to enjoy the interest and emoluments arising therefrom equally with my children, but the principal is to remain intact for the benefit of my children.

"(2) After the death of myself and husband I wish all the property to be equally divided among my daughters, Caroline Howe, Magdalene, Nelly and Mabel McDowell, and my grandchild Winn McDowell, daughter of my deceased son, Wm. W. McDowell.

"(3) This property is to be held for the sole use and benefit of my children and grandchild, Winn McDowell, free from any indebtedness incurred by their husbands, if they have any.

"(4) If any of them die without children then their portion is to be equally divided among the remaining children or if they should be dead and leave children then the children are to succeed to their mother's share as if she had been alive.

"(5) I wish the furniture and household effects to be left in charge and for the use of my single daughters as long as any of them remain unmarried. In case they should marry then this property is like all my other property to be equally divided among my heirs."

The wife, Evaline B. McDowell, died in the year 1896, and the husband, Lucien McDowell, died in the year 1902. Administration with the wills annexed was granted to Nellie McDowell Garrard of both estates, and in the settlement thereof she paid, in about the year 1895, something over $2,200 from the estate of Evaline B. McDowell to Nellie McDowell, who was the wife of M. H. Kendall, and about the same time she paid to Nellie McDowell Kendall from her father's estate (Lucien McDowell's) about the sum of $500. Nellie McDowell, wife of appellee, died in the year 1905, leaving no children or child surviving her. Appellants brought this action against appellee alleging that the sums before stated were received by appellee's wife from the two estates mentioned, and that they were used in improving his property by the erection of houses, etc., and that as their sister Nellie died without children the same, under the wills aforesaid, went to her brothers and sisters, appellants, and prayed for a judgment against appellee for these amounts, and asked that the same be enforced as a lien against his property. A demurrer was sustained to the petition, and appellants appealed.

The devisee in the will of Lucien McDowell was his wife, Evaline B. McDowell, who died in the year 1896, six years before the death of her husband, and therefore the devise lapsed, and under section 4843, Ky. St. (Russell's St. § 3966), his estate passed at his death as if no will had been made. Newton v. Southern Baptist Theological Seminary, 115 Ky. 414, 74 S. W. 180, 24 Ky. Law Rep. 2310; Schroeder v. Bohlsen, 119 Ky. 305, 83 S. W. 627, 84 S. W. 535, 26 Ky. Law Rep. 1237. The will of Lucien McDowell gave his wife the fee to the property devised to be "used as she saw fit." The language following this expression is repugnant to the first clause, to wit: "If any portion of said property should be left at her death it is to be equally divided among my children." The wife was given power to use the property or to sell and dispose of it as she saw proper. In the case of Clay v. Chenault, 108 Ky. 77, 55 S. W. 729, 21 Ky. Law Rep. 1485, the court said: "It seems to us that the decided weight of authority—if, indeed, there be any to the contrary—is to the effect that a will or deed giving to the vendee or devisee full power to sell and convey passes the absolute fee, and that any provision or devise (over) is absolutely void for the reason that it is inconsistent with or repugnant to the fee." Therefore that portion of the estate that appellee's wife received from her father, she took without any limitations upon it.

By the will of Evaline McDowell, she gave her husband a life estate in her property, and he was to enjoy the interest and emoluments arising therefrom equally with her children; but she provided that the principal was to remain intact for the benefit of her children. By the second clause she provided that after the death of her husband her property should be equally divided among her daughters, naming them, and her granddaughter, Winn McDowell. By the fourth clause she provided that if any of them should die without children their portion was to be divided equally among the remaining children, etc. Appellants contend that as Mabel, the wife of appellee, died without children, the portion received by her should be divided equally among the other devisees named in the will. Counsel on both sides of the case agree that by the will of Evaline McDowell her children and grandchild were devised a defeasible fee in her property, subject to be defeated by dying without children. Appellee's counsel contend, however, that the will means that death must take place before their father died, at which time the division was to be made; and appellants' counsel contend that the will referred to death at any time without issue. We are of the opinion that appellee's construction is correct. This court has construed many wills with provisions similar to the will of Evaline McDowell. In the case of Harvey v. Bell, 118 Ky. 513, 81 S. W. 671, 26 Ky. Law Rep. 671, this court classified wills, placing them under four heads. The second and third are, respectively, as follows: "(2) On the same principle, where property is devised to one or more infants, and is to be held by their trustees or guardians until

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they are 21 years old, and then to be turned over to them, or divided between them, with the proviso that, if they die without issue, it shall go to the survivors, or, if all die, to a third person, it has been held that the limitation as to dying without issue is to be limited to a death in infancy before the period of distribution. [Citing a number of authorities.] (3) And where, by the will, the devise is to a class, and the period of division is postponed, even where the devisees are not infants, it has been held that the limitation as to dying without issue must be confined to a death without issue before the period of division fixed by the will. [Citing authorities.]"

We are of the opinion that the case at bar falls within the terms of the third class. The devise was to a class, and the period of division among that class was postponed by the will of Mrs. McDowell until the death of Lucien McDowell. "Death without children" must refer to death without children before the period fixed for the division. The will in the case at bar refers to a definite period, to wit, the death of Lucien McDowell, to which the words, "if any of them die without children," may be referred. It is the period at which the testatrix directed the estate should be divided. In our opinion the testatrix meant the dying without issue before the period for the distribution of the estate, and the period at which it should vest absolutely in the persons to whom it was given, if they were then living. If any of them had died before the period of distribution, without children, then their interest in the estate would have reverted to the surviving devisees. This court has uniformly held in the construction of deeds and wills that "death without issue" referred to some period fixed in the deed or will, rather than to death at any time without issue. The law favors the vesting of estates, and, in case of doubt, it favors the fee rather than the lesser estate. It results therefore that Mabel McDowell, wife of appellee, received the property from both her mother and father as the absolute owner and without any limitations thereon, and the lower court was correct in sustaining the demurrer to appellants' petition.

Appellants' counsel contend that the lower court erred in sustaining the demurrer to the petition even though they failed to show any right to recover any part of the money for which they sued. The ground upon which they base this contention is that they prayed in their petition that the two wills be construed, and that they were entitled to have that done, even though the proper construction thereof would show that they were entitled to no relief. We are of the opinion that this is error. A court of equity will not entertain a suit brought simply for the purpose of interpreting the provisions of a will at the instance of persons who have no interest and who can obtain no relief by an interpretation thereof.

For these reasons, the judgment of the lower court is affirmed.

MASON, HANGER & COLEMAN CO. v. KENNISON.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—SAFE PLACE IN WHICH TO WORK.

A contractor widening a railroad tunnel was bound to furnish a laborer removing rock blown down by blasting a reasonably safe place in which to work, and to exercise a constant watchfulness that it was kept reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177–209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 205*)—INJURIES TO SERVANT—SAFE PLACE IN WHICH TO WORK—DUTY OF SERVANT TO INSPECT.

A laborer removing from a railroad tunnel rock blown down by blasting was not required to exercise any diligence whatever to discover hidden dangers, but had a right to rely upon ordinary diligence by his employer to protect him, irrespective of whether or not his foreman ordered him into the tunnel to clear the débris to let a train pass.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547–549; Dec. Dig. § 205.*]

3. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Instructions making the employé's right to recover turn upon whether the employer had been guilty of gross negligence in failing to provide a safe place in which to work, and imposing upon the employé the exercise of ordinary diligence to discover hidden danger, and failing to point out that it was the employer's duty to furnish a reasonably safe place in which to work, were more favorable to the employer than it was entitled to.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

Appeal from Circuit Court, Pulaski County.

"To be officially reported."

Action by Sherwood Kennison against the Mason, Hanger & Coleman Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sharp, Bethurum & Cooper, Faulkner & Sharp, and Lindsay & Edelen, for appellant. Edwin P. Morrow, W. B. Morrow, and R. B. Waddle, for appellee.

BARKER, J. The appellee (plaintiff), Sherwood Kennison, at the time the cause of action stated in his petition arose, was in the employ of the appellant, Mason, Hanger & Coleman Company, a West Virginia corporation. The appellant was engaged in the execution of a contract to widen tunnel No. 10 on the line of the Cincinnati, New Orleans & Texas Pacific Railway Company in Pulaski county, Ky. Appellee was an ordinary laborer working in a gang of men under the direction and control of J. W. Davis,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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appellant's foreman. At the time of the accident complained of, the appellant was engaged in blasting the roof and sides of tunnel No. 10 for the purpose of enabling it to be double-tracked. Upon Kennison and others with him was imposed the duty of coming into the tunnel after the blast and removing the rock and other débris which had been blown down. The accident was caused as follows: Kennison and his co-laborers had been sent out of the tunnel to escape the effect of the impending blast. A railroad train belonging to the Cincinnati, New Orleans & Texas Pacific Railway Company had come up and was waiting to be allowed to go through the tunnel. Of course, it had to be stopped until after the blast had been made and the track cleared of the rock, and débris thrown upon it by the explosion. After the blast was made, the men seem to have been given a signal to return to work, and Kennison and his companions proceeded to clear the track so that the train could pass through the tunnel. Almost immediately after Kennison commenced the work of moving the débris, a large stone at the point where the top and the side of the tunnel meet, which had been loosened by the explosion, fell and rolled against appellee, mashing his foot most severely and inflicting other injuries upon him. To recover damages for this injury, appellee instituted this action, alleging in his petition that it was caused by the negligence of the appellant's employés superior in authority to him who failed and refused to make the necessary inspection after the blast and remove the loosened stone so as to make the place where appellee was required to work reasonably safe. The appellant in its answer denied all the material allegations of the petition, and pleaded contributory negligence in a second paragraph. This affirmative matter of the answer having been denied by reply, the issues were completed. A trial before a jury resulted in a verdict in favor of appellee (plaintiff) for the sum of $900. To reverse the judgment based upon this verdict the corporation prosecutes this appeal.

The court instructed the jury in part as follows:

"No. 1. The court instructs the jury that, when the plaintiff entered into the employment of the defendant, he assumed all the ordinary risks and hazards incident to such employment, unless he was acting under the specific orders of and in the presence of the foreman, Davis, his superior servant, and, if you shall believe from the evidence that the plaintiff was at the time he was injured acting under the direct order of his superior, Davis, then and in that event he only assumed such risks and hazards as were plain and obvious to him under the circumstances surrounding this case. The court further instructs the jury that it was the duty of the plaintiff to exercise ordinary care for his own safety while engaged in the employment of the defendant company. It was the duty of the defendant company before ordering the plaintiff into the tunnel after the blast was fired in same to have made such tests of the safety of the tunnel as an ordinarily prudent person would have made under the same or similar circumstances.

"No. 2. You will find for the defendant in this case, unless you shall believe from the evidence that by the gross negligence of the defendant's agents and servants, superior in authority to the plaintiff, the plaintiff was injured by a rock or rocks falling on him at the time and place complained of by him, and further believe from the evidence that the dangerous condition of the tunnel at the place where the plaintiff was injured was known to the defendant, its agents, and servants superior in authority to the plaintiff, or by the exercise of ordinary care could have been known by them, and, if you believe the latter state of case, you will find for the plaintiff.

"No. 3. Although you may believe from the evidence that the plaintiff, Kennison, knew of the dangerous condition of the roof of the tunnel or the sides thereof, yet if you further believe from the evidence that he was at the time and place acting under the direct orders of and in the presence of the foreman, Davis, his superior servant, the Mason, Hanger & Coleman Company could not be excused from liability on this ground unless the danger was so obvious that a person of ordinary prudence, acting under like or similar circumstances, would not have obeyed said order, and continued to work thereunder.

"No. 4. If you shall believe from the evidence that after the blast was discharged in the tunnel and prior to the time the plaintiff was injured the foreman, Davis, made or had made such a test as was necessary or reasonably necessary to ascertain the safety of the tunnel, and if after he made such test he in good faith believed same was reasonably safe, and directed the plaintiff after such examination to perform the labors at the place where plaintiff was injured, then in that event the plaintiff cannot recover, and, if you so believe, your finding will be for the defendant."

The appellant insists that the foregoing instructions are erroneous, and also that it was entitled to a peremptory instruction that the jury should find in its favor. To this we cannot agree. It was the duty of the appellant to furnish the appellee (its servant) a reasonably safe place in which to work, and it was its duty to exercise a constant watchfulness that the place in which he was required to work was kept reasonably safe while he was engaged in its service. The servant was not required to exercise any diligence whatever to discover hidden dangers, but had a right to rely upon the master discharging its duty to him. Of course, the servant could not brave obvious

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dangers, and then hold the master responsible. But the law imposes upon the servant situated as was appellee no duty of inspection. In the case of Pfisterer v. Peter & Co., 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605, this court, in an opinion by Judge Burnam, examined the question as to whether or not the servant was bound to exercise ordinary care to avoid being injured when situated with reference to his work as was Kennison, and the doctrine was there announced, after a review of the authorities, that the servant has the right to rely on the master's exercising ordinary diligence to keep the place where he labors in a reasonably safe condition, and that the servant only assumes such risks as he actually knows, or which are so obvious that a reasonably cautious man would not take the risk thereof. In Kentucky Freestone Co. v. McGee, 118 Ky. 306, 80 S. W. 1113, 25 Ky. Law Rep. 2211, the doctrine announced in Pfisterer v. Peter & Co., supra, was approved, and from the principle thus established this court has never departed. It is immaterial whether or not the foreman, Davis, gave Kennison and his co-laborers orders to rush in and clear up the débris in order to let the waiting train pass. To remove the rock and thus clear the track was the business of the servant, and it was his duty to do this without any special orders from the foreman, and in doing so he was not required to look for danger, but could rely upon the exercise of ordinary diligence by the master to protect him as he worked.

The court in the instructions made the employé's right to recover to turn upon the question whether or not the employer had been guilty of gross negligence; whereas, as above stated, to enable the servant to recover, it was only necessary that the employer should be guilty of ordinary negligence in failing to afford him a safe place in which to work. The court also imposed upon the employé the exercise of ordinary diligence to discover hidden danger; whereas, he had the right to rely alone upon the diligence of the master, as before stated. The court failed to point out to the jury that it was the duty of the appellant to furnish the employé with a reasonably safe place in which to work. We are of opinion that the instructions given were far more favorable to the appellant company than it was entitled to, and that upon the facts of the case the jury were fully warranted in rendering the verdict which they did.

We are not unmindful of the argument made for appellant, that the principle that the master is required to furnish the servant a reasonably safe place in which to work is not applicable to all situations where the relation of master and servant exists. When the danger is created by the work which the servant is engaged in doing, then it cannot be said that the master has imposed upon him the duty of a constant supervision in order to protect the servant from danger. But we do not have this case before us. Here the servant had no part in the creation of the danger to which he was exposed and from which he suffered. The work he was doing was not the work which created the danger, but was separate and distinct from it. He was entitled, as an ordinary laborer engaged in removing the rock blown down by the blasting, to have the supervision of the master to protect him from the danger created by the blasting of the roof. We think the situation here was one which clearly comes within the rule above enunciated, which requires the master to furnish the servant with a reasonably safe place in which to work.

Judgment affirmed.

MASON, HANGER & COLEMAN CO. v. HENRY.

(Court of Appeals of Kentucky. Oct. 15, 1909.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE.

A master is bound to exercise ordinary diligence to furnish a servant with a reasonably safe place in which to work, and for failure to do so is liable to the servant for any damage caused thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 205*)—INJURY TO SERVANT—SAFE PLACE—DUTY OF SERVANT.

A servant is not bound to search for hidden danger in the place provided for him to work, being entitled to rely on the belief that the master will discharge the legal duty to furnish him with a reasonably safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547–549; Dec. Dig. § 205.*]

3. MASTER AND SERVANT (§ 219*)—INJURY TO SERVANT—ASSUMED RISK.

A servant may not work in a place where the danger is so obvious that an ordinarily prudent man would not take the risk, and, if he does so, he assumes the risk of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*]

4. MASTER AND SERVANT (§ 149*)—INJURIES TO SERVANT—DIRECTION TO FOREMAN.

Where it was plaintiff's duty without special direction, in the ordinary course of his employment, to go in front of a shovel to level a cut and lay temporary track for the advancement of the shovel, and in doing so he was injured by the fall of rock unsecurely placed above the cut, it was immaterial to his right to recover whether he had been specially ordered by his foreman to assume the position he was in when he was injured or not.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 149.*]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Alfred Henry against the Mason, Hanger & Coleman Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Sharp, Bethurum & Cooper, Lindsay & Edelen, and Faulkner & Sharp, for appellant. Wesley & Brown, for appellee.

BARKER, J. The appellant, Mason, Hanger & Coleman Company, is a West Virginia corporation, and was at the time of the happening of the accident which constitutes the basis of this litigation engaged in making a railroad cut through an embankment some 10 or 12 feet high in Pulaski county, Ky. The appellant was an ordinary laborer engaged in laying track in front of a steam shovel which was being operated to make the cut. It is not necessary to describe this work with minute particularity. The steam shovel was operated on an improvised railroad track. It would cut some five or six feet of the excavation at one reach. The shovel would then take out the dirt and throw it down the embankment. When this was done, it was the duty of the appellee with other laborers to smooth or level the cut in front of the shovel, and construct thereon a temporary track so that the shovel could be moved up against the embankment to make another cut. This operation was performed over and over during the progress of the work. In making a cut a large rock was encountered, which was too heavy to be lifted by the shovel and thrown over the embankment, and thus moved out of the way. Instead, it was pushed up on the hill above the cut, and left in that position. When the earth was removed, the appelee and his colaborers came around from behind the shovel in front to level the earth and improvise a track as usual. The rock was above them, as said before, presumably upon a somewhat steep slant. At any rate, while the appellee and his colaborers were engaged in their usual work, the stone slipped over the edge of the cut and fell down in it, and either struck or rolled against the appellee, knocking him down and against other rocks or hard substance, whereby he was seriously injured. To recover damages for this injury, appellee instituted this action in the Pulaski circuit court, alleging in his petition that his injuries were caused by the negligence of appellant company and its agents and employés superior in authority to him. The appellant (defendant) answered, denying the material allegations of the petition and pleading contributory negligence in the second paragraph. The issues were then made up by reply, denying the affirmative matter of the answer. A trial before a jury resulted in a verdict in favor of plaintiff for the sum of $400, and from the judgment based thereon this appeal is prosecuted.

The appellant criticises the instructions of the court as given, and complains of its failure to grant it a peremptory instruction at the close of the evidence. The case of Mason, Hanger & Coleman Company v. Sherwood Kennison (this day decided) 121 S. W. 999, involved principles in all respects similar to the one at bar, and the instructions given were practically the same. We refer to the opinion in that case as authority for holding that the court did not err in overruling the motion for a peremptory instruction, and for saying that the instructions given in this case were far more favorable to appellant than it was entitled to. We there pointed out that it was the master's duty to exercise ordinary diligence to furnish the servant with a reasonably safe place in which to work, and that, if it failed so to do, it was liable to the servant for any damage caused thereby. We also pointed out that there was no duty upon the servant to look or search for hidden danger; that he had a right to rely upon his belief that the master would discharge the duty which the law imposes upon him, and therefore did not have to exercise ordinary diligence for his own protection. Of course, the servant may not work in a place where the danger is so obvious that an ordinarily prudent man would not take the risk, and, if he does, he assumes the risk of injury.

Upon the whole case, we are satisfied that the appellant received a fair trial at the hands of both the court and the jury, and that no substantial right to which it was entitled was violated. It follows from what we have said that it was immaterial whether a foreman specially ordered plaintiff to go in front of the shovel to do the work of leveling the cut and laying the track. This was his ordinary employment, and it was his duty to do it without special direction, and, when he did so, he was entitled to the protection of the principle of law that the master must furnish him a reasonably safe place in which to work.

Judgment affirmed.

SMITH v. SMITH.

SAME v. SMITH et al.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. TRUSTS (§ 63*)—EXPRESS TRUSTS—ABOLITION OF RESULTING TRUSTS.

Though under Ky. St. § 2353 (Russell's St. § 2050), resulting trusts are abolished, the grantee in a conveyance is nevertheless liable to those contributing the purchase money, as for money had and received; the status of the parties being that of trustee and cestui que trust under an express trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 90; Dec. Dig. § 63.*]

2. EQUITY (§ 423*)—DECREE—RELIEF GRANTED.

On issue joined in equity the court may grant the parties any relief the record shows them entitled to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 986; Dec. Dig. § 423.*]

3. TRUSTS (§ 25*)—CREATION.

At common law a use or trust was not required to be declared in any particular way.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 34; Dec. Dig. § 25.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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4. TRUSTS (§§ 17, 18*)—VALIDITY OF ORAL TRUSTS AND REQUIREMENTS OF STATUTE OF FRAUDS.

A parol agreement of the grantee in a conveyance of land to hold it for the use and in trust for the one furnishing the consideration is valid and not within the statute of frauds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 19; Dec. Dig. §§ 17, 18.*]

5. TRUSTS (§ 72*)—"RESULTING TRUST."

A "resulting trust" is one arising on the naked fact that one furnishes the consideration, while the title is taken to another, a stranger, without an agreement as to the use or trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 102; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 7, pp. 6188–6192.]

6. LIMITATION OF ACTIONS (§ 102*)—EFFECT OF TRUST—RESULTING TRUST.

Under Ky. St. § 2543 (Russell's St. § 209), providing that the provisions of the chapter (Limitations of Actions) shall not apply in the case of a continuing and subsisting trust, the statute does not apply in behalf of the trustee under an express enforceable parol trust respecting land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 500; Dec. Dig. § 102.*]

Appeal from Circuit Court, Jefferson County; Chancery Branch, First Division.

"Not to be officially reported."

Actions by Emma Smith against Kate Josephine Smith and by Mary Smith and others against the same defendant. From the judgments, defendant appeals. Judgment in first action reversed, and cause remanded; and judgment in second action affirmed.

Ernest McPherson and Geo. A. Brent, for appellant. Thum & Roy, for appellees.

O'REAR, J. These two cases were prepared and heard together in the lower court, and are similarly treated here. They involve a common question.

The petitions allege: That Emma, Orville, Clara, and Frank Smith, children of Lucius Smith, now deceased, had been engaged in the market business at Fifth and Green streets' market in Louisville, when the father was alive; that the earnings of the business were used in part in the support of their father's family, the four named then residing with the family; that their net earnings they invested in a house and lot on Alford street in Louisville, the title to which they caused to be taken to their father to be held by him in trust for those whose means purchased it; that subsequently they caused the title to be changed, which was done by the execution of a deed to the appellant, Kate Josephine Smith, who took the title to be held in trust by her for the benefit of the four; that with their consent the property was sold, and with the proceeds, and about $1,600 additional contributed by the four, another house was bought, which was on Madison street in Louisville; that Kate Josephine Smith, in violation of her trust, had sold the latter property, and converted the proceeds to her own use. A judgment was prayed against her by the plaintiff Emma for one-fourth of the proceeds, and by Mary, the widow and administratrix of Orville, for one-fourth. The answer was: That Kate Josephine had also contributed to the sum which was paid for the houses; that they all belonged to her father in fee simple, until he by his deed gave them to her. She claimed the proceeds in her own right, denied the existence of the trust, and disclosed that the last house had sold for $3,200, which she then had on deposit in bank.

The facts developed that Lucius Smith had for many years conducted a market business on Second street in Louisville. He had a large family, and it may be added to their credit that they were all industrious and willing to work and help. The children as they became old enough went into the market to help the father in his business. They acquired experience and skill in the business. The father, perhaps because of certain drug habits, or whether so or not, was rather unsuccessful. He did not get ahead. Then he allowed the older children to start a market business on their own account at Fifth and Green. This business was successful, and grew in volume and profitableness. The Second street business failed to pay, or alone to support the family. The Fifth and Green market had to supplement it, until finally the Second street market was abandoned, and the old man quit. Of the older children who helped to conduct the Fifth and Green business, the four mentioned, Clara for a part of the time worked at the English kitchen, taking her wages to herself, paying board to the family, however. From the earnings of the business the Alford street house was bought, and its proceeds and $1,600 more furnished by the Fifth and Green street market business paid for the Madison street house. The chancellor found, and we concur, that there was an understanding among the contributors, and between them and Lucius Smith, and subsequently between them and Kate Josephine, that the title was to be held for the use of and in trust for all who contributed. It is not deemed necessary to recount here the circumstances and other evidence upon which this conclusion is reached; but the chancellor found that Emma Josephine Smith, the wife and widow of Lucius and the mother of the others named, was also a party contributing to the fund, and a beneficiary of the agreement. Kate Josephine was likewise included by the chancellor's finding. Consequently he adjudged Kate Josephine to pay one-sixth of the $3,200, or $533.33, to each of the plaintiffs. It is from that judgment that these appeals are prosecuted.

The plaintiffs constructed the cases upon the theory that the transaction worked a resulting trust; but as, under the statute (sec-

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tion 2353, Ky. St. [section 2050, Russell's St.]), resulting trusts are abolished, the grantee in the conveyance was nevertheless liable to those who contributed the purchase money, as for money had and received. Martin v. Martin, 5 Bush, 47; Smith v. Morgan, 4 Ky. Law Rep. 829; Mannen v. Bradberry, 81 Ky. 153; Deposit Bank v. Rose, 113 Ky. 946, 69 S. W. 967, 24 Ky. Law Rep. 732; Brooks v. Brooks, 104 S. W. 392, 31 Ky. Law Rep. 969. To this claim Kate Josephine pleaded the five-year statute of limitation, as the Alford street house, and indeed both houses, had been bought more than five years before this suit was filed; but on issue joined in equity the court may grant the parties any relief the record shows them entitled to. The status of the parties was that of trustee and cestuis que trust under an express trust.

At the common law a use or trust was not required to be declared in any particular way. 1 Spence's Eq. Jur. 478, and note. As secret and parol trusts offered easy means of effectuating fraud, and promoted perjury, the English statute of frauds in 1676 enacted that all trusts of lands should be proved and manifested by writing. By the seventh section of that statute (Car. II, c. 3, § 1), it was provided that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing." Resulting trusts were excepted. As the statute did not extend expressly to the colonies then settled, it has been held as having been in force only in such as had recognized or adopted it. Hall v. Livingston, 3 Del. Ch. 366. The various states have adopted the English statute in some form. The statute of frauds and perjuries in Kentucky does not contain the seventh section of the English statute or any equivalent declaration, while we have another statute expressly prohibiting resulting trusts. Section 2353, Ky. St., supra. Whether a trust in land may be created by parol in this state has been much debated, and the cases do not seem to be reconcilable upon principle. Still it is firmly fixed as the law of this state that such trusts may be created, under certain conditions, but not under all conditions. It is not necessary to now set out the distinctions, further than to show that this case belongs to the former class. The question was rather fully considered in Sherley v. Sherley, 97 Ky. 512, 31 S. W. 275, 17 Ky. Law Rep. 450. The cases are collected there. From them it will be found that, where one furnishes the consideration, a valuable consideration, to buy land, a parol agreement of the grantee in the conveyance to hold it for the use and in trust for the one furnishing the consideration, is valid, and not within our statute. Such is this case. A "resulting trust" is one arising upon the naked fact that one furnishes the consideration, while the title is taken to another, a stranger, without an agreement as to the use or trust. It was held at the common law that a trust resulted from the facts, without agreement to that effect. As this case presents an express enforceable parol trust with respect to the land, the statutes of limitation cannot apply in behalf of the trustee. Section 2543, Ky. St. (section 209, Russell's St.).

While it is true that Emma Josephine Smith, while the wife of Lucius Smith, contributed services in the conduct of the market business at Fifth and Green streets, or, if not there, was performing services at the home of equal value to the parties, we think the chancellor erred in holding that she was a party to the trust agreement. Her services then belonged to her husband, and were doubtless rendered to him in that view; or, if rendered to her children in their separate business, was in return for the benefit she was receiving from the business, in that it contributed to the support of her home and other members of her family. The children engaged in this business were early in life allowed by their father to conduct the business in their own names, and to hold and own its proceeds.

The chancellor was justified in including appellant as one of the beneficiaries of and party to the trust agreement. She was the eldest of the children. She worked assiduously at the business, and was a valuable member. In late years, when the mother became infirm by reason of disease and old age, appellant took upon herself the cares of the household, yet going to the market and helping in the business on Saturdays and other busy times. But in adjusting the accounts between these parties the chancellor should have taken into consideration what each had withdrawn from the firm. Kate Josephine had withdrawn nothing. Each of the others had withdrawn $500 in the division of the profits at one time, and at another Emma had withdrawn $200, and Clara retained $200. That would make the whole assets to be treated in the accounting amount to $5,600, each one-fifth amounting to $1,120. Emma having withdrawn $700, she is entitled now to $420 only; Clara the same; Orville (his estate) to $620; Frank the same; and Kate Josephine (who had withdrawn nothing), $1,120. There are several vague allusions to Emma's having withdrawn other small sums. These may be deemed not unjustly, we apprehend, as about the equivalent of the time taken for her own use by Clara from the firm, and for similar time for short periods when Orville and Frank attempted independent enterprises on their own behalf. And as to Kate Josephine, the fact that she is not made to account for rents and interest will equalize her on that score.

The judgments were for $533.33 each. The judgment in favor of Emma Smith against

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appellant, Kate Josephine Smith, is reversed, and cause remanded for a judgment in conformity herewith. The judgment that should have been entered for Mary Smith, administratrix of Orville Smith, is so near the amount that should have been rendered that we will not reverse for the insignificant difference, so that judgment is affirmed.

UPTON'S COMMITTEE v. BUSH et al.

SAME v. GADDIE et al.

(Court of Appeals of Kentucky. Oct. 28, 1909.)

1. INSANE PERSONS (§ 30*)—GUARDIANSHIP—STATUTES—CONSTRUCTION.

Ky. St. § 2156 (Russell's St. § 4247), authorizing proceedings to inquire into the state of persons alleged to be of unsound mind or imbecile, or incompetent to manage their estates, and to a committee, applies to persons who are incompetent by reason of mental unsoundness or imbecility, and not to incompetency by mere physical infirmity, because of sickness, infancy, or age.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 43; Dec. Dig. § 30.*]

2. INSANE PERSONS (§ 25*)—UNSOUNDNESS OF MIND—ADJUDICATION OF INSANITY—SETTING ASIDE—JURISDICTION.

Where a court has found a person to be of unsound mind, an application to vacate such decree must be made to the same court, and is not within the jurisdiction of a court of another county.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 33; Dec. Dig. § 25.*]

3. INSANE PERSONS (§ 30*)—INQUISITION—COMMITTEE—APPOINTMENT—GROUNDS—VERDICT.

A verdict in a lunacy inquisition finding that defendant is incompetent to manage his estate, but not finding that he is a person of unsound mind, or stating in what the incompetency consists, was insufficient to warrant the appointment of a committee.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 45; Dec. Dig. § 30.*]

4. INSANE PERSONS (§ 24*)—INQUISITION—SUBSEQUENT INQUEST.

Where a person has been found incompetent, but one subsequent inquiry is permitted in which the issue to be tried is whether the original condition has ceased to exist, whether the first inquest was obtained by fraud, or whether the inquest was false when judgment was entered.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 31; Dec. Dig. § 24.*]

5. INSANE PERSONS (§ 94*)—ACTIONS—"NEXT FRIEND."

The office of next friend is to represent a person under disability in the litigation, being authorized to appear only when there is no legal and statutory representative discharging that duty.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. § 94.*

For other definitions, see Words and Phrases, vol. 5, pp. 4797, 4798; vol. 8, p. 7732.]

6. INSANE PERSONS (§ 94*)—ACTIONS—NEXT FRIEND.

Though the Attorney General or the attorney for the commonwealth might have maintained a suit to recover property belonging to an incompetent who had no committee, such suit was also maintainable by the incompetent by his next friend, where the representative of the commonwealth did not act.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. § 94.*]

7. INSANE PERSONS (§ 94*)—ACTION BY NEXT FRIEND—QUALIFICATION.

Where a next friend suing for an incompetent having no committee failed to file the affidavit of qualification, he should be allowed to supply the defect on timely objection being made, in the absence of which his failure to do so is waived.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. § 94.*]

8. INSANE PERSONS (§ 94*)—ACTIONS—NEXT FRIEND.

Where an order appointing a committee of an incompetent was invalid for want of jurisdiction, and the committee, after having sued to recover property belonging to the incompetent, offered to prosecute the suit as next friend, and it appeared that defendants had imposed on the incompetent to obtain the property sought to be recovered improperly and for an inadequate consideration, the court should not have dismissed the suit by the committee, but should have permitted him to continue it as the incompetent's next friend.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. § 94.*]

Appeal from Circuit Court, Hardin County.

"To be officially reported."

Actions by G. W. Upton's Committee against S. H. Bush and others and against W. R. Gaddie and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

James Montgomery, for appellant. L. A. Faurest and Bush & Irwin, for appellees.

O'REAR, J. G. W. Upton was found by the verdict and judgment of the Larue circuit court to be a person of unsound mind, and incompetent thereby to manage his affairs. A committee was appointed to take charge of his estate, an inheritance. In 1895 by proceedings had in the circuit court of Larue as well as the county court of Hardin (he having removed to the latter county) instituted by himself he was found by the verdict of the juries to be of a sound mind. It is not pretended that there was a substantial change in his condition at any time. He was not a lunatic. His imbecility was a weakness of understanding, by reason of which he could not properly comprehend the value of property, or make contracts with respect to it. His was the mind of a child in those respects. Some things he could do. As a school boy he could learn certain lessons. He was good at penmanship, and could memorize certain rules of grammar, and do sums in arithmetic, as a boy 10 years old could do. But it seems that his mind never matured so that he could appreciate the value of property, or how its ownership affected his welfare. He knew how to spend money, for in that, of course, he had plenty of help. But the value of it to him was

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practically unknown or unappreciated by him. He would sell anything he had for any kind of a price, and make bargains such as no mature mind would have made. Nor was he an idiot. As to business matters he was simply weak-minded. Just as very young persons are, or very old ones sometimes get to be. It is difficult to classify his mental condition. It is enough to say of it that he had not contractual capacity. Such is the man as this record shows him to be and to have been. The statute of this state (section 2156, Ky. St. [section 4247, Russell's St.]) deals with the subject of a "person found to be of unsound mind, or imbecile, or incompetent to manage his estate," and confers upon the circuit and county courts the jurisdiction to inquire into such state of the person, and, if found incompetent, to commit his estate, and, if need be, the care of his person to a committee, or, if a lunatic or dangerous, the care of his person to an asylum. This section has been construed not to apply to persons who are incompetent from mere physical infirmity to manage their estates, as because of sickness or old age, or mere infancy; but it covers only the instances where the person is incompetent by reason of mental unsoundness or imbecility. Menifee v. Ends, 97 Ky. 388, 30 S. W. 881, 17 Ky. Law Rep. 280; Taylor v. Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. Law Rep. 1572. The central thought in the statute is the abnormally deficient mind, the purpose being to protect the property of such persons from becoming the prey to the avaricious who would overreach them in contracting.

Upton had some mind. He could communicate his wants in intelligible language, and was, of course, capable of thought and purpose. He wanted to get his property into his control so that he could spend it. He got two lawyers, Haynes and Irwin, to institute the proceedings mentioned to have his committee discharged. They proceeded under section 2160, Ky. St. (section 4252, Russell's St.), which provides: "Whenever it shall appear to a county or circuit court, from an affidavit filed, that a person found of unsound mind has been restored to his proper senses, or that the inquest was false or fraudulent, the court shall forthwith direct the facts to be inquired into by a jury in open court and make all necessary orders or decrees in the premises." The court which found the person to be of unsound mind is the tribunal that should open up the judgment in the case; for the person is a ward of that court, and his estate is in its custody till the judgment is vacated. Consequently the Hardin county court had not jurisdiction to inquire into the matter. The proceedings in the Hardin county court may then be disregarded. In the Larue circuit court the following proceeding appears to have been entered: "Larue Circuit Court. May term, 1895. Commonwealth of Kentucky v. G. W. Upton, Jr. This day came parties by attorneys and announced ready for trial; thereupon came the following jury, to wit: (names the jury, T. J. Wilkins and eleven others) who were duly sworn and impaneled to try the issue, and after hearing the evidence and receiving the instructions of the court and hearing the arguments of counsel, they were permitted to return to their jury room to consider of their verdict, and after some time returned into open court the following verdict, to wit: 'We, the jury, believe from the evidence that G. W. Upton has sufficient mind to manage his estate. T. J. Wilkins.'" Upon that verdict this judgment was entered: "This cause having been submitted, and the court having ordered an inquest herein to determine the competency of the defendant to manage his estate and the jury impaneled having returned a verdict that G. W. Upton was competent to manage his estate, it is now adjudged and agreed by the parties that Jacob Hubbard, committee for G. W. Upton, settle his accounts as said committee with the Larue circuit court, and he will after said settlement turn over all notes, choses in action, and money in his hands as said committee to defendant Upton, and will surrender to the defendant the possession of said defendant's estate. It is also adjudged that the costs of this action and of the inquest to be paid by the plaintiff and taxed as costs herein, including a reasonable attorney's fee to Murray R. Hubbard, plaintiff's attorney."

Another suit involving some part of Upton's estate (which was prepared and tried with these suits) was recently before this court, where it was said (Rush, Committee, v. Handley, 97 S. W. 726, 30 Ky. Law Rep. 170): "It is further contended that at the time Nelson purchased from Upton he had been declared by a court competent to transact business for himself. The evidence upon this point is rather meager, but in substance is as follows: About the time of the death of G. W. Upton's father, the question of his sanity was tried in a court of competent jurisdiction, and the jury adjudged that he was of unsound mind, and a committee was appointed for him by the court. Soon after this some parties made an effort to have a jury declare him competent, and finally succeeded in having a jury so adjudge (one of the appellees, D. S. Handley, being a witness on these trials). It further appears that these parties who had interested themselves in Upton as above set forth at once took charge of his affairs, and within 30 days thereafter he had wasted all the estate left to him by his father, about $2,500." Messrs. Haynes and Irwin had a contract with Upton for 30 per cent. of his estate for their fee in these (and possibly in other) matters; Haynes' part being assigned subsequently to appellee Bush, an attorney at law residing in the same town with Upton, and who knew him well. On Novem-

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ber 1, 1895, Upton made a deed to appellees Bush and Irwin (the latter having been one of his attorneys in the foregoing proceedings) for all his interest in the estate of the grantor's grandfather. The consideration was $200, most of which was debt created by Upton for a stock of merchandise to wholesale houses a short while before. The evidence shows the property then conveyed was worth nearer $2,000. Irwin and Bush conveyed by general warranty two parcels of the property to appellee Gaddie.

This suit was brought in equity by Albert Rush, as committee for G. W. Upton, against Gaddie to recover the real estate last mentioned. Gaddie pleaded his purchase from Bush and Irwin, and denied that Rush was the committee of Upton. Gaddie made his answer a cross-petition against his warrantors, Bush and Irwin. They made their answer a cross-petition against the plaintiff. They put in issue appellant's claim that Upton was of unsound mind, but asserted that he was of sound mind when they bought from him. Although they had not the right to make their answer a cross-petition against the plaintiff, yet the parties joined an issue on whether Bush and Irwin had not under their deed from Upton collected considerable money due him of the personal estate derived from his ancestor. It turned out that they had collected at least $334 on that score. On the trial of these consolidated and cross-actions the circuit court dismissed appellant's petition. He prosecuted appeals. One has been disposed of as stated above. 97 S. W. 726, 30 Ky. Law Rep. 170.

In the record now before us something more appears concerning appellant's appointment as committee than was shown on the other appeal. It now appears that in July, 1896, the Hardin county court impaneled a jury to inquire into the state of mind of G. W. Upton. Their verdict was: "We, the jury, find from the evidence that Geo. W. Upton is a person who is incompetent to manage his estate; that he was born in Hardin county and resides in Hardin county, and is 23 years old; that he was not brought into this state for the purpose of becoming a charge on the commonwealth; that he owns no estate of any kind; that his father is dead, mother is living and resides in Hardin county." It is said in brief that the circuit court dismissed appellant's petition because the proceedings just mentioned had in the Hardin county court were void; that, as the verdict did not show that Upton was of unsound mind, that court had not jurisdiction to appoint a committee for him, citing Menifee v. Ends, supra; Hendricks v. Settle, 53 S. W. 1051, 107 Ky. 344, 21 Ky. Law Rep. 1058; Taylor v. Moore, supra; and Tipton v. Tipton's Committee, 30 Ky. Law Rep. 80, 97 S. W. 413. The authorities sustain appellees' contention as to the jurisdiction. Still we think the circuit court should not have dismissed the petition. It is true that Upton was not otherwise a party to this cause, so far as the record before us discloses, than by his committee, Rush. But the record is in a very imperfect condition. Much of it was left out of the transcript, and has been brought up later. Some of it is not here yet. Briefs on both sides allude to the fact that Rush offered to prosecute the suit as next friend, but was denied. It is said that he did not tender the affidavit required by section 37 of the Civil Code of Practice.

From earliest times imbeciles have been regarded as wards of the chancellor. In Nailor's Children v. Nailor, 4 Dana, 339, some of the children of George Nailor filed a bill against him and his wife, charging that he was of unsound mind because of extreme age, and was under the influence of his wife, who had seduced him late in life to marry her in order that she might get control of his property for herself and her own children, and that she was squandering his estate. They prayed a restraining order against her selling the property and for other general relief. A demurrer was sustained to the bill. This court reversing the judgment said, inter alia: "It is unquestionable that in England the chancellor exercised jurisdiction over the persons and estates of idiots and lunatics. The form of proceeding there was by petition to the chancellor, which might be filed by the Attorney General or by any creditor, friend, or relative of the individual, praying for a commission of idiocy or lunacy. * * * Though the proceedings in this case are not technically formal when tested by the English practice, yet the bill contains substantially all the allegations which would be proper in a petition, and is verified by affidavit, as required by the common law. And though there are many specific prayers which are unwarranted by the forms of practice, and cannot be granted, there is a general prayer, which will authorize the chancellor to afford that redress which is consistent with the rules of law, and the powers of the court, according to the circumstances of the case." There was then a statute in this state respecting the holding of inquests substantially like the existing statute. The arm of the chancellor has not been shortened since then. Rush's suit brought before the court a state of facts with defendants in possession of an imbecile's property upon a disclosure that should have aroused the chancellor's concern and vigilance, and enlisted his ancient equitable jurisdiction. He should not have turned the parties and property loose upon the showing before him.

Going back a step, we will remark that the late proceedings in the Larue circuit court (of May, 1896) seem to us to have been unauthorized. The statute permits, after one has been found of incompetent mind, but one subsequent inquiry: Has the original condition ceased to exist; or was

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the first inquest obtained by fraud; or was the inquest false when judgment was entered? In this case it is not pretended now, nor then so far as this record shows, that the first inquest was obtained by fraud. The unsoundness of mind found by the first jury was one that does not abate short of death. It was of the kind like a deformity. It was not lunacy. It was more like idiocy. But whether or not it was curable, or susceptible of improvement, it is not shown in the proceedings, and is not asserted that those proceedings were based upon the fact that there had been such improvement. If the practice indulged is permissible, then one jury may, without finding any change in the mind of the person after the first inquest, conclude that the first jury decided the matter wrong, and proceed to find it the other way, either on the same or different evidence. The statute does not contemplate such unseemly course. On the contrary, it inferentially forbids it. It recognizes that a verdict and judgment regularly entered fixes the status of the party, except where the proceeding was tainted by fraud or was false. In the latter event the correct practice is by direct attack, and the question would be, Was the first inquest false? In addition, it recognizes and provides for the contingency of a change in a person's mind when the change is to restore it to soundness. All the inquests after the first were irregular and unauthorized. As the first committee has been discharged, the trial court should have allowed the suit of Upton to be prosecuted by a friend; and, if the affidavit of qualification was not filed, if the objection was made in due season, it could have been supplied, or a prochein ami suffered who could have qualified. But there was not a motion before answer in this case to have Rush file the affidavit. Thereafter it is deemed waived. Staton v. Bryant, 5 Ky. Law Rep. 426; Henning v. Barringer, 10 S. W. 136, 10 Ky. Law Rep. 674. Although Rush did not denominate himself next friend, yet his attitude in the case was the equivalent of that office, and he should have been so treated. As said in Nailor v. Nailor, supra, that, though the statute imposes a duty upon certain attorneys of the commonwealth to put in motion the proceedings, this is but directory to them, and a means used by the Legislature to insure attention to the condition of that unfortunate class when they might otherwise be neglected by their relations, or friends, or have none. "But," it was said, "the statute containing no repealing clause, it is remedial and cumulative, and cannot be fairly construed (as contended by counsel for appellees) as repealing any provision of the common law which recognizes the right of the other persons, such as friends or relations or even others, filing the petition." The office of next friend in court is to represent the person under disability in that litigation. He can come in only when there is not a legal and statutory representative discharging the duty. The Attorney General or the attorney for the commonwealth might have maintained this suit as well. There being no committee and the commonwealth's representative not acting, Rush may be deemed next friend for that purpose. We are of the same opinion upon this record as was reached in Handley's Case, supra, namely: "The testimony introduced is overwhelming that he (Upton) was incompetent to transact business, and that appellees knew that fact." The circuit court should have adjudged Upton a recovery of the 73 acres of land described in the amended petition, subject to a lien in behalf of Gaddie for a sum the equivalent of the vendable value added to the land by permanent and lasting improvements put on it by him, less reasonable rents; also, the recovery of the storehouse and lot in Upton village named in the petition, and rents, less taxes and repairs, if any.

As to appellees Irwin and Bush the judgment should have been for $334 and interest from the time it was collected. Upon the return of the case, and before judgment is entered, let Rush qualify as next friend by executing the bond required by the Code; or, if the Larue circuit court has appointed another committee in lieu of Jacob Hubbard, let him be joined as a party plaintiff, if he will, otherwise as a defendant.

Reversed and remanded for proceedings consistent herewith.

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use ordinary care to furnish the servant a safe place to work, where the work of the servant renders the place at which he works dangerous as the work progresses, does not apply where a master, by its foreman, overseeing blasting in a tunnel, ordered servants into the tunnel to clear away earth dislodged by the blasting, where they could not see the condition of the walls because of darkness, telling them that the place was safe; the servants in such case having a right to rely upon the foreman's assurance.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 205.*]

2. MASTER AND SERVANT (§ 90*)—SAFETY OF SERVANT—DUTY OF MASTER.

The master must use ordinary care for the safety of his servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.*]

3. DAMAGES (§ 206*)—PHYSICAL EXAMINATION OF PERSON INJURED—DISCRETION OF COURT.

The physical examination of plaintiff should be made by an impartial physician appointed by the court, and the court properly refused to require plaintiff to submit to personal examination by physicians of defendant's own choosing.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. § 206.*]

4. RELEASE (§ 57*)—SUFFICIENCY—EVIDENCE.

Where plaintiff, a poor, ignorant negro, from Asia Minor, uneducated and unused to the English language, was injured in defendant's employ, and confined in a hospital with a fractured skull, broken leg, and crushed foot, the court will be slow to enforce against him a purported settlement, obtained while he was in the hospital, unless on the clearest proof that it was fairly obtained.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106–108; Dec. Dig. § 57.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"Not to be officially reported."

Action by Elijah Berry against the Keller & Brady Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Myers & Howard, for appellant. B. F. Graziani and G. F. Boughner, for appellee.

HOBSON, J. The Keller & Brady Company took a contract with the Louisville & Nashville Railroad Company to enlarge Grant's tunnel, which is about ten miles from Covington, and about one-half of a mile in length. They proceeded with the work, and had in their employ Elijah Berry, a negro from Asia Minor. The tunnel was cased with brick. The work consisted in taking out the brick arch, in widening and heightening the tunnel, and replacing the old arch with one of concrete. The method of doing the work was this: Certain hands went along in the tunnel and drilled holes in the roof, in which they placed dynamite sticks. These, when shot off, would shoot out the dirt and stone from the roof. When some ten or twelve feet were shot down in this way, the foreong bars, so as to get down all the loose rock that was left hanging and might fall. When this had been done the platform was pushed back, and Bailey would call in another set of hands, known as the muck gang, whose duty it was to clean up the stuff on the floor and throw it into cars, so it could be hauled out. When the shots were fired, the other men would go into the manholes along the side of the tunnel, so as to be out of the way of any flying stones from the blasts, and the muck gang would stay back there until the walls were scaled and it was safe for them to go to work below. Elijah Berry was one of the muck gang, and had been working in the gang but a short time when he was hurt, on March 2, 1907. The dynamite was fired on that occasion as usual, and after the firing of the blasts Bailey got upon the elevated platform with a light and the men whose duty it was to scale the walls. About the time that they got to work scaling the walls, Bailey learned that a train had stopped at the end of the tunnel and was waiting to pass through it. It could not come in until the track was cleared up. Before the men had finished scaling the wall, Bailey directed them to stop work, and let the platform be pushed back so that the track could be cleared up for the train to pass. One of the men said to him that he had better finish scaling the wall; that there was still loose rock there which was liable to fall. Bailey said: "Never mind that; they must let that train through." He thereupon had the platform pushed back, and called out to the muck gang, who were back at the manholes, "Come ahead; it is all right; get to work." It was dark in the tunnel, the hands in the muck gang could not see the roof of the tunnel, and so they came forward, when ordered to do so by Bailey, and went to work cleaning up the stone and other débris which had been thrown on the railroad track. While Berry was engaged in this work as one of the gang, a stone fell from the roof at that point to which Bailey's attention had been called by the man who was scaling it, and struck Berry on the back of the head, fracturing his skull, and knocking his mouth down upon other rock below, by reason of which a number of his teeth were knocked out. While he was lying in this position, other rock fell upon him from the roof, breaking his leg in two places and mashing the bones of his foot. He was rendered insensible by the injuries, and at the time of the trial, some time afterwards, had not regained the use of his foot, and his legs were both in bad condition. The doctors who were introduced in his behalf testified that his injuries were permanent; that his foot would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

never get any better, and from their testimony it would seem that his capacity to labor is in a great measure destroyed. He brought this suit to recover for his injuries, and, having recovered a judgment for $1,466, the company appeals.

The chief question made on the appeal is that the court should have instructed the jury peremptorily to find for the defendant at the conclusion of the plaintiff's testimony. This is based on the ground that the work of blasting out the tunnel was necessarily dangerous; that Berry was engaged in the work, and took the risks which were incidental to it. The rule is that, where the work of the servant renders the place at which he works dangerous as the work progresses, the principle that the master must use ordinary care to furnish the servant a safe place to work does not apply. But that is not this case. The master here was conducting his work by a foreman. After the blasts were set off, the foreman held a light while the men scaled the walls. The scaling of the walls was for the protection of the men who had to work under them, and when the foreman ordered these men to work, and told them that the place was safe, they had a right to rely upon his assurance. The case we have is that of a servant acting under the direct command of the master, and acting upon the specific assurance that the place was safe, when the servant could not see, and of necessity must rely upon the master's assurance. It is true Bailey testifies he did not order back the men before they finished scaling, and says that the wall was scaled better that it had been at any other time. He also says that there was no more occasion for hurrying at that time than usual, and that he did not say to either of the men, "Never mind scaling; don't scale any further," when told that the men had not finished; but he admits saying to the muck gang, "Boys, hurry and clean up this; it's all right; don't hold the train any longer than we possibly can." When he said to these men that the roof was all right, he should have used ordinary care to know that it was all right. That he did not use such care is manifest from the numbers of rock that fell when these men went to work, for other stone fell than those which hit Berry; and that he hurried these men under this place to get up the stones off the track, so that the train could pass, is manifest from all the proof. The master must use ordinary care for the safety of his servants. He cannot imperil their lives negligently and escape responsibility. The motion for a peremptory instruction was properly overruled, and the evidence fully sustains the verdict and judgment.

When the plaintiff was on the witness stand, the defendant proposed to have him examined then by two physicians whom it had present as witnesses. The plaintiff declined to submit to the examination unless required to do so by the court. The court offered to have him examined by an impartial physician to be named by him. The defendant thereupon withdrew its motion for an examination. There was no substantial error on the part of the court in this matter. The court has a discretion in such matters, and he did not abuse a sound discretion in refusing to require the plaintiff to submit to a personal examination by physicians of the defendant's own choosing. Such examination should always be made by some impartial physician appointed by the court. Besides, the defendant's physician had treated the man for some time after his injury, and his testimony as to the extent of his injuries is as clear as any other witness in the case.

The defendant had paid Berry while in the hospital $50 and had taken a receipt from him in full settlement. It relied on this receipt in bar of the action. He testified that he had worked for the company a month at $1.60 a day; that it owed him his wages for the time he had worked, and the remainder was money paid him for the time he had lost, and nothing was said about any settlement. He was a poor, ignorant negro, uneducated, and unused to the English language, and unable to speak it with any degree of clearness. He had a terrible wound on the top of his head, his leg was broken in two places, his foot was crushed, and a number of his teeth were knocked out. The court would be slow to enforce against such a person such a settlement, unless on the clearest proof that it was freely made and fairly obtained. The record before us fully justified the jury in disregarding it.

Judgment affirmed.

DYCUS et al. v. BROWN et al.

(Court of Appeals of Kentucky. Oct. 21, 1909.)

1. PLEADING (§ 129*)—ANSWER—ADMISSIONS—FAILURE TO DENY.

Averments of a petition are confessed by failure to deny them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–275; Dec. Dig. § 129.*]

2. BANKRUPTCY (§ 421*)—DISCHARGE—CLAIMS BARRED.

Creditors who had actual notice of the adjudication of their debtor in bankruptcy, and of the steps taken in the proceedings, were bound to present their claim, though not mentioned as creditors, and on failure so to do their claim is barred by the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772–774; Dec. Dig. § 421.*]

3. PARTNERSHIP (§ 12*) — THE RELATION — CREATION.

Defendants executed a contract with plaintiffs which stated that it was for the purpose of buying and selling tobacco on joint account during the season, and by which defendants agreed to buy tobacco to be paid for with money furnished by plaintiffs, and ship it for sale by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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and defendants were partners in the transaction.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 27; Dec. Dig. § 12.*]

4. BANKRUPTCY (§ 436*) — UNLIQUIDATED CLAIMS—EVIDENCE.

In an action against bankrupts, after their discharge, by persons engaged in a joint transaction with them for the purchase and sale of tobacco, to recover losses in the partnership transaction, in which defendants set up their discharge in bankruptcy, evidence *held* to show that plaintiff knew, when defendants filed their petition in bankruptcy, that the transaction would result in loss, leaving defendants indebted to them, though the amount was uncertain.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 436.*]

5. BANKRUPTCY (§§ 149, 320, 421*)—DISCHARGE —"UNLIQUIDATED CLAIM"—DEBTS BETWEEN PARTNERS.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), provides that if one or more, but not all of the members of a firm are adjudged bankrupt, the firm property shall not be administered in bankruptcy, unless on consent of the nonbankrupt partners, but that such partners shall settle the partnership business as soon as possible, and account for the interest of the bankrupt partners. By section 63 debts of the bankrupts may be proved and allowed against their estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, owing at the filing of the petition, whether then payable or not; (4) founded upon an open account or upon contract; (5) founded upon provable debts reduced to judgments after the petition is filed and before discharge. Section 63, subd. "b," permits unliquidated claims against the bankrupt to be liquidated as the court may direct, and may thereafter be proved. Plaintiffs were partners with defendants in buying and selling tobacco, and plaintiffs knew, when defendants filed a petition in bankruptcy, that the venture would result in loss, leaving defendants indebted to plaintiffs, though the exact amount was not then known, and could not be known until the rest of the tobacco was sold. *Held*, that plaintiffs had an "unliquidated claim" against defendants within section 63, subd. "b" which was provable when plaintiffs filed their petition, and was barred by failure to present it, and the provision of the bankrupt act, permitting nonbankrupt partners to administer the assets, did not relieve them from reporting to the court the amount received in the settlement of the partnership affairs; its purpose not being to defeat the rights of creditors of bankrupt partners.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 149, 320, 421.*

For other definitions, see Words and Phrases, vol. 8, p. 7195.]

6. BANKRUPTCY (§ 314*) — CONSTRUCTION OF ACT—PROVABLE DEBTS.

The provision of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), relating to provable debts, should be construed to make all debts fairly within its meaning provable debts, in order to effectuate the purpose of the act in relieving insolvents, and any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

due under a partnership settlement. From a judgment for plaintiffs, defendants appeal. Reversed, with directions to dismiss.

Miller & Miller and E. H. James, for appellants. J. D. Mocquot, for appellees.

CARROLL, J. In November, 1902, the appellants W. S. and J. B. Dycus, and S. H. Cassidy, now deceased, composing the firm of S. H. Cassidy & Co., entered into a contract with the appellees Brown and Bloom "for the purpose of buying and selling tobacco on joint account during the season of 1902–1903." By the terms of the contract Cassidy & Co. agreed to buy tobacco in the country, to be paid for with money furnished by Brown and Bloom, and ship the same to the Western District Warehouse Company at Paducah for sale by Brown and Bloom. Cassidy & Co. were to receive 60 cents per hundred pounds as compensation for buying and delivering the tobacco. And it further stipulated: "When all the tobacco prized and delivered under this contract shall have been sold, and all legitimate expenses of the business have been paid (said expenses to include commissions of sixty cents per hundred pounds paid S. H. Cassidy & Company, all fire and marine insurance on tobacco, interest on all money used in the business, freight, drayage and regular warehouse charges for selling said tobacco) then all profits or losses arising from this business shall be divided as follows—One-half to Brown and Bloom, and one-half to Cassidy & Company." After this contract was entered into, Cassidy & Co. bought a large quantity of tobacco with money furnished by Brown and Bloom, and shipped the tobacco to the warehouse named in the contract. In October, 1903, Cassidy & Co. composed of the members above mentioned, filed their petition in bankruptcy, and in February, 1904, settled with their creditors on the basis of 25 per cent. of their claims, which settlement was approved by the bankrupt court, and thereupon the firm was discharged and acquitted of its indebtedness. Brown and Bloom were not mentioned in the bankruptcy proceedings as creditors of Cassidy & Co., nor was any part of the tobacco in the possession of Brown and Bloom scheduled among the assets of the firm, although at that time a large quantity of the tobacco purchased by Cassidy & Co., and shipped to Brown and Bloom, was unsold, and in the custody of the latter in Paducah. Some time in 1904 or 1905 Brown and Bloom sold all of the tobacco that had been purchased by Cassidy & Co., and it was then ascertained that a loss of about $11,000 had been sustained. In 1908 Brown and Bloom brought this ac-

judgment in favor of Brown and Bloom for the amount claimed, and it is of this judgment that the appellants complain.

There does not seem to be any serious dispute concerning the fact that the sale of the tobacco resulted in a loss, or the amount of it; but appellants insist that the discharge in bankrupcy released them from all liability to Brown and Bloom growing out of the tobacco transaction, and that the judgment against Mrs. M. A. Cassidy was erroneous.

Taking up first the question as to the liability of Mrs. M. A. Cassidy, her connection with the transaction arose in this way: In December, 1907, her husband, S. H. Cassidy, conveyed to her all his real and personal estate, and in consideration thereof she agreed "to meet and comply with all his obligations so far as the property herein conveyed may enable her to do and comply with them." And it was averred in the petition of Brown and Bloom that "the value of the property so conveyed to and received by Mrs. Cassidy was more than sufficient to satisfy the claim of Brown and Bloom, and all other obligations of S. H. Cassidy, and that Mrs. Cassidy took said property in trust for the purpose of discharging the obligation due to Brown and Bloom, as well as all other indebtedness of S. H. Cassidy." These averments of the petition were confessed by the failure to deny them. We are therefore of the opinion that, unless there be some other reason for setting aside the judgment against Mrs. Cassidy, the objections to it in her behalf cannot avail her.

Cassidy & Co.—and for purposes of brevity we include Mrs. Cassidy—set up in their answer that prior to their adjudication in bankruptcy they agreed with Brown and Bloom that the latter would take all of the tobacco that had been purchased by Cassidy & Co. for the firm "for better or worse," and pay all debts and expenses growing out of the purchase and sale of the tobacco; and, in consideration of this undertaking on the part of Brown and Bloom, Cassidy & Co. surrendered all interest they had in the tobacco, and thereafter did not concern themselves about it, but treated the tobacco as the sole property of Brown and Bloom. They further averred that because of the agreement and transfer of the tobacco to Brown and Bloom, it was not mentioned in the schedule filed by them in bankruptcy proceedings. All this was denied in a reply filed by Brown and Bloom. On the issue of fact thus presented the evidence is conflicting, but in the view we have of the case it does not seem important to further consider this phase of it.

As it is conceded that Brown and Bloom had actual notice of the adjudication in bankruptcy, and all the steps taken in the bankruptcy proceedings, they occupied towards the claim of Brown and Bloom was a "provable" one under the bankrupt act, they should have presented it in the bankrupt court, and, failing to do so, are barred by the discharge in bankruptcy from recovering the amount of it in this action. If the claim against Cassidy & Co. was not a "provable" one in bankruptcy, then neither the failure to present it nor the discharge affects their right to recover. It will thus be seen that the question narrows down to the single issue of whether or not the claim of Brown and Bloom was a "provable" claim against Cassidy & Co. at the time the latter filed their petition in bankruptcy. That Cassidy & Co., on the one side, and Brown and Bloom, on the other, were partners in this tobacco venture is manifest from the contract. This being so, it is the contention of counsel for Brown and Bloom that they were not required to surrender the tobacco to the bankrupt court, or present to the court any claim on account of probable or possible loss resulting to the partnership, and it is further insisted that their claim was not a "provable debt." Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), provides in part that: "In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt." And, also: "Debts of the bankrupt may be proved and allowed against his estate, which are (1) a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account or upon a contract express or implied; (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for discharge * * * unliquidated claims against the bankrupt may pursuant to application to the court be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

In the assumption that Brown and Bloom did not have a provable debt against Cassidy & Co. in October, 1903, we cannot agree. Bloom was asked the following questions:

or not the partnership venture engaged in between you, Mr. Brown, and the defendants would result in a profit or a loss. A. I expected it to be a loss—in fact I knew it. Q. Was it known at that time whether there would be a profit or a loss? A. Not exactly; the account was not closed up yet. It was open, and the tobacco had to be sold yet." From this it appears that Brown and Bloom knew at the time Cassidy & Co. filed their petition in bankruptcy that there would be a loss, and consequently an indebtedness due by Cassidy & Co. to them, although the amount of it was not then ascertained. The mere fact that the total amount of the loss was not then ascertained, or the fact that it could not be ascertained until all of the tobacco was sold, did not, in the fair meaning of the bankrupt act, leave it all an unprovable debt. Although the precise amount of the loss was not known when the petition in bankruptcy was filed, yet it was susceptible of ascertainment, and might properly be treated as an unliquidated claim, and as such it was the duty of Brown and Bloom to make application to the bankrupt court to have it liquidated, in order that it might when liquidated be proved and allowed against the bankrupt's estate. It only required a sale of the tobacco to fix the exact amount of the loss and consequent liability of Cassidy & Co., and if application had been made to the bankrupt court, it cannot be doubted that the court would have allowed a reasonable time to ascertain the loss, and have entered such orders as would protect the rights of Brown and Bloom in the meantime. The provisions of the bankrupt act in reference to provable debts should be so construed as to permit all debts that come fairly within the meaning of the law to be treated as provable to the end that the purpose of the act in permitting insolvents to be relieved of their debts may be carried out; and, where there is doubt as to whether a debt is provable or not, or as to whether it comes within the meaning of an unliquidated demand that may be made a provable debt, the doubt should be resolved in favor of the provability of the debt, or that it is an unliquidated demand in the meaning of the act, as the case may be.

That there is some confusion and apparent conflict in the cases as to what are and are not provable debts, and as to the proper meaning of the words "unliquidated claims," must be conceded, but the weight of authority favors the view we have taken. Thus, in the case of In re Hilton (D. C.) 104 Fed. 981, the facts were that in November, 1895, Johnson made a written contract with the firm of Hilton, Hughes & Co., in which the bankrupt Hilton was a partner, whereby Johnson was employed for five years at an annual salary ent of their creditors. Johnson was paid up to that time, and discharged from further service. In 1899 Hilton became a voluntary bankrupt, and in his schedule Johnson was named as a creditor for an unliquidated demand arising from the breach of contract, but took no steps to liquidate his claim for damages. The question afterwards came before the court, in the bankruptcy proceedings, as to whether or not Johnson's claim was a provable debt. In considering the case the court said: "It only remained to liquidate the amount of the damages arising out of the breach of contract to make it provable like any other debt. Section 63b expressly provides for the proof of such claims to be liquidated 'in such manner as the court shall direct.' Having made this provision, it is impossible to suppose that it was the intent of the act to allow a creditor voluntarily to withhold such claim from liquidation, and thereby preserve it as a claim against any subsequently acquired property, and thus practically defeat the object of the bankrupt act as respects the debtor; to free him from the load of former obligations. Section 17 provides that the discharge shall release the bankrupt from all his 'provable debts.' A provable debt as here used means in my judgment any claim that the creditor may make provable through the means provided by section 63b. * * * I cannot doubt that the intent of these words 'claim provable in bankruptcy' was to include every claim that under the provisions of the bankrupt act might be made provable; and the definite provisions of section 63b for making unliquidated claims provable is, I think, precisely what is intended to be included in those words as distinguished from the previous word 'debt.' In my judgment, therefore, this claim as a claim that could be made provable in the manner provided by the act would be barred by the bankrupt's discharge." In the case of In re Stern et al., 116 Fed. 604, 54 C. C. A. 60, it appears that the Manhattan Ice Company entered into contracts with sundry customers to supply them with ice for a fixed period. Before the period expired, the ice company was adjudicated a bankrupt, and the question presented for decision was whether or not the persons with whom it had made contracts to furnish ice had "provable debts" against it for the damages growing out of its failure to fulfill its contract. The court held that they did. In the case of In re Silverman et al. (D. C.) 101 Fed. 219, the facts were that Rosenburg presented a claim against the bankrupt Silverman Bros. for unliquidated damages growing out of a breach of contract for his employment as manager of one of their departments. In considering the case the court, among other things, stated:

"The claim being unliquidated, its allowance against the estate is provided for by subsection 'b' of section 63 of the bankrupt act, which provides that 'unliquidated claims against the bankrupt may pursuant to application of the court be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.' The claimant was therefore premature in presenting his claim for allowance before the referee, without first making application to the court to direct the manner of liquidating it."

In the light of these authorities, and others that we have examined, we are of the opinion that Brown and Bloom had, within the meaning of the bankrupt act, an unliquidated claim against Cassidy & Co. that was a provable debt, and should have been presented in the bankruptcy proceedings; and, failing to do so, their right of recovery is barred by the discharge. In our opinion section 63b relating to unliquidated claims was intended to, and does, embrace a claim such as Brown and Bloom had at the time the petition in bankruptcy was filed. Their claim arose out of a contract. It was capable of definite ascertainment; and, although unliquidated in the sense that the exact amount they were entitled to recover was not ascertained, it was nevertheless a provable claim. Provable claims are not confined to the debts or liabilities mentioned in subsections 1, 2, 3, 4, and 5 of section 63, but include unliquidated claims arising out of contract that are capable of definite ascertainment, such as the claim we are considering. An unliquidated claim of this character may be barred by the discharge, as well as an ascertained claim due upon a note, judgment, or open account, if the creditor holding such claim fails to present it. A creditor having an unliquidated claim within the meaning of the bankrupt act can no more withhold it, and after the discharge maintain an action upon it, than he could if his claim was founded upon a judgment or a note.

In Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, in considering the proper construction of the words "unliquidated claims" in the bankrupt act, the court said: "In section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph 'b,' however, adds nothing to the class of debts that might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct. We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove." In Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, the court upon the same subject said: "As to paragraph 'b,' two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph 'a.' Certainly paragraph 'b' does not embrace debts of an unliquidated character, and which in their nature are not susceptible of being liquidated." See, also, Brown v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961; 9 Am. & Eng. Ann. Cas. 445.

Although the precise question presented in the case before us was not involved in the cases mentioned, the reasoning of the court supports the view we have taken.

Nor does the fact that the claim grew out of a partnership venture which must be settled add anything to the strength of the argument presented by Brown and Bloom that it was not necessary to assert their claim in the bankrupt court. It may be conceded that Brown and Bloom had the right to settle the partnership business, but it is also manifest that it was their duty to report the settlement made to the bankrupt court. If a profit had been realized on the tobacco, the creditors of the bankrupts were entitled to their interest in it; and if a loss resulted, the partners sustaining the loss had the right to present their claim against the bankrupt's estate. It cannot be successfully maintained that, because the bankrupt act permits those members of a partnership who are not adjudged bankrupt to administer the assets, it was intended to release so much of such assets as might belong to the bankrupt partner from the payment of his debts. It seems evident that the purpose of the act, in giving to the members of the partnership not adjudged bankrupt the right to settle up the partnership affairs, was to protect their interest, and not to defeat the rights of the creditors of the bankrupt partner. And in our opinion when some members of a partnership are adjudged bankrupt, and the other partners take charge of the partnership assets, it is their duty to report to the bankrupt court all steps taken by them in the winding up of the partnership business, and to report to the court the amount received in settlement of the partnership affairs. Brown and Bloom, however, did not pay any attention to the bankrupt proceedings, or make any reports of the partnership affairs. Their failure to do this lends support to the contention of Cassidy & Co. that they were to take the tobacco and relieve Cassidy & Co. from all liability on account thereof. But, without further extending this opinion, we may conclude by saying that, as Cassidy & Co. were discharged from their

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indebtedness to Brown and Bloom, the judgment against them was erroneous.

Wherefore the judgment is reversed, with directions to dismiss the petition.

NUNN, C. J., not sitting.

RICHIE v. OWSLEY et al.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. FORCIBLE ENTRY AND DETAINER (§ 6*)—CIVIL LIABILITY—NATURE AND FORM OF REMEDY.

It is not competent to try title in forcible entry, but in whom the legal title was vested at the time of entry is material and necessary to be ascertained, where on that alone depends the question whether plaintiff was in actual possession when defendant entered.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29–33; Dec. Dig. § 6.*]

2. FORCIBLE ENTRY AND DETAINER (§ 9*)—ACTUAL POSSESSION TO MAINTAIN ACTION.

The same kind of actual possession that will in time ripen into a good title will maintain an action of forcible entry.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 9.*]

3. FORCIBLE ENTRY AND DETAINER (§ 28*)—PLEADING AND PROOF.

It is always a relevant inquiry, on the plea of not guilty in forcible entry proceedings, whether plaintiff was in the actual possession of the premises, as well as whether defendant forcibly entered thereon.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 129–131; Dec. Dig. § 28.*]

4. ADVERSE POSSESSION (§§ 19, 100*)—ACTUAL POSSESSION—HOW ACQUIRED.

Actual possession of land in this state may be acquired, either by physical inclosure of the whole boundary or by an inclosure of a part under a claim of title to the whole, if no one else is asserting title to any part of the boundary on which claimant has so entered.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 99–105, 547–574; Dec. Dig. §§ 19, 100.*]

5. ADVERSE POSSESSION (§§ 98, 100*)—EVIDENCE OF EXTENT OF CLAIM AND POSSESSION.

If one enters land under a paper title, it may be looked to as showing the extent of his claim and possession; or, if he enters without a paper, claiming to a marked boundary, that fact may be shown as indicating the extent of his possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 542–574; Dec. Dig. §§ 98, 100.*]

6. ADVERSE POSSESSION (§ 96*)—EXTENT OF ACTUAL POSSESSION.

If an entrant goes on a boundary under a junior patent, entirely or partly within a senior grant or survey, he will be deemed in actual possession of only so much as he actually incloses, if the owner of the senior grant is then in actual possession of his boundary; or, if the owner of the senior grant be not in actual possession, but enters before the junior patentee ripens title by adverse possession, the latter will ipso facto be restricted to his actual close.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533–536; Dec. Dig. § 96.*]

7. PUBLIC LANDS (§ 151*)—PATENT AS CONFERRING LEGAL TITLE ON GRANTEE.

If there be no other or older grant from the state to lands covered by a patent under which a party claims, the patent confers on him the legal title, unless another has by actual adverse possession acquired title thereto dehors a patent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 151.*]

8. PROPERTY (§ 10*)—CONSTRUCTIVE POSSESSION.

The owner of a legal title is in constructive possession of all land within his boundary not in actual possession of somebody else.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 10.*]

9. LANDLORD AND TENANT (§ 127*)—ACTUAL POSSESSION OF LESSEE.

A written lease of patented land, title to which was created by the patent, and which had devolved on lessor either by conveyance or by operation of the statute of limitations prior to another's entry thereon, invests lessee with the actual possession at the time of such entry.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 127.*]

10. ADVERSE POSSESSION (§ 4*)—LIMITATION AGAINST COMMONWEALTH.

Since January, 1893, limitation may run against the commonwealth, as expressly provided by Ky. St. § 2523 (Russell's St. § 240); Gen. St. c. 71, art. 3, § 10.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24–42; Dec. Dig. § 4.*]

11. ADVERSE POSSESSION (§ 114*)—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show adverse possession against the commonwealth for the statutory period prior to the date of patent for land in controversy.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 114.*]

12. ADVERSE POSSESSION (§ 68*)—CLAIM OF OWNERSHIP—NECESSITY.

One on whose possession of land title by adverse possession is based, must be shown to have claimed to own the land at the time.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387–393; Dec. Dig. § 68.*]

13. ADVERSE POSSESSION (§ 44*)—NECESSITY OF CLAIM AND POSSESSION BEING CONTINUOUS.

A claim and possession, on which title by adverse possession is based, must be shown to have been continuous.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226–231; Dec. Dig. § 44.*]

14. FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE—ADMISSIBILITY.

In forcible entry, it was error to exclude evidence for plaintiffs of a survey of land covering that in dispute, made for a certain party prior to the patent to defendant's lessor, under whom defendant claimed the right to enter.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 29.*]

15. FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE—ADMISSIBILITY.

In forcible entry, it was relevant to show, in support of plaintiff's actual possession when defendant entered, that a tract covering the area in dispute was patented, and had been in the actual adverse possession of plaintiff's lessor

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try and Detainer, Dec. Dig. § 29.*]

16. Forcible Entry and Detainer (§ 6*)—Scope of Inquiry—Title and Possession.
While title cannot be tried in a forcible entry proceeding, possession can be.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29–33; Dec. Dig. § 6.*]

17. Forcible Entry and Detainer (§ 29*)—Admissibility of Evidence—Title Papers.
In forcible entry, title papers may be received to show the extent of possession, or to show that it was limited, if they do show it.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 135–138; Dec. Dig. § 29.*]

18. Public Lands (§ 151*)—Conflicting Patents—Effect of Priority.
If land in dispute in forcible entry was patented prior to a patent to defendant's lessor, the latter patent would be void, and could not be received as evidence tending to limit the possession of plaintiff's lessor.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 433; Dec. Dig. § 151.*]

Appeal from Circuit Court, Knott County.

"To be officially reported."

Forcible entry by William Owsley and others against Canada Richie. From a judgment for plaintiffs, defendant appeals. Reversed.

O. H. Pollard and W. W. Craft, for appellant. Smith & Combs, for appellees.

O'REAR, J. William Howard by his deed conveyed to J. F. Bullitt a tract of land on waters of Quicksand creek in Knott county, described as containing 1,203 acres. Bullitt conveyed to the Virginia Kentucky Coal Corporation. It executed a lease to appellee Wm. Owsley as its tenant. Only a small part of the tract was cleared of its forest or inclosed. But the written lease described the entire boundary as having been leased to Owsley. Thereafter appellant, as tenant of Hayes, went upon that boundary, but outside of the inclosure upon it, and built a hut. This forcible entry proceeding followed. It was tried on traverse in the circuit court. This appeal involves the correctness of rulings of the circuit court in that trial.

Hayes in January, 1888, obtained a patent from the commonwealth of Kentucky for 200 acres, within which his tenant settled as above stated. Whether that patent was void because the land for which it was issued had been previously entered, surveyed, or patented (section 4704, Ky. St. [Russell's St. § 2758a3]) becomes a material question in this case as affecting the fact whether Owsley was in the actual possession of the land under his lease when Richie, Hayes' tenant, entered. It is not competent to try the title in this character of proceeding, but because of the peculiar situation, the fact of where the legal title was then vested is material, fact and law, whether Owsley was in actual possession of the premises when Richie entered.

It was shown in the evidence that Wm. Howard obtained a deed for this 1,203-acre tract in February, 1888, from his sisters, Mrs. Shepherd and Mrs. Fitzpatrick, and at that time the boundary was plainly marked with aged marks upon its line and corner trees; that it was so marked as early at least as in 1871; that William Howard was born upon that tract of land, and had lived there for the whole of his life (about 50 years) up until he sold it to Bullitt; that Wm. Howard cut the timber from the part near where Richie built his cabin, and sold it since 1888. The inference is that Wm. Howard's father owned the land prior to his death (date not shown), and that Wm. Howard and his two sisters inherited it, though there are not enough facts in the evidence to make this inference necessary, or even permissible, as proof. Appellees' position in the argument is, and such seems to have been the view of the circuit court, that since the deed of February, 1888, to Wm. Howard, he then and thereafter actually residing within the boundary described in the deed, he was in actual possession of that entire boundary, whether or not he had the legal title to it; that actual possession was the only thing necessary to enable the possessor to maintain forcible entry proceedings against one who entered upon the boundary without the former's permission; that enough was shown to sustain the verdict and judgment of guilty. It has been laid down as the law, and we think that it is necessarily true, that the same kind of actual possession that will in time ripen into a good title will maintain an action of forcible entry. Henry v. Clark, 4 Bibb. 426; Brumfield v. Reynolds, 4 Bibb. 388; Howard v. Whitaker, 61 S. W. 355, 22 Ky. Law Rep. 1775; Wall v. Nelson, 3 Litt. 395; Chiles v. Stephens, 1 A. K. Marsh. 334. If the only question here was the sufficiency of such possession to maintain the writ, and had nothing appeared regarding the Hayes patent, a case would have been made out, as it was shown to the jury's satisfaction that Richie had built his cabin within the 1,203-acre tract included in Owsley's leasehold. But it is always a relevant inquiry, on the plea of not guilty, whether the plaintiff was in actual possession of the premises, as well as whether the defendant forcibly entered thereon. An actual possession of land in this state may be acquired, either by a physical inclosure of the whole boundary, or by an inclosure of a part of the boundary under a claim of title to the whole, if no one else is asserting title to any part of the boundary upon which he has so entered. If he enters under a paper title, the paper may be looked to as showing

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the extent of his claim and possession; or, if he enter without a paper, but claiming to a marked boundary, that fact may be shown as indicating the extent of his possession. But there are certain limitations upon the rule just announced. If the entrant goes upon a boundary under a junior patent, which latter is entirely or partly within a senior grant or survey, he will be deemed to be in the actual possession of only so much of the land as he actually incloses, if the owner of the senior grant is then in the actual possession of his boundary; or, if the owner of the senior grant be not in the actual possession of the boundary in his grant, but enters thereon before the patentee of the junior grant has ripened a title by adverse possession, the latter will ipso facto be restricted to his actual close. Rulings of this court to the above effect are so numerous and consistent that it is not thought necessary to cite the cases here.

Nor do we know from this record whether the Howards or any one else had a grant from the state for this 1,203 acres, or that part embracing the 200 acres covered by Hayes' patent. There was no evidence on that point. If it should be conceded that there was not such a grant, or any grant older than Hayes, then Hayes' patent would have conferred upon him the legal title to the 200 acres, unless Howard had by actual adverse possession acquired title thereto dehors a patent. Whether Howard had so acquired a title will be again adverted to. If Hayes had the legal title in January, 1888, he had thereby the constructive possession of all the land within his boundary not in the actual possession of somebody else. So when Wm. Howard took the deed from his sisters in February, 1888, he would acquire the legal title to only that which they were seized of in fee simple when they conveyed; his actual possession could not, except by inclosure or physical occupancy, oust the constructive possession of Hayes in the 200 acres, no part of which was within Howard's inclosures. The constructive possession of land follows the legal title, and remains until ousted by an actual adverse possession. If Hayes was the owner of the legal title to the 200 acres, then he had the right of possession, and if he owned the legal title, Howard was not in actual possession of this forest land by virtue solely of his sisters' deed. If that were the case, Richie's entry was not tortious. If the 1,203 acres, or that part of it including the settlement of Howard and the plot where Richie built his cabin, had been previously patented, and title thereby created had devolved upon the plaintiff's lessor, either by conveyance or operation of the statutes of limitation prior to Richie's entry, then the written lease to Owsley would have invested him with the actual possession of the land in controversy at the time of entry. Or, if the 1,203 acres had not been previously patented, but Howard and those under whom he claimed had been in the continuous actual adverse possession of that boundary for 15 years immediately prior to January 25, 1888, the land in that event would not have been vacant land, and Hayes' patent to it would have been void. Since January, 1873, limitation may run against the commonwealth. Section 10, art. 3, c. 71, Gen. St. 1888; section 2523, Ky. St. (Russell's St. § 240); Commonwealth v. Nute, 115 Ky. 239, 72 S. W. 1090, 24 Ky. Law Rep. 2138; C., St. L. & N. Ry. Co. v. Commonwealth, 115 Ky. 278, 72 S. W. 1119, 24 Ky. Law, Rep. 2124; L. & N. R. R. Co. v. Smith, 125 Ky. 336, 101 S. W. 317, 31 Ky. Law Rep. 1. It was therefore possible for the statute to have tolled the title of the state before the patent to Hayes was issued.

It is the contention of appellees that Howard and those under whom he claimed had had such possession for the statutory period of 15 years, prior to January 25, 1888. The strongest evidence in this record on that point is the testimony of Wm. Howard, from which we quote the following: "Q. How old are you? A. I was 50 years old on the 28th day of last February. Q. I want to read to you a boundary of some land deeded to you from Elizabeth Fitzpatrick. [Reads boundary.] Do you know that boundary? A. Yes, sir. Q. Is that what is known as the Bill Howard farm? A. Yes, sir. Q. You say you were born on that tract of land? A. Yes, sir, I was born on that place. Q. And you say you are 50 years old? A. Yes, sir. Q. How long did you live there? A. Until I was grown, married, and had a family. Q. Who lived there when you moved away? Q. I rented the place to other parties when I moved over to Buckhorn. Q. Is this boundary of land the same boundary that you conveyed to Bullitt, who conveyed the same to the Virginia Kentucky Coal Corporation? A. Yes, sir; it is. Q. Now do you know where that little house is over there said to have been built by the Hayeses and Richie? A. Yes, sir; I seen it one time. Q. Is that house inside of the boundary of the deed to you? A. Yes, sir; it is inside that boundary. Q. Are you acquainted with the lines of this deed all the way around the boundary described? A. Yes, sir; I am. Q. How do you distinguish the lines? A. It is marked out. Q. How long has it been marked out? A. I couldn't just state. It has been surveyed 37 years ago last October, the land where this house was built. Q. It was marked 37 years ago? A. Yes, sir. * * * Q. Now when you lived there, Mr. Howard, when you lived in the house, to what extent did you claim possession to this boundary of land? A. To the dividing ridge and to the marked lines. Q. Did that include this land where the hut is built? A. Yes, sir. Q. What did you ever do upon this boundary, if anything? A. I sold a lot of timber. Q. Was it marked out? A. Yes, sir; quite a number of poplars. * * * Q. Had you had possession and

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tenants on that land from the time you moved until you disposed of it to Bullitt for the company? A. Yes; most of the time. Q. To what extent did you claim possession during this time? A. Claimed it because I was living on it. * * * Q. You do know that the deed from Elizabeth Fitzpatrick to you, and that deed that you made to Bullitt for the Virginia Kentucky Coal Corporation cover that hut they built? A. Yes, sir. Q. And you by tenant and yourself have been in possession claiming it to the outside lines of those deeds since it was made in 1888? A. Yes, sir. * * * Q. While you lived there and owned this land did you exercise ownership over it to those marked lines that you spoke of with the intention of holding the whole of it. A. Yes, sir." This witness did not show, nor did any evidence offered tend to show, that the witness Wm. Howard had any title, or assert any claim to the land prior to 1888. While he says he "was born on the farm," and that he lived there till after he was married and had a family, yet he does not state that at that time he was claiming to own the land. Nor is it shown that the witness' claim and possession were continuous.

An effort was made by the plaintiffs to show that a survey for 200 acres, dated October 7, 1871, made for Wm. Dobson, covered the land in dispute. But the trial court excluded it, which ruling was error.

It was relevant to show that the 1,203 acres, including the Howard settlement and the area in dispute here, were patented lands; that they had been in the actual adverse possession of the plaintiff's lessor and its vendors for 15 years prior to January 25, 1888. This evidence regarding previous adverse possession was admissible in this proceeding upon the same principle that the title papers were; that is, to show the fact of actual possession in Owsley when Richie entered. While title cannot be tried in this proceeding, possession can be. Title papers may be received as evidence showing extent of possession. So may any other fact that tends to show the same thing. Upon the same principle title papers may be introduced to show that the possession was limited, if they do show it. The question for the jury will be, not who owns the land, nor the finding of any fact upon which the court could predicate a judgment of ownership. But it is who was in possession, if any one. It is not perceived why any relevant fact that tends to show possession, or to limit it, or to exclude it, may not be received, although the same evidence might be relevant also in an action of ejectment or trespass. If the land in dispute was patented prior to the issual of Hayes' patent, then the latter would be void, and could not be received as evidence in this case tending to limit the possession of appellee's lessor. The question for the jury would then be whether Owsley was in actual adverse possession of the 1,203-acre boundary, and in defining what is actual possession under the circumstances the court should tell the jury what antecedent facts would give, and what would oust the lessee's actual possession. The trial in several particulars did not conform to these principles.

Whereupon the judgment is reversed, and cause remanded for a new trial consistent herewith.

WINSTEAD et al. v. HICKS.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. SHERIFFS AND CONSTABLES (§ 137*)—LEVY ON AND SALE OF EXEMPT PROPERTY—ACTION ON BOND—PETITION—SUFFICIENCY.

In an action on an indemnity bond given to the sheriff by an execution plaintiff, allegations of the petition that the two horses levied on and sold were plaintiff's only work beasts, and that by such levy and sale he was deprived of their use, etc., that he did not have sufficient provisions, including bread stuff and animal food, to sustain his family for more than one week, nor sufficient provender to sustain his live stock for more than one week, nor any other personal property, wages, money, or growing crops out of which the said provisions or provender could be provided, were sufficient to sustain a judgment for plaintiff, as against the objections that plaintiff did not state that the horses were his only work beasts at the time of the levy, or that he had not then other personal property not disclosed sufficient to have made up the deficit in his provision.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 137.*]

2. PLEADING (§ 34*) — CONSTRUCTION — AIDER BY VERDICT OR JUDGMENT.

While, on demurrer and before judgment, pleadings are strictly construed against the pleader, after verdict or judgment they are liberally construed to sustain the judgment, and at that time mere formal defects will be held cured.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 73, 74; Dec. Dig. § 34.*]

3. EXEMPTIONS (§ 119*)—TIME FOR CLAIM.

While a judgment debtor may waive his exemption, the statute does not require him to notify the sheriff before the execution sale or before the execution of the indemnity bond that he claims the property as exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 140–145; Dec. Dig. § 119.*]

4. SHERIFFS AND CONSTABLES (§ 138*)—INDEMNITY TO SHERIFF—ACTION — NOTICE OF EXEMPTION—SUFFICIENCY OF EVIDENCE.

In an action by an execution defendant on an indemnity bond given the sheriff, evidence *held* to support a finding that plaintiff notified the sheriff that he claimed the property levied on to be exempt.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 138.*]

5. TROVER AND CONVERSION (§ 44*)—MEASURE OF DAMAGES.

The general rule is that in trover the measure of damages is the value of the property, with interest (in the discretion of the jury) from the time of its conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 260, 261; Dec. Dig. § 44.*]

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6. DETINUE (§ 19*)—MEASURE OF DAMAGES.
In detinue the measure of damages is, as a general rule, the value of the use of the property, plus its deterioration and the necessary expense of recovering it.
[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 37–40; Dec. Dig. § 19.*]

7. EXEMPTIONS (§ 137*)—INDEMNITY TO SHERIFF—EFFECT—RECOVERY OF EXEMPT PROPERTY SEIZED.
While the effect of the giving of an indemnity bond to an officer holding an execution is, if the surety is good, to restrict the right of action for damages for the conversion of the property under the execution to an action on the bond, the makers being substituted in liability for the sheriff, the execution of the bond does not prevent the debtor claiming as exempt the property levied on from maintaining an action against the sheriff or the purchaser to recover the property as in detinue.
[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 137.*]

8. SHERIFFS AND CONSTABLES (§ 139*)—LEVY ON AND SALE OF EXEMPT PROPERTY—ACTION ON INDEMNITY BOND—MEASURE OF DAMAGES.
In an action by the execution defendant on an indemnity bond given the sheriff, the measure of damages for levying on and selling exempt property is the same as in trover, viz., the value of the property, with interest (in the discretion of the jury) from the time of its conversion.
[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 297–307; Dec. Dig. § 139.*]

9. EXEMPTIONS (§ 149*)—LEVY ON AND SALE OF EXEMPT PROPERTY—ACTION TO RECOVER—MEASURE OF DAMAGES.
In an action by an execution debtor against the sheriff or the purchaser at execution sale of exempt property to recover the property, the measure of damages is the same as in detinue, viz., the value of the use of the property, plus its deterioration and the necessary expense of recovering it.
[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 179; Dec. Dig. § 149.*]

10. SET-OFF AND COUNTERCLAIM (§ 22*)—SUBJECT-MATTER—WRONGFUL LEVY AND SALE—ACTION ON INDEMNITY BOND.
In an action by an execution debtor on an indemnity bond given the sheriff for damages for the levy on and sale of exempt property, it was error to adjudge that the damages be set off by the amount of the original judgment.
[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 22.*]

Appeal from Circuit Court, Henderson County.
"To be officially reported."
Action by B. C. Hicks against A. S. Winstead and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Yeaman & Yeaman, for appellants. Robt. G. Hill and Vance & Heilbronner, for appellee.

O'REAR, J. An execution issued upon a judgment in favor of Winstead against Hicks was levied upon two horses and a buggy, the property of the latter. A bond of indemnity was required by the sheriff before selling the property, which was executed by the appellants. Thereupon the property was sold. This suit is upon that bond by the execution defendant, who claims that he was a housekeeper of this commonwealth, with a family, that those were his only work beasts, and that he had not the provision for his family and the provender for his exempt live stock allowed by law, and consequently all the property was exempt from sale under the execution. He laid his damages at $525. The case was submitted to the judge without a jury, who, upon a separate finding of the law and facts, adjudged that the live stock was specifically exempt; that the buggy was exempt under the provision of the statute allowing other personal property in lieu of exempt provision and provender not on hand, fixing the value of the exempt articles at $300, and finding the damages to be $125. The latter sum was arrived at by deducting from the value of the use of the live stock sold the reasonable cost of keeping it for the time the defendant was deprived of it by its seizure and sale under the execution.

The appellants complain of the trial court's conclusion of law and fact, as follows:

First. That the petition was not sufficient to allow a recovery for the animals. It is claimed the plaintiff did not specifically state that they were his only work beasts at the time of the levy, or that he had not then other personal property not disclosed sufficient to have made up the deficit in his provision. The allegations of the petition are that "the said two horses seized, levied on, and sold were his only work beasts, and by the said illegal levy and sale he has been deprived of the use and services of said horses from the 7th of May, 1908, the date of said seizure, whereby he has been damaged as set out," etc. As to the exempt provisions and provender, the allegation is: "That he did not have sufficient provisions, including bread stuff and animal food, to sustain his family for more than one week, nor did he have sufficient provender suitable to live stock to sustain his live stock for more than one week; nor did he have any other personal property, wages, money, or growing crops out of which the said provisions or provender could be provided." These allegations are sufficient, but, if not, after verdict or judgment in plaintiff's behalf, are sufficient to sustain the judgment. The rule is pleadings are liberally construed after verdict or judgment to sustain the judgment, whereas on demurrer and before judgment they are strictly construed against the pleader. Any formal defect in pleadings is deemed cured by the verdict or judgment. Hill v. Ragland, Sheriff, 114 Ky. 209, 70 S. W. 634, 24 Ky. Law Rep. 1053; Dunekake v. Beyer, 79 S. W. 209, 25 Ky. Law Rep. 2002; Ashland, etc., R. Co. v. Lee, 82 S. W. 368, 26 Ky. Law Rep. 700; Harmon v.

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Thompson, 84 S. W. 569, 27 Ky. Law Rep. 186.

Second. It is not now denied that Hicks was a housekeeper, entitled to the exemptions claimed; nor that the property was of less value than that found by the court. But it was made a ground for the motion for new trial in the lower court, and for a reversal here, that the evidence did not justify the finding of the court of the fact that the execution defendant notified the sheriff before the sale, or before the execution of the bond of indemnity, that he claimed the property as exempt. The statute does not impose upon a debtor that duty. True, he may expressly or by his conduct waive the exemption. But, unless he does so, it is not perceived by what authority the court could impose upon him a condition upon which his statutory exemption was made to depend different from or in addition to what the statute had imposed. The courts have taken two views of the question whether the debtor must claim his exemption to be entitled to it. The principal difference arises out of the difference in the phraseology of the statutes. In some of the states the condition is expressly or impliedly imposed in the statute creating the exemption that the debtor must claim it before it will be allowed to him. In those states it is held he must claim the exemption at or before the time of sale. Freeman on Executions, § 211. But in others the exemption is absolute, and the defendant need not expressly claim it in order to avail himself of his statutory right. Id. § 212, and cases collected. Our statute belongs to the latter class. In the early history of the statutes of exemption from execution the decisions were not in harmony on the subject, but modernly the question seems to have became settled in conformity with the foregoing statement, which seems to us to be in accord with the spirit and reason of the legislation. In this state that rule was applied in Stirman v. Smith, 10 Ky. Law Rep. 665, 10 S. W. 131.

In McGee v. Anderson, 1 B. Mon. 187, 36 Am. Dec. 570, it was held that the execution defendant would be put to his election to claim one of three or more horses (where only two were exempt), one having been levied on by the sheriff under execution. This case seems to be the same in principle in its main aspect as the case relied on by appellants, viz., Commonwealth for the benefit of Breef v. Burnett, 44 S. W. 966, 19 Ky. Law Rep. 1836. In that opinion, in discussing an instruction properly refused (but not copied in the opinion), the court observed: "Instruction No. 9 was properly refused for the reason it was the duty of the appellant on or before the day of sale to make known to the officer or plaintiff in the execution that he (appellant) did not have on hand the provisions allowed by law to himself and family, and that he claimed a sufficiency of the live stock suitable for that purpose as exempt from levy and sale. These facts being peculiarly within his own knowledge, and could not have been known to the officer or the plaintiff in the execution, it was his duty to make that fact known, if it was a fact, in time to assert any claim." The above quotation, as will be observed, was with reference to property claimed as exempt in lieu of specific exempt property not on hand. Just what instruction No. 9 was that was then rejected we do not now know. The facts shown in the opinion were that the execution defendant probably had other property out of which he might have claimed his exemption in lieu of that not on hand in specie. In such instance the execution defendant ought not to put the plaintiff and officer to the hazard of guessing at what the defendant had in his larder. Failing to apprise them, or one of them, when he had opportunity to do so, might justly be regarded as a waiver of his right to claim such property. That opinion did not overrule Stirman v. Smith, supra, and did not advert to the prevailing rule deduced from the authorities elsewhere. Harmonizing it with McGee v. Anderson and Stirman v. Smith, we must hold that it was intended to apply only to those instances where the execution defendant was put upon his election, and, failing to elect, would be deemed to have waived his right. Appellee Hicks practiced this case by the opinion in Commonwealth, etc., v. Burnett, supra. He attempted to show that he gave the sheriff notice of his claim to the exemption. He testified that he lived some distance from the county seat; that he had a young lady, who was operator of the long-distance telephone line between his point and the county seat, to call up the sheriff at the county seat, and notify him that he (Hicks) claimed the property as exempt, and advised that he protect himself by a bond of indemnity. He further testified that he did not personally use the telephone because he was slightly hard of hearing; but that he stood by and heard the operator repeat the message over the telephone to the sheriff. The sheriff testified that he remembered having been called over the long-distance telephone on the subject of that execution, and that the talking from the other end of the line was a woman's voice; that he did not remember what was said, whether a lien was claimed by some one or whether the property was claimed as exempt. He at first testified that it was the latter, but on cross-examination retracted so far as to say that he had not sufficient recollection on that point to state, but was rather of the impression that it was concerning a lien. He said he had been called but once on the subject. While not conclusive, this evidence persuades the mind that the conversation related by the plaintiff was had. The sheriff corroborates the plaintiff as to the fact of the conversation, and the time and manner of it. There was

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no testimony to the contrary. There was a mortgage lien on the property, but it was not contended that the lienholder or any one other than Hicks called the sheriff to notify him of the fact. It is a reasonable inference that the plaintiff, even if he mentioned the mortgage, also mentioned his own claim of exemption. The circuit judge believed his testimony, and we find no ground for rejecting it.

Third. The general rule is that in an action of trover the measure of damages is the value of the property, with interest (in the discretion of the jury) from the time of its conversion (Sanders v. Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167), while in actions of detinue the criterion is the value of the use of the property, plus its deterioration and necessary expense in recovering it. Exceptional circumstances under proper averments admit of a somewhat different criterion in the latter cases. Manning v. Grinstead, 90 S. W. 553, 28 Ky. Law Rep. 789; Schulte v. L. & N. R. R., 108 S. W. 941, 33 Ky. Law Rep. 31. Although this is an action on the bond of indemnity, it is properly classified as belonging to that of actions of trover at the common law. The effect of the execution of the bond is, if the surety is good, to restrict the right of action for damages for the conversion of the property under the execution to an action on the bond. The makers of the bond are substituted in liability for the sheriff. But the execution of the bond does not prevent the debtor claiming the property levied on as exempt from maintaining an action against the sheriff who has levied upon it or the purchaser to recover the property as in detinue. Bethel v. Van Meter, 9 Ky. Law Rep. 331; Hoskins v. J. M. Robinson Co., 101 Ky. 667, 42 S. W. 113, 19 Ky. Law Rep. 877. In neither instance is the character of the action, whether on the bond or against the officer or the purchaser or the plaintiff in the execution, different from the common-law actions of trover and detinue. It follows that the measure of damages allowed in those cases from ancient times and consistently is the correct measure upon the bond. Sections 492, 493, Sedgwick on Damages; Freeman v. Luckett, 2 J. J. Marsh. 390; Daniel v. Holland, 4 J. J. Marsh. 18; Justice v. Mendell, 14 B. Mon. 12. In allowing a recovery of $125 for the use of the horses, and in addition to their value, the trial court erred in this case. But the court went further, and adjudged that the damages of $125 be set off by the debt of $100, for which the plaintiff in the execution had judgment against the defendant (appellee). That, too, was error. Mulliken v. Winter, 2 Duv. 256, 87 Am. Dec. 495; Collett v. Jones, 7 B. Mon. 586. The plaintiff (appellee) should have had judgment for the value of the exempt property and interest, but no more. The result of the judgment appealed from is not substantially different from what it would have been had the court pursued the correct course in estimating the damages.

The original judgment of appellant against the appellee is not affected by the judgment appealed from.

Affirmed.

BRONSTON'S ADM'R v. LAKES.

(Court of Appeals of Kentucky. Oct. 27, 1909.)

1. BILLS AND NOTES (§ 465*) — ACTIONS — PLEADING — CONSIDERATION — NECESSITY OF ALLEGING.

Act 1812 (Laws 1811–12, p. 180, c. 375), substantially readopted in Rev. St. 1852, c. 22, § 2, Gen. St. 1873, c. 22, § 2, and in Ky. St. 1894, § 471, placing all writings executed without seal for the payment of money, etc., upon the same footing with sealed writings containing like stipulations, abolished the common-law distinction between sealed and unsealed instruments, so that every written promise imports a consideration, and hence it is not necessary to allege a consideration in an action on a promissory note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1477–1479; Dec. Dig. § 465.*]

2. BILLS AND NOTES (§ 489*)—ACTIONS—PROOF—CONSIDERATION—NECESSITY.

If, in an action a note, which imports a consideration, the pleader unnecessarily alleges a consideration, it must be proved.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1612; Dec. Dig. § 489.*]

3. BILLS AND NOTES (§ 493*)—ACTIONS—BURDEN OF PROOF—WANT OF CONSIDERATION.

Where, in an action on a note, the consideration therefor is impeached by a verified answer, the burden of proving want of consideration is on the one alleging it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1662; Dec. Dig. § 493.*]

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by Maria Lakes against T. C. Bronston's administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Sullivan and S. M. Wallace, for appellant. Smith & Smith, for appellee.

CARROLL, J. The appellee, Maria Lakes, instituted this action against the administrator of Bronston, alleging that Bronston "on the 5th day of May, 1892, executed and delivered to her his promissory note, by which he promised to pay her on the 2d day of August, 1892, the sum of $1,000, with interest at the rate of 7 per cent. per annum from date until paid, that no part of said debt or interest had been paid, and that the same was due and owing to her." She filed with and as a part of her petition the note, reading: "On the 2d day of August next I promise to pay Maria Lakes one thousand dollars with interest at the rate of seven

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per cent. per annum from this date until paid, for value received. May 5, 1892. T. C. Bronston."

The only question presented by the record is whether or not a general demurrer filed by Bronston's administrator should have been sustained. In support of the proposition that the demurrer should have been sustained, counsel for appellant insist that the petition was fatally defective because it failed to aver the consideration for the execution of the note. The argument of counsel is: "That at the common law, and in the absence of a statute to the contrary, every contract, except contracts under seal, which by law dispenses with the necessity of a consideration, and negotiable instruments which under the law merchant are presumed to have been given for a consideration, requires a consideration to support it; and as a necessary corollary thereto, it is incumbent upon the pleader, in declaring upon such a contract, to both aver and prove a consideration for it." And that unless section 471, Ky. St. (Russell's St. § 1787), changes the rule, the lower court was in error in overruling a demurrer to the petition. The statute referred to reads: "A seal or scroll shall in no case be necessary to give effect to a deed or other writing. All unsealed writings shall stand upon the same footing with sealed writings, having the same force and effect, and upon which the same actions may be founded. But this section shall not apply to, nor shall it alter, any law requiring the state or county seal, or the seal of a court, corporation, or notary, to any writing." Counsel correctly state the common-law rule; and, if it controlled the practice in cases like this, the argument that the petition in failing to aver a consideration did not state a cause of action would be well taken. At the common law there was a marked difference in the effect given to a sealed and an unsealed instrument of writing. In the case of deeds and other writings of like import the seal was as necessary as the signature to make it a valid and enforceable instrument. Indeed at common law contracts were classed as simple or sealed contacts. All contracts, whether verbal or reduced to writing, but not under seal, were simple contracts, and written contracts under seal were spoken of as sealed contracts. A contract, although in writing, unless a seal was attached, was treated as a parol contract, and it was necessary in declaring on it to set out the consideration, and also to prove it. Interesting information concerning the origin, use, and necessity for seals upon deeds and written contracts, and the difference between sealed and unsealed instruments, can be found in Blackstone's Commentaries, book 2, p. 305; Chitty's Pleadings, vol. 1, p. 299; Chitty on Contracts, vol. 1, p. 5.

In this state, prior to the act of 1812 (Laws 1811–12, p. 180, c. 875), the distinction between sealed and unsealed instruments of writing was recognized by our court, and it was held in a number of cases to be necessary, in declaring upon what might be termed a simple contract—that is, a verbal contract or a contract in writing but not sealed—to aver the consideration for its execution. Thus in Letcher v. Taylor, 2 Bibb, 585, a common-law action of debt was brought upon an agreement in writing, but without a seal. The declaration contained no averment of the consideration upon which the agreement was made. In ruling that the general demurrer interposed should have been sustained, the court said: "The objection to the declaration for want of an averment of the consideration of the agreement is fatal. In a case founded upon a deed, or a mercantile instrument, as the law in such a case implies a consideration, none is necessary to be stated in the declaration; but in all other cases the consideration, not being implied, must be averred." To the same effect is Hart v. Coram, 3 Bibb, 26; Beauchamp v. Bosworth, 3 Bibb, 116; Jackson v. Berry, 3 Bibb, 85. But in 1812 the Legislature enacted: "That all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performance of any act or acts, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations; receiving the same consideration in all courts of justice; and to all intents and purposes having the same force and effect and upon which the same species of actions may be founded, as if sealed." This act was in substance readopted in 1852 as a part of the Revised Statutes, and may be found in chapter 22, § 2, was again re-enacted in the adoption of the General Statutes of 1873, c. 22, § 2, and readopted in section 471, as a part of the Kentucky Statutes, in 1894. So that since 1812 there has been in effect no distinction between sealed and unsealed instruments of writing. A writing without a seal stands on the same footing as a writing with a seal. The purpose and effect of the act of 1812, as well as the subsequent legislation upon the same subject, was to abolish in every particular, both as to substance and procedure, the common-law distinction between sealed and unsealed instruments. Since the enactment of this legislation, every writing signed and delivered, whereby the obligor unconditionally promises to do a specified thing, imports a sufficient consideration, and it is not necessary in declaring on it to aver that it was executed for a consideration, or to prove that there was any consideration for its execution, unless the consideration is denied. But, if in declaring on a writing that imports a consideration, thereby dispensing with the averment that it was executed for a consideration, the pleader unnecessarily sets out the consideration, he must prove it. Steadman v. Guthrie, 4 Metc. 147; L. & N.

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by section 472 of the Kentucky Statutes. But when so denied, the burden of proving the want of consideration is placed on the person relying on this plea to defeat the action. Andrews v. Hayden, 88 Ky. 455, 10 Ky. Law Rep. 1049, 11 S. W. 428; Trustees v. Fleming, 10 Bush. 234; Brann v. Brann, 44 S. W. 424, 19 Ky. Law Rep. 1814; Kelsewetter v. Kress, 68 S. W. 633, 24 Ky. Law Rep. 405.

The court properly overruled the demurrer, and the judgment is affirmed.

STORY v. LITTLE et al.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. HIGHWAYS (§ 29*) — PETITION TO OPEN ROAD—SUFFICIENCY.

Ky. St. 1909, § 4288 (Russell's St. § 5420), provides that applications for opening roads shall be allowed only for the convenience of traveling to the county courthouse, to a public warehouse, an established town, etc. Section 4289 provides that applications to have a new road opened shall be to the county court signed by at least five landowners of the county, etc. *Held*, that a petition which is otherwise sufficient need not state that the proposed road was required to enable the petitioners to travel to one of the places named in section 4288.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 47–59; Dec. Dig. § 29.*]

2. HIGHWAYS (§ 29*) — ESTABLISHMENT — INSUFFICIENCY OF PETITION—DEMURRER.

Were it necessary that the petition should state that the proposed road was required to enable the petitioners to travel to one of the places named in section 4288, Ky. St. 1909 (Russell's St. § 5420), the defect in failing to so state should have been taken advantage of by demurrer.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 29.*]

3. HIGHWAYS (§ 58*)—OPENING—SUFFICIENCY OF PETITION—REVIEW.

The failure of a petition for a new road to state that it was necessary to provide access to any of the places, to reach which a public road may be established under section 4288, Ky. St. 1909 (Russell's St. § 5420), is immaterial on appeal from a judgment establishing the road, where the report of the commissioners shows its necessity in order to reach several of the places mentioned in the statute, as the necessity for the road will be determined from the entire record.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 58.*]

4. HIGHWAYS (§ 41*)—OPENING—COMMISSIONER'S REPORT—AMENDMENT—STATUTES.

While road commissioners could not amend their reports under the "General Statutes" under the Kentucky Statutes now in force, road commissioners may amend their report.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 41.*]

5. HIGHWAYS (§ 28*)—PETITION FOR ROAD—DEATH OF PETITIONER.

Where one of six landowners, who had signed a petition for opening a road, died, it was not error for the circuit court to refuse to enter an owners.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 28.*]

6. HIGHWAYS (§ 41*)—ROAD COMMISSIONER'S REPORT.

The report of road commissioners was written in the office of the attorneys of the petitioners. One of the attorneys, at the request of the commissioners, calculated and arrived at the quantity of land that would be taken from each landowner for the proposed road. It is not claimed nor shown that the calculations were in any respect incorrect. The correctness of the report was testified to by the commissioners and approved by two juries which had viewed the entire route of the new road and lands over which it ran. *Held* that, in the absence of allegations and proof of fraud or undue influence on the part of the attorney as to the preparation of the report, the fact that the commissioners received the assistance of the attorney in the preparation of their report would not invalidate it.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 41.*]

7. HIGHWAYS (§ 39*)—ROAD COMMISSIONER'S REPORT.

Road commissioners took luncheon with two of the petitioners for a new road during their work of viewing the route of the proposed road. It does not appear that they were improperly influenced by the hospitality of the petitioners, nor was it shown that they were talked to on the subject of the road. *Held*, that it was not error to refuse to quash the report because of this, in the absence of testimony tending to show any improper conduct or conversation upon the part of the petitioners.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 39.*]

8. HIGHWAYS (§ 34*)—ESTABLISHMENT—COMMISSIONERS' REPORT.

It is not ground for dismissal of a petition for a public road that neither the petition nor the commissioners' report gives the width of the proposed road. The statute prescribing the commissioner's duties does not require their report to state the width, where the report which, with the petition, follows the statute, fixes the beginning and end of the road and the course and distances thereof, and where the order establishing the road fixes the width thereof at 30 feet, and makes the line of the survey the center thereof.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 34.*]

9. HIGHWAYS (§ 107*) — ESTABLISHMENT — STATUTES.

The Legislature, after having already passed a law providing for the opening of all public roads (Ky. St. 1909, § 4289 [Russell's St. § 5421]), later enacted the free turnpike statute (Ky. St. 1909, c. 129, art. 6 [Russell's St. § 5492–5513]), which provided that all turnpikes thereafter constructed should be public roads. Section 4748b, subd. 5, provided that the fiscal court could acquire turnpike roads by gift, lease, or purchase, and provided for the construction of turnpikes when the public good demanded it, and subdivision 6 declares all turnpikes so acquired or constructed to be public roads to be maintained by the fiscal court. *Held*, that the failure of the Legislature to provide a manner for opening turnpikes as distinguished from other public roads shows conclusively that it

considered the earlier law for the opening of public roads ample for the purpose, and proceeding to open either a public road or a turnpike may be had under the earlier statute.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 107.*]

10. HIGHWAYS (§ 58*) — OPENING — PROCEEDINGS—REVIEW—COURT OF APPEALS—SCOPE.

Under the direct provisions of Ky. St. 1909, § 4308 (Russell's St. § 5435), relating to appeals in proceedings to open highways, the Court of Appeals have jurisdiction only of matters of law arising on the record.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 58.*]

11. HIGHWAYS (§ 61*) — COSTS—APPEAL—REFUSAL TO ACCEPT DAMAGES.

Where a party refused to accept damages allowed him by the report of road commissioners, and failed to recover as much either in the county or circuit court, he was not entitled to his costs.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 219; Dec. Dig. § 61.*]

Appeal from Circuit Court, Fleming County.

"To be officially reported."

Action by Jasper Story against R. B. Little and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Powers and R. J. Babbitt, for appellant. Jno. P. McCartney and B. F. Grannis, for appellees.

SETTLE, J. Appellees, following the giving of the required statutory notice, filed in the Fleming county court a petition to obtain the opening of a public road through their own lands and those of appellant and others. Commissioners appointed by the court viewed the route of the proposed new road and duly assessed the damages that would result from its establishment to the persons over whose lands it would run, and thereafter made a report to the court showing performance of the duties required of them. Later an amended report was filed by them for the purpose of supplying certain omissions in the first report. The appellant, Jasper Story, being opposed to the opening of the road, filed numerous exceptions to the report of the commissioners. The issues of fact raised by the exceptions were tried in the county court by a jury resulting in a verdict sustaining the report, and the court thereupon entered judgment overruling the exceptions, confirming the report, and establishing the road. Appellant, being dissatisfied with the judgment, prosecuted an appeal to the Fleming circuit court, and, the trial in that court having likewise resulted in a verdict in favor of appellees, appellant by the present appeal seeks a reversal of the judgment of the circuit court.

We will endeavor to pass upon such of appellant's exceptions to the report of the proceedings as we regard material. His first objection is that the petition does not state the proposed new road is necessary for the convenience of the petitioners or others traveling to one of the several places mentioned in section 4888, Ky. St. (Russell's St. § 5420). Section 4289, Ky. St., provides: "Applications to have a new road opened or a former one changed or discontinued, or to have the privilege of erecting gates across any such road, shall be by petition to the county court signed by at least five land owners of the county, which petition shall set forth, in writing, a description of the road, and what part thereof is to be altered or vacated. If for a new road, the names of the owners and tenants of lands, if known, and if not known it shall be so stated, over which the road is to pass, the points at or near which it is to commence, its general course, and the place at or near which it is to terminate, and if to erect gates the place proposed for that purpose." A reading of the petition will show that it contains the signatures of five landowners of Fleming county, and sets forth every fact required by the section, supra, to be therein stated. This we think was sufficient, but if we were of opinion that the petition should have stated that the proposed road was required to enable the petitioners to travel to one of the places named in section 4288, and that the omission to state that fact in the petition made it defective, we should hold that the defect was one that appellant should have taken advantage of by demurrer. The report of the commissioners shows that the road will be necessary to enable the petitioners and others to reach several of the places to which it is permissible under section 4288 to open a public road, and, in addition, the fact is abundantly established by the evidence appearing in the record. The question of whether the opening of a proposed road is or not necessary is to be determined by the court from the record as a whole.

Appellant complains that the county court improperly allowed the commissioners to amend their report, and, in support of this contention, his counsel cites the case of Mitchell v. Bond, 11 Bush, 614. That case was decided when the "General Statutes" were in force, the provisions of which, with respect to the road law, were in many respects unlike those of the present law on the same subject contained in the Kentucky Statutes. Ford v. Collins, 108 Ky. 553, 56 S. W. 993, 22 Ky. Law Rep. 251; L. & N. R. R. Co. v. Gerard (Ky.) 112 S. W. 915. Under the present law this court has recognized the right of road commissioners to amend their report and approved it as correct practice. Chamberlain v. Hignite, 97 S. W. 396, 30 Ky. Law Rep. 85.

We find no force in appellant's complaint that the circuit court after the death of Allen Boyse, one of the petitioners, failed to enter an order of revivor, and refused him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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(appellant) a continuance of the case for that purpose. The name of Boyse was one of six landowners appearing to the petition, and, as after his death there were still five landowners concurring in the application for the new road whose names remained to the petition, an order of revivor was unnecessary following the death of Boyse.

We do not think the county or circuit court erred in refusing to quash the commissioners' report on appellant's motion because it was written in the office of appellees' attorneys. It does not clearly appear from the evidence by whom the report was written, but does appear that one of appellees' attorneys at the request of the commissioners calculated and arrived at the quantity of land that would be taken from each landowner for the proposed road. It is not, however, claimed nor did the evidence show, that the calculations of the attorney were in any respect incorrect, and if, as there was some evidence to prove, it be conceded that the report of the commissioners was typewritten in the office and presence of the attorney and by his stenographer in the presence of the commissioners, that fact should not be held to invalidate the report, as it is not denied it was written by their direction or in conformity to their views, even though they may have received the assistance of the attorney in its preparation. Neither fraud nor undue influence on the part of the attorney with reference to the preparation of the report was alleged or proved, and its correctness was testified to by the commissioners and approved by two juries, one on the trial in the county and the other in the circuit court, who were permitted to view the entire route of the new road and the lands over which it ran before returning their verdicts.

Another of appellant's complaints is that the county and circuit courts refused to quash the report because of the fact that the commissioners took luncheon with two of the petitioners during their work of viewing the route of the proposed road. This ruling of the court was not error. It does not appear from the evidence that the commissioners were improperly influenced by the hospitality of the petitioners, nor was it shown that they were talked to by the latter on the subject of the road while partaking of their hospitality. The commissioners were some distance from their own homes, and not convenient to a hotel. Under the circumstances, and in the absence of testimony tending to show any improper conduct or conversation on the part of their hosts, we are unwilling to impugn the intelligence or condemn the work of the commissioners by assuming that they were influenced by the meal furnished them to make a report more favorable to the petitioners than was authorized by the law and facts.

Appellant further contends that the petition should have been dismissed because neither the petition nor the report of the commissioners indicates the width of the proposed road. The report of the commissioners, like the petition, follows the statute. The report states the points of beginning and ending of the road to be opened, as well as the courses and distances thereof; and also the names of the owners over whose lands it will run. It does not, it is true, give the width of the road, nor does the statute defining the duties of the commissioners seem to require that their report shall indicate the width of the road. We find, however, that the width of the road, 30 feet, is fixed by the order establishing it, which also makes the line of survey the center. This we think sufficient. In the case of Tingle v. Tingle, 12 Bush, 160, the report of the viewers was excepted to because it failed to give the metes and bounds of the road to be opened. In overruling the exception the court said: "It was also objected that the report was defective because it did not give the metes and bounds of the proposed change. The courses and distances are given, and the width of the road is fixed by the order establishing the alteration; but neither that order nor the report indicates on which side of the single line run and reported as the route the road is located; and the question arises, Is the running of a single line on the proposed route a substantial compliance with the statute which requires the report to describe the route laid out and reported by metes and bounds and by general courses and distances? * * * We are not aware of any case in which a report of viewers has been held insufficient because the road was not bounded by two parallel lines on the opposite sides of the road, including it within those external lines, but upon a careful examination of the reported cases we are satisfied that it has heretofore been deemed a sufficient meeting and bounding of a proposed road to fix with certainty and distinctness the points of beginning, of termination, and the location of the road from one to the other of those points by a survey and fixing the width of the road making the line of survey the center thereof." According to the testimony of the commissioners, the land of the appellant taken for the road is 30 feet in width, and he was allowed by the report for the quantity appropriated at the rate of $40 per acre.

Appellant insists that, though the petition in this case seeks the establishment of a public road, it is the purpose of the appellees and the county court to convert it into a turnpike, which, it is claimed, cannot legally be done without a proceeding to condemn the right of way as and for a turnpike. We regard this contention unsound. The present road law was in force when the Legislature on March 18, 1896, passed the free turnpike statute. Article 6, c. 129, Ky. St. (Russell's St. §§ 5492–5513). By a vote under the latter law Fleming county made

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all turnpikes in the county free. Therefore all new pikes constructed are to be such roads as the statute declares them to be. Subsection 5, § 4748b, provides that the fiscal court may acquire all turnpike or gravel roads by gift, lease, or purchase, and also provides for the construction of turnpikes or gravel roads when the public good demanded it. Subsection 6 declares: "All turnpikes and gravel roads thus acquired or constructed shall become public roads and shall be maintained by the fiscal court." We quite agree with counsel for appellees that the Legislature, having already enacted a statute providing the manner of opening all public roads, and later enacting that all turnpikes hereafter constructed shall be public roads and maintained by the fiscal court as such, declined to confuse the public mind and incumber the statute with any re-enactment of a provision for the manner of opening turnpikes as distinguished from other public roads, and the fact that such provision is omitted from the free turnpike statute is conclusive that the Legislature regarded the public road statute ample for the purpose. As the converting of the road in controversy into a turnpike cannot increase or lessen appellant's damages or put him to any additional cost, and will give him a far better road through his premises than a dirt road, we are unable to see any good reason for his opposition to the change.

Several of appellant's exceptions based upon alleged insufficiency of the evidence we deem it unnecessary to consider, further than to say that the two juries regarded it sufficient to sustain the report of the commissioners and upon it and their own inspection of the route of the proposed road based their verdicts. We have to do only with questions of law arising on the record, for section 4303, Ky. St. (Russell's St. § 5435), provides: "In all such cases the party aggrieved may prosecute an appeal within 60 days by executing bond as required in other cases to the circuit court of the county, and the appeal shall be tried de novo, and from the decision of the circuit court either party may prosecute an appeal in the Court of Appeals, and the latter court shall have jurisdiction only of matters of law arising on the record of such cases."

Finally, appellant complains that the circuit court gave appellees judgment against him for costs. This was not error. Appellant, having refused to accept the damages allowed him by the report of the commissioners, and having failed to recover as much either in the county or circuit court, he was not entitled to his costs and the circuit court properly so adjudged. As on the whole case the necessity for the road and its convenience to the traveling public seem to have been sufficiently established, and it is fairly apparent that the proceedings show a substantial compliance with the requirements of the statutes as to the opening of public roads, no reason is perceived for disturbing the judgment.

Wherefore it is affirmed.

DUQUESNE DISTRIBUTING CO. v. GREENBAUM et al.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. LIBEL AND SLANDER (§ 77*) — ACTIONS — PARTIES.

Slander can only be committed by an individual, and two or more persons cannot jointly utter the same words, but each speaks for himself, and is liable for his own language, and two or more persons cannot be jointly sued.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 171; Dec. Dig. § 77.*]

2. PARTNERSHIP (§ 169*) — LIABILITY FOR TORTS—SLANDER.

Though partners are not jointly liable, and cannot be sued as a firm for slanderous words spoken by one of them unless by the direction or authority or approval of the others, they are liable as a firm for slander committed by a servant whom they have directed or authorized to speak the words for them, or where, with knowledge of what their servant has done, they ratify it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 303½; Dec. Dig. § 169.*]

3. PARTNERSHIP (§ 169*)—NATURE OF PARTNERSHIP.

A partnership is, like a corporation, a legal entity, except in a more limited sense, and a firm, like a corporation, may have agents, and may be liable for their acts of commission and omission in all cases where a corporation would be liable.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 303½; Dec. Dig. § 169.*]

4. PARTNERSHIP (§ 169*) — CORPORATIONS (§ 423*)—TORTS OF AGENT—LIABILITY OF PRINCIPAL.

A partnership or corporation is not liable for slander by its servants unless the actionable words were spoken by its express consent, direction, or authority, or were ratified or approved by it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 303½; Dec. Dig. § 169;* Corporations, Cent. Dig. §§ 1692–1695; Dec. Dig. § 423.*]

5. MASTER AND SERVANT (§ 329*)—WRONGFUL ACTS OF SERVANT—LIABILITY OF MASTER.

The general rule that, when it is attempted to hold a master liable for the wrongful act of his servant, it is sufficient to describe the wrongful act, and charge that it was done by the servant while acting within the scope of his employment, is particularly true in cases involving injury to person or property by a physical act or omission of the servant that involving a wrongful act or breach of the duty of the master to the person injured, but it does not apply when it is attempted to hold a master in slander for words spoken by his servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1269; Dec. Dig. § 329.*]

6. MASTER AND SERVANT (§ 306*)—SLANDER BY SERVANT.

To charge a master with liability for the slanderous utterance of a servant, it is not sufficient to aver and prove that the servant at the time was engaged in the service of the master or was acting within the scope of his employ-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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Servant, Cent. Dig. §§ 1230–1232; Dec. Dig. § 306.*]

7. Partnership (§ 169*)—Slander by Agent—Liability of Principal.

A firm engaged in selling liquor to liquor dealers is not liable for slanderous words uttered by a traveling salesman with respect to a concern not a competitor, where the firm neither authorized the salesman to speak the words nor ratified them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 303½; Dec. Dig. § 169.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Duquesne Distributing Company against Joseph Greenbaum and another. From a judgment of dismissal on sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

A. T. Burgevin, for appellant. Chatterson & Blitz, for appellees.

CARROLL, J. In this action for slander by appellants against the appellees a demurrer was sustained to the petition as amended, and the petition dismissed; so that the only question we are called upon to consider is whether or not the petition as amended stated a cause of action.

It averred, in substance: That the Duquesne Distributing Company is a corporation engaged in the manufacture and sale of an aperient water known by the trade-name as "Red Raven," sometimes known as "Red Raven Splits," which product had been extensively advertised by the plaintiff at great expense, and had become well known throughout the United States and elsewhere, and the plaintiff had enjoyed a profitable business arising from the sale thereof throughout the state of Minnesota and elsewhere. That "Red Raven" was sold principally to persons engaged in the sale of liquor at wholesale and retail, and the good will and friendship of such persons was in consequence of great importance and value to the plaintiff in the conduct of its business; and it did enjoy the confidence and good will of its customers and made very large sales of its product to them and realized large profits from such sales. That the defendants, desiring and intending to injure the plaintiff in its business standing and favor with its patrons and customers so engaged in the liquor trade, on or about March 1, 1908, at the city of Duluth, in Minnesota, falsely and maliciously made the following statement of and concerning the business of plaintiff to ———, who was and is engaged in the business of selling liquor at said place, and was a customer of the plaintiff and a dealer in the product of plaintiff: "They [meaning the plaintiff] contributed ated $10,000 to further the prohibition movement." That said words spoken of and concerning the plaintiff were spoken and published by persons who were salesmen or traveling agents of the defendant, and they spoke and published the said words and statements while acting within the scope of their authority as such salesmen and agents. That by means of the false and malicious statements of defendants the plaintiffs lost the good will and confidence of many of their customers, who were led to believe the truth of said statements, and the business standing of plaintiffs with their customers was thereby injuriously affected, and the plaintiffs lost the custom and trade of their said customers, and the custom and trade of many other persons engaged in the sale of liquor who would otherwise have dealt in the product of plaintiffs. That by reason of the circulation of the said false and malicious statements of defendants the business of the plaintiff has fallen off and decreased so that the plaintiff has sustained loss and damage to the amount of $10,000.

In considering the case before us, two principal questions are presented: First, can a partnership be sued for slander; and, second, is a partnership liable for slanderous statements made by its agents or employés?

All the authorities are agreed that slander, which is an oral utterance of defamatory matter, must necessarily be committed by an individual. Two or more persons cannot in the very nature of things jointly utter the same words. Each must and does speak for himself, and each is liable for his own language. A dozen persons might repeat identically the same slanderous words at one and the same time or at different times, and each would be liable in an action against the individual; but two or more of them could not be jointly sued. In Webb v. Cecil & Vaughan, 9 B. Mon. 198, 48 Am. Dec. 423, Cecil and Vaughan were jointly sued for slander by Webb. A demurrer was sustained to the petition. In passing on the case the court said: "That the matters alleged would be sufficient to sustain civil actions against the defendants we apprehend there can be no doubt, but we are not satisfied they are sufficient to sustain an action against them jointly. The tort complained of is verbal slander, and nothing more, for which it seems a joint action against two cannot be maintained. For a libel signed and published by two a joint action may be supported, upon the ground that it is an entire offense, and one joint act done by them both. But such an action cannot be maintained against two for slanderous words because the words of one are not the words of the other. The act of each con-

stitutes an entire and distinct offense. And a further reason may be suggested that the same words spoken by one may occasion greater injury than spoken by another, and that each should only be responsible for the injury inflicted by his own independent act." To the same effect is Cooley on Torts, p. 124; Newell on Slander and Libel, p. 382; Townsend on Slander and Libel, § 118. But, although partners are not jointly liable and cannot be sued as a partnership for defamatory words spoken by any one of them, unless by the direction or authority or with the approval of the others, they may be held liable as a firm for slander committed by an agent or servant whom they have directed or authorized to speak the words for them, or in their behalf or interest, or in furtherance of their business. And this rule may with propriety be so extended as to make them liable, if, with knowledge of what their agent or servant has done in this particular, they approve or ratify it, although in the first instance it may not have been done with their knowledge or consent or by their authority. A partnership in so far as its liability for the slanderous utterances of an agent or servant is concerned stands on the same footing as a corporation. A partnership is a legal entity as well as a corporation, except in a more limited sense. The firm as well as the corporation may have agents, and be liable for their acts of commission and omission in all states of case that a corporation would be liable. But this liability, as we shall presently point out, is not so general where it is sought to recover for slanderous words spoken by the agent as it is in the case of an ordinary tort committed by the agent. That a corporation or partnership may be sued in libel for actionable words written and published by its agents is well settled, not only by the decisions of this court, but by the authorities generally.

In Newell on Slander and Libel, p. 373, it is said: "If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. And so, if an agent or servant of the firm defames any one by the express direction of the firm, or in accordance with the general orders given him by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it; or, if having authority to forbid it, he permitted it, the act was his." Burgess & Co. v. Patterson, 106 S. W. 837, 32 Ky. Law Rep. 624; Pennsylvania Iron Works Co. v. Voght Machine Co., 96 S. W. 551, 29 Ky. Law Rep. 861, 8 L. R. A. (N. S.) 1023; John Rivers v. Yazoo & Miss. Val. R. Co., 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931; Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255; Singer Manufacturing Co. v. Taylor, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90; Sawyer v. Norfolk Southern R. Co., 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Am. & Eng. Ann. Cas. 440; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. It is true that these authorities relate to actions for libel, but upon principle there can be no sound reason why the corporation or partnership may not also be sued for the slanderous utterances of its agents or servants. Libel is no more a tort than slander; the only difference between them being that in libel the words are written, while in slander they are spoken. If the principal may be liable for what his agent writes, we think he should likewise be liable for what he speaks. In each case the wrong is the same, and, although there is a dirth of authority on the subject of the liability of a partnership or corporation for the slanderous utterances of its agents or servants, we hold that within the limitations hereinafter set out they may be sued for slander. Without including in what we say the rules applicable when the action is for libel, and confining our opinion to actions for slander, as that is the question we are dealing with, we think that a partnership or corporation cannot be held liable for the slanderous utterances of its agents or servants unless the actionable words were spoken by its express consent, direction, or authority or are ratified or approved by it. Generally speaking, when it is attempted to hold the master or principal liable for the wrongful acts of his servant or agent, it is sufficient to describe in a general way the wrongful act, and charge that it was done by the servant while acting within the scope of his employment. This is particularly true in cases involving injury to persons or property, where some physical act is done or omitted to be done by the servant that involved a wrongful act or a breach of duty upon the part of the master to the person injured. But a different rule should be applied when it is attempted to hold the master or principal in slander for defamatory words spoken by his agent or servant. Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question

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agent or servant may meet, or know, or come in contact with while in the service of his principal or master. As to other torts or wrongful acts committed by the servant or agent, and for which the master or principal may be liable, they can as a general rule guard against by exercising care in the employment of agents and servants and in the selection and use of the appliances or things they work with. But no sort of reasonable care that the master or principal could exercise in employment or control would enable him to prevent his servant or agent from the use in his absence of language that might be actionable. A speech by the agent or servant when absent from the principal or master is absolutely within his power alone to regulate or control. He may be prudent and discreet, or reckless or careless in his conversation. He may have his tongue under perfect control, or under no control whatever, may talk freely about persons and things, or talk little. And so we think that, when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking. Tested by this rule, the petition was bad. The charge is that "the agents or servants were salesmen or traveling agents of the defendant partnership, and that they spoke and published the said words and statements while acting in the scope of their authority as such salesmen or agents." The agents who spoke the words charged were at the time acting as the agents of Greenbaum Bros., in the sense that they were then engaged in selling liquor for them, but it does not appear from the petition that it was any part of their duty under directions from Greenbaum Bros., to in any way speak of or concerning the Duquesne Distributing Company or its product, or that the agents spoke the words charged by the consent or approval or in the interest of or to promote the business of their employer. No reason is assigned why Greenbaum Bros. should desire to injure the trade or business of the distributing company. The two concerns were not competitors in any sense of the word. The goods sold by one did not interfere with the sale of goods by the other. Greenbaum Bros. were not concerned in or prejudiced in any personal or business way and proven to hold a partnership, individual, or corporation liable for defamatory words spoken by an agent or servant. Here a firm having its principal place of business in this state, with salesmen selling its goods all over the country, is sought to be made responsible in damages because one or two of its agents in a distant state uttered a slanderous speech concerning a party with whom it had no business or other relations and no reason to desire to prejudice or injure. If, under this state of facts, Greenbaum Bros. could be sued for the utterances of their agents, they could likewise be sued for any slanderous statements made by them concerning any person whom they might meet or come in contact with or see proper to discuss in the course of their travels. To lay down a rule like this would be ruinous to persons who are obliged in the conduct of their business to employ agents and servants. But when the principal or master directs or authorizes the agent or servant to speak certain words, or if with knowledge of their speaking he approves or ratifies them, he assumes a direct responsibility for the acts of his agent or servant, and subjects himself to an action to the same extent as if he had spoken them himself.

This view of the case renders it unnecessary to consider the questions raised by counsel as to whether or not the petition sufficiently sets out the special damages sustained to authorize a recovery.

Wherefore the judgment of the lower court is affirmed.

PICKRELL v. CITY OF CARLISLE.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. MUNICIPAL CORPORATIONS (§ 658*) — STREETS—OBSTRUCTIONS.

Streets, including the pavements, of a town, belong to the municipality for the use of the public traveling upon them for their whole length and width.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1430; Dec. Dig. § 658.*]

2. MUNICIPAL CORPORATIONS (§§ 696, 697*)—OBSTRUCTIONS OF STREETS — NUISANCES — ABATEMENT.

Any permanent structure built upon any part of the public streets which interferes with their use by the public may be abated by the municipality, or be abated by the courts, at the instance of the town.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1498–1501, 1502–1505; Dec. Dig. §§ 696, 697.*]

3. MUNICIPAL CORPORATIONS (§ 665*)—USE OF STREETS—RIGHTS OF ABUTTING OWNERS.

The public will not be heard in equity to complain of an abutting owner's act in obstruct-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing a street, which does not unreasonably interfere with the public's use of a street for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1441; Dec. Dig. § 665.*]

4. MUNICIPAL CORPORATIONS (§ 667*)—STREET—RIGHT TO OBSTRUCT—TITLE BY PRESCRIPTION.

A lot owner may acquire by prescription an exclusive right to occupy a public street with his building or partial obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1443; Dec. Dig. § 667.*]

5. MUNICIPAL CORPORATIONS (§ 667*)—OBSTRUCTIONS OF STREETS—NUISANCE—ABATEMENT.

Plaintiff erected in front of his house steps which extended upon the sidewalk. A former owner maintained an obstruction of the same character at the same place for more than 15 years prior to 1873. Others on the same block and in other blocks, where the sidewalks were narrower, were allowed to maintain other similar partial obstructions. *Held*, that the steps were not a purpresture and a public nuisance, which could be abated, the present owner having the right to maintain them, having an easement to continue the obstruction maintained by the former owner, or one no more an obstruction, and the fact that others maintained like obstructions was evidence that it was not unreasonable, but was a common custom.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1443; Dec. Dig. § 667.*]

6. WORDS AND PHRASES—"COMMON."

What is "common" is generally known to all.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1310–1312.]

7. MUNICIPAL CORPORATIONS (§ 666*)—ORDINANCES — PROHIBITING OBSTRUCTION OF STREETS.

A town may prohibit the erection of steps extending upon the sidewalk by a general ordinance of uniform application.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1442; Dec. Dig. § 666.*]

Appeal from Circuit Court, Nicholas County.

"To be officially reported."

Action by T. H. Pickrell against the City of Carlisle. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Swinford & Swinford and Hazelrigg & Hazelrigg, for appellant. Holmes & Ross, for appellee.

O'REAR, J. The town of Carlisle, county seat of Nicholas county, was laid out in 1816. A plot of the town was then recorded in the county clerk's office, showing location and width of streets. The town is now a city of the fifth class, with a population of less than 2,000. The part of the town occupied by business houses is Main street. The courthouse square fronts main street on the south, and extends to Chestnut street on the north. On the west is Locust street (originally named Main Cross street), and runs at right angles to Main and Chestnut. That block of Locust street opposite the courthouse square is occupied by a bank, a clothing store, a lawyer's office, and the postoffice building on the south end of the block, while the north end is occupied by dwelling houses except at the corner of Chestnut, which is occupied by the Christian church building. Locust street is 70 feet wide along this block, and is 60 feet wide throughout the remainder of its length. All of Locust street north of the post office (except the Christian church) is fronted by residence property only. Nor are there any business houses north or northeast of the block named. Appellant owned a lot immediately south of the Christian church, fronting on Locust street. He applied to the town council for, and was granted, a permit to build a dwelling house on his lot. The surface of the ground on which Carlisle is situated is hilly. Locust street and the block west of the courthouse square have a sharp slope to the south and west. All the buildings on that block except the Christian church have a greater elevation of the foundations on their south side above the surface of the street, owing to that fact. All the buildings on that block fronting Locust street are built on the line of the street, several of them being residences. The most of them have steps and porches extending a foot or so, to three or four feet, out on the pavement. The pavement along that block is 12 feet wide, and constructed of cement. Appellant's lot has a frontage on Locust street of 55 feet. When he came to build his house, he excavated for his cellar and foundation, placing his building so that it would come up to the property line on the street. After his foundation was built, and when he began to build his steps, extending them out on the pavement for 3½ feet, as was necessary to enable him to get into the house if it was built on the property line as it was begun, the town council ordered the steps removed, and, the marshal threatening to tear them down, appellant filed this suit for injunction against the town and its officers, restraining them from interfering with the plaintiff's steps. Pending the suit the building was finished at a cost of about $8,000 or $9,000. The circuit court adjudged that plaintiff was not entitled to the relief sought, dissolved the injunction, and ordered the steps removed. From that judgment this appeal is prosecuted.

In addition to the foregoing, the proof discloses the following facts: Many other buildings in the town on Main street and other streets had steps extending out on the pavements. On this lot where plaintiff erected his house there formerly stood an old stone building used as a store for many years. It had stood there longer than the memory of the oldest inhabitant. It was built on the property line also. There was a stone step 18 inches wide, 6 or 8 inches high, and 5 feet long in front of it and extending for its full length and width on the pavement. Just south of that step there was a cellar door in the

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side it was much higher above the surface of the pavement than at its north side. The door extended out onto the pavement four feet, and its width when open was eight feet. The steps now in question occupy part of the space formerly taken up by that cellar door, and partly by the old step above referred to. The old cellar door was doubtless built when the stone house was. At least it was there when witnesses 55 to 75 years old, and who had always lived in the town, first knew it.

Under these circumstances, were the plaintiff's steps a purpresture, and a public nuisance, which the town might abate or prevent, and which it ought to prohibit. It is old and familiar law that the streets, including the pavements, of a town, belong to the municipality for the use of the public traveling upon them for their whole length and width; likewise, that any permanent structure built upon any part of the public streets so as to interfere with their use by the public for travel may be per se a nuisance, and may be abated by the municipality, or be abated by the courts at the instance of the town. But it is not true that the municipality and the traveling public have the right to the exclusive use of the public streets. The owners of abutting lots have rights in the streets in addition to those enjoyed by the general public, and it may be in spite of their rights. For example, the abutting owner has a particular easement in the street immediately fronting his lot, or leading to it, of ingress and egress, to a not unreasonable extent, although the exercise of his right might interfere with the public use. If it were not so, then towns could not exist, for the title to the street would in effect, or could, absorb the value of the abutting lot as a city lot. This right of ingress and egress must be exercised in a reasonable manner, so as to interfere not excessively with the public right of travel. It will vary according to the circumstances of the particular case. The location of the lot, the purposes for which it may be used, and is used, the natural grade of the street and lot, or artificial grade of the street as made by the city, all are pertinent factors entering into the question. So will the number of the population of the town, and the extent, present and probable, of the necessity for the public's use of the street for traveling purposes. The dominant idea of the common law is "reasonableness." Neither the city nor the abutting lot owner is allowed to act the dog in the manger—at least, will not be given the aid of a court of equity in so acting. It is therefore that a lot owner is confined to a reasonable use of his right of ingress and egress, of ornamentation of his lot and the street in front of it (as by planting and maintaining shade trees, awnings, lamp posts, and the travel.

The general rule is fairly summarized in the following paragraph from Dillon on Municipal Corporations (volume 2, § 734): "The owners of lots bordering upon streets or ways have or may have in other respects a right to make a reasonable and proper use of the street or way. What may be deemed such a use depends, in absence of legislative or authorized municipal declaration, much upon the local situation and public usage—that is, the use which others similarly situated made of their land—this being evidence of reasonable use. Conformably to these principles, it was held that common and well-established usage in the city of Boston justified the owner of the land in erecting thereon warehouses on the line of the streets or ways with doors or windows opening onto the street or highway, and shutters projecting into the same when open, and with sidewalks in front, having on their surface iron gratings for admitting light to, and trapdoors for communicating with, the cellar or underground apartments of the warehouses and used for putting in or taking out goods. So, for the same reasons, it is not an unreasonable use of the street in a populous place, where land is valuable, so to erect structures as that the grates and doors, when opened, swing over the line of the street. Whatever may be the rights of the public, certain it is that these acts do constitute a trespass upon the privy owner of the soil of the street." The Supreme Court of Pennsylvania had our question before it in the Commonwealth v. First National Bank of West Newton, 207 Pa. 255, 56 Atl. 437. West Newton was a town about the size of Carlisle. The controversy was as to the right of a property holder to construct steps on the sidewalk of Main street, a street 42 feet wide, practically where other projections of like character had existed to a former building. The steps extended two feet nine inches on a sidewalk seven feet wide. The court observed: "In the absence of municipal regulation, lot owners may for purposes of necessity, ornament, or convenience partially obstruct a highway in a reasonable manner, so as not to prevent the use of the highway by the public; and the municipal authorities may by ordinance or otherwise regulate the manner of this public use and the ornamentation. What is a reasonable exercise of this discretion depends on the circumstances." The same court in Livingston v. Wolf, 136 Pa. 519, 20 Atl. 551, 20 Am. St. Rep. 936, said: "The footways, no less than the carriageways, are under municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar doors, door steps, awnings, projecting windows, cornices, and the like. This power

must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the Constitution and laws." In Georgetown v. Hambrick, 127 Ky. 43, 104 S. W. 997, 31 Ky. Law Rep. 1276, 13 L. R. A. (N. S.) 1113, this court declared that while a municipality has control of its streets and sidewalks, and may regulate the width of each, it must do so in a reasonable manner, and not arbitrarily; that the abutting lot owner has certain rights therein that must be respected, and cannot be capriciously or unreasonably curtailed. In Commonwealth v. Borough of Beaver, 171 Pa. 542, 33 Atl. 112, the Supreme Court of Pennsylvania said: "The general proposition that the public have a right to travel on foot or in vehicles over every portion of the highway is modified largely by exceptions. In Commonwealth (City of Allegheny) v. Zimmerman, 95 Pa. 292, 40 Am. Rep. 649, Mercur, J., in delivering the opinion of the court, says: 'So shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance per se.' The mere partial obstruction of a street, when in fact such obstruction does not interfere with the public use, does not create a nuisance. * * * The right to partially obstruct a street does not appear to be limited to cases of necessity. It may extend to cases of convenience or ornament, provided it does not unnecessarily interfere with public travel."

Appellee relies on certain text-writers. Elliott on Roads; Thompson on Negligence; and Wood on Nuisances. These authors lay down the principle more broadly than the adjudged cases, so far as we have noticed or they have been cited to us. When courts charged with the responsibility of declaring governing principles and applying them in actual cases between litigants have spoken, a less strict rule has been observed. The cases recognize the fact, of which we are all cognizant, that in nearly every town, and particularly the old towns of the states which were early settled, the custom was to build houses fronting on streets and abutting on the property line so as to make some part of the approach extend out on the pavement. This is perhaps more frequently so as to cellar doors and similar so-called obstructions. Most of the states hold to the doctrine that limitation does not run against the public, and that no length of time could ripen into a right what was originally a common nuisance. Notwithstanding, the weight of authority, and what seems to us to be the right of the matter, tends to support a milder doctrine than that the public authorities must at all hazards require removed, and that the lot owner must under pain of having his property demolished or materially impaired, remove, those inoffensive obstructions which for generations and in a great number of instances have been suffered to exist upon some portion of the streets. All agree that the municipality may by general ordinance, or by a consistent course, regulate such obstructions even to prohibiting them entirely. But, unless it does so, where they are suffered in a number of instances, and where they do not appear to be an unreasonable use of the street, it is deemed, not that they are there as a matter of right, but that their presence is usual and customary, and does not materially or unreasonably interfere with the public use. Dillon on Municipal Corporations (4th Ed.) § 657. Noticing some of the adjudged cases cited by appellee, and which seem to be the most persuasive authority cited to sustain the judgment in this case, we find that the expressions most strongly supporting appellee's contention are dicta, or turn upon other facts not here present. For example, People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304, was a mandamus to compel certain municipal officers to remove an obstruction consisting of a bay window. An ordinance of the city permitted lot owners to appropriate three feet of the pavement. It is not shown what the width of the street was, nor whether the encroachments were not unreasonable or usual in that city. The question turned on the power of the council to enact such general ordinance. It was held to be beyond its power. This excerpt will show the thought of the court: "If bay windows may be authorized to be extended into the street eighteen inches when near the ground, then why not cities authorize property holders owning properties on each side of the street to cover the entire street, so long as they will place their projections and obstructions high enough that the tallest man in the community, or the highest wagon or the biggest load that may be conceived of, may pass readily? It seems to us the very suggestion carries with it its own answer, and that there is no safe field of speculation other than to keep within the limits placed by the books, by saying that the streets in the entirety are public properties, exclusively for public use, and that they, or any part of them, cannot be devoted exclusively to private purposes or private use."

Yet the fact is that no city enforces the ironclad doctrine announced. Cornices, awnings, shade trees, hitch posts, cellar openings, coal holes, gratings to protect windows, door sills or single steps, shutters, show windows a few inches wide, all structures of a permanent nature, and tradesmen's exhibitions of wares in boxes, barrels, or otherwise, temporary, but so constant, as to be practically permanent matters, are universally suffered, and are not found either dangerous or annoying to pedestrians. The question always comes back to the point: Are they unreasonable, and do they make the street unsafe for the public use? In Parker v. Mayor, 39 Ga. 725, 99 Am. Dec. 486, the city charter seems to have required the city authorities to keep the streets free from buildings, posts, steps, fences, or other obstructions or nui-

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person passing along the sidewalk is a nuisance which they are bound to abate." We are not prepared to criticise that statement. Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603, was a case where a coal hole was excavated in the pavement, but left with a defective covering. The landlord and tenant of the premises were sued. The case opens with this statement: "The defendants did not allege in their answer that the coal hole was constructed by any license from the proper city authorities. * * * It may then be treated as a nuisance, being an unauthorized excavation in the street. * * * Even if this hole was excavated on the street by permission of competent authority, the person who originally excavated it was bound to do it in a careful manner, and to see that it was properly and carefully covered, so as not to be perilous to travelers upon the street." The case turned entirely upon the fact that the hole was negligently maintained without suitable covering. White v. City of New Berne, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166, 125 Am. St. Rep. 476, was an action against the city for personal injury inflicted on the plaintiff by his stumbling over steps projecting into the street. The case was made to turn upon that fact, coupled with the further fact that the city had failed to maintain a light at or near that point to show the obstruction. We apprehend it would have been equally liable had the plaintiff fallen over some unevenness in the street, which was structural and dangerous if not lighted. Callahan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831, was a case where the defendant had by use of drays and other accessories in his business practically appropriated a street, excluding the public. It was held that was an unreasonable use, even though the magnitude and nature of the defendant's business seemed to require it. Other cases for personal injury to the plaintiff's falling over obstructions in streets, such as steps and the like, lay down the general doctrine that the streets are primarily for the public use, and that any permanent appropriation by lot owners is a purpresture, and a nuisance, where it endangers the public safety. Appellee expresses the fear that such would be its predicament should some one stumble upon these steps, and sustain injury. The question would be for the jury whether the presence of the steps was unsafe, and, in view of the lay of the ground, the width of the pavement at that point, and other steps similar in the same locality, made the street not reasonably safe for the travel of pedestrians. The jury might find it one way or the other body who may come to view the question will be governed by the law and the facts. In this state the doctrine obtains that a lot owner may obtain by operation of the statutes of limitation an exclusive right to occupy a public street with his building or partial obstructions. Bosworth v. City of Mt. Sterling, 13 S. W. 920, 12 Ky. Law Rep. 157.

The fact that more than 15 years prior to 1873 the owner of the lot had maintained an obstruction substantially at the same place, and not differing in character from that now sought to be removed, gave the present owner an easement to continue it, or another no more an obstruction. And the fact that others in the same block, and in other blocks where the pavements were not so wide, were suffered, and had been for a great many years, to maintain similar partial obstructions, is evidence that such steps were not unreasonable, but were a common custom in that town. What is common is generally known by all, and would seem not to be an unreasonable course. The town might have prohibited such steps by a general ordinance of uniform application. As it has not done so, unless it shows that the particular obstruction complained of is in fact a nuisance, and is an unreasonable use of the public way under the conditions shown to exist there, appellant ought not to be singled out for discipline merely to vindicate a previously unused power.

The judgment will be reversed, and the cause remanded, with directions to grant the injunction prayed for.

MORGAN et al. v. BOARD OF COUNCILMEN OF CITY OF FRANKFORT.

(Court of Appeals of Kentucky. Oct. 28, 1909.)

1. MUNICIPAL CORPORATIONS (§ 957*) — RATE OF TAXATION — CONSTITUTIONAL LIMITATIONS.

As Const. § 157, expressly permits the tax rate, exclusive of the school tax, in a city of the third class to exceed 75 cents on $100, if necessary to pay the interest on and provide a sinking fund for an indebtedness contracted before the adoption of the Constitution, where it is neither alleged nor proved that the tax the collection of which is resisted, was not levied in part, or at least to the excess over 75 cents and the school tax, to pay the interest on, and provide a sinking fund for, an indebtedness contracted before the adoption of the Constitution, the presumption will not be indulged that the Constitution has been violated.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 957.*]

2. TAXATION (§ 589*)—TAXES BARRED BY LIMITATION—RECOVERY.

Where, in an action for taxes, those for certain years were admittedly barred by lim-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

itation, it was error to include them in the judgment.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 589.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the Board of Councilmen of the City of Frankfort against John H. Morgan and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Jno. W. Ray, for appellants. Wm. Cromwell, for appellees.

SETTLE, J. This is the second appeal in this case. The action was brought to recover in behalf of the city of Frankfort taxes alleged to be owing it by appellants on certain real estate for the years 1897 to 1905, inclusive, the payment of which the latter are resisting. On the first appeal this court, among other things, decided that the creation, assessment, and levy of the tax by the city of Frankfort must be presumed to be legal and correct, and that the burden of proving its illegality, if any, is upon the appellees. Board of Councilmen v. Morgan, 110 S. W. 286, 33 Ky. Law Rep. 297.

Various objections are made by appellees to the right of the city to collect the tax sued for, the principal one being that the levy for each year, exclusive of so much thereof as is to be applied to school purposes, is in excess of the limit fixed by section 157, state Constitution. In other words, that the rate of taxation adopted by the city in the levy of the taxes for which judgment is sought is greater than can be levied by a city of less than 10,000 population, and that the population of Frankfort is less than 10,000. Section 157 of the Constitution is as follows: "The tax rate of cities, towns, counties, taxing districts, and other municipalities, for other than school purposes, shall not at any time exceed the following rates upon the value of taxable property therein, viz.: For all towns or cities having a population of 15,000 or more, one dollar and fifty cents on the hundred dollars; for all towns or cities having less than 15,000, and not less than 10,000, one dollar on the hundred dollars; for all towns or cities having less than 10,000, seventy-five cents on the one hundred dollars and for counties and taxing districts fifty cents on the $100.00; unless it should be necessary to enable such city, town, county or taxing district to pay the interest on, and provide a sinking fund for the indebtedness contracted before the adoption of the Constitution. * * *" Frankfort, by act of the Legislature, has been declared a city of the third class; and, while it may be true that its population is less than 10,000, and its tax rate for the years it is attempting to collect taxes of appellants was, exclusive of the tax for school purposes, in excess of 75 cents on the $100, it nevertheless had the right to exceed that rate, if the tax imposed was necessary to enable it to pay the interest on, and to provide a sinking fund for, an indebtedness contracted by the municipality before the adoption of the present Constitution, for section 157 of that instrument expressly confers such right. It is not alleged in appellant's answer or either amendment thereto, nor does it appear from the evidence, that the tax, the collection of which is resisted, for any of the years claimed was not levied in part, or at least to the extent of the excess over 75 cents and the school tax, for the purpose of paying the interest on and providing a sinking fund to liquidate an indebtedness contracted by the appellee city before the adoption of the Constitution. In the absence of such an allegation and proof we will not indulge the presumption that the Constitution has been violated.

This conclusion makes it unnecessary for us to consider the grounds relied on by appellants to defeat the tax.

It appears, however, that the judgment of the circuit court improperly includes in the recovery the tax for the years 1897, 1898, 1899, 1900, and 1901. As the tax for each of these years was admittedly barred by the statute of limitations, it was error to include them in the judgment.

For this error alone the judgment is reversed, and cause remanded, that the court may enter a judgment to conform to this opinion.

RATLIFF v. DANIEL'S EX'R et al.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. APPEAL AND ERROR (§ 1041*)—REVIEW—HARMLESS ERROR—REQUIRING AMENDMENT TO PETITION.

Where, in an action for setting fire to a building, the petition charged in effect that defendants had set fire to it, and also charged that defendants incited others to do so, whether the court was right in requiring plaintiff to allege that he did not know which state of facts was true is immaterial; he having amended his petition to conform to the court's rulings, the whole matter being placed in issue, and trial being had on the merits of the whole case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

2. WITNESSES (§ 140*)—COMPETENCY—PERSONS INTERESTED IN A DECEDENT'S ESTATE.

Civ. Code Prac. § 606, subsec. 2, which forbids a person to testify for himself as to a statement of a person since deceased or as to an act done or permitted to be done by him, except for the purpose and to the extent of affecting one who is living and who, when over 14 years of age and of sound mind, heard such statements or was present when such transaction took place or when such act was done or committed, unless among other things, a representative of or some one interested in the estate shall have testified against such person with reference

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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ecutor sued for a wrongful act of the testator.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598–606 ; Dec. Dig. § 140.*]

3. Fires (§ 7*)—Civil Liability—Evidence—Relevancy of Indictment.

In an action against an executor charging his testator with the burning of plaintiff's house, the court properly refused to allow to be read an indictment of defendant's testator for the burning of such house.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 7.*]

4. Fires (§ 7*)—Action for Setting Fire—Admissibility of Evidence.

In an action against an executor charging his testator with the burning of plaintiff's house, plaintiff was properly not allowed to show by an insurance agent that his main witness living near the house had renewed a policy of insurance on her property shortly before the fire; there being nothing in his evidence connecting the testator therewith.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 7.*]

5. Evidence (§ 155*)—Attack on General Character—Rebuttal Evidence.

Where, in an action against an executor charging his testator with the burning of plaintiff's house, plaintiff offered proof attacking the testator's general character, the court properly allowed defendant to show in what respect his moral character was bad.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 447; Dec. Dig. § 155.*]

6. Trial (§ 252*)—Instructions—Conformity to Evidence.

Instructions should be based on the evidence, and a view of the case should not be set out in an instruction when there is no evidence to support it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

7. Fires (§ 7*)—Actions for Setting Fire—Evidence.

In an action against an executor charging his testator with the burning of plaintiff's house, *held*, that there was nothing in the evidence tending to show that his testator procured or induced any one else to set fire to the building.

[Ed. Note.—For other cases, see Fires, Dec. Dig. § 7.*]

Appeal from Circuit Court, Caldwell County.

"Not to be officially reported."

Action by Charles Ratliff against E. H. Daniel and others. Defendant Daniel having died pendente lite, the case was revived against his executor. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Selden Y. Trimble, Jno. C. Gates, Breathitt & Bell, and Trimble & Bell, for appellant. S. D. Hodge, Hodge & Hodge, Ward Headley, and J. Elliott Baker, for appellees.

HOBSON, J. Charles Ratliff owned a storehouse on the corner of Main and Eddyville streets in Princeton, Ky.; the lot running back to Washington. In the rear of from Main street to Washington street. Their lots did not adjoin on Main street, but in the rear and on Washington street they adjoined. On the rear of Daniel's lot was a residence occupied by Mrs. Mollie Boyd as his tenant, which fronted on Washington street. On October 23, 1902, Daniel's warehouse took fire, and for some years afterwards the fire seems to have been regarded as accidental; but nearly three years afterwards when Daniel had refused to marry Mrs. Boyd, and she complained that he had broken a marriage contract with her, she gave out that Daniel had set fire to Ratliff's house and had burned it. On October 2, 1905, after this had come to Ratliff's ears, he brought this suit against Daniel charging that he had burned his house, and that the house and contents were of value $7,817. Daniel filed an answer in which he denied the allegations of the petition. A trial was had which resulted in a hung jury. After this Daniel died, and after his death at the October term, 1908, the case being revived against his executor, a second trial was had, which resulted in a verdict and judgment for the defendant. The plaintiff appeals.

The plaintiff alleged in his petition that Daniel himself, or by inducing and inciting other person or persons to the plaintiff unknown, wrongfully and willfully set fire to the building. The defendant moved the court to require the plaintiff to elect whether he would rely upon the allegation of his petition to the effect that E. H. Daniel set fire to the building, or upon the allegation that Daniel induced or incited other persons to set fire to it. The court ruled that the plaintiff must make the election, or allege that one or the other state of facts was true and that he did not know which was true. Thereupon the plaintiff interlined his petition by stating that he did not know which state of facts was true. The defendant then filed his answer, and the case proceeded. Whether the court was right in requiring the plaintiff to allege that he did not know which state of facts was true is immaterial. The plaintiff amended his petition to conform to the ruling of the court; the whole matter was placed in issue; and the trial was had on the merits of the whole case.

The defendant on the last trial read to the jury the testimony of E. H. Daniel given on the first trial. The fire occurred about midnight. The defendant introduced Miss Jessie Simmons, who lived at Daniel's house, and proved by her that on the night of the fire Daniel came home about half past 9 and went to bed, and that he was in bed asleep and was waked up when the fire occurred; that he did not leave home after he came

there that night until he was sent for to come to the fire. Daniel had left a will which had been probated, and by this will he had devised to Miss Simmons his estate. It was insisted for the plaintiff that she was testifying for herself, and under section 606 of the Civil Code of Practice could not testify as to anything done or omitted to be done by Daniel, as he was dead. Subsection 2 of section 606 is in these words: "Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless the infant or his guardian shall have testified against such person, with reference to such statement, transaction or act; or the person of unsound mind shall, when of sound mind, have testified against such person, with reference thereto; or, the decedent, or a representative of, or some one interested in, his estate, shall have testified against such person, with reference thereto." It will be observed that by the statute a person may not testify for himself as to a statement of a person since deceased or as to an act done or omitted to be done by him, except for the purpose and to the extent of affecting one who is living and who when over 14 years of age and of sound mind heard such statements or was present when such transaction took place or when such act was done or omitted, unless, among other things, a representative of or some one interested in the estate shall have testified against such person with reference thereto. The statute thus clearly recognizes the right of persons interested in an estate testifying for its protection when the estate is sued by a third person, for, if those interested in the estate could not testify as to acts done or omitted by the decedent, the exception would be without meaning. This precise question was before us in Moore v. Moore's Adm'r, 101 S. W. 358, 30 Ky. Law Rep. 1370. We there said: "While no person may testify for himself as to a transaction with or an act done or omitted to be done by a decedent, a person, although he may be interested in the estate, may testify for the decedent's estate, and for its protection against one who is living. The statute was not designed to deprive the estate of a decedent of the testimony of the persons most likely to be able to protect it."

The grand jury upon the testimony of Mrs. Boyd indicted Daniel for the burning of the house. The plaintiff offered to read the indictment to the jury. The court properly refused to allow it to be read. A conviction for felony may be shown, but an indictment for felony may not be shown. The plaintiff was properly not allowed to show by the insurance agent, Mills Wood, that Mrs. Boyd had renewed a policy of insurance on her property shortly before the fire. There was nothing in his evidence connecting Daniel with this. The plaintiff offered proof attacking the general character of Daniel. The court properly allowed the defendant to show in what respect his moral character was bad. The fact that Daniel executed the deed of October 2d was before the jury; but, explained as it was, the fact was of little value.

At the conclusion of all the evidence the court instructed the jury, in substance, that if they believed from the evidence that Daniel set fire to the plaintiff's house, and thereby caused the building or any of its contents to be consumed or destroyed by fire, they should find for the plaintiff. He refused to give an instruction asked by the plaintiff to the effect that the jury should find for the plaintiff if they believed from the evidence that Daniel either in person, or by inciting or inducing some one else so to do, set fire to the building and thereby caused it to be destroyed. The only difference between the instruction given and that refused was that the instruction refused contained these words "either in person, or by inciting or inducing some one else so to do." The court also refused to so tell the jury when asked the question by them. It may be conceded that Daniel burned the house if he set fire to it with his own hands, or if he procured another to set fire to it, and that he is equally liable in either case; but the instructions of the court to the jury should be based upon the evidence, and a view of the case should not be set out in an instruction when there is no evidence to support it. The plaintiff's whole case rested upon the evidence of Mrs. Boyd and her son. She testified, in substance, as follows: Some days before the fire Daniel told her the warehouse would not stand long; that he did not like Ratliff; that he wanted her son to come to his store and help him to connect the hose to the fire plug because Ratliff's warehouse was going to burn in about two weeks, and he wanted to have the hose on in order to save her house. That he asked her when her insurance would run out, told her to keep insured, and about a month before the fire she did renew the insurance with $12.50 which he gave her, telling her at the time it would not be very long until Ratliff's house would be burned down. He said, "Revenge is sweet," and he did not like any of the Ratliffs. That on the night of the fire between 9 and 10 o'clock Daniel came to her house and wanted to borrow a dress of hers. She asked him what he was going to do. He

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said it would be all right, that he had some dirty work to do, she would know directly, and he wanted to borrow one of her dresses to put on. That he did not want any one to know who he was. She got an old calico motherhubbard, and he put it on and went down toward the Ratliff warehouse with something in his hands. It was not long until he came back. She asked him what he had done, and he said: "It is all right. You will see in a short while what I have done." Shortly after this the alarm of fire was given, and the warehouse was discovered to be on fire. After the fire he said to her, "I told you the warehouse was going to burn in about two weeks, and it sure did." The testimony of her son was to the same effect as his mother's as to the hose, and as to some similar statements made to him by Daniel. Another witness testified that he came along the street shortly before the fire alarm was given, and a negro came running down the street who bore off to one side so that he could not see who it was. He went on home, and after he got home the alarm of fire was given. There was nothing in this evidence to show or tending to show that Daniel had procured or induced any one else to set fire to the building. If the testimony for the plaintiff was true, he had burned it; and, if the jury had believed this testimony, they would have so found. There was nothing in the evidence tending to show a conspiracy between Daniel and anybody else to burn the house or connecting any one else with the burning of it. To have submitted this issue to the jury would have been to submit to them a view of the case on which there was no evidence. The proof showed that Daniel and Ratliff were good friends. No motive for such a deed is shown when we take all the evidence. Mrs. Boyd and her son were thoroughly impeached. The case rested wholly upon their testimony to connect Daniel with the fire; and, in view of all the facts, we conclude that, in any view of the matter, the ends of substantial justice do not require a new trial of the action. Daniel's property was similar to Ratliff's. It was wholly uninsured. That Daniel had procured another person to set the building on fire, and then had placidly gone home and gone to sleep without taking any precaution for the protection of his own property, no jury would have believed. If the testimony of Miss Simmons is true, the testimony of Mrs. Boyd cannot be true, for, according to Mrs. Boyd, it was not long after Daniel left her house before the alarm of fire was given. Ratliff regarded Daniel at the time as his friend, and it is incredible that such a crime as this would have been committed by a man without adequate motive, and of this there is no evidence.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. PEARCY.

(Court of Appeals of Kentucky. Oct. 22, 1909.)

1. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE OF CIRCUMSTANCES.

A railroad company, has a right, when backing an engine to make a coupling, to do so with a car attached to the engine, so that the reason it was attached (a defect therein) is immaterial, and may not be shown by the brakeman, who was to have made the coupling, and who was injured through alleged neglect of the engineer to obey a stop signal.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE OF CIRCUMSTANCES.

A railroad company having the right to pile timber along its track, a brakeman, injured, while preparing to make a coupling, through a stop signal given the engineer being neglected, may show such piling, and consequent obstruction of the view between him and the engineer, only as the reason for his communicating the stop signal to the engineer through the fireman, instead of directly to him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

3. EVIDENCE (§ 158*)—BEST AND SECONDARY EVIDENCE.

The rules of a company being in writing, the written rules are the best evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471–526; Dec. Dig. § 158.*]

4. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE.

A brakeman, injured in making a coupling, may not show that another brakeman was intoxicated; nothing he did or omitted to do having anything to do with the accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

5. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Whether a brakeman was negligent in going on the track, and working on the lever of a car to which a coupling was to be made, without waiting to see whether a stop signal he gave the engineer was obeyed, was a question for the jury, where the engineer had been running by his signals, and had previously obeyed all given by him, and the train was moving very slowly.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

6. TRIAL (§ 139*)—PEREMPTORY INSTRUCTION.

A peremptory instruction, on the ground that an engineer did not receive the stop signal of a brakeman, cannot be given; the fireman having testified he received it, and communicated it to the engineer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. § 139.*]

7. MASTER AND SERVANT (§ 198*)—"FELLOW SERVANTS."

The fireman and a brakeman of a train are "fellow servants."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493–514; Dec. Dig. § 198.*

For other definitions, see Words and Phrases, vol. 8, pp. 2716–2730; vol. 8, p. 7662.]

8. MASTER AND SERVANT (§ 202*)—INJURY TO SERVANT—LIABILITY OF MASTER—GROSS NEGLIGENCE.

A railroad company is not liable for injury to a brakeman, where death did not ensue, un-

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less the negligence of its engineer causing it was gross.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 535; Dec. Dig. § 202.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO FACTS.

There having been no evidence of negligence of a superior servant other than that of an engineer, in an action for injury to a brakeman, an instruction, instead of being as to finding negligence of "agents" of the company and "servants" superior to the brakeman; should have been as to finding negligence of the "engineer."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

10. DAMAGES (§ 216*)—PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTIONS.

The measure of compensatory damages for personal injuries is erroneously stated by an instruction that the jury could take into consideration the age and situation of the person, his earning capacity, and its probable duration, his bodily suffering and mental anguish resulting from the injuries, the loss from want of the injured limbs, and the extent to which he is disabled by the injuries from making a support for himself.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. § 216.*]

11. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In place of an instruction, in an action by a servant for injuries, that though he was injured through the negligence of defendant's superior servant, yet if he by his own negligence contributed to the injury, and but for his negligence would not have been injured, he could not have recovered, there should have been given one that he was bound to exercise such care to keep out of danger as may be reasonably expected of a person of ordinary prudence situated as he was, and if he failed to do so, and but for such failure he would not have been injured, he could not recover, notwithstanding any negligence of the superior servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

12. MASTER AND SERVANT (§ 293*)—INJURY TO SERVANT — ACTIONABLE NEGLIGENCE — INSTRUCTIONS.

The jury, in an action for injury to a brakeman through failure to stop the engine, as signaled by the brakeman, should be instructed that, though he gave a stop signal to the fireman, if the latter did not pass it to the engineer, as to which the evidence was conflicting, the company was not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1161; Dec. Dig. § 293.*]

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by John Pearcy against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Benjamin D. Warfield, Jas. D. Black, and J. W. Alcorn, for appellant. Edward W. Hines, B. B. Golden, C. C. McChord, and J. V. Norman, for appellee.

HOBSON, J. John Pearcy was the middle brakeman on a local freight train of the Louisville & Nashville Railroad Company between Middlesboro and Corbin, Ky. There was also on the train a head brakeman, a rear brakeman, and a negro who was learning the road. At Ferndale station they took on a car, the coupling apparatus of which at one end was defective, the defect being that the bumper dropped down below its proper position, and in order to couple this car, one brakeman had to hold up the bumper while the other coupled it. After this car was put in the train it went on its way, stopping at the different stations as usual until they reached Gray's station, some 35 miles further on. They had an order to meet another train there, and the conductor ordered the negro, after they stopped, to go ahead and flag down the other train, but the negro did not go as far ahead as the engineer thought necessary, and he refused to pull out on the main track, as the conductor had directed, for the purpose of going in on a side track, and getting out a car that stood on it. The conductor had ordered the head brakeman and Pearcy to attend to this while he went back to the rear of the train to send the rear brakeman to the rear to flag any train that might be approaching in the rear. When the engineer refused to pull out on the main track, saying that the negro had not gone far enough, the conductor ordered the head brakeman to go forward and signal the coming train. He thereupon went forward, gave the necessary signals, and told the negro to go back and help Pearcy. The engineer pulled out on the main track, and Pearcy threw the switch and signaled the engineer back. He then went back to the switch leading to where the car was they wanted to get, and threw that switch and signaled the engineer on back. The engineer came on back slowly, and Pearcy went down to where the car was. When he got there, he found the lever of the car would have to be adjusted before the coupling could be made. He thereupon gave a stop signal, and, assuming that it would be obeyed, went to work on the lever, having his back to the approaching train. It was dark, and he suddenly discovered that the train had not stopped, and was coming upon him. He attempted to jump out, but in doing so his foot was caught, and one arm and one leg were run over. The engineer was on the right side of the engine. Pearcy was on the left side, and was passing the signals to the engineer through the fireman. He brought this suit against the railroad company to recover for his injuries, and having recovered $12,500, the railroad company appeals.

The above are the facts as stated by the plaintiff, and as the proof for him conduced to show. The engineer testified that he got no stop signal from the fireman, or any one else, and that he was backing as he had been signaled to do when the injury occurred. It

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was dark, and nothing could be seen except the light of the lanterns by which the signals were given. The engineer also testified that there was a man on each side with a lantern in his hand, while Pearcy says that there was no one there by him. The negro who had been ordered back by the rear brakeman to help Pearcy was not introduced on the trial, and the proof does not show where he was.

Much evidence was introduced on the trial as to the car picked up at Ferndale, and as to the coupling being defective, it being claimed by the plaintiff that one reason he could not see the engineer was that this car had been left attached to the engine by the direction of the conductor, on account of the difficulty in coupling and uncoupling it. All of this evidence should have been excluded from the jury. A railroad company has a perfect right to make couplings with more or less cars attached to the engine, and the reason why a particular car is attached to the engine is wholly immaterial. Pearcy knew all about the car, and understood the situation perfectly. All the testimony relating to this car, including the testimony as to what the conductor had said, should have been excluded from the jury. There was also evidence to the effect that there was a pile of timber which obstructed the view between Pearcy and the engineer, and this was also given as a reason why he was signaling from the fireman's side, as the track was on a curve, and the timber came in between him and the engineer. The railroad company has a right to pile timber along its tracks, and the fact that this timber obstructed the view was immaterial, except as showing why the signals were given on that occasion as they were. The court on another trial will so tell the jury. There was much evidence about the rules of the company. Where the rules are in writing, the writing should be introduced, for the written or printed rule is the best evidence. The rear brakeman had nothing to do with the coupling of the cars, as he had been sent back to flag the train in rear, and no evidence should have been admitted as to his being intoxicated, because nothing that he did or omitted to do had anything to do with the accident. The court at the conclusion of the trial excluded the evidence as to the car picked up at Ferndale, as to Biscoe's being intoxicated, and as to the timber piled on the right of way, but on another trial it will not be admitted, except as above stated.

Whether Pearcy should have gone in to work at the lever after he gave the stop signal, and before he knew that it was obeyed, is a question for the jury. The engineer had been running by his signals; he had obeyed all the signals which he had given; the train was running very slowly; and what a man of ordinary prudence would do under the circumstances would depend somewhat upon the custom of doing the business. Time is of great importance in the railroad business. Brakemen must necessarily discharge their duties as promptly as they can, and we conclude that it should be left to the jury to determine whether Pearcy used ordinary care in going in as he did. The fireman in effect testified he received a stop signal from Pearcy, and passed it to the engineer. In view of this evidence we cannot say that a peremptory instruction should have been given on the ground that the engineer did not receive the signal which Pearcy gave. The case is here on all the evidence.

The court gave the jury these instructions: "(1) If you shall believe from the evidence that the plaintiff, John Pearcy, on the occasion mentioned in the evidence in this case, was run over and injured by defendant's train or engine, whereby he lost a leg and an arm, as exhibited to the jury, and you shall further believe from the evidence that said injuries were caused by the gross carelessness or the gross negligence of the defendant's agents and servants superior to plaintiff then and there controlling, managing, and operating the said train or engine, you shall find for the plaintiff, but unless you shall believe from the evidence that the said injuries to the plaintiff were caused by the gross carelessness or gross negligence of the defendant's aforesaid agents or servants, in the control, management, or operation of said train or engine, you should find for the defendant. If you find for the plaintiff, you should find for him such damages as you may believe from the evidence he has sustained, and in estimating the amount of such damages, you should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering, and mental anguish, resulting from the injuries received and the loss sustained by the want of the limbs injured, and the extent to which he is disabled from making a support for himself by reason of the injuries received, and you may, in addition to such compensatory damages, find punitive damages in your discretion, not exceeding, however, for all injuries complained of, $25,000, the amount claimed in the plaintiff's petition. (2) Although you may believe from the evidence that the plaintiff was injured through the gross carelessness or gross negligence of the defendant's aforesaid agents or servants, yet if you shall further believe from the evidence that the plaintiff, by his own carelessness or negligence at the time of his injury, contributed to the same, and that but for his said carelessness or negligence he would not have been injured, you should find for the defendant. (3) Gross negligence, in the meaning of these instructions, is the absence of slight care. (4) The defendant is not the insurer of the safety of its employés, and the plaintiff in accepting the employment as brakeman assumed all the ordinary risks incident to said business."

There was nothing in the evidence to show

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any negligence on the part of the conductor. The fireman and the brakeman were fellow servants. Southern R. R. Co. v. Clifford, 110 Ky. 731, 62 S. W. 514, 23 Ky. Law Rep. 111. As death did not result, the defendant was not liable, unless there was gross negligence on the part of the engineer. In lieu of the first clause of instruction No. 1 the court should have told the jury that, if they believed from the evidence that the engineer operating the engine in question received a stop signal, and by gross negligence failed to obey it, and thereby caused the plaintiff to receive the injuries sued for, they should find for the plaintiff. In lieu of the second clause of the instruction he should have told the jury that, unless they believed from the evidence that the engineer received a stop signal, and by gross negligence failed to obey it, they should find for the defendant. The measure of compensatory damages given in instruction 1 is erroneous. L. & N. R. R. Co. v. Hall, 115 Ky. 579, 74 S. W. 280, 24 Ky. Law Rep. 2487; L. & N. R. R. Co. v. Logsdon, 114 Ky. 746, 71 S. W. 905, 24 Ky. Law Rep. 1566; Lexington R. R. Co. v. Herring, 96 S. W. 558, 29 Ky. Law Rep. 798. On another trial the court will define the measure of compensatory damages as indicated in these cases. In lieu of the second instruction the court will tell the jury that it was incumbent upon the plaintiff to exercise such care to keep out of danger as may be reasonably expected of a person of ordinary prudence situated as he was; and if he failed to do this, and but for such failure, he would not have been injured, they should find for the defendant, although there was gross negligence on the part of the engineer as set out in No. 1. By another instruction the court should tell the jury that, although the plaintiff gave a stop signal to the fireman, still if the fireman did not pass it to the engineer, the defendant is not liable.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

ENTERPRISE MFG. CO. v. CAMPBELL et al.

(Court of Appeals of Kentucky. Oct. 14, 1909.)

1. SALES (§ 23*)—CONTRACTS—EVIDENCE.

Where a manufacturer receiving an order for a sawmill and fixtures for delivery at 30 days or as soon thereafter as he could obtain transportation to the point of delivery, the order stipulating for a cash payment and secured notes for the balance, and providing that the order was subject to the acceptance of the manufacturer, accepted the cash payment, he must within a reasonable time which does not exceed the 30 days, either accept or reject the order, and by retaining the cash payment thereafter without notifying the buyer of the nonacceptance of the order, the order was accepted and a binding contract made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44–48; Dec. Dig. § 23.*]

2. SALES (§ 418*)—CONTRACTS—BREACH—DAMAGES.

A buyer of a sawmill, suing for the nondelivery thereof, may show that he had contracts with third persons to saw timber, and may show what reasonable profits he could make therefrom, but he cannot show the contract profits unless the seller had notice of such contracts, nor can he show that one of the third persons refused to pay a note because of the failure to carry out the contract with him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174, 1189–1192, 1198; Dec. Dig. § 418.*]

3. SALES (§ 418*)—CONTRACTS—BREACH—DAMAGES.

A buyer of a sawmill suing for the nondelivery of the mill may not recover damages resulting from the fact that he could not saw lumber with which to repair a tramroad on his land because such damages were too remote, and were not in the contemplation of the parties, in the absence of notice to the seller at the time of the execution of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

4. SALES (§ 418*)—CONTRACTS—TERMINATION.

A buyer of a sawmill for delivery December 1st, or as soon thereafter as the seller could obtain transportation to the point of delivery, wrote on December 27th following, to the seller's agent, that, unless the mill was then at the point of delivery, he would not take it. The mill had not then been delivered. Subsequently the buyer consented to take the mill, and the seller's agent stated that he thought the seller would ship it in a few days. The mill was never delivered. *Held*, that the buyer's letter to the seller's agent terminated the contract, and he could recover only such damages as he suffered between the time the mill could with reasonable diligence have been received and the date of the letter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174, 1175; Dec. Dig. § 418.*]

5. SALES (§ 418*)—CONTRACTS—BREACH—DAMAGES.

A buyer of a sawmill suing for the nondelivery thereof may recover the reasonable expenses of any trips which he made to the point of delivery prior to his termination of the contract to ascertain why the mill had not been shipped.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1198; Dec. Dig. § 418.*]

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Action by A. E. Campbell and another against the Enterprise Manufacturing Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellant. Eversole & Eversole, for appellees.

CLAY, C. Appellees, A. D. and Joel Campbell, instituted this action against appellant, Enterprise Manufacturing Company, to recover damages for its failure to deliver to them a sawmill at Jackson, Ky. The jury returned a verdict in favor of appellees for the sum of $900. From the judgment based thereon this appeal is prosecuted.

On November 2, 1907, appellees signed an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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order to appellant for a certain sawmill and fixtures described in the order, which directed shipment of the mill on December 1, 1907, or as soon thereafter as appellant could obtain transportation to Jackson. According to the terms of the order, appellees agreed to pay the sum of $100 in cash and to execute notes for the balance of the purchase money. This balance was $1,000. The notes were to be secured by first mortgage on the sawmill and fixtures, and also on certain lands described in the order. Appellees made the first payment of $100 in cash at the time the order was given. This money was accepted by appellant, and retained by it until the institution of this action. Printed upon the order is the following: "This order subject to the acceptance of the Enterprise Manufacturing Company." Appellant never notified appellees either of its rejection or acceptance of the order. On December 27, 1907, appellees wrote to E. H. Minix, who was appellant's agent at Jackson, Ky., that, unless the mill was already at Jackson, they would not take it. After that date, however, they went to Jackson and consented to take the mill, and Minix said he thought the company would ship it in a few days. The mill never arrived, nor did appellant offer to return appellees' money until the institution of this action.

In their petition appellees set forth the contract in question, and the failure of appellant to perform it. They also charged that upon the faith of the contract in question they had entered into a contract with a number of people for sawing lumber and ties; that they were deprived of an opportunity to comply with these contracts because of appellant's failure to supply the sawmill; and that, by reason thereof, they were damaged in the sum of $1,000. Appellant answered in two paragraphs. In the first it denied the allegations of the petition. In the second it pleaded that the order in question was subject to acceptance by it, and had never been accepted. They also pleaded that on December 27, 1907, appellees notified it that they did not want the mill. It is first insisted by appellant that a peremptory instruction should have gone in its favor because the order in question was never binding until accepted by it, and because the evidence on the question of damages was insufficient to take the case to the jury.

After appellant accepted the cash payment of $100 from appellees, we think it was incumbent upon it within a reasonable time either to accept or reject the order. Appellant could not keep appellees' money for an unreasonable length of time, and then claim that it never accepted the order. We think a reasonable time within which appellant should have acted was not later than December 1, 1907. As appellant retained the money after that date, without notifying appellees that the order was not accepted, we are of the opinion that this was a sufficient acceptance of the order.

During the course of the trial appellees proved certain contracts with parties to saw timber for them. It was not shown that notice of these contracts was ever brought home to appellant until after appellees concluded not to take the mill and so notified appellant. It was error, therefore, to admit testimony to show what profits would have been realized upon these special contracts. Appellees could, however, show that they had contracts with these parties to saw timber, and what the reasonable profits therefrom would be—not what the contract profits would be. Appellees were also permitted to prove that a tramroad on their land was out of repair, and that they were damaged because they could not saw the lumber with which to repair it. Such damages were entirely too remote and speculative, and could not, in the absence of notice, have been within the contemplation of the parties at the time the contract was entered into. Nor could appellees recover because one of the parties for whom they had contracted to saw timber refused to pay them a note of $125 because of their failure to carry out their contract.

The instructions in this case are erroneous, in that they do not fix the measure of damages, but permit the jury to "roam at will," and fix such damages as they see fit. They are also erroneous in that they do not fix any time limit, but permit the jury to find damages for an indefinite length of time. In our opinion appellees' letter of December 27th ended the contract between them and appellant. The fact that after that time appellant's agent expressed the opinion that appellant would ship the mill, or that he would get it to do so, did not bind appellant to do so. In other words, the agent's statement did not make a new contract between the parties. That being the case, appellees are entitled to recover only such damages as they suffered between the time when the sawmill could with reasonable diligence have been received and set up by them at the place designed for its location, and December 27th, when they notified appellant's agent not to ship the sawmill. The measure of damages is the reasonable profits which appellees would have realized during such time from the ordinary operation of the mill. They may also recover the reasonable expense of any trips which they made to Jackson, just prior to December 27, 1907, for the purpose of ascertaining why the mill had not been shipped. Upon the question of the measure of damages, appellees may show that they had contracted with other parties to cut timber, and what the reasonable profits for cutting the same would have been. They cannot show what the contract profits would have been.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

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LOUISVILLE DRY GOODS CO. v. LANMAN et al.

(Court of Appeals of Kentucky. Oct. 26, 1909.)

1. SALES (§ 369*) — REMEDIES OF SELLER — FRAUD OF BUYER.

If an insolvent, buying goods of plaintiffs, mortgaged the entire stock in or to be in his store, to secure a bank holding his notes and a surety thereon to the exclusion of his other creditors, plaintiffs could avoid the sales on the ground of the buyer's actual fraud in buying without intention or means of paying for the goods, and in intending that they should, the moment they came into his possession, pass to preferred creditors, and regain the goods by detinue, or claim and delivery under the Code, or could sue for damages for the deceit and could pursue the additional remedy of sequestrating the debtor's property for payment of his debts under the act of 1856 relating to conveyances by insolvents in contemplation of insolvency, or could proceed against the debtor in involuntary bankruptcy proceedings in the United States court, if, when they learned of the deceit, that court had power, under the limitation of time, to grant them relief.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1084; Dec. Dig. § 369.*]

2. BANKRUPTCY (§ 426*)—DEBTS DISCHARGED —LIABILITY GROWING OUT OF FRAUD.

Under Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), excluding debts created by fraud from the release of the discharge in bankruptcy, the debt of the insolvent, incurred by purchasing goods on credit with the intention of setting over the goods to certain other favored persons leaving nothing with which he could pay for them or out of which the sellers could make their debt, would not be released by a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 792; Dec. Dig. § 426.*]

3. BANKRUPTCY (§ 20*)—REMEDY OF SELLER— OBTAINING PERSONAL JUDGMENT AGAINST A BUYER ADJUDICATED A BANKRUPT.

The federal court being unable to discharge the buyer from the debt, plaintiffs could pursue him in the state courts and obtain a personal judgment against him, though he had been adjudged bankrupt, upon which, after the federal court had exercised its jurisdiction, the writ of fieri facias might issue; but, pending the proceedings in bankruptcy, the state court should stay its execution until the bankruptcy case is finally adjudicated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

4. BANKRUPTCY (§ 9*) — CONSTRUCTION OF STATUTES.

Act of 1856 (Ky. St. §§ 1910–1917 [Russell's St. §§ 2104–2111]), providing that a mortgage by a debtor in contemplation of insolvency and to prefer certain creditors shall operate as an assignment of all his property for the benefit of all creditors, except as provided, such transfers to be under the control of equity, etc., is not a bankrupt or insolvency statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7–9; Dec. Dig. § 9.*]

5. BANKRUPTCY (§ 9*)—PREFERENTIAL MORTGAGES BY INSOLVENT.

Ky. St. § 1910 (Russell's St. § 2104), makes a mortgage by a debtor in contemplation of insolvency and with design to prefer creditors an assignment of all the debtor's property for benefit of all creditors, except as provided. Section 1911 (section 2105) gives equity control of preferential mortgages made by a debtor in contemplation of insolvency upon petition of an interested person within six months after the transfer is lodged for record or the property is delivered. Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), makes the transfer while insolvent of any portion of his property by a debtor to his creditor with intent to prefer the creditor an act of bankruptcy, and provides that a petition may be filed against an insolvent who has committed an act of bankruptcy within four months after commission of the act. Section 60b makes a preference given four months before filing a petition voidable by the trustee. *Held*, that the federal statute does not invalidate either a preferential mortgage by an insolvent debtor or his voluntary deed of assignment, and if such mortgage is not attacked within the time which will give the bankrupt court jurisdiction, or if the assignor is not proceeded against by his creditors or does not file petition to be adjudged a bankrupt within the four months allowed by the federal statute, the instruments may be enforced, and the parties thereto granted appropriate relief by the state court when invoked within six months, and, where the state court has been invoked and has taken jurisdiction and possession of the property, it may proceed to a final adjudication, though the federal court may also have taken jurisdiction of the bankrupt and his affairs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7–9; Dec. Dig. § 9.*]

6. BANKRUPTCY (§ 20*) — JURISDICTION OF STATE COURT.

The state court, having taken jurisdiction, could adjudge a recovery against the debtor in personam in favor of the creditor against whom the preference was made, staying the execution until his application for discharge in bankruptcy has been acted upon by the federal court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 20.*]

Appeal from Circuit Court, Mercer County.

"To be officially reported."

Action by the Louisville Dry Goods Company against J. W. Lanman and others. Judgment of dismissal, and plaintiff appeals. Reversed and remanded.

C. E. Rankin, for appellant. E. H. Gaither, for appellees.

O'REAR, J. J. W. Lanman was a merchant doing business at Cornishville, in Mercer county. The petition alleges: That the plaintiffs were wholesale merchants, and had sold him bills of merchandise from April to June, 1908, amounting to $473.82, and from June 23, 1908, to July 28, 1908, of $50.46; that on April 28, 1908, the defendant Lanman, being then insolvent, and with the design to prefer some of his creditors to the exclusion of the others, executed a mortgage to the Union Bank of Cornishville, Ky., upon a storehouse and lot situated in Cornishville, "and the stock of merchandise now within or to be within said storeroom, consisting of dry goods, boots, shoes, notions, and whatever articles there may be therein, including furniture and fixtures," to secure the bank in the sums of $1,495.75 on a note due March 8, 1908, $1,323 on a note due June 4, 1908, and $148.42 overdraft then due the bank; that these debts were in existence prior to the execution of the mortgage, and were secured by a prior pledge of 30 shares of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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stock of the bank as collateral; that one S. P. De Baun had since the filing of the suit been subrogated to the rights of the bank by an assignment of the mortgage to him by the bank; and that the mortgage was fraudulent, and executed with the design to prefer the bank and De Baun. It is also alleged that De Baun was bound as surety on the original notes to the bank, and that the mortgage covers all the property of the mortgagee. The mortgage was acknowledged on April 28, 1908, but was not recorded until July 28, 1908. This suit was begun by the filing of the petition and issual of summons on January 14, 1909. The summons was executed by personal service on Lanman, De Baun, and the Union Bank of Cornishville on January 16, 1909. On January 27, 1909, the day on which an appearance and answer were due, the defendants filed a joint answer which they term a "plea in bar," stating that on January 25, 1909, the defendant J. W. Lanman filed in the District Court of the United States for the Eastern District of Kentucky his petition in bankruptcy, that said Lanman was thereupon on that day adjudged a bankrupt by said court, and that the affairs of the bankrupt had been referred by that court to its referee in bankruptcy. Upon that showing they prayed to be dismissed. A demurrer was filed to the answer by the plaintiffs. The circuit court overruled the demurrer. The plaintiffs declined to plead further, and their petition was dismissed. The plaintiffs have prosecuted this appeal from that judgment.

We have concluded that the judgment is erroneous, when considered upon either of several grounds. The allegations of the petition in this case are not denied. They are confessed as true. It follows that J. W. Lanman was insolvent when he gave the mortgage, and inferentially, when he bought the goods for which he is sued in this case; that he designed by the mortgage to prefer the bank and De Baun to the exclusion in whole of his other creditors. What were the rights of the plaintiffs when they filed this suit? Depending upon the whereabouts of the goods, they had a choice of four courses open to them: (1) To avoid the sales to Lanman, on the ground of his actual fraud in buying the goods without intention or means of paying for them, but intending that they should the moment they came into his possession pass to his preferred creditor, the bank, or his favored surety at the bank, De Baun. This was such fraud as in law, at the election of the sellers, would have avoided the sale, and they could have regained their goods by detinue, or, what is the same practice under our Code, an action of claim and delivery; but perhaps the goods had been disposed of to innocent purchasers before the plaintiffs learned of the fraud. At any rate, it was at the election of the plaintiffs whether they pursued that remedy, or (2) to proceed in an action at law to recover the value of the goods from the fraudulent vendee—not upon the contracts of sale, but upon the deceit practiced upon them. And (3) the plaintiffs might pursue the additional remedy afforded by the laws of this state to sequestrate the debtor's property for the payment of his debts under the act of 1856 (Ky. St. §§ 1910–1917 [Russell's St. §§ 2104–2111]), or (4) proceed against him in involuntary bankruptcy proceedings in the United States District Court. The last-named course would depend, for its efficacy, upon whether, at the time the plaintiffs learned of the deceit and of the debtor's transfer of his property, the United States court had the power, under the limitation of time prescribed by the act of Congress, to grant them full relief. These remedies are at the election of the creditors, the vendees. The plaintiffs elected to sue in the state court to pursue the second and third of the remedies outlined above. The question is: Does National Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), give the United States courts exclusive jurisdiction of the affairs and property of a voluntary bankrupt under the circumstances recited above? It is remarked that the existing act defines more clearly the demarcation of the jurisdictions of the federal and state courts, and shows more disposition to not interfere with the local jurisdiction of the latter than did Act March 2, 1867, c. 176, 14 Stat. 517. Certain it is that Congress did not intend to aid fraud in any of the provisions of the act. In truth, the fraudulent were placed beyond its intended benefits, and held to the strictest accountability when their acts came within the jurisdiction of the courts of the United States.

No debtor can be discharged in bankruptcy of a liability which grows out of his fraud. Section 17, Act 1898. It was held in Classen v. Schoenemann, 80 Ill. 304, and Ames v. Moir, 130 Ill. 582, 22 N. E. 535, that if a debtor buys goods for cash on delivery, obtains possession of them without payment, and immediately ships them beyond reach of the seller, and then refuses to pay, his conduct is such as to make the debt a fraudulent one within the meaning of the bankrupt law. It is equally fraudulent, in law and morals, for one to buy goods with a positive intention not to pay for them, for if such intention were known to the vendor he certainly would not sell. "Its suppression therefore is a legal fraud." Benjamin on Sales, 442, and cases collected by that author. The cases hold that such design may be inferred from the conduct and circumstances of the vendee. It is admitted here that he was insolvent, and intended to set over to certain favored persons the very goods he purchased from the plaintiffs on credit, leaving nothing with which he could pay for them, or out of which they could make their debt. That is very black fraud. As the United States District Court could not have discharged Lan-

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man from the plaintiffs' debts created by his fraud, they were at liberty to pursue him in the state courts, and obtain a personal judgment against him, even though he had been adjudged bankrupt, upon which, after the federal court had exercised its jurisdiction, the writ of fieri facias might issue; but, pending the proceedings in bankruptcy, the state court should have stayed its execution until the United States courts had finally adjudicated the bankrupt's case.

But there is still another branch of this case, of more importance than the one just discussed. That is the right of the state court to proceed to a judgment in rem as against the property embraced in the mortgage and as affecting the bank and De Baun. The determination of that question involves the nature of the mortgage as it affected the debtor's property covered by it, and the rights of the plaintiffs created by that instrument in relation to that property. The statute of Kentucky (section 1910, Ky. St. [Russell's St. § 2104]), commonly known as the "act of 1856," concerning the conveyance by insolvents in contemplation of insolvency, is not a bankrupt or insolvency statute. Ebersole v. Adams, 10 Bush, 83; Downer v. Porter, 116 Ky. 423, 76 S. W. 135, 25 Ky. Law Rep. 571. It does not declare that the transaction shall be void. It operates independently of motives of fraud by the parties. It is voidable only for a specific purpose, at the instance only of creditors of the debtor making the mortgage or conveyance, and then only if they take action to that end in a court of equity within six months from the execution or recordation of the instrument. The effect of such mortgage or conveyance, if so attacked, is made by the statute to operate as voluntary assignment of all the debtor's property for the benefit of all his creditors. It is precisely as if he had executed voluntarily a deed of trust in behalf of all his creditors, conveying the title to all his property (except exemptions) to a trustee upon the express trust that the latter would sell it and pay the proceeds pro rata to his creditors. Linthicum v. Fenley, 11 Bush, 131.

It is true the act of Congress of 1898 makes both a preference by an insolvent debtor of some one or more creditors to the exclusion of others, the execution of a voluntary deed of assignment, acts of bankruptcy; but, unless they are proceeded on as such within four months from the time when filed for record, they are not affected by the bankrupt statute. Sections 3 and 60, Act Cong. 1898. But the federal statute does not prohibit or invalidate either a preferential mortgage by an insolvent debtor, or his voluntary deed of assignment. If such mortgage is not attacked within the time which will give the bankrupt court jurisdiction of the matter, or if the assignor is not proceeded against by his creditors, or does not file his petition to be adjudged a bankrupt, within the four months allowed by the federal statute, those instruments may be enforced, and the parties to them granted all appropriate relief by the state courts. Or, further, if the jurisdiction of the state court has been invoked, and the latter has taken jurisdiction and possession of the property, it may proceed to a final adjudication of the rights of the parties, although the United States District Court may also have taken jurisdiction of the bankrupt and his affairs. Linthicum v. Fenley, supra; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. It was held in Linthicum v. Fenley that the filing of the petition in the state court gave that court possession of the res, and entitled it to proceed with the case. However, there can scarcely be apprehended any conflict of jurisdiction in this matter, for, while the state court had jurisdiction of the subject-matter and parties when the suit was begun down there, the federal court did not have when the bankrupt filed his petition in that court January 25, 1909, more than four months after the mortgage had been recorded in the proper office of registry. While then the debtor may have been adjudged a bankrupt, and the United States District Court had jurisdiction of his estate, it would have had to administer it, except as to conveyances and incumbrances executed or suffered within four months of the filing of the petition in that court, subject to existing liens and conveyances. Neither the act of Congress nor the statute of this state (the act of 1856) make a preferential conveyance by an insolvent debtor void, or deem it a fraud. Each statute gives to it, if the remedy is invoked within the prescribed times, the effect of a voluntary assignment by the debtor for the benefit of all his creditors. The state statute allows two months more of time in which the conveyance may be attacked.

While this transaction was such that the bankrupt court might have acquired jurisdiction of it, and have administered the estate embraced as if the mortgage did not exist, yet it did not within the time when it might, consequently the trust created by our statute survives unaffected by the provisions of the act of Congress. The state court can and should proceed to execute the trust, by requiring the property to be sold and the proceeds applied to the payment ratably of all the debts of Lanman then in existence. Property since acquired by him and before his application in bankruptcy will be subject alone to the bankrupt proceedings. And, in addition, the state court may adjudge a recovery by the plaintiff against the defendant Lanman in personam, staying the execution till his application for discharge in bankruptcy has been acted on by the United States District Court.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

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JUDKINS et al. v. MYERS et al.

(Supreme Court of Arkansas. Oct. 11, 1909.)

TIME (§ 11*)—BILL OF EXCEPTIONS—TIME FOR FILING.

Where, on January 29th, parties were allowed six months within which to file a bill of exceptions, and filed the bill on July 30th at 58 minutes past 11 p. m., it was too late, and the bill of exceptions formed no part of the record.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 53; Dec. Dig. § 11.*]

Appeal from Circuit Court, Lawrence County; Eugene Lankford, Judge.

Action between Minnie Judkins and others and Mattie Myers and others. From the judgment, there was an appeal. Affirmed.

J. B. Judkins, for appellants. Campbell & Suits, for appellees.

BATTLE, J. On the 29th day of January, 1908, the trial court overruled the appellants' motion for a new trial and gave them six months within which to file a bill of exceptions. On the 30th day of July, 1908, at 58 minutes past 11 o'clock p. m., they filed a bill of exceptions. It was then too late, and their bill of exceptions formed no part of the record, and there is nothing presented to us for consideration; the questions in the case being such as could be presented only by a bill of exceptions.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. ARCHIE et ux.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—NONDELIVERY OF MESSAGES—MENTAL ANGUISH.

A telegraph company failed to deliver a message announcing that the sender's wife would arrive at a designated town and requesting his brother to meet her. The wife arrived there in the middle of the day. There was a hotel close to the station, and she had relatives in the town, with telephone connection in their house. She remained at the station 10 or 15 minutes, and met a friend within two or three blocks from there, who went with her to the home of her brother-in-law. *Held* not to show that she suffered any mental anguish because she was not met at the station.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 69; Dec. Dig. § 68.*]

2. DAMAGES (§ 49*)—MENTAL ANGUISH.

To recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause, and not merely the result of a too sensitive mind or a morbid imagination.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 49.*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by C. L. Archie and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Modified and affirmed.

C. L. Archie and Maggie Archie brought suit against the Western Union Telegraph Company to recover damages for mental anguish on account of the alleged negligence of the defendant company in failing to transmit and deliver a telegram from C. L. Archie to his brother, requesting him to meet Maggie Archie, the wife of C. L. Archie, at the station at Corinth, Miss., on a certain day. C. L. and Maggie Archie lived in Bowie county, Tex. Maggie Archie was in ill health and under the care of a physician. He advised her to leave Texas. Her husband decided to send her to Mississippi, where they had relatives. He accompanied her to Texarkana, Ark., and from that place, on the 13th day of October, 1906, delivered to the defendant company, for transmission to his brother at Corinth, Miss., the following telegram: "To J. W. Archie, Corinth, Miss. Meet Maggie on No. 30 tomorrow. C. L. Archie." On October 14, 1906, Maggie Archie, accompanied by her little boy and girl, arrived at Corinth on train No. 30, between 1 and 2 o'clock in the daytime. J. W. Archie did not meet her. After waiting at the station for him for 10 or 15 minutes, she started to walk to his house, which was about three-quarters of a mile distant. When she had gone two or three blocks, she met a friend, who conducted her there and carried her bundles. She and the children were so weak and sick that at times they had to stop and rest. When they reached her brother-in-law's, she was so weak and sick that she went to bed. She remained in Corinth about one week, and then went to her father's, about 12 miles in the country. For several years prior to going to Texas, she had lived within 4 or 5 miles of Corinth; but when she came to Corinth she came in on the opposite side, and not by the depot. She was a stranger to that part of the town. Corinth is a place of from 7,000 to 10,000 inhabitants. There was a nice hotel near the depot, and J. W. Archie had a telephone in his house. The company received the message promptly at Corinth, but failed to deliver it. There was a trial before a jury, and a verdict for plaintiffs in the sum of $500, and the defendant has duly prosecuted an appeal to this court.

Geo. H. Fearons and Rose, Hemingway, Cantrell & Loughborough, for appellant. Webber & Webber, for appellees.

HART, J. (after stating the facts as above). Counsel for appellant insist that, under the particular facts and circumstances of this case, appellees are not entitled to recover damages for mental anguish. We do not think that there could have been any real mental suffering in this case. The facts are essentially different from those in the case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

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of Western Union Tel. Co. v. Hanley, 85 Ark. 263, 107 S. W. 1168, where a recovery was allowed. In that case Mrs. Hanley arrived at Mayfield, Ky., at 1 o'clock at night, and on account of the failure to deliver her message she was compelled to remain at the station for about three-quarters of an hour before she could get a conveyance. It is true that she suffered no insult or physical injury; but the question was, what would be the natural effect upon her mind? Her mental anguish consisted in what might have happened to a defenseless woman in the middle of the night in a strange place. The very fact that she arrived there at that time of night unattended and with no one to meet her might have caused her to be insulted, or to suffer a worse injury. Here Maggie Archie arrived at her destination in the middle of the day. There was a hotel close to the station. She had relatives in Corinth with telephone connection in their house. She only remained at the station 10 or 15 minutes, and met a friend within two or three blocks of there, who went with her to her brother-in-law's. The facts and circumstances as detailed by her show that she was only subjected to disappointment at not being met at the station. There was no real danger from the situation in which she was placed. Her sickness was not caused by mental suffering. At most she could only have suffered anxiety from an imaginery situation. There could have been no real cause for mental anguish. As held in the cases of McAllen v. Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715, and Morrison v. Western Union Tel. Co., 24 Tex. Civ. App. 347, 59 S. W. 1127, in order to recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause, and not merely the result of a too sensitive mind or a morbid imagination.

Having decided that the appellees are not entitled to recover, under the facts of this case, damages for mental anguish, it is not necessary to consider the other assignments of error of the appellant company.

It is conceded that the appellees are entitled to recover the sum of $2, and a judgment for that sum will be affirmed.

WESTERN UNION TELEGRAPH CO. v. SOCKWELL.

(Supreme Court of Arkansas. July 12, 1909. On Rehearing Oct. 18, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—ADMISSIBILITY OF EVIDENCE.

In an action against a telegraph company for mental anguish caused by negligence in delivering a message, there was evidence to show that the message was taken to a hotel and left with the boy in charge of the hotel phone switch board. *Held*, that it was not error to exclude testimony that the switchboard boy told the messenger that plaintiff was stopping at the hotel, as it is not shown that it was the duty of the boy to give information as to persons stopping at the hotel, and the evidence did not tend to prove that it was his duty to receive messages sent to the patrons of the hotel or give any information concerning them, and such evidence was hearsay.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—ADMISSIBILITY OF EVIDENCE.

In an action against a telegraph company for mental anguish caused by negligence in delivering a message to plaintiff informing him of the serious illness of his father, evidence that plaintiff's father had given him 40 acres of land, and that he had not visited his father but once since leaving home because he was financially unable to visit him oftener, was admissible to show the affection between plaintiff and his father, and not to show plaintiff's poverty.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—ADMISSIBILITY OF EVIDENCE.

In an action against a telegraph company for mental anguish caused by defendant's negligence in delivering a message to plaintiff which had no address except the town, there was evidence to show that there was a city directory in defendant's office which contained the name and address of plaintiff. *Held*, that evidence offered by defendant to show the proper or usual method of attempting to find an addressee addressed in that manner was inadmissible, as any evidence tending to show that defendant failed to consult the directory, but resorted to some other method less definite, would show negligence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*)—ACTIONS FOR DAMAGES—INSTRUCTIONS.

In an action against a telegraph company for mental anguish caused by negligence of defendant in delivering a message to plaintiff addressed to a city only, it was shown that at the time the message was received that defendant had in its office a city directory containing the name and address of plaintiff. *Held*, that it was not error to refuse to charge that it was the duty of the sender of the telegram to give such an address as would enable the telegraph company to deliver it by the exercise of ordinary care, and that in a city of 25,000 or more population such an address as the one given, unless the addressee was so generally known that he could be found by the exercise of ordinary diligence, would not be a sufficient address, and that failure to deliver the telegram for such a reason would require a finding for defendant, and that, if plaintiff was unknown to employés and the delivery boy took the message to the principal hotel in the city, and was told by one of the hotel employés that plaintiff was stopping there, and he delivered the message to said employé, who was one who habitually received such messages, and if the jury find that it is the common practice of delivery clerks with a message of that kind to inquire at hotels, the verdict should be for defendant.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

5. TELEGRAPHS AND TELEPHONES (§ 74*)—ACTIONS FOR DAMAGES—INSTRUCTIONS.

In an action against a telegraph company for mental anguish caused by negligence of defendant in not delivering a message addressed to plaintiff which contained no other address than the name of the city, it was shown that at the

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time the message was received defendant had in its office a city directory containing the name and address of plaintiff. *Held*, that instructions, given at request of plaintiff, that whether sending the message to plaintiff without any further address than the city and state was such negligence on the part of the sender of the telegram as to excuse defendant for failure to deliver, and whether accepting and undertaking to deliver the message without any further address than that given and failure to deliver it promptly was negligence on the part of the defendant were questions for the jury, were more favorable to defendant than was warranted by the facts in evidence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

In an action against a telegraph company for mental anguish caused by negligence in delivering a message to plaintiff, informing him of the serious illness of his father, the court instructed that if the jury find that the telegram was addressed to plaintiff at S., and was received by defendant at that place, and was not delivered until 15 days thereafter, and that plaintiff had a known residence in S. on the day the telegram was received, that in the meantime his father had died, that, on account of such delay, plaintiff was precluded from being with his father in his last illness and at his death, and that said failure to deliver was on account of defendant's negligence, the jury should find for plaintiff whatever amount they believed to be a compensation to him for the mental anguish occasioned by his inability to be with his father in his last illness and death. *Held*, that the instruction was not objectionable as assuming that plaintiff had a known residence in S. and as assuming that plaintiff had suffered mental anguish on account of his inability to be with his father; there being evidence that plaintiff had been a resident of S. for three years, and that the relations between plaintiff and his father were those of an affectionate father and son.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

7. APPEAL AND ERROR (§ 856*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

Although Kirby's Dig. § 6215, subd. 6, allows the granting of a new trial where the verdict is not sustained by sufficient evidence, the refusal to grant a new trial will not be reversed on appeal because of insufficiency of evidence where the motion for a new trial is not made on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 856.*]

Battle and Wood, JJ., dissenting.

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by R. C. Sockwell against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit by appellee against appellant for damages for mental anguish growing out of the alleged negligence of appellant in failing to deliver a telegram. The complaint contains among other allegations the following: Plaintiff says that his father, a man of advanced age, was prior to the 5th day of August, 1908, residing in Mountain Park, and that prior to said 5th day of August plaintiff alleges that his father had become sick and confined to his bed; that plaintiff was notified of such sickness, and was told that, if any alarming symptoms occurred which would indicate the probable death of his said father, a telegram would be sent to him at Ft. Smith, Ark. Plaintiff alleges that on the 5th day of August, 1908, his father grew rapidly worse, and that his brother, R. C. Sockwell, on said 5th day of August, at the time of 7 o'clock and 40 minutes p. m., delivered to the Western Union Telegraph Company at Mountain Park for transmission for a valuable consideration the following telegram, to wit: "Come at once, Father is very low." Plaintiff alleges that said message was received at the office of the Western Union Telegraph Company at Ft. Smith, Ark., at 8 o'clock and 15 minutes p. m. on said 5th day of August, but that the said Western Union Telegraph Company did not deliver said message to this plaintiff until the 20th day of August, 1908, at 7:10 a. m., and that, when the plaintiff learned of his father's sickness, his said father had died, and had been buried. Plaintiff alleges that he was greatly devoted to his said father, and that his said father was greatly devoted to him, plaintiff, and that, had he received said message prior to his father's death, he would have promptly gone to his father's bedside and lingered with his father pending his dissolution; that the failure of the aforesaid defendant to deliver said message, and in consequence of the plaintiff's inability to be with his father prior to and at the time of his death, the plaintiff alleges that he has suffered great mental anguish, and has been damaged in the sum of $2,000. The answer denied all these allegations.

The appellee testified as follows: "That he was born in 1886, and lived and worked with his father until his marriage four or five years since. After his marriage, his father gave him 40 acres of land out of the home farm, and he lived on that until the fall of 1904. April, 1905, he came to Ft. Smith, and entered the service of the street car company, with whom he has ever since remained as motorman at first and later as conductor. That he had visited his father at his home in Oklahoma some 300 miles away once, and his father had visited him in Ft. Smith in July preceding his death. That he did not visit his father more because of his being financially unable to do so. That the relations between his father and himself were those of affectionate father and son. That he was notified by letter a few days prior to August 5, 1908, of his father's illness, and at once wrote him to advise him in case his father's condition became critical. That he heard nothing further from home until August 14th, when he was informed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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by letter from his mother of the death and burial of his father. That he took the first train for Weatherford, Okl., and visited his mother and the family. That he then learned that a telegram had been sent him, and was given a copy of it by the Western Union operator at Weatherford. On his return home, August 20th, he went to the office of defendant in Ft. Smith, and Manager Stannard delivered to him the message on which this suit is based." Appellant objected to the testimony as to the financial condition of plaintiff and to the testimony as to the gift of the 40 acres. The objections were overruled, and exceptions saved.

R. O. Sockwell: He was 25 years old, a brother of appellee and son of deceased, and resided with their father in Kiowa county, Okl., on August 5, 1908. "To the best of his knowledge and belief" his brother, E. C. Sockwell, resided in Ft. Smith "during the month prior to August 5, 1908." Prior to August 5th he had notified his brother that their father was sick with typhoid fever, and that notice would be given him if he got worse. On August 5th his father became worse, and witness delivered to M. V. Holland, the rural mail carrier, the telegram described in the complaint, to be taken to appellant's agent at Mountain Park for transmission.

S. Cornet: Was the agent for defendant at Mountain Park, Okl., on August 5, 1908, and on that date received from M. C. Holland the message in suit for transmission.

M. C. Holland: He conveyed the telegram from the sender, R. O. Sockwell, to defendant's agent at Mountain Park.

The appellant's witness H. C. Stannard testified as follows: Was manager for defendant at Ft. Smith. Its office force at night consisted of one operator, one night clerk, and one delivery boy. That these composed the office force on the night of August 5, 1908. That the message was delivered to the addressee on August 20, 1908. That there was a city directory in defendant's office in Ft. Smith, much worn by use, which contained the name and address of plaintiff. Appellant asked the witness to state the proper or usual method of attempting to find an addressee when no further address than the name and town was given. This was objected to. Counsel for appellant then stated that he proposed to show by the witness that he had been in the telegraph business as manager for 30 years; that when messages were received in a place as large as Ft. Smith, with no more address than a name and no one in the office knew such a person, the delivery boy would take the message to the principal hotels and inquire there for the addressee; that this was the general practice in trying to locate an unknown person. The court refused to permit the testimony, and appellant excepted.

Ira Lunsford: Was the operator who received the message and hung it upon the receiving hook. He had never heard of appellee.

Ray Greenlee: Was night clerk in appellant's office at Ft. Smith on August 5, 1908, and received the message that night. He took it from the hook, copied it, registered it, and gave it to the messenger boy, Logsden. He had never heard of appellee.

Eugene Logsden: Was appellant's delivery boy on night of August 5, 1908, and received the message between 8 and 9 that night. He had never heard of appellee. He took the message to the Hotel Main, the principal hotel in the city, and found a boy about 14 years old, named Hennessy, behind the clerk's desk. The message was delivered to Hennessy, and he receipted for it. Hennessy was in charge of the hotel phone switchboard, and has been in the habit of receiving and receipting for messages addressed to the hotel or to persons stopping there; that he had so received such messages in the presence of and with the knowledge of the clerk. Counsel for appellant asked witness what Hennessy said to him, but appellee objected. Counsel for appellant stated that he expected to show by this witness that Hennessy told the messenger that Sockwell was stopping at Hotel Main. The court refused to permit this testimony to be given, and appellant excepted.

The court, over appellant's objection, gave the following instructions:

"(1) All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury or pecuniary loss for negligence in receiving, transmitting, or delivering messages, and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company. Therefore, if you find from a preponderance of the evidence in this case that plaintiff's brother R. O. Sockwell delivered to the defendant telegraph company on the 5th day of August, 1908, the following telegram in substance: 'Come at once, Father is very low'; that said telegram was addressed to the plaintiff at Ft. Smith, Ark.; that said message was received at the office of the Western Union Telegraph Company at Ft. Smith, Ark., at 8 p. m. on the said 5th day of August, and that said telegraph company did not deliver said message to the plaintiff until about the 20th day of August, 1908, and that said plaintiff had a known residence in the city of Ft. Smith on the day and date set out in this complaint, and that in the meantime his father had died and had been buried, and that on account of the delay in delivering the said message plaintiff was precluded from being with his father in his last illness and at his death, and that said failure to deliver was on account of negligence of defendant's agents and employés—you will find for the plaintiff in whatever you should believe to be a compensation to him for the

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mental anguish occasioned to him by his inability to be with his father during his last illness and death.

"(2) Whether sending the message to the plaintiff without giving any further address than the city and state was such negligence on the part of the sender of the telegram as to excuse the defendant for failure to deliver is a question of fact for the jury.

"(3) It is also a question of fact for the jury to determine whether the accepting and undertaking to deliver the message without any further address than that given and failure to deliver same promptly was negligence on the part of the defendant under all the evidence in the case."

The court, over the objections of appellant, refused prayers numbered 1, 2, 3, and 4, which, in effect, told the jury that it was the duty of the sender of a telegram to give such an address as would enable the telegraph company to deliver the same by the exercise of ordinary care, and that in a city of 25,000 or more population a message which gave nothing more than the name of the addressee, unless he was so generally known that he could be found by the exercise of ordinary diligence, would not be a sufficient address, and that, if the jury found these facts to exist, and that the failure of appellant to deliver the telegram promptly was because of the want of such correct address, they should find for the defendant. Also refused prayers Nos. 5 and 6 as follows:

"No. 5. If you find that plaintiff was unknown to the employés of defendant at the office when the message was received, and that the delivery boy took the message at once to the Hotel Main, the principal hotel in said city, where he was told by one of the hotel employés that plaintiff was stopping there, that he thereupon delivered the message to said employé, and that said employé was one who habitually received and receipted for messages left at the hotel, then you will find for defendant.

"No. 6. If you find that none of the employés in defendant's office when the message was received knew plaintiff, that the delivery clerk took it directly to the Hotel Main, which was the principal hotel of the city; that Ft. Smith has a population of 25,000 or more; that the delivery clerk delivered said message to an employé of the hotel who was in the habit of receiving messages directed to persons in care of said hotel or stopping there, who receipted for the same, and if you further find that it is the common and usual practice of delivery clerks, when they have a message for an unknown party, to inquire at the hotels, then defendant was not negligent in making such delivery, and, if you further find that defendant did not learn until long after the death of plaintiff's father that said message had not been received by the addressee, then you will find for defendant."

There was a verdict in favor of appellee for $800. The motion for new trial alleged the following errors: In excluding the evidence of the messenger that he was told by the party in charge of the office at Hotel Main that the addressee was stopping there. In permitting evidence of appellee's financial condition. In refusing to allow Stannard to testify as to usual method of finding addressee when message did not contain specific address. In refusing each of appellant's six requests for instructions. In giving each of the three instructions.

The motion was overruled. Judgment was entered in accordance with the verdict, and this appeal was taken.

Geo. H. Fearons, Mechem & Mechem, and Rose, Hemingway, Cantrell & Loughborough, for appellant. Oscar L. Miles, for appellee.

WOOD, J. (after stating the facts as above). We will consider the questions in the order presented in the motion for new trial.

1. It was not error to exclude the offered testimony of the messenger boy that he was told by Hennessy that Sockwell was stopping at the Hotel Main. It was not shown that it was the duty of the boy in charge of the "hotel phone switch board" to give information of the persons stopping at the hotel. Even had it been shown that appellee was at the hotel, the offered evidence did not tend to prove that it was the duty of the phone boy to receive messages sent to the patrons of the hotel, or to give any information concerning them. The offered testimony was pure hearsay.

2. The testimony of appellee that his father had given him 40 acres of land, and that he had not visited his father more because he was financially unable to do so, was not prejudicial error. The connection in which this evidence was elicited shows that its purpose was not to show appellee's poverty, or financial condition, as appellant contends, but to show the state of feeling, the affection, that existed between father and son.

3. There was no error in refusing to allow the witness Stannard to testify as to the proper or usual method of attempting to find an addressee when no further address was given than the name and town. This witness testified "that there was a city directory in appellant's office in Ft. Smith, much worn by use, which contained the name and address of plaintiff." It could not be said, in view of this evidence, that the name and address of appellee were unknown to appellant. It shows that his name and address were at hand in the directory. But, instead of consulting this, appellant proposed to show what was the usual custom, and that it followed that custom. In view of the above evidence, no matter if there was such a custom as appellant offered to prove, it was palpable negligence on the part of appellant to follow the custom instead of taking the positive information

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in its possession. Any evidence which tended to show that appellant failed to consult and follow this certain information, but, instead, resorted to some other method less definite, would necessarily show negligence on the part of appellant.

4. In view of the fact that appellant showed that it had the name and address of appellee at the time the message to him was received at Ft. Smith, it was not error for the court to refuse the prayers of appellant to have the question submitted to the jury as to whether the sender of the telegram had given such correct address as would enable appellant by the exercise of ordinary care to deliver the message. It follows that prayers of appellant numbered 1, 2, 3, and 4 on the subject of the negligence of the sender, and prayers numbered 5 and 6 on the subject of the custom in delivering telegrams, were properly refused. It follows, also, that prayers numbered 2 and 3 given at appellee's request were more favorable to appellant than was warranted by the undisputed evidence. Appellant cannot, therefore, complain of these. Appellant, having the name and the correct address of the addressee of the message, as its own evidence shows, was in no position to claim that appellee was negligent in not giving a more definite address. Appellant failed to exercise ordinary care to ascertain where the addressee could be found which it might have easily done by consulting the city directory in its hands.

5. Appellant contends that the first instruction given at the instance of appellee is erroneous in "assuming that plaintiff had" a known residence in Ft. Smith "at the time of this occurrence." The instruction left the jury to determine from a preponderance of the evidence as to whether or not appellee had a known residence in the city of Ft. Smith which was really more favorable to appellant than it had the right to ask on this question, for the undisputed evidence of appellee is that in April, 1905, "he came to Ft. Smith and entered the service of the street car company with whom he has ever since remained." Appellant also contends that the instruction assumes that appellee had suffered some mental anguish on account of his inability to be with his father when that was a question for the jury. The evidence was that the relations between appellee and his father "were those of affectionate father and son." It was not prejudicial error to assume that an affectionate son would suffer mental anguish by being deprived of the opportunity of being with his father in his last illness.

The contention here that there was no evidence to show when appellee's father died, and therefore no evidence to show that appellee would or could have reached him before his death had the message been promptly delivered, is borne out by the record.

But one of the grounds for which a verdict may be vacated and a new trial granted is as follows: "The verdict is not sustained by sufficient evidence." Section 6215, Kirby's Dig. subd. 6. The motion for new trial contains no such ground. Had the attention of the trial court been called specifically to this in the motion for new trial, we would then be in position to say that the court had erred in overruling the motion. But on review here we reverse only for errors in the rulings of the lower court. Therefore it must be held that the failure of the appellant in its motion for a new trial to object to the sufficiency of the evidence to support the verdict was a waiver of such ground there and here. The trial court was not given the opportunity to set aside the verdict on the ground that there was no evidence to sustain it. Moving for new trial waives all exceptions taken at the trial and not incorporated in the motion. 1 Crawford's Digest "Appeal and Error," p. 122, IVb, where the cases are collated. Therefore appellant cannot succeed upon his contention raised here for the first time that the evidence does not sustain the verdict.

Finding no reversible error, the judgment is affirmed.

BATTLE, J., dissents.

On Rehearing.

PER CURIAM. Rehearing denied.

WOOD, J. (dissenting). Appellee's mental anguish, according to the allegations of his complaint, grew out of his "inability to be with his father prior to and at the time of his death." There is no evidence to show when appellee's father died. There is no evidence to warrant the finding that, if the telegram had been delivered promptly to appellee, he could have reached his father's bedside prior to his death. In the absence of this evidence, appellee fails to prove the cause of action alleged.

While the motion for new trial does not assign as error that there was no evidence to support the verdict, the objection to the first instruction and the exception to the ruling of the court in giving it, carried forward into the motion for new trial, raises the question here; for it was error to submit to the jury the question as to whether or not "on account of the delay in delivering the said message plaintiff was precluded from being with his father in his last illness and at his death," when there was no evidence to show that appellee could have reached his father's bedside before his death had the message been promptly delivered. Instructions must be based upon the evidence. It is prejudicial to submit abstract questions that are material to the issue.

I have reached the conclusion on reconsideration that the above is the correct view to take of the case, and that the same should

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BATTLE, J., concurs.

WESTERN UNION TELEGRAPH CO. v. HARRIS.

Supreme Court of Arkansas. Oct. 18, 1909.)

. TELEGRAPHS AND TELEPHONES (§ 31*) — REGULATION OF BUSINESS — ADOPTION OF REASONABLE RULES.

A telegraph company may prescribe rea-nable rules for its business, and reasonable ours during which messages may be sent and ·livered at certain offices.

[Ed. Note.—For other cases, see Telegraphs d Telephones, Cent. Dig. § 20; Dec. Dig. § .*]

TELEGRAPHS AND TELEPHONES (§ 38*) — NONDELIVERY OF MESSAGES—LIABILITY.

Under the rule that, where a telegraph com-y is unable, through a disarrangement of lines or other cause, to transmit a message, must inform those who wish to employ it the fact, a transmitting agent who knows, under the circumstances should know, that account of the closing of the receiving office e will be delay in delivering an urgent mes- must inform the sender of the fact; and, re he fails to do so, the company is liable damages resulting from such neglect.

d. Note.—For other cases, see Telegraphs Telephones, Cent. Dig. § 33; Dec. Dig. §

ELEGRAPHS AND TELEPHONES (§ 38*) — NDELIVERY OF MESSAGES—LIABILITY.

A transmitting agent of a telegraph com- is bound to know the rules of other offices office hours, as the company can furnish ents with such information, and an agent ing a message for immediate transmission certain by inquiry whether the receiving is open for the receipt of messages.

Note.—For other cases, see Telegraphs elephones, Cent. Dig. § 33; Dec. Dig. §

eal from Circuit Court, Perry County; d W. Winfield, Judge.

on by G. B. Harris against the West-nion Telegraph Company. From a nt for plaintiff, defendant appeals. d.

H. Fearons and Rose, Hemingway, & Loughborough, for appellant. Sel-ellers, for appellee.

LLOCH, C. J. This is an action in- by G. B. Harris against the Western elegraph Company, to recover dam- alleged negligent failure to trans- deliver a telegraphic message. The recovered judgment below, and the t appealed. There is practically no s to the facts of the case, which llows: In July, 1907, Harris resid- village or town of Perry, in Per- , Ark., and his wife went to Little visit to one of her relatives, nam- ery, a message directed to the plaintiff, Harris, at Perry in the following words: "Your wife is very sick, come down at once." If the plaintiff had received the message at any time prior to 10:35 o'clock that night, he could, and the proof shows that he would, have taken a train at that hour, which would have brought him to Little Rock and to the bedside of his sick wife in about two hours. The message was not, however, delivered to him by that time, on account of the fact that Perry, the receiving office, was not a night office; the office hours at that place being from 7:30 a. m. to 7 p. m. On this account he did not, and could not, leave Perry until the next morning. His wife became unconscious some time before he reached her, but the proof shows that, if he had received the message in time to take the 10:35 p. m. train at Perry, he would have reached her bedside several hours before she became unconscious. She died on the same day, without having regained consciousness after the plaintiff reached her bedside. When the message was filed with the operator at Little Rock for transmission, the latter gave no information to the sender that the office at Perry was not a night office, and that the message would not, or might not, be delivered before the next morning. It was proved that there is a long distance telephone line between Little Rock and Perry, and that the plaintiff had a telephone in his house where he slept that night, and could have been reached by telephone.

The failure to deliver the telegraphic message to the plaintiff on the same night it was sent was manifestly due to the fact that Perry was not a night office, and that no operator was regularly maintained there during the hours of the night. This of itself would afford no grounds for recovery, for it is well established that telegraph companies have the right to prescribe reasonable rules and regulations for the operation of the business, including the right to prescribe reasonable hours during which messages may be sent and delivered at certain offices. Western Union Tel. Co. v. Love Banks Co., 73 Ark. 205, 83 S. W. 949; Western Union Tel. Co. v. Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. v. Gillis, 89 Ark. 483, 117 S. W. 749. But it is insisted by plaintiff that his right of recovery is established by proof of the fact that the defendant's agent at Little Rock was guilty of negligence in failing to inform the sender that the message would not be delivered that night, so that another means of communication with the plaintiff could have been adopted, viz., the telephone. We are of the opinion that this contention

is well founded. The defendant's agent when he received the message knew, or should have known, that the message would not be promptly delivered, on account of the fact that the receiving office was closed during the hours of the night. The message was filed for immediate transmission and delivery, and its urgency and importance appeared on its face. The sender had the right to assume that, as the message was received by the company for immediate transmission, if there existed any reasons why it could not be promptly delivered, information thereof would be then given so that other means could be adopted. The agent of the company had no right to assume that the sender of so urgent a message knew of the necessary delay incident to awaiting the opening of the receiving office the next day, and he therefore was not justified in withholding or failing to give information that there would necessarily be considerable delay in sending the message. The rule is, we think, well established by the authorities that "if a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means." Gray on Communication by Telegraph, § 18; Tel. Co. v. Fleischner, 66 Fed. 899, 14 C. C. A. 166; Swan v. Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; W. U. Tel. v. Bruner (Tex.) 19 S. W. 149. The same principle is stated in another place as follows: "Where, from any cause it is impossible to transmit the message, or where considerable delay will be necessary, and the operator is aware of the fact when the message is offered him, it is his duty to inform the sender, particularly when the message shows on its face the necessity or importance of its being speedily transmitted." 27 Am. & Eng. Enc. Law (2d Ed.) 1026. This principle, we think, demands that where the company's transmitting agent knows, or under the circumstances should know, that on account of the closure of the receiving office there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and, if he fails to do so, the company is liable for damages resulting from such neglect.

The further question then arises whether or not the transmitting agent is bound to take notice of the office hours at the receiving office. The evidence in this case is silent on the question as to whether or not the Little Rock agent knew that the Perry office was, in accordance with the rules, not open at night. This question is not free from doubt, and there is little authority on the subject. Judge Thompson in his work on Negligence (volume 2, § 2402) states his conclusion to be that the agent of the company ought to be held bound to know the rules of other offices with respect to office hours. We think this is the sound and just view of the matter, and that any other rule would work an injustice to those who deal with telegraph companies. It appears to us to be conveniently within the power of the company to furnish its agents with information as to the rules of various offices with respect to the hours within which messages may be received and delivered. In addition to this it is within the power of one of the agents, when he receives a message for immediate transmission, to ascertain by inquiry over the lines whether the receiving office is at that time open for the receipt of messages, so that he can give the necessary information to the sender.

We are of the opinion, therefore, that the facts of the case justify a recovery of damages by the plaintiff, so the judgment is affirmed.

LANSING WHEELBARROW CO. v. MONTGOMERY.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. WITNESSES (§ 32*)—FEES—TAXATION—NECESSITY FOR PROVING ACCOUNT—STATUTORY PROVISIONS.

A witness in a civil case cannot have his fees for attendance and mileage taxed against the losing party, unless he proves his account in compliance with Kirby's Dig. § 3524, providing that every account for attendance of a witness shall be sworn to, and shall state that he was summoned to attend as a witness in the cause on which the charge is made, and the number of days he attended, and, if summoned without the limits of the county, the number of miles he traveled in consequence of the summons; the statute applying to civil as well as criminal cases.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 72; Dec. Dig. § 32.*]

2. WITNESSES (§ 32*)—FEES—TAXATION—NECESSITY FOR PROVING ACCOUNT—STATUTORY PROVISIONS—ABROGATION BY CUSTOM.

The statute cannot be abrogated by a custom for witnesses to report to the clerk verbally the number of days' attendance, without making out an account and swearing to it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 72; Dec. Dig. § 32.*]

Appeal from Circuit Court, Cross County; Frank Smith, Judge.

Action by the Lansing Wheelbarrow Company against Dick Montgomery. From the judgment, plaintiff appeals. Reversed and remanded, with directions.

T. E. Hare, for appellant. J. T. Patterson, for appellee.

McCULLOCH, C. J. The sole question involved in this appeal is whether or not a witness in a civil case pending in the circuit court is entitled to have his fees for attendance and mileage taxed against the

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losing party, without having, in the time and manner provided by statute, proved his account therefor. The statute is as follows: "Every account for attendance of a witness shall be sworn to, and shall state that he was summoned to attend as a witness in the cause upon which the charge is made, and the number of days he attended, and if summoned without the limits of the county, the number of miles he traveled in consequence of the summons." Section 3524, Kirby's Dig. This court in Fulks v. State, 64 Ark. 148, 41 S. W. 54, held that a witness in a criminal case could not have his fees taxed unless he proved same in the manner and within the time prescribed by the statute. The statute applies equally to civil and criminal cases. It was shown in evidence in the present case that it had always been the prevailing custom in Cross county, where the case was pending, for witnesses to report to the clerk verbally the number of days' attendance, without making out an account and swearing to it, as provided by the statute. This alleged custom does not alter the rights of the parties, nor prevent the operation of the statute. Parties, witnesses, and officers are all presumed to know of the existence of this statute, and it cannot be abrogated by custom.

Reversed and remanded, with directions for further proceedings on the motion to retax costs not inconsistent with this opinion.

SCROGGIN v. RIDLING.

(Supreme Court of Arkansas. Oct. 18, 1909.)

TAXATION (§ 534*)—PAYMENT OF TAXES—MISTAKE OF COLLECTOR—EFFECT.

The owner of land offered to pay the taxes thereon, and he gave a correct description of it to the collector who made a mistake in describing it, thereby omitting 40 acres. The owner was unable to tell from the tax receipt that a mistake was made, and he supposed that his receipt was correct, and paid the amount of taxes claimed to be due. *Held*, that a sale of the 40 acres for taxes was void under the rule that a bona fide attempt to pay all the taxes frustrated by the mistake of the collector is equivalent to actual payment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 990; Dec. Dig. § 534.*]

Appeal from Conway Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by O. O. Scroggin against H. L. Ridling. From a decree for defendant, plaintiff appeals. Affirmed.

Sellers & Sellers, for appellant. Wm. L. Moore, for appellee.

HART, J. O. O. Scroggin brought suit in ejectment in the Conway circuit court against H. L. Ridling to recover possession of the N. E. ¼ of the N. E. ¼ of section 20, township 8 N., range 16 W., in Conway county, Ark. He relied on a tax title to maintain his action. Ridling filed his answer and motion to transfer the cause to the chancery court, in which he set up that he had attempted to pay the taxes in apt time, but that through the mistake or fault of the collector of taxes the land was not properly described in the tax receipt given him, and that he did not discover the mistake until the present suit was brought. Ridling asked that he be allowed to redeem the land, and that a decree be entered canceling Scroggin's tax deed as a cloud upon his title. By consent the cause was transferred to the chancery court, and the chancellor found the issue in favor of Ridling, allowing him to redeem upon payment of $5, the taxes, penalty, and costs, for which the land was sold. Thereupon Ridling offered to pay to Scroggin said sum of $5, which was refused in open court, and a decree was entered canceling Scroggin's tax deed as a cloud upon Ridling's title. Scroggin has appealed to this court.

The sole question raised by the appeal is as to the validity of the tax title of Scroggin. It is conceded that a bona fide attempt to pay all the taxes frustrated by the mistake or fault of the collector is equivalent to actual payment, and this was the rule announced in the case of Gunn v. Thompson, 70 Ark. 500, 69 S. W. 261. We think the facts of this case bring it within the rule. Ridling received a deed for the land in 1902, and in 1903 he got some one to go to the collector's office to pay the taxes for him. In 1904 he went himself to the collector to pay the taxes, but did not have the deeds with him. He wished to pay taxes on 180 acres of land, and gave the description of it to Albert Stover, deputy collector in the sheriff's office. Ridling testifies as follows: "I told him beginning at the northeast corner of the section with the Fonville land, the Fonville 40 at the northeast corner. Then I told him going three-fourths of a mile south, the next 40 the house was on, and the 40 still south of that, and then beginning at the section line and running east and west north of these three 40's and running one-quarter and one-half quarter south." The Fonville 40 is the one in controversy. Ridling further stated that he could not tell from examining the tax receipt whether or not it correctly described the land, and that he did not even have sufficient education to discover the mistake by comparing the tax receipt with his deed. He supposed his tax receipt was correct, and paid taxes on the land during 10 subsequent years, until this suit was brought, not knowing that it had been sold for taxes. The suit was commenced September 21, 1908. The collector made a plat of the 180 acres from the description given him by Ridling. All the land described except the 40 acres in controversy was correctly written in the tax receipt. Ridling's description

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began with the 40 acres in controversy, and the other lands were described with reference to it. No mistake having been made with reference to them shows that the mistake was made through the fault of the collector. Ridling correctly described the land to the collector, and in good faith paid him the amount of taxes claimed to be due.

We think the facts uphold the finding of the chancellor, and it is ordered that the decree be affirmed.

BLAKE v. SCOTT.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 308*)—CONSTRUCTION OF SIDEWALKS—LIABILITY OF ABUTTING OWNERS.

Where an abutting owner did not resist the enforcement of a city ordinance requiring abutting owners to construct the sidewalk, but proceeded to comply with it, and contracted with a third person to build the walk and the retaining wall, necessary because of the grade established by the city, and the third person performed the work, the abutting owner's liability to pay for the work was not affected by the invalidity of the ordinance, and the city was not liable in any action on the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 819½; Dec. Dig. § 308.*]

2. CONTRACTS (§ 168*)—TERMS IMPLIED AS PART OF CONTRACT—INTENTION OF PARTIES.

The terms of a contract may be express or implied from acts, but there must be in either case a distinct intention common to both parties, which intention may be implied from acts and words, and the law will impute to the parties the intention which the meaning of their acts and words reasonably impart.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.*]

3. WORK AND LABOR (§ 4*)—ORDER TO ABUTTING OWNER TO CONSTRUCT SIDEWALK—CONTRACT FOR WORK.

A city adopted an ordinance requiring abutting owners to construct sidewalks. A contractor building sidewalks and the retaining wall for abutting owners was requested by defendant, an abutting owner, to build the walk and retaining wall in front of his property, as he was doing for the other owners. The defendant saw the work as it progressed, and made no objection. *Held*, that the abutting owner was liable for the cost of the work.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3–7; Dec. Dig. § 4.*]

4. WORK AND LABOR (§ 4*)—IMPLIED PROMISE TO PAY.

An implied contract to pay will arise where under all the circumstances the services were such as to create a reasonable belief that they would be paid for.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 4; Dec. Dig. § 4.*]

5. COURTS (§ 488*)—LEGAL OR EQUITABLE—TRANSFER OF ACTION AT LAW TO CHANCERY—WAIVER.

Where the parties to an action at law did not object to the transfer thereof to the chancery court, and did not object to the chancery court entertaining and trying the action, any objection to the transfer was waived, and the chancery court had jurisdiction to try and determine the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1316, 1321; Dec. Dig. § 488.*]

Battle, J., dissenting in part.

Appeal from Nevada Chancery Court; Jas. D. Shaver, Chancellor.

Suit by H. V. Scott against G. R. Blake, in which the City of Prescott was made a party. From a decree for plaintiff against defendant Blake, and a dismissal of the action against the City of Prescott, defendant Blake appeals. Affirmed.

Hamby & Haynie, for appellant. H. B. McKenzie, for City of Prescott.

FRAUENTHAL, J. The plaintiff below, H. V. Scott, instituted this suit against the defendant, G. R. Blake, upon an account for building a concrete sidewalk and curb. In effect, it was an action for a balance claimed due upon the account. The total amount due for the walk and curb was $273.90, and upon that the defendant had paid $132.45, leaving a balance of $145.45, for the recovery of which amount this suit was brought. The defendant denied that he had employed the plaintiff to build the sidewalk and curb, but had only employed him to build the walk; that the cost of the walk amounted to $132.45, which he had paid; and that the balance of $141.45 was the cost of the curb for which he claimed that he was not liable. In his answer he also alleged that some years before the building of this walk and curb the city of Prescott had dug a ditch in front of his property and graded up the street at that place, and thereby made an elevation in front of his property and next the street, which extended in depth from 12 inches to 3 feet from the top of the sidewalk to the bottom of the ditch, and that the plaintiff built a wall or curb of that depth in front of the sidewalk, and that this suit is for the price thereof. He claimed that he did not employ plaintiff to build the wall or curb, that the necessity for building same was created by the city of Prescott in digging the said ditch and elevating the grade of the sidewalk, and that the city of Prescott was on this account liable for the price of building the wall or curb. He asked that the city of Prescott be made a party to the suit, which was done. The city of Prescott filed its answer, in effect, denying that it had made any contract with any one for the doing of the work which was involved in the suit, and denied that it was in any manner liable therefor. Thereupon the circuit court of its own motion, and without any objection made by any party to the suit, transferred the action to the chancery court. The chancery court without objection of any of the parties assumed jurisdiction of the cause and proceeded to trial of the case. It render-

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ed a judgment in favor of plaintiff and against defendant, Blake, for the amount of the claim, and dismissed the action as against the city of Prescott. Blake prosecutes this appeal.

It appears from the evidence that the defendant, Blake, owned a lot situated in a block along which the city of Prescott by ordinance required sidewalks to be built by the various owners of the lots. The lot of defendant was quite low, and some years prior to the building of this sidewalk the city of Prescott had dug a ditch and raised the grade before defendant's property as set out in his said above answer. The plaintiff was engaged in building sidewalks along the block for other owners of lots, and in building such walks he also built for the other owners the curb or retaining wall in the front of such walks down to the bottom of the ditch, for all of which work these other owners were paying. When, in doing this work, for the other owners, the plaintiff was near to the property of the defendant, the defendant requested the plaintiff to proceed and do the work of building the walk before his property as he was doing for the other owners; and about the only other definite understanding the parties had was as to the terms of payment. Nothing was definitely said as to the exact amount or extent of the work. In order to build the sidewalk, it was necessary to build the curb or wall as a part thereof so as to retain the earth upon which the walk rested, and the top of the curb became also a part of the walk. Upon receiving request from defendant to build the sidewalk in front of his property, the plaintiff began with building the curb or wall, and the defendant was present and saw the plaintiff doing every part of the work. The only person or authority that requested the plaintiff to do the work was the defendant, Blake, and it was only at his request that the plaintiff proceeded to do any of the work, and only at defendant's request that he did the entire work. This the defendant knew, and, if he did not expect or intend to pay for the work of building the curb or wall, he did not make any statement to that effect to plaintiff. In the progress of the work the defendant, Blake, made payments from time to time to plaintiff; and, after the entire work of building the curb or wall and walk had been completed, and the plaintiff presented his claim for the balance due on said entire work, the defendant for the first time told the plaintiff that he thought the city of Prescott should pay for the curb or wall, and suggested that plaintiff sue the defendant, Blake, and said city for the cost of the curb or wall, and whatever the court said he would do.

The plaintiff claims that he understood from the agreement of his employment by defendant that he was to do the work of building the walk and curb or wall as constituting the sidewalk in the same manner as he was doing for the other owners at the time of the employment by defendant, and that defendant, and only the defendant, was to pay for the entire work. The defendant, Blake, contends that he thought it was the duty of the city of Prescott to pay for the work of building the curb or wall, and that the city would pay therefor and not he; and on that account made no mention relative thereto. The right of the plaintiff to recover herein against the defendant, Blake, is determined by the contract which he made with Blake, either express or implied. The liability of Blake is not diminished or affected by any act done or ordinance passed by the city of Prescott, if he is liable for the indebtedness sued for, and that liability is solely dependent upon his own acts and contract. It is contended by defendant, Blake, that the city of Prescott had dug a ditch before his property, and had in grading the sidewalk raised a high embankment, and thus had made the work in the front of his property so unequal that it was not uniform with like work required of other owners, and, on this account, the ordinance of that city requiring him to lay sidewalks could not require him to build this curb or retaining wall. But, if that contention should be deemed to be correct, it would only be a defense to Blake in resisting the enforcement of that ordinance. If, on the other hand, he did not resist the enforcement of the ordinance, but proceeded to comply with its requirements and to build his sidewalk, and contracted with the plaintiff to do the work, then his liability to plaintiff could not be affected by any act done by the city of Prescott. In fact, the city of Prescott was not a necessary or proper party to this suit. It was not a party to the alleged contract between plaintiff and Blake, and was not in privity therewith. It could not, therefore, be held liable in any action based upon such a contract. 7 Am. & Eng. Ency. Law, 113. The rights of the parties herein are founded and rest upon the contract that was made between the plaintiff and Blake, and solely upon that contract. The uncertainty of these rights, if there is any uncertainty, grows out of the dispute in the testimony as to scope of that contract, and to the failure of the parties when making the contract to specifically name its extent and scope in express language. When a contract is entered into, it is either express in its terms or its terms may be implied from the acts, conduct, and express words of the contract. To form the agreement of the parties it is essential that there should be a distinct intention that is common to both. But the intention of the parties need not be express. It may be implied from the acts and words used, and the law will impute to the parties an intention which the meaning of their words and acts reasonably import.

In Freeman v. Cook, 2 Exch. 654, 18 L. J. Exch. 114, that rule is formulated as follows: "If, whatever a man's intention may

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be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." In this case the plaintiff was building sidewalks for other owners in the same block and along the same line of frontage of defendant's property. In doing the work for the other owners he also built as a part of their sidewalks the curb or wall down to the bottom of the ditch, and of the same character as that which of necessity would have to be built for defendant in the construction of the sidewalk in front of defendant's property; and the other owners were directing that the curb or wall should be built before their property in constructing their sidewalks, and were paying therefor. The plaintiff offered to do the work in front of defendant's property in the same way and to the same extent. The defendant, Blake, requested him to build the sidewalk without specifically mentioning the curb or wall; and, when in pursuance of that request the plaintiff began the work by starting on the curb, the defendant stood by and saw the work of building the curb proceed. He must have known that plaintiff was only doing that work at his request and at the request of and by the direction of no other person or party. It was not suggested that any other person or that the city of Prescott would pay therefor, or was liable to pay therefor. The circumstances are sufficient to justify the finding from the words and conduct of the defendant, Blake, and the plaintiff that the defendant, Blake, requested this work of building the curb or wall to be done as a part of the work of building the sidewalk, and that he would pay the plaintiff therefor. "An implied contract to pay will be presumed if under all the circumstances the services were such as to lead to a reasonable belief that they would be paid for." Hogg v. Laster, 56 Ark. 382, 19 S. W. 945. The work here done was specially beneficial to Blake, and from his words and acts it is but reasonable to presume that it was the intention of both the parties that he requested the work to be done, and it is but just to imply that he intended to pay therefor. Bishop on Contracts, § 188; 2 Page on Contracts, § 772; 9 Cyc. 248. It follows that there is ample evidence to support the finding of the chancellor that defendant Blake employed the plaintiff to build the curb or wall, and that he is liable to the plaintiff for the cost of same by reason of that employment.

It is the opinion of BATTLE, J., that the circuit court should not have transferred this cause to the chancery court, and that, inasmuch as there was no right or remedy in the case that called for the interposition of a court of equity, the chancery court had no jurisdiction to entertain or try the case; that, on this account, the judgment of that court should be reversed and the cause remanded to the chancery court, with direction to transfer the cause to the circuit court. But he is of opinion that the plaintiff is entitled to recover of defendant Blake the amount sued for, and that the City of Prescott was not a proper party to the suit. The majority of the judges are of opinion that inasmuch as none of the parties objected to the transfer of the cause to the chancery court, and did not object to the chancery court entertaining and trying the action, any objection to such transfer would now be considered waived, although none of the parties has made any objection to such transfer or to the trial of the cause by the chancery court in this court, and that under this state of the case the chancery court had jurisdiction to try and determine the cause. Collins v. Paepcke-Leicht Co., 74 Ark. 81, 84 S. W. 1044, and authorities there cited.

The decree is affirmed.

BATTLE, J., dissents.

FRANCE v. SHOCKEY.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. GUARDIAN AND WARD (§ 163*) — ANNUAL ACCOUNT—CONCLUSIVENESS—EXCEPTIONS.

Where, in proceedings to surcharge the final settlement of a guardian with a larger charge on the item of the balance of the last annual settlement, the record did not show that any item of property of the ward had been omitted from the settlement, or that any credit was allowed except on items of credit specifically set out in the settlement, and the order of the probate court confirming the annual settlement became final for want of timely appeal, it was proper to refuse to surcharge the final settlement; the confirmation of the annual settlement being conclusive except against direct attack.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 474, 540–544; Dec. Dig. § 163.*]

2. GUARDIAN AND WARD (§ 161*) — SETTLEMENT OF ACCOUNT—REVIEW—RECORD—ABSTRACT OF EVIDENCE.

Where, in proceedings to confirm the final settlement of a guardian, the ward urged that the guardian should be charged with rent of homestead, and it appeared that in the final settlement a charge was made on an item of rent without setting forth the property, and the abstract on appeal did not set forth the testimony of the witnesses testifying for the guardian, the action of the court refusing to charge the guardian with rent of homestead would not be disturbed on appeal.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 523; Dec. Dig. § 161.*]

3. GUARDIAN AND WARD (§ 161*)—ACCOUNTING—REVIEW — RECORD — ABSTRACT OF EVIDENCE.

Where, in proceedings to confirm a guardian's final settlement, the court allowed a credit of $125 for the support of the ward, and it did not appear that the amount exceeded the income of the estate within Kirby's Dig. § 3792, pro-

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viding that the guardian cannot without direction of the court allow for the education and maintenance of the ward more than the income of the estate, and the ward claimed that she had rendered services for the guardian worth the amount of the support, and the guardian denied that the ward had performed any work, the action of the court in allowing the credit would not be disturbed on appeal, because of the failure of the ward to abstract the testimony of the witnesses of the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 523; Dec. Dig. § 161.*]

4. APPEAL AND ERROR (§ 1008*)—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

A finding of the trial court sitting as a jury is as conclusive on appeal as the finding of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. § 1008.*]

5. GUARDIAN AND WARD (§ 150*)—COMPENSATION—ALLOWANCE.

Under Kirby's Dig. § 3828, providing that guardians shall receive reasonable compensation for their services, the court in proceedings to confirm the final settlement of a guardian may allow him a compensation, when no allowance was made in any of the annual settlements.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 150.*]

6. GUARDIAN AND WARD (§ 54*)—FINAL SETTLEMENT—INTEREST.

Where a guardian filed his final settlement but took no steps for two years to obtain its confirmation, the court confirming the settlement, and finding the amount due the ward, did not err in allowing the ward only 6 per cent. interest on the balance due.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 242–253; Dec. Dig. § 54.*]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Final accounting by J. B. Shockey, guardian of Courtney France, in which the latter filed exceptions. From a judgment confirming the final settlement, Courtney France appeals. Affirmed.

W. N. Carpenter, for appellant.

FRAUENTHAL, J. In 1895 the appellee, J. B. Shockey, was appointed guardian of Courtney Holland, a minor, by the probate court of Benton county. As such guardian he made eight annual settlements of the guardianship thereafter, and each of these settlements was confirmed by said probate court. No appeal was taken from any of said orders confirming said settlements. The last of these annual settlements was confirmed by said probate court in 1903. On January 20, 1904, Courtney Holland married and became Courtney France, and in April, 1904, she arrived at the age of 18 years. In April, 1904, the guardian filed his ninth and final settlement. In this final settlement the guardian took credit for an item of support, education, and money advanced to the ward since last settlement, amounting to $386.25, which was more than the amount of the rents and interest received, the clear income of the estate. According to the final settlement there was a balance of $250 due to the ward, and a number of months after the filing of the final settlement the appellee paid to the appellant the said alleged balance and took the receipt of herself and her husband therefor. During this time the final settlement, although long since filed, was not acted on by said probate court. In March, 1906, the appellant filed in the said probate court exceptions to the said final settlement. In this pleading she incorporates also exceptions to each of the eight annual settlements. Each exception is in the same language except as to the item of amount, so that the exception to the first will indicate the exceptions to the other annual settlements.

The exceptions to the first settlement are as follows: "(1) She excepts to the annual settlement of the said J. B. Shockey filed July 20, 1896, and says there is due her on said settlement $442.99." The amount of the balance actually found due on this first settlement by the order of confirmation was $427.99; but neither in this exception, nor in any of the exceptions, is it alleged that any item of charge, property, or asset is omitted from the settlements, or that any item of credit was allowed which was not set out in the settlements. It would appear from the argument of counsel for appellant that the objections to the annual settlements were based on the claim that certain items of credit were excessive as to amount, and this excessive amount had been allowed; and it is his contention that the probate court has jurisdiction to investigate the annual settlements in that particular, and if found erroneous to correct them. The above exceptions made to each of the annual settlements are incorporated in and made a part of the exceptions to the final settlement, and the specific exceptions to the final settlement are that the balance should be larger in amount. No specific item of asset is alleged or claimed to have been omitted from the final settlement. No item of credit taken is complained of, except the item: "Support, education, money advanced to the ward since last settlement $386.25." The probate court confirmed the final settlement as made by the guardian. From that judgment the appellant appealed to the circuit court, and that court restated the account. It found that it was concluded from investigating any erroneous or excessive allowances of credits in the annual settlements by the orders confirming those settlements. It found that the items of charges in the final settlement were correct. It allowed a credit of $125 on the item of support, education, and money furnished ward, and a credit of $40.75 for compensation or commission to the guardian, and other credits of the allowance of which no complaint is made. It found that there was still a balance due to the ward after the payment of said $250, and that this balance should bear interest at the

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rate of 6 per cent. per annum from July, 1904, the date when the hearing of the matter on the confirmation of the final settlement could be first entertained in the probate court, and it remanded the proceedings to the probate court with directions to enter in that court an order in accordance with the judgment of the circuit court.

It is urged by counsel for appellant that the probate court has the power to open the settlements of guardians after confirmation thereof and to correct any errors in such settlements; but it has been uniformly held by this court that the order of confirmation of a settlement of a guardian by the probate court is a judgment which can be appealed from, but which cannot be otherwise disturbed, except in a court of chancery upon an allegation of fraud or some other recognized ground for equitable relief. Each order confirming each settlement becomes final and conclusive of all matters therein embraced and cannot be reopened for alleged errors. The order of confirmation is a finding and an adjudication of each item of charge and credit contained in such settlement, and the investigation of the correctness of such finding and adjudication is concluded. Rightor v. Gray, 23 Ark. 228; Payne v. McCabe, 37 Ark. 318; Phelps v. Buck, 40 Ark. 219. The record does not show that any item of property of the ward has been omitted from these annual settlements, or that any credit was allowed except upon items of credit specifically set out in the settlements. The probate court passed upon these and made a finding of the justice of their allowance and of their amounts. If its finding was erroneous, it could only be corrected upon appeal. No appeal has been taken from the orders of confirmation of these annual settlements within the time prescribed by law, and they have therefore become final. Thereafter the probate court has not the jurisdiction to reopen these settlements. Nelson v. Cowling, 89 Ark. 334, 116 S. W. 890. It follows that the court did not err in refusing to surcharge the final settlement with a larger charge on the item of the balance of the eighth annual settlement.

It is urged that in the final settlement the guardian should be charged with rent of homestead; but in the final settlement there is a charge made on an item of rent without specifically setting forth of what property it is the rent. The appellant in her abstract of the evidence has wholly failed to abstract the testimony of the witnesses of the appellee. As shown by the transcript, nine witnesses actually testified on the part of the appellee. We have repeatedly held that it is necessary that a fairly complete abstract of the record should be made in order to secure a review of questions depending on the record. Files v. Law, 88 Ark. 449, 115 S. W. 373; Jett v. Crittenden, 89 Ark. 349, 116 S. W. 665. In this case there is no abstract of the testimony of any of the nine witnesses who testified on the part of the appellee, and we are therefore led to presume from the court's finding that the contention of appellant that no charge was made for this rent is not well founded.

It is urged that the court erred in allowing the item of credit of $125 for support, education, and money furnished the ward. The probate court allowed upon this item the sum of $386.25, and the appellant claimed that this was in excess of the income of the ward, and that the expenditures were made without the direction of the probate court, and that it was error to allow it. Section 3792 of Kirby's Digest provides that: "Without such direction the guardian shall not be allowed in any case for the maintenance and education of the ward more than the clear income of the estate." The circuit court allowed on this item the sum of $125, and the evidence does not show that this exceeded the amount of the rent and interest received, which constituted the income of the estate. It is urged that appellant was a member of appellee's family and by her work earned for appellee the amount of her support; but the testimony of appellant herself shows that the appellee sent her to college from September to January and paid the expenses of her tuition and books, that he purchased for her clothes to the amount of $75, and that he furnished her money. The appellee denied that the appellant performed any work. The appellant has wholly failed to abstract the testimony of appellee and the witnesses in his behalf, and it cannot therefore be found that items to the value of $125 were not furnished to appellant, for which she is chargeable. In addition to this, the finding of the trial court sitting as a jury is as conclusive on appeal as the finding of a jury, and we cannot say in this case that there is not sufficient evidence to support the findings of the lower court. Bell v. Welch, 38 Ark. 139; Garland Co. v. Hot Springs Co., 68 Ark. 83, 58 S. W. 636; Ark. Central R. Co. v. Jansen, 119 S. W. 648.

It is urged that the court erred in allowing the item of compensation to the guardian. Upon an examination of the various settlements we find that no allowance was ever made and no credit taken by the guardian as a compensation for his services. The court here allowed him $40.75 for such compensation. Section 3828 of Kirby's Digest provides: "Guardians and curators shall receive such compensation for their services as the court shall decide to be just and reasonable." We cannot say that this amount allowed for compensation of the guardian was unjust, and certainly it was not excessive. We do not think that error was committed by allowing only 6 per cent. interest on the balance found due from the guardian, nor do we find from the record any prejudicial error committed by the lower court.

The judgment of the Benton circuit court herein is affirmed.

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BRAGG v. HARTNEY et al.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. TRUSTS (§§ 95, 349*)—CONSTRUCTIVE TRUST.
Where legal title to property is obtained through actual fraud or concealment, equity impresses a constructive trust on the property in favor of the one equitably entitled thereto, though he never had any legal estate therein, and equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of a subsequent holder, unless he is a purchaser in good faith and without notice.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147, 514; Dec. Dig. §§ 95, 349.*]

2. TRUSTS (§ 95*)—CONSTRUCTIVE TRUST.
Defendant, with knowledge that plaintiff's ancestor was incapable of transacting business, purchased land for $5,000, $3,000 of which was paid by the ancestor and defendant, and the ancestor gave a note for the balance. The title was taken in the name of defendant and ancestor, and they divided the land. After the death of the ancestor, the $2,000 note was probated against his estate, and the part of the land, the title to which was in his name, was sold to pay it, and defendant became the purchaser. *Held*, that a constructive trust was created in favor of the heirs of the ancestor, who succeeded to his rights in the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. § 95.*]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Suit by Martin Hartney and Mary Meschal against J. L. Bragg. From a decree for plaintiffs, defendant appeals. Affirmed.

Spence & Dudley, for appellant. J. T. Craig, M. P. Huddleston, and Johnson & Burr, for appellees.

HART, J. This is a suit in equity instituted in the Clay chancery court for the Eastern district by appellees, Martin Hartney and Mary Meschal, against the appellant, J. L. Bragg.

The abstract of appellees correctly states the substance of the pleadings and the findings and decree of the court, as follows: "Appellees, as sole heirs at law of T. J. Hartney, deceased, filed their amended complaint against J. L. Bragg, the appellant, and F. Linke, alleging therein that Bragg and T. J. Hartney in his lifetime bought a farm of 240 acres of R. Liddell for the agreed price of $5,000; $3,000 as paid in cash by Hartney at the time of the foreclosure, and $2,000 was secured by two notes of Hartney and Bragg, who afterward made a mutual partition of the land by exchange of deeds. Hartney died before any part of either note had been paid. Bragg procured an administrator of Hartney's estate to be appointed by the probate court of the Eastern district of Clay county, Ark., procured both land notes to be allowed and proved as debts against Hartney's estate, and caused Hartney's land to be sold by the administrator to pay said notes, at which sale Bragg was the purchaser at the price of $1,000. F. Linke, the assignee of said $2,000 of land notes, took a mortgage on the entire 240 acres for $2,000 from Bragg on the day of the administrator's sale. Said $2,000 and interest constitute a lien on all said lands in favor of said Linke and is unpaid." Appellees further allege that T. J. Hartney was, at the time of the purchase of the land from Liddell, the payment of the purchase price thereof, the division of the land, and the execution of the deed to Bragg in consummation thereof, a weak-minded person, wholly incapable of making or entering into contracts, or executing deeds, or dividing lands, or transacting any other business. Hartney paid all the $3,000 cash payment for the land, and Bragg paid no part thereof. Bragg, through overreaching, undue influence, and fraud practiced upon Hartney, procured the deed for the land to be made to himself and Hartney, procured an unjust division of the land to be made and Hartney's deed pursuant thereto. Through fraud Bragg procured the allowance of the whole of the $2,000 of purchase-money notes to be proved as debts against Hartney's estate, and the lands standing in Hartney's name to be sold by the administrator to himself for $1,000, by means whereof Bragg acquired title to the whole 240 acres without having paid a cent of the purchase price thereof. Appellees further averred that because of Bragg's fraud all deeds by which Bragg got any title to said lands are null and void, the pretended sale by the administrator is likewise null and void, and that all said deeds ought to be canceled and held for naught. Appellees offer to pay to Linke the amount of the $2,000 of unpaid purchase money, with interest, and prayed the court to cancel all deeds by which Bragg took any title to said lands and to divest all title thereto out of Bragg and invest the title in appellees, subject to Linke's claim and for all proper relief. Bragg filed his separate answer in the suit wherein he admits the purchase of the lands from Liddell, taking the deed for the same to himself and Hartney, the division of said lands, the death of Hartney, and the purchase of that interest by himself at the administrator's sale; but he avers that he paid to Hartney the half of the cash payment, denies all averments of fraud, and claimed to be the owner of all of said lands. Upon the trial of the cause the chancellor found all the issues in favor of appellees and against Bragg, and by the final decree canceled all deeds by which Bragg claimed title to said lands and divested all his interest therein and vested the same in appellees and charged a lien on said lands in favor of Linke for $2,945.44, the amount of unpaid purchase money and interest. Bragg alone appeals from this decree.

Prior to coming to the state of Arkansas,

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appellant, J. L. Bragg, and T. J. Hartney had lived in Hickman county, Ky. Bragg was the older and had known T. J. Hartney from his birth. A preponderance of the testimony shows that from childhood Hartney had been mentally weak, and almost an imbecile. His father died leaving a will, by the terms of which the lands devised to T. J. Hartney could not be sold until he reached the age of 30 years. As soon as he came into possession of his lands and personal property, Hartney began to dispose of it for a nominal price. Appellant Bragg and one Houston got some of it. Proceedings were instituted by his friends in Kentucky to have him declared of unsound mind, and a committee appointed to take care of his estate. The order was made, but no one could be found who would act. Soon afterwards, in January, 1903, Bragg came to Arkansas. T. J. Hartney sold his lands in Kentucky for $3,995. He received a draft for $3,000 and the remainder in cash. The land in controversy was sold to Bragg and Hartney for $5,000. Three thousand dollars of the purchase money was paid with the above-mentioned draft of T. J. Hartney, and the notes of Bragg and Hartney were given for the deferred payments. The title was taken in the name of Bragg and Hartney. Hartney came to Arkansas in February, 1903, and moved on the land with Bragg. He was never permitted to exercise any authority over the land and implicitly obeyed Bragg in all things. Hartney had lived with Bragg before coming to Arkansas. Just a short while before they left Kentucky, Bragg, referring to Hartney, said: "I have got a sucker, and when I turn him loose he won't do any one else any good." He further said: "I have got Tom Hartney on the string now. It is 'old man Bragg' now, and it will be 'Mr. Bragg next year.'" Bragg and Hartney made a division of the land, and Bragg received the more valuable part. Hartney then went back to Kentucky and died in March, 1904. He was buried at the expense of the county. The notes for $2,000, the balance of the purchase money, was probated against Hartney's estate, and that part of the land, the title to which was in his name, was sold to pay them. Bragg became the purchaser. He told one of his neighbors that Hartney's father had died in good circumstances, leaving Tom as his only child, and that he (Bragg) had just as well have the estate as any one. Bragg claims to have paid one-half of the $3,000 which was paid when the deed was executed; but a preponderance of the testimony shows that he was insolvent, and that the $3,000 was paid by T. J. Hartney. We are of the opinion, after a thoughtful reading of the record: That Bragg knew that Hartney was weak-minded and utterly incapable mentally of transacting any business; that Hartney was wholly under the control and dominion of Bragg, that on account of the undue influence exercised by Bragg he was induced to pay the $3,000 in the beginning and let the title be taken in the name of Bragg and himself; and that the whole transaction was fraudulent from its inception, and was deliberately planned by Bragg to get possession of the estate left Hartney by his father, without any cost to himself. Appellees are the sole heirs at law of the deceased, T. J. Hartney, and as such have succeeded to his rights in the property. The rights of F. Linke were protected by the decree of the chancellor, and he has not appealed.

The general rule on the subject is thus stated in volume 3 of Pomeroy's Equity Jurisprudence, at page 2033, as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder until a purchaser of it in good faith and without notice acquires a higher right, and takes property relieved from the trust. The forms and varieties of these trusts, which are termed ex maleficio, or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

Without going into further details of the testimony of this case, it is sufficient to say that it brings the cause squarely within the principles above announced.

We are of the opinion that the decree of the chancellor is correct, and it therefore will stand affirmed.

THOMAS et al. v. BURKE et al.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. INTOXICATING LIQUORS (§ 130*)—PROHIBITION ORDER—PARTIES—RIGHT TO APPEAL.

A signer of a petition for a prohibition order filed in the county court thereby became a party to the record, and was guaranteed the right to appeal from an order denying the petition by the Constitution and laws of the state, though it might finally be decided that he was not eligible as a petitioner; the right of appeal depending not on the right of the petitioners to the relief prayed for, but on his right to be heard in the appellate court.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 139; Dec. Dig. § 130.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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2. INTOXICATING LIQUORS (§ 130*)—PROHIBITION ORDER—PROHIBITED DISTRICT—INHABITANTS—ENUMERATION.

Where a schoolhouse, named as the center of a three-mile prohibition district in a petition for the establishment thereof, was less than three miles from the state line, a ruling that in determining whether a majority of the adult inhabitants residing within a radius of three miles from such center desired the order the state line must be disregarded, was erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 139; Dec. Dig. § 130.*]

3. INTOXICATING LIQUORS (§ 130*)—PROHIBITED DISTRICT—CENTER—PETITION—CONSTRUCTION.

Kirby's Dig. § 5120, provides that whenever the adult inhabitants within three miles of any schoolhouse shall desire to prohibit the sale or giving away of any intoxicating liquors, and a majority shall petition the county court, the court shall make an order, etc. A petition under such section described the house which was to mark the center of the prohibited area as "the public school building situated on block 34, in the city of Texarkana, Miller county, Ark." There were two buildings on block 34, both used for public school purposes situated 30 feet apart, under the supervision of the same superintendent and corps of teachers; one of the buildings being known as the main building, situated near the center of the block, and the other a smaller one called the "annex." *Held*, that the petition should be construed as referring to the main building only as the center of the proposed prohibited area, and if so construed, was not objectionable for uncertainty.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 139; Dec. Dig. § 130.*]

4. EVIDENCE (§ 460*)—PROHIBITION DISTRICT—PAROL EVIDENCE.

Where a petition applied for an order prohibiting the sale of liquors within three miles surrounding a schoolhouse on a designated city block, and it appeared that there were two buildings used for school purposes on the block, parol evidence was admissible to show the surroundings, and to identify the particular building described.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. § 460.*]

Battle and Hart, JJ., dissenting.

Appeal from Circuit Court, Miller County; Jas. S. Steel, Special Judge.

Petition by B. B. Thomas and others for a prohibition order, to which E. F. Burke and others filed an objection. From an order sustaining the objections, petitioners appeal. Reversed and remanded.

M. E. Sanderson and W. V. Tompkins, for appellants. J. D. Conway and Jno. N. Cook, for appellees.

McCULLOCH, C. J. This is an appeal from the judgment of the circuit court of Miller county refusing to make an order prohibiting the sale or giving away of intoxicating liquors within three miles of a schoolhouse in the city of Texarkana. The county court had refused to make the order prayed for, and an appeal was taken to the circuit court. The case was heard in the circuit court on oral evidence. The petition was in due form prescribed by law, and described the house which was to mark the center of the prohibited area as "the public school building situated on block 34, in the city of Texarkana, Miller county, Ark."

The first point to which attention should be directed is that raised by appellees (persons who were permitted by the court to appear and make themselves parties for the purpose of remonstrating against granting the prayer of the petition) whether or not the appeal from the judgment of the county court was properly granted. The record shows that the petitioners, which of course means all of them, prayed an appeal to the circuit court, and that the affidavit for appeal was made by B. B. Thomas, one of the petitioners and appellants. The appellees filed a motion in the circuit court to dismiss the appeal on the ground that Thomas had never been an inhabitant of the territory in question, that he was only temporarily there at the time the petition was signed and presented to the county court, and that he had removed to a distant part of the state before the case came up for hearing in the circuit court. The court overruled the motion to dismiss the appeal, and we think that was a correct ruling. It is unnecessary for us to decide, in passing on this ruling of the court refusing to dismiss the appeal, whether or not Mr. Thomas was in fact an inhabitant of the three-mile area within the meaning of the statute. He did in fact sign the petition, and was entitled to be heard, with the other petitioners, when the county court considered the matter; and when the court by its judgment denied the prayer of the petition, he was one of the persons aggrieved by the judgment within the meaning of the statute, and he, as well as the other petitioners, was entitled to prosecute an appeal to the higher court. In other words, the right to take an appeal depended, not on the right of the petitioners to the relief prayed for, but on the right to be heard in the appellate court when relief was denied in the inferior court; and when Mr. Thomas signed the petition which was filed in the county court, he became a party to that record, and was guaranteed the right of appeal by the Constitution and laws of the state as much as any other petitioners, even though it should finally be decided that he was not eligible as a petitioner. Of course, if Thomas had been the only person who took an appeal, and it appeared on the hearing that he was not eligible as a petitioner, and therefore had no interest in the further prosecution of the case, a question would arise as to whether or not the court should consider the case and grant the relief solely on his request. But no such question arises on this record, as it shows that all of the petitioners appealed, and the affidavit was made by Thomas as one of the parties aggrieved.

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There are only two other questions in the case necessary for us to decide. One is this: The schoolhouse named in the petition is less than three miles distant from the state line, and the circuit court held that "all of the adult inhabitants residing within the radius of three miles of such center must be counted in ascertaining the total number of adult inhabitants within said district, irrespective of the state line." This court has decided to the contrary, and the ruling of the circuit court is incorrect. Lindley v. State (Ark.) 120 S. W. 987.

The remaining question is as to the correctness of the court's declaration of law and finding of fact concerning the designation of the schoolhouse, which was to mark the center of the proposed prohibition territory. The petition, as already shown, named "the public school building situated on block 34, in the city of Texarkana, Miller county, Ark.," as the center of the proposed territory. There was no conflict in the evidence on this branch of the case, and it is undisputed that there are two buildings on block 34, both used for public school purposes. The two buildings are situated about 30 feet apart (or about 100 to 150 feet from center to center), and are under the supervision of the same superintendent and the same corps of teachers. In other words, there are two buildings, about 30 feet apart, used in conducting one school by one superintendent and corps of teachers. One of the buildings is shown to be the main building, situated near the center of the block, and the other, which is a smaller one, is referred to as the "annex." Upon this showing, the court found that there were two public school buildings on block 34, and that the petition failed to designate the particular one which was to form the center of the proposed area. This was one of the grounds on which the court denied the prayer of the petition. The statute prescribes that "whenever the adult inhabitants residing within three miles of any schoolhouse, academy, college, university or other institution of learning, or of any churchhouse in this state, shall desire to prohibit the sale or giving away of any vinous, spirituous or intoxicating liquors of any kind," etc., and a majority thereof shall petition the county court of the county "wherein such institution of learning or churchhouse is situated," that said court shall make an order, etc. Kirby's Dig. § 5129. This phase of the statute has never been passed on by the court, except in the following cases, which do not reach to the particular question now under consideration: Williams v. Citizens, 40 Ark. 290; State v. Bailey, 43 Ark. 150; Gazola v. State, 45 Ark. 458; Lindley v. State, supra.

In Williams v. Citizens, supra, the petition named as the center of the proposed area two churches situated about 200 yards apart. This court held that that rendered the proceedings void. Judge Eakin, speaking for the court, said: "Two points, as centers of circular areas, cannot be designated in the same petition, signed without distinction, by a majority of the adult inhabitants living within three miles of both points, or of either one or the other point. In the first case the area would be less than one with a radius of three miles, and in the second case it would be greater. The statute confers no authority to make such an order as would result, in either case. Every adult inhabitant residing within three miles of any particular schoolhouse, church, etc., should be counted in determining the majority—that is, in theory, and as nearly practically as possible—and no one living more than three miles from that particular house should be. This cannot be effected by designating two or more distinct buildings more or less widely separated, without any indication of one as the center for all. Where they are close together, it would probably make little difference, but embarrassments would grow as the distance widened, and the courts cannot fix the limits within which the practice would be permissible." The next two cases cited above arose upon indictments for selling liquor within three miles of two churches, and the court, citing the Williams Case, held that the orders were void. In Lindley v. State, supra, the petition described the center of the proposed area as "the new stone public schoolhouse situated on block 23, in the town of Mammoth Springs," and it was afterwards shown that the house was situated on block 22, instead of block 23, as stated in the petition. This court held that the defect did not render the proceedings void, and that "it was sufficient to describe it in the language of the statute with such reasonable certainty as to identify it as the point marked from which the radii were to extend in designating the territory to be embraced in the order."

Now it is manifest that the framers of the statute had in view two things in shaping the form of the proceedings: One, that a definite object should mark the center of the prohibition area to be created; and the other that the radii of this area should extend three miles from this center. This necessarily means that the center shall be definitely and accurately pointed out, so that there should be no uncertainty as to the limits of the area. But absolute accuracy in the description is not required. Reasonable certainty is sufficient. This is demonstrated in Lindley v. State, supra, in which it was held that an error in describing the schoolhouse on the wrong block was immaterial, as the building was otherwise sufficiently described. Applying the descriptive language of the petition in this case to the facts shown to exist with reference to the buildings on block 34, there can be no doubt that it means the principal or main building, and not the so-called "annex." The descriptive words in their ordinary acceptation cannot mean

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anything else. Parol evidence is admissible of course to show the surroundings, so as to identify the particular building intended to be described—to fit the description to the building. Paragould v. Lawson, 88 Ark. 478, 115 S. W. 379. The petition, therefore, named only one building as the center of proposed area, and we are of the opinion that the learned judge erred in his conclusion that two buildings were named.

Appellants ask that we make a finding here of the fact as to whether or not the petition contained a majority of the adult inhabitants residing within three miles of the school building mentioned in the petition, and render a final judgment without remanding the case for further trial. We do not deem it proper to do this on the conflicting testimony in the record. The circuit judge made no findings of fact as to whether the petition contained a majority of the adult inhabitants residing in this state within the three-mile limit, and we think the case should be remanded for new trial in accordance with the law herein stated. It is so ordered.

BATTLE and HART, JJ., dissent.

SPAULDING MFG. CO. v. GODBOLD.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. PARTNERSHIP (§ 219*)—JUDGMENT IN NAME OF PARTNERSHIP.

A judgment is not void because taken in the name of a partnership, objection not having been made to the action being brought in such name, or the judgment being so taken.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 435; Dec. Dig. § 219.*]

2. PARTNERSHIP (§ 68*)—DEED TO PARTNERSHIP IN FIRM NAME.

A deed to a partnership in its firm name, not including the name of any partner, when the purchase was by the partners individually, and the deed was taken to the partnership through mistake, is not void in equity; but may be corrected.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 105; Dec. Dig. § 68.*]

Appeal from Columbia Chancery Court; E. O. Mahoney, Chancellor.

Suit by the Spaulding Manufacturing Company against S. A. Godbold. Decree for defendant. Plaintiff appeals. Reversed and remanded.

Stevens & Stevens, for appellant. McKay & Lile, for appellee.

HART, J. The controversy in this case is about the title to certain lands in Columbia county, Ark. An action in ejectment therefor was commenced by the Spaulding Manufacturing Company against S. A. Godbold in the Columbia circuit court.

The complaint alleges that the Spaulding Manufacturing Company is a partnership composed of H. W. Spaulding, F. E. Spaulding, and E. H. Spaulding. The deed relied upon to support the action is a sheriff's deed under execution, and is made an exhibit to the complaint. The deed recites that the execution was issued and came to the hands of the sheriff on the 27th day of July, 1905; that the Spaulding Manufacturing Company obtained a judgment against S. A. Godbold, and that the execution was issued on that judgment; that the levy and sale was made under the execution, and that the Spaulding Manufacturing Company became the purchaser; that the grantee named in the deed was the Spaulding Manufacturing Company. The defendant Godbold excepted to the deed for the reason that there was no grantee named in the deed. The circuit court sustained the exception, and ordered that the deed be stricken from the record for the reason that it was not entitled to be used as evidence on the trial of the cause. The plaintiff then moved that the cause be transferred to equity, and as grounds stated that the land was purchased by the individual partners at the execution sale, and that, by mistake of the draftsman, the firm name, instead of the names of the partners, was written in the deed as grantee. They asked that the deed be reformed, and that, when so reformed or a new deed executed, the possession of the land be given to them. The court granted the motion, and transferred the cause to the chancery court. On motion of the plaintiff the chancery court ordered that the motion to transfer the cause to the chancery court be made an amendment to the complaint. Whereupon the defendant demurred to the complaint. The court sustained the demurrer, and dismissed the action. The plaintiffs have appealed to this court.

It is contended by counsel for appellee that the judgment recited in the sheriff's deed under execution is void for the reason that it was rendered in the firm name, and not in the names of the individuals composing the firm, and that the deed therefore conveys no title. It has been expressly held in Missouri that judgments rendered in favor of a firm by the firm name are not void. Davis v. Kline, 76 Mo. 310. See, also, Conrades & Co. v. Spink, 38 Mo. App. 309. In the case of Frisk et al. v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198, the court said: "Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity, which is waived unless due objection be made thereto before judgment." See, also, 15 Ency. of Pleading & Practice, pp. 840, 841. Section 6093, Kirby's Dig., provides that the defendant may demur to the complaint where it appears on its face that the plaintiff has not legal capacity to sue. In construing this section in the case of Pettigrew et al. v. Washington County, 43 Ark.

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33, the court held that the judgment should have been in favor of the state, the obligee in the collector's bond, or of the county treasurer, the real party in interest. The judgment in fact was rendered in the name of the county. The court said: "This was a matter of form rather than of substance, and, since the objection to the plaintiff's capacity to sue for this demand was not taken either by demurrer or answer, it must be deemed to have been waived." From which we deduce that, no objection having been made to the judgment being taken in the name of Spaulding Manufacturing Company in the original suit, the defect of parties was waived, and the judgment became a valid one upon which execution might issue.

It is next objected that the naming of the Spaulding Manufacturing Company as the grantee in the sheriff's deed under execution renders the deed void. This is not a case like that of Percifull v. Platt, 36 Ark. 456, and Cooper v. Newton, 68 Ark. 157, 56 S. W. 867, where the style of the firm includes the name of one of the partners, and the court held that the legal title was conveyed to such partner, and that he became in equity a trustee for the other partners to the extent of their interest. In the present case the firm name includes the name of no person. It is the general rule that a conveyance to a partnership by its firm name which does not include the name of any of the partners does not vest in it any legal title because the partnership is not recognized in law as a person. Because the deed is void at law, it by no means follows that the same rule applies in equity. The appellees allege in their amended complaint that the individual members of the firm were the purchasers of the land at the execution sale, and that by mistake of the draftsman the name of the firm, instead of the names of the persons who composed the firm, was written in the deed. It is a fundamental principle of equity that it regards and treats that as done which in good conscience ought to be done, and, as said by Mr. Pomeroy: "It is only by looking at the intent rather than at the form that equity is able to treat that as done which in good conscience ought to be done."

Again, it is contended that a court of equity will refuse to aid the defective execution of statutory powers, and the cases of Tatum v. Croom, 60 Ark. 487, 30 S. W. 885, and Landon v. Morris, 75 Ark. 6, 86 S. W. 672, are cited to support that contention. In those cases the mistake was not only in the execution of the deed, but in the proceedings anterior to that, and upon which the sale was based. But in the present case it will be observed that there was no irregularity or defect in the execution, or the proceedings thereunder as was the case in Tatum v. Croom and Landon v. Morris, supra, but under the allegations of the complaint the execution and the proceedings under it were regular in all respects, and the only mistake was in the execution of the deed itself. The individuals who composed the firm are alleged to have purchased the lands in question and the primary object of the action as it now stands under the pleadings is merely to correct the deed by inserting therein the true names of the grantee. The interest in the land of Godbold, the execution debtor, was divested out of him by the sale under the execution and his subsequent failure to redeem within the statutory period; and it would be inequitable to deny appellees the relief prayed for. The sheriff who made the sale or his successor in office would be a necessary party to obtain the relief prayed.

The decree is therefore reversed, and the cause remanded, with leave to the appellees to make such new parties as they are advised is necessary to do.

HOGINS v. BULLOCK.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 131*)—MAYORS—FILLING VACANCY IN OFFICE.

A vacancy in the office of mayor is to be filled by special election, the mayor, under Kirby's Dig. §§ 5432, 5581, 5589, being a member of the city council, section 5433 providing for special elections of members of the council, and Const. art. 6, § 23, authorizing the Governor to fill by appointment any vacancy in any office only when no mode is provided by the Constitution and laws for filling it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 305, 378; Dec. Dig. § 131.*]

2. ELECTIONS (§ 158*) — NONOBSERVANCE OF STATUTORY PROVISIONS.

Nonobservance of the provisions of Kirby's Dig. §§ 2777, 2779, 2780, 2788, 2790, as to certification of nominations and printing of ballots, and forbidding the printing thereon of the name of any candidate not certified and filed in the prescribed time, does not, in the absence of fraud, where not objected to till after election, make the election void; the statute not declaring such effect.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 123; Dec. Dig. § 158.*]

Appeal from Circuit Court, Pope County; Hugh Barham, Judge.

Suit by J. F. Bullock against J. F. Hogins. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 4th day of February, 1909, the mayor of Russellville, a city of the second class, resigned. A special election was ordered for February 16, 1909, to fill the vacancy. Appellee was elected at the election held on that day, and on February 23, 1909, was commissioned by the Governor. In the meantime, on the 8th of February, 1909, appellant was appointed mayor by the Governor for the unexpired term prescribed by law, had received his commission, and had duly

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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entered upon the discharge of the duties of mayor. Appellee, after receiving his commission, qualified as mayor by taking the oath of office and filing bond with the recorder of the city. He demanded of appellant the office and records of same, and, upon appellant's refusal to surrender them, brought this suit against appellant to oust him from the office. The evidence showed that a proclamation by the acting mayor of the city was made and published February 8th, 9th, and 12th in a newspaper published and having a general circulation in Russellville. The notice of election was given eight days. It was the usual notice given for special elections. There was no primary election to nominate candidates for mayor to be elected at the special election to be held on the 16th of February, 1909. The name of appellee was printed on tickets by the election commissioners. No other names were printed on the tickets. There were no other avowed candidates, but blank spaces and lines were left on the printed tickets so voters could write other names if they wished. Appellee received all the votes cast at the election, to wit, 203 votes. Appellant voted for appellee. The election commissioners certified to the election of appellee, and he was commissioned as above stated by the Governor.

Dan B. Granger and Brooks, Hays & Martin, for appellant. R. B. Wilson, for appellee.

WOOD, J. (after stating the facts as above). 1. The only question is: Who was entitled to the office of mayor of the city of Russellville, when appellee instituted this suit? The Constitution makes no provision for filling the office of mayor. The framers of the Constitution left the entire matter of the organization of cities to the Legislature. Article 12, § 3. By section 5433, Kirby's Dig., it is provided that: "Special elections of the members of the city council of all cities shall be held at such time and place as the mayor by proclamation shall direct, so that at least ten days' notice thereof shall be given." The mayor, under the law, is a member of the city council. See section 5589, Kirby's Dig., in connection with sections 5432 and 5581. By these provisions it is clear that the only mode for filling a vacancy in the office of mayor is by special election, and not by appointment. In the absence of express constitutional or statutory authority authorizing the Governor to appoint, he has no such power. "The right to make appointments to office is not inherently an executive prerogative." 23 A. & E. Ency. Law, p. 343, and cases cited. But this court has held that the authority to fill vacancies in municipal offices does come within the purview of the general powers conferred by statute on municipalities in this state. Payne v. Rittman, 66 Ark. 201, 49 S. W. 814. Our conclusion on this point is that neither the Constitution nor the statute confers upon the Governor the power to fill vacancies in the office of mayor by appointment. Section 23 of article 6 of the Constitution, providing that, when any vacancy occurs in any office and no mode is provided by the Constitution and laws for filling same, the Governor shall fill the same by appointment, etc., has no application to a vacancy occurring in the office of mayor. A mode is provided by statute for filling vacancies in the office of mayor. See sections of Digest, supra, and section 5612. Section 23, art. 6, Const., refers to other than municipal officers.

2. Appellant urges that, even if election was the only mode of filling the vacancy, such election in this case was invalid because the provisions of the general election laws as to the certification of nominations, printing of ballots, and forbidding the printing thereon of the name of any candidate not certified and filed in the time prescribed apply likewise to special elections for mayor. See sections 2777, 2779, 2780, 2788, 2790, Kirby's Dig. We need not decide whether these provisions apply to the special election of mayor; for, conceding that they do, appellant is in no position to complain of a failure to observe the requirements of the law. He held the office without legal authority, and was not the victim of any unfair treatment in the election. He was not a candidate, and voted for the appellee, who was the only candidate at the very election which he now calls in question. It is not pretended that any fraud was perpetrated on him by the appellee or the election commissioners. The statute does not declare that the election shall be void at which ballots are used containing the name of a person who has not been certified as a nominee. The failure to comply with the letter of the law by election officers, especially in matters over which neither the candidate nor the voter has control, and in which no fraud is perpetrated, will not as a general rule render an election void unless the statute expressly makes it so. McCrary on Elections, § 403. Says the Supreme Court of Indiana: "All the provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void." Jones v. State, 153 Ind. 440, 55 N. E. 229. The same principle is recognized in Rhodes v. Driver, 69 Ark. 501, 64 S. W. 272. See, also, Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Govan v.

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Jackson, 32 Ark. 553, and other cases cited in appellee's brief.

The election in this case was regularly called, notice was given, and appellee was the unanimous choice of untrammeled voters.

Affirm.

JOHNSON & BURR v. ELDER.

(Supreme Court of Arkansas. June 21, 1909. On Rehearing, Nov. 1, 1909.)

1. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF.

In a suit to quiet title, plaintiff must succeed on the strength of his own title, and not on the weakness of that of his adversary.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 36; Dec. Dig. § 10.*]

2. TAXATION (§ 658*)—TAX SALES—NOTICE OF SALE—CERTIFICATE.

Failure of the county clerk to attach to the record of the list and notice of the sale of delinquent tax lands the certificate required by Mansf. Dig. § 5763, is a fatal defect.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 658.*]

On Rehearing.

3. ADVERSE POSSESSION (§ 65*)—OCCUPANCY—BOUNDARY LINE.

Where the grantor of B. occupied a small area of cleared land claiming it as his own for 26 years before he conveyed it to B., such occupancy constituted a complete investiture of title by adverse possession, notwithstanding the mistake in his belief that it was within the boundary lines of his claim.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 366; Dec. Dig. § 65.*]

4. LANDLORD AND TENANT (§ 50*)—LEASE—CONSIDERATION.

Where plaintiff's alleged tenant had complete title by adverse possession to a part of the land in controversy at the time plaintiff claimed title thereto, such tenant's agreement to lease the land from plaintiff and his execution of a note for the rent agreed on were void for want of consideration.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 120; Dec. Dig. § 50.*]

5. ADVERSE POSSESSION (§ 100*)—OCCUPANCY BY TENANT—VOID LEASE.

Where the owner and occupant of a small tract of cleared land, on plaintiff's alleging title to a larger tract including the land so cleared, agreed without consideration to hold the land for plaintiff as tenant to avoid litigation, such alleged tenant's continued occupation of the small tract could not operate as plaintiff's constructive possession of the entire larger tract under color of title so as to give plaintiff title by adverse possession on the expiration of a subsequent period of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547–574; Dec. Dig. § 100.*]

6. ADVERSE POSSESSION (§ 30*)—ATTORNMENT—NOTORIETY.

Plaintiff, having acquired a void tax deed to certain land including a cleared tract in possession of B., who had acquired title to the cleared tract by adverse possession, demanded the land from B., who agreed to pay a small yearly rent to plaintiff for the land so occupied. B. did not extend his possession to the unoccupied land; nor was anything done to change his visible possession; nor was plaintiff's title otherwise recognized, except that on one occasion plaintiff was permitted to send a man into B.'s field to gather two bushels of corn which was claimed as rent. *Held*, that B.'s attornment to plaintiff was not of sufficient notoriety to extend his possession to the entire tract claimed by plaintiff under his deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 126, 127; Dec. Dig. § 30.*]

7. ADVERSE POSSESSION (§ 30*)—OCCUPANCY—NOTORIETY.

The element of notoriety must be added to adverse possession before it can ripen into title by limitations, since possession follows the title of the true owner until that possession is actually invaded.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 126; Dec. Dig. § 30.*]

8. BOUNDARIES (§ 18*) — LAKES — RIPARIAN RIGHTS.

The owner of land abutting on the meandered line of a lake has prima facie title to the center of the lake by virtue of his riparian rights.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 121, 122; Dec. Dig. § 18.*]

9. PUBLIC LANDS (§ 26*)—SURVEY—CORRECTION OF ERRORS.

A mistake in the survey of the meandered line of the lake on government lands may be corrected by the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 37; Dec. Dig. § 26.*]

10. PUBLIC LANDS (§ 61*) — SURVEY — LAKE BED.

The United States in 1885 patented to Arkansas all unsurveyed lands in certain townships as swamp and overflowed land. The tract in controversy at the time the land was surveyed was within the meandered lines of a lake, and according to the official plat adjoined plaintiff's tract, which abutted on the meandered line. It did not appear that the land department had ever resurveyed or officially determined whether the area was land or lake bed at the time of the original survey, and the patent to the state merely conveyed to it "all of the unsurveyed land in the township mentioned." *Held* that, if the tract was in fact land instead of lake bed at the time of the original survey, the subsequent patent conveyed the title to the state, from which it passed to defendant's grantor, and if it had been officially declared by the Land Department to be land instead of lake bed at the time of the survey, such ruling would overturn plaintiff's prima facie riparian rights with reference thereto.

[Ed. Note.—For other cases, see Public Lands, Cent. Land, § 210; Dec. Dig. § 61.*]

Appeal from Greene Chancery Court; E. D. Robertson, Chancellor.

Action by W. S. Elder against Johnson & Burr. Judgment for plaintiff, and defendant appeals. Reversed on rehearing.

Johnson & Burr, pro se. Huddleston & Taylor, for appellee.

FRAUENTHAL, J. This action was originally instituted by the plaintiff, W. S. Elder, by filing an ex parte petition on October 14, 1907, in the Greene chancery court seeking to confirm his title to the land involved in

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this suit, and which is described as the fractional N. E. quarter of section 27, township 19 N., range 5 E., containing 142.08 acres, in Greene county, Ark. His claim of title was founded upon a tax deed executed to him by the state of Arkansas on June 4, 1903, in which it is recited that the land was sold to the state for the nonpayment of the taxes of 1891. The defendants, Johnson & Burr, and A. H. Glasscock filed an intervention in said suit and were made parties thereto. They claimed title to the land by virtue of the grant of said land to the state of Arkansas as swamp lands by the United States under the act of Congress approved September 28, 1850 (Act Sept. 28, 1850, c. 84, 9 Stat. 519), deed from the state of Arkansas to John B. Jones on March 18, 1879, and by mesne conveyances from Jones to defendants. In his original petition the plaintiff alleged that the land was wild and unoccupied; but subsequently he filed an answer to defendant's intervention and a cross-complaint against the defendants, in which he stated that the allegation that the land was wild and unoccupied was made by mistake, and alleged that he was and had been in possession of the land for a number of years, and he asked in this cross-complaint to have his title to the land quieted in him. He also filed a motion to have the above allegation as to the occupancy of said land stricken from the petition, and this was by the court granted. The defendants made answer to the cross-complaint of the plaintiff, and this cause thereupon became an action by plaintiff to quiet his title to said land. The chancellor found that the plaintiff had acquired title to the land by adverse possession of the land for two years under said tax deed, and entered a decree quieting the title to the land in the plaintiff.

The evidence in the case was taken partly by depositions and partly by the agreed statement of facts. From this it appears that the tax sale of said lands for the year of 1891, and upon which is founded the tax deed executed by the state of Arkansas to plaintiff, is void for the reason that the county clerk failed to attach to the record of the list and notice of sale of delinquent lands for that year the certificate required by section 5763 of Mansfield's Digest; and the sales of lands in said county for said year were held to be void by this court in the case of Taylor v. State, 65 Ark. 595, 47 S. W. 1055. But the plaintiff claims that he has had possession of the land under said tax deed for a period of more than two years next before the commencement of this action, and in this way claims title to the land. The muniments of title introduced by defendants indicate a chain of title from the United States to them; but it is unnecessary to inquire further into the alleged title of defendants. Because in a suit like this to quiet title, the plaintiff must succeed upon the strength of his own title, and not upon the weakness of the title of his adversary. Lawrence v. Zimpleman, 37 Ark. 644; Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Mason v. Gates, 82 Ark. 294, 102 S. W. 190; Little v. Williams, 88 Ark. 37, 113 S. W. 340; Sibly v. England (Ark.) 119 S. W. 820. And if the plaintiff has title to the land by reason of said tax sale and possession thereunder, it would be superior to the alleged title of defendants.

The sole question therefore involved in this case is whether the plaintiff has had the possession of said land under said tax deed for such time as under the law will invest him with the title. This tract of land is located within the meandered lines of what is known as "Cache Lake" according to the original survey of the United States government. At the time of the purchase of the land by the plaintiff in 1903 from the state, a number of acres of the land were above the former marshy lands of the lake, and some acres of it were dry; but the greater part of it was covered with timber. About 1½ acres of the land were cleared and in cultivation and were located within an inclosure of another tract owned by one Don Byers. Byers and his grantors had supposed that this 1½ acres of the land, which is in the shape of a triangle, was part of a different and distinct tract of land owned by them, and so had been inclosed with a fence in conjunction with their tract, and this triangle was then in the actual possession of Byers. In the fall of 1903 the plaintiff saw Byers and laid claim to this part of the land, and thereafter in 1904 had the same surveyed, and by the survey showed that this triangular portion was a part of the tract of land described in his tax deed. Byers and the plaintiff then entered into an agreement by which Byers agreed to hold the possession of the triangular tract as the tenant of the plaintiff and to attorn to the plaintiff as such tenant therefor. He then executed his note to the plaintiff for the rent of the land for the year of 1904 in the sum of $5. He agreed to thus become the tenant of the plaintiff and to recognize the title of the plaintiff to the tract of land for the reason that he did not want any litigation over it; but he testified that he then held, and for all the years since 1904 continued to hold, the possession of this tract of land as the tenant of the plaintiff. Byers and his grantors of the land adjoining this tract had had possession of this tract for some years before 1903; but in 1903 Byers thus surrendered the possession to the adverse claim and demand of the plaintiff and in subordination to the rights of the plaintiff, and as the tenant of plaintiff he agreed to hold the possession of the land, for the plaintiff, and did so hold it up to the date of the commencement of this suit. The chancellor in effect made this finding of fact, and,

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while the evidence is not entirely satisfactory, nevertheless it is sufficient in our opinion to support that finding. Where the chancellor's finding is not clearly against the preponderance of the evidence, it must be sustained. Whitehead v. Henderson, 67 Ark. 200, 56 S. W. 1065; Hinkle v. Broadwater, 73 Ark. 489, 84 S. W. 510.

It is urged by the defendants that, inasmuch as Byers was already in possession of the land, he could not become the tenant of the plaintiff; but we cannot see how that would affect the relation between those parties, if as a matter of fact an agreement of tenancy was made. The relation of landlord and tenant is created by a contract. That may be either express or implied, and its validity is, like all other contracts, based on an agreement between the parties. The fact that the tenant is in the possession of the land at the time of the creation of the tenancy does not affect such contract, if made; and it will not affect it, even though the tenant had prior to that time claimed to have a better title to the land. 24 Cyc. 938; Hershey v. Clark, 27 Ark. 527; Hughes v. Watts, 28 Ark. 153. In the case of Locke v. Frasher, 79 Va. 409, it is held that the general rule that a tenant cannot dispute his landlord's title is not varied when the tenant is in actual possession at the time he makes the contract of tenancy.

The effect of the acceptance by such person of such a contract is a recognition of the title and the possession of the lessor, and is the same as if the party, lessor, had entered and taken possession. The mere fact that such a contract is entered into in order to avoid litigation will not defeat it. That is not equivalent to duress, and, if possession was not given in this way, it could probably have been secured by the lessor through other legal avenues. In the case of School District of City of Harrisburg v. Long (Pa.) 10 Atl. 769, one claiming to own land in the possession of another procured the execution of a rental contract by an assertion of title in himself and a threat of eviction, and it was held that such rental contract was valid, and the tenant could not dispute the landlord's title. In the case in review therefore Byers could agree to become the tenant of the plaintiff, although previously in the possession of the land; and under such agreement the possession of Byers as tenant became the possession of the plaintiff as landlord. 1 Cyc. 996; James v. Miller, 54 Ark. 460, 16 S. W. 195; Cox v. Daugherty, 75 Ark. 395, 36 S. W. 184, 112 Am. St. Rep. 75; Washington v. Moore, 84 Ark. 220, 105 S. W. 253, 120 Am. St. Rep. 29; Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Palmer v. Melson, 76 Ga. 803; Forgy v. Harvey, 151 Ind. 507, 51 N. E. 1066. Under the evidence in this case therefore the plaintiff was in the actual possession of 1½ acres of the tract of land in controversy for more than two years continuously before the commencement of this suit, and such possession was open and adverse. That possession was held under the tax deed, which, though void, was yet a color of title. Elliott v. Pearce, 20 Ark. 508; Cofer v. Brooks, 20 Ark. 542. It has been repeatedly held by this court that the actual possession of a part of the land under a deed describing the entire tract is in law possession to the limit of the whole land. Ledbetter v. Fitzgerald, 1 Ark. 448; Logan v. Jelks, 34 Ark. 547; Sparks v. Farris, 71 Ark. 117, 71 S. W. 255, 945; Crill v. Henderson, 71 Ark. 390, 74 S. W. 299; Boynton v. Ashabranner, 75 Ark. 514, 88 S. W. 568; Rucker v. Dixon, 78 Ark. 99, 93 S. W. 750; Connerly v. Dickinson, 81 Ark. 258, 99 S. W. 82; Van Etten v. Dougherty, 83 Ark. 534, 103 S. W. 737.

The case of Wheeler v. Foote, 80 Ark. 435, 97 S. W. 447, is very similar to the case at bar on this question of possession. In that case a part of the land in controversy, about 1½ acres, had been cleared, fenced, and occupied by the owner of the adjoining tract and had been thus occupied by him under a mistake that this part was on his own tract. The occupant, upon the claim made by the holder of a tax title, agreed to hold possession as tenant of the tax owner, and in consideration that he would protect the timber on the land from trespassers. In that case the court held that through the tenancy thus created the holder of the tax deed obtained possession of this 1½ acres of the land, and that through the tenant he thus held possession under color of title to the whole, and that this gave the holder of the tax deed title to the whole land described in the deed. It results from this, and we are of opinion that the evidence sustains the finding of the chancellor, that the plaintiff was in continuous adverse possession of the land for more than two years under the tax deed, conveying the land in controversy to him. The effect of this was to confer on the plaintiff a valid title to all the land in controversy. Jacks v. Chaffin, 34 Ark. 534; Wilson v. Spring, 38 Ark. 182; Gates v. Kelsey, 57 Ark. 523, 22 S. W. 162; Cooper v. Lee, 59 Ark. 460, 27 S. W. 970; Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045; McConnell v. Swepston, 66 Ark. 141, 49 S. W. 566; Ross v. Royal, 77 Ark. 324, 91 S. W. 178; Dickinson v. Hardie, 79 Ark. 364, 96 S. W. 355.

We find therefore no error in the decree, and the same is affirmed.

On Rehearing.

McCULLOCH, C. J. On further consideration of the evidence in this case, we find the facts to be that the grantor of Byers, the alleged tenant of plaintiff, Elder, occupied the small area of cleared land, claiming it as his own, for about 26 years, before he conveyed to Byers. This constituted a complete investiture of title, notwithstanding the mistake in getting beyond the boundary line. Hudson v. Stillwell, 80 Ark. 575, 98 S. W. 356. Byers being the owner of the land, his alleged agree-

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ment to attorn to plaintiff was void and unenforceable. The note which he gave to plaintiff was also void for want of consideration. Parham v. Dedman, 66 Ark. 26, 48 S. W. 673.

The question is therefore presented whether or not the void agreement of Byers, the owner and occupant of the small tract of cleared land, to attorn to plaintiff, constituted such possession by the latter of that part of the land as to extend his possession constructively over the unoccupied land in controversy to which he had color of title, and ripen into title by limitation. We conclude that it did not. The plaintiff was never in possession of any part of the land, either actually or constructively. He had neither title, nor possession, nor right of possession. If the real owners of the land had made inquiry during the alleged period of limitation and ascertained the true facts, they would not have found the plaintiff in possession of any part of their land, because he was not, in fact, in possession either in person or by agent or tenant. This conclusion is not in conflict with the doctrine announced in Wheeler v. Foote, 80 Ark. 435, 97 S. W. 447, for the facts of that case are clearly distinguishable from the facts in this. There, as soon as Bloomer cleared part of the tract by mistake as to boundary, and before he acquired title by lapse of time, he agreed to attorn to the plaintiff, Mrs. Foote, and he thereafter occupied the cleared land as her tenant and acted as her agent in keeping trespassers off the adjoining timber land. He had never acquired any title to the land when he agreed to attorn to Mrs. Foote as his landlord, and his occupancy was notorious as her tenant and agent for a long time thereafter, until the commencement of the litigation.

We think, also, that the alleged attornment of Byers to plaintiff was insufficient, for another reason, to extend his possession constructively over the unoccupied land: It lacked sufficient notoriety to amount to adverse possession. The facts, as we find them to be, are that Byers did only one act before the commencement of this litigation which could be claimed as an attornment to plaintiff. That was his agreement, about three years before the commencement of the action, to pay plaintiff a small amount of rent. After the suit had been commenced, he permitted plaintiff to send a man into his field and gather about two bushels of corn, which was claimed as rent. There was no visible change of possession, and nothing was done to give notoriety to the agreement to attorn. There was nothing done to put the real owners upon notice that the actual possession of the small tract of cleared land by one who had no color of title was transferred to another person who had color of title so as to extend the possession constructively. The injustice of permitting a secret transfer of possession to one who had color of title so as to extend his possession over the unoccupied portion of the land is manifest. The title to 1½ acres of the land had already been taken from the true owner by Byers and his vendor, through their occupancy for the full period of limitations; but they had no color of title which extended their possession beyond the limits of the actual occupancy, and, in order to acquire the title to the remainder of the tract, there must have been something in the nature of actual notice to the true owner or its equivalent. The element of notoriety must be added to adverse possession before it can ripen into title by limitation. Possession follows the title of the true owner until that possession is actually invaded. Haggert v. Ranny, 73 Ark. 344, 84 S. W. 703. We conclude therefore that the plaintiff's claim of title by adverse possession cannot be sustained.

This conclusion makes it necessary to give attention to another feature of the case not discussed in the original opinion. The tract of land in controversy was, at the time of the government survey in the year 1846, within the meandered lines of Cache Lake, according to the official plat of that survey, and the plaintiff is the owner of a tract of 17.92 acres abutting on the meandered line. This gives the plaintiff the prima facie title to the center of the lake by virtue of his apparent riparian rights. Little v. Williams, 88 Ark. 37, 113 S. W. 340; Rhodes v. Cissell, 82 Ark. 367, 101 S. W. 758.

But a mistake in the survey is subject to correction by the government. Little v. Williams, supra. The United States government in 1885 patented to the state of Arkansas all of the unsurveyed lands in this and certain other townships as swamp and overflowed land, and it does not appear that the Land Department ever caused another survey to be made and officially determined that the area in controversy was land instead of lake bed at the time of the original survey. The patent does not specifically describe the several tracts of land, but in general terms conveys "all of the unsurveyed land" in the township named. If it was in fact land, instead of lake bed, at the time of the original survey (of which there is no direct proof in this record), the subsequent patent by the government of unsurveyed land conveyed the title to the state of Arkansas, and the state, in turn, conveyed it to Jones, the defendant's grantor; and if it be found that the Land Department of the United States has officially declared this particular tract to have been land, instead of lake bed, at the time of the original survey, that would overturn the prima facie riparian rights of the plaintiff. These matters are not sufficiently developed in the records for us to reach a decision as to the rights of the parties on this branch of the case. We cannot determine whether the facts of the case fall within the doctrine announced in Little v. Williams, supra, or of Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

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The plaintiff is not entitled to an affirmance of the decree on the strength of his prima facie showing of riparian rights, for it is obvious that, if he be given that portion of the land between parallel or converging lines running to the center of the lake, he would not be entitled to all of the land in controversy, and we cannot tell from this record how much, if any, he would be entitled to. Inasmuch as this branch of the case was not fully developed, we will leave it open for further proceedings in the chancery court, with leave to both parties to introduce further testimony.

A rehearing is therefore granted, and the decree is remanded, with directions to deny the plaintiff's right to recover on his alleged title by adverse possession, but for further proceedings not inconsistent with the opinion on the other branch of the case.

BATTLE, J., concurs in the judgment, and also in all of the opinion, except that part which holds that the alleged attornment of Byers to plaintiff was ineffectual to give possession of the cleared land to the latter because Byers was then in possession and was the owner of the land by limitation. He expresses no opinion on that point, and prefers to place the decision, as to this branch of the case, on the other ground stated in the opinion, viz., that the alleged attornment by Byers to plaintiff was not of itself an act of sufficient notoriety to constitute adverse possession in him so as to constructively extend his possession over the unoccupied land.

FRAUENTHAL, J. In the former opinion it was said that the evidence was not entirely satisfactory to sustain the finding that the appellee held the possession of the triangular tract of land through Byers as his tenant. On further examination of the evidence I do not think that it is sufficient to sustain the finding that Byers and Elder entered into a definite and binding agreement that Byers would rent the land and become the tenant of Elder and would absolutely and unconditionally recognize the title of Elder as superior to his claim or title to the land, and that such agreement of tenancy continued during two consecutive years; nor that such possession under such agreement of tenancy was so open and notorious as to put in operation the two years' statute of limitation.

On this account I concur in sustaining the motion for rehearing herein.

YORK v. STATE.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. JURY (§ 110*)—FAILURE TO PEREMPTORILY CHALLENGE.

Defendant cannot avail himself of any error of the court in excusing jurors from the panel and summoning talesmen, not having peremptorily challenged the talesmen, and his peremptory challenges not having been exhausted.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 518, 520; Dec. Dig. § 110.*]

2. JUDGES (§ 29*)—EXCHANGING CIRCUITS PENDING TRIAL.

Under Const. art. 7, § 22, and Kirby's Dig. §§ 1321, 1322, authorizing judges to temporarily exchange circuits with the same powers as in their own circuit, there was no error in judges exchanging pending a prosecution before one of them, in which all the evidence had been adduced, the instructions given, and the opening arguments of counsel made.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140–152; Dec. Dig. § 29.*]

3. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CHARGE AS A WHOLE.

Construing the charge as a whole, instructions given on behalf of the state and that given for defendant on the question of self-defense was not prejudicial, those given for the state stating general rules of law, without any direction as to the verdict, while that for defendant was specific, applying the law to the facts, as defendant contended they were, and directing the jury to acquit if they found the facts to be as stated therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1900, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

Appeal from Circuit Court, Dallas County; A. B. Grace and H. W. Wells, Judges.

James York was convicted of voluntary manslaughter, and appeals. Affirmed.

Goodwin & McHaney and Herring & Williams, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

BATTLE, J. James York was indicted at the August, 1908, term of the Bradley circuit court, for murder in the first degree, committed by killing Homer McClain, and was tried in the Dallas circuit court, after a transfer of the cause to that court, on the 23d day of June, 1909, and convicted of voluntary manslaughter, and his punishment was fixed at three years' imprisonment in the state penitentiary.

In impaneling the jury to try the defendant the trial court caused the panel of 24 jurors, selected by jury commissioners to serve at the June, 1909, term of the Dallas circuit court, to be sworn, over the objection of the defendant, to answer questions touching their qualifications to serve as jurors in the trial of the defendant, and asked the whole panel "if they believed in capital punishment," and five answered that they did not, and were excused from serving. The court then ordered the sheriff to summon five bystanders to take the places of the five jurors excused, which was done, and the five talesman, over the objection of the defendant, took the places of the five jurors who had been excused, and the names of the panel as thus composed were written upon separate slips of paper, and placed in a box, and the names of the jurors selected to

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serve as a jury in the case were drawn from the box in the manner provided by the statute.

Did the court commit a reversible error in excusing the five jurors and causing five others to be summoned and substituted in their places?

In Meyer v. State, 19 Ark. 156, a juror was challenged by the defendant for cause. The challenge was overruled. The defendant excepted to the ruling of the court, and stood upon his challenge, and he was sworn as a juror in the case. The court said: "After his competency was determined by the court, the prisoner did not get clear of him by peremptory challenge, but permitting him to be sworn as a juror rested upon his exception to the decision of the court, which he had a right to do"—and held that the trial court erred in overruling the challenge, and for such error in part reversed the judgment of the circuit court, and allowed the defendant a new trial. Since that time this court has uniformly held that if, after a court has erroneously overruled a challenge of a juror for cause, the defendant elected to challenge him peremptorily, he could not avail himself of the error, unless he had exhausted his peremptory challenges, thereby holding that he could protect himself against such error and would not be allowed to suffer by so doing if he exhausted his peremptory challenges before the completion of the jury. Benton v. State, 30 Ark. 328; Wright v. State, 35 Ark. 639; Polk v. State, 45 Ark. 165; Caldwell v. State, 69 Ark. 322, 63 S. W. 59.

In Mabry v. State, 50 Ark. 492, 8 S. W. 823, the regular panel of jurors was exhausted, and the jury in the case remained incomplete,. and bystanders were summoned to complete it, and, over the objection of the defendant on account of the manner in which they were summoned, were sworn as members of the jury. The court said: "When such objection is made, and the record fails, as in this case, to show that the defendant exhausted his peremptory challenges, it is unavailing in the appellate court, because the failure to challenge is an implied admission that the jurors are unobjectionable. * * * The right of peremptory challenges is conferred as a means to reject, not to select, jurors. The object of the law is to obtain a jury impartial to the prisoner and the state alike. Neither has a right to the services of any particular juror. Hurley v. State, 29 Ark. 22. If all the talesmen had been challenged by him, and he had then been forced to accept a juror without the privilege of exercising his right of peremptory challenge, he might have cause to complain. But he has voluntarily taken his chance of acquittal at the hands of jurors whom he might have rejected, and he must abide the issue."

The record in the case at bar does not show that appellant exhausted his peremptory challenges, and, according to the principle upon which the Mabry Case rests, he has no right to complain.

During the progress of the trial in this case, and after all the evidence had been adduced and the instructions had been given by the court, and the opening arguments of both parties had been made by counsel, the Honorable H. W. Wells, circuit judge of the Tenth judicial circuit of the state of Arkansas, and the judge of the Dallas Circuit Court, then presiding in the trial, and the Honorable A. B. Grace, circuit judge of the Eleventh judicial circuit of the state of Arkansas, by an agreement spread upon the record exchanged circuits, the former vacating the bench and the latter immediately occupying it and presiding during the remainder of the trial, and, until the arguments were completed, the motion for new trial was overruled, and the prisoner was sentenced and judgment rendered, and an appeal was prayed and granted.

Did the judges commit a reversible error in exchanging circuits at the time they did?

Section 22 of article 7 of the Constitution of this state provides: "The judges of the circuits may, temporarily, exchange circuits or hold courts for each other, under such regulations as may be prescribed by law." And section 1321 of Kirby's Digest says: "The judges of the circuit courts may by agreement temporarily exchange circuits or hold courts for each other for such length of time as may seem practicable and to the best interest of their respective circuits and courts." And section 1322 provides: "The judges exchanging as aforesaid shall have the same powers and authority, while holding courts for each other, as the judge for the circuit in which term or terms shall be held."

This case is unlike Stokes v. State, 71 Ark. 112, 71 S. W. 248, where the judgment of the circuit court was reversed because the trial judge lost control of the proceedings of the court by his temporary absence. In this case the proceedings of the court were at all times under the direct supervision of a judge fully authorized to control them. We are unable to see that appellant could have been prejudiced by the exchange of the judges unless it be in the decision of questions of evidence. But this could not affect the legality of the exchange, as the witnesses whose testimony may be in question in such cases may be recalled and required to testify what they had stated in the trial, and go through the same course of examination. Bullock v. Neal, 42 Ark. 278. In the case cited this court held that "when the judge at a trial becomes sick and unable to proceed after the evidence is all in, and the instructions have been given to the jury, the trial should proceed under a special judge before the same jury, and without rehearing the testimony." That case is decisive in this; the judge in the case cited being a special judge, and in this case a regular judge vested by the Constitu-

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tion and the statute with the same powers and authority as the judge of the Dallas circuit court had.

In the trial of appellant the court instructed the jury, over the objection of the appellant, in behalf of the state, in part, as follows:

"(8) In ordinary cases of one person killing another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.

"(9) In order to justify the taking of life in self-defense, the party must employ all means within his power consistent with his safety to avoid the danger and avert the necessity."

And at the request of the defendant instructed the jury, in part, as follows:

"(7) The court instructs the jury that if you find from the evidence in this case that the defendant, Jim York, was in his place of business or residence, or was in a place of business where he was in control, in the town of Vick, in Bradley county, Ark., when the killing occurred, as alleged in the indictment, if you find that the killing so alleged did occur, then the court instructs you that the defendant, Jim York, had a right to be in his place of business or residence, and if you find from the evidence that the deceased, Homer McClain, by himself or in company with others, came into the defendant's place of business or residence with the intent of assaulting the defendant or offering him personal violence, or, being in his place of business or residence, formed the intent of assaulting him or offering him personal violence, and by overt acts or words made it appear to defendant that he was in danger of losing his life or of receiving great bodily injury, or that he was about to be assaulted at the hands of deceased, Homer McClain, or at the hands of deceased, in company with others, then the court instructs you that the deceased Homer McClain, and those acting with him, if any, were trespassers, and the defendant had the right to defend himself and act upon the danger as it appeared to him, whether the danger was real or not, and if you believe from the evidence, or if you have a reasonable doubt from the evidence as to whether the deceased, Homer McClain, came to the defendant's place of business or residence with the intent, or being in the defendant's place of business or residence, formed the intent of assaulting the defendant or offering him personal violence, and by any overt act or words gave defendant reasonable grounds to believe from his point of view that he was in danger of being assaulted or receiving personal violence at the hands of deceased, or at the hands of deceased in company with others, and that defendant, while honestly defending himself against such assault or proffered personal violence, and without fault upon his part, killed the deceased by stabbing him, the killing would be justifiable, and under those circumstances you must acquit the defendant."

Appellant contends that the instructions given in behalf of the state conflicts with that given at his request, and should not have been given. Were they prejudicial? All of them were based upon evidence. Those given in behalf of the state were general, and that given at the instance of the defendant was specific, applying the law to the facts as defendant contended they were, and directing the jury to acquit in the event they found the facts to be as stated in the instructions given at the request of the defendant. On the other hand, those given in behalf of the state stated general rules of law without any directions as to the verdict. Construed as a whole, as they should have been, we are unable to see how those given in behalf of the state could have prejudiced the defendant.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

HOLT v. STATE.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. JURY (§ 110*) — FAILURE TO PEREMPTORILY CHALLENGE.

Any error in not excusing a juror for cause was waived; defendant not having exhausted his peremptory challenges.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520; Dec. Dig. § 110.*]

2. CRIMINAL LAW (§ 720½*)—TRIAL—ARGUMENT OF STATE'S COUNSEL.

For counsel for the state in argument to denounce defendant as an "assassin and murderer," a mere expression of opinion, while bad form, was not error, especially where, from the standpoint of the state, it was a reasonable deduction from the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1677; Dec. Dig. § 720½.*]

3. CRIMINAL LAW (§ 1169*)—ERROR CURED BY INSTRUCTION.

Error, in admitting opinion as to sanity without foundation laid, is cured by instruction that the jury shall not consider the opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF CONFESSION.

Testimony, erroneously admitted, that when the deputy sheriff said to defendant, after taking him into custody, that it looked like there was a pretty hard case against him, defendant replied, "B. shot a man, and got off with a few months," was not prejudicial, as tending to create an impression that defendant thought lightly of human life, and believed he could kill a

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man and get off with a few months, in view of the fact that defendant was claiming he acted in self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF CONFESSION.

Error in admitting an involuntary confession of the killing was not prejudicial; a prior voluntary confession thereof having been shown, and defendant having as a witness confessed it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3140; Dec. Dig. § 1169.*]

6. JURY (§ 67*)—DESIGNATING PERSONS TO SUMMON JURORS—DISCRETION.

The trial court has large discretion in determining what is "sufficient cause," within Kirby's Dig. § 2350, providing that it may, for sufficient cause, designate some other person than the sheriff to summon jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 298–301; Dec. Dig. § 67.*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

John D. Holt was convicted of murder, and appeals. Affirmed.

John D. Holt, pro se. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. Appellant appeals from a judgment of the Washington circuit court convicting him of the crime of murder in the second degree. He was indicted for murder in the first degree. The indictment was in apt language, and correctly charged the offense. The evidence for the state tended to show that appellant on the 6th day of September, 1908, shot and killed one J. W. Murry from ambush. It was shown that Murry a few weeks prior to the killing had accused appellant of stealing watermelons, had cursed appellant, calling him vile names, and had threatened to kill appellant; that this abuse filled appellant with rancor, which on the day of the killing caused him to say that he was going to "get his gun and make him take it back or kill him." There were circumstances tending to show that appellant, while lying in wait, killed Murry as he passed along the highway. Such was the theory of the state. On the other hand, there was evidence tending to prove that appellant met Murry in the public road, and requested him to retract the abusive language he had formerly used toward appellant; that he refused to do so, but made a motion as if to draw a weapon, whereupon appellant shot and killed him instantly. The jury passed upon the conflicting theories to be deduced from the evidence, and it suffices to say that a verdict for murder, even in the first degree, would not have been disturbed by this court. There was some evidence to justify the court in submitting to the jury the question as to whether appellant was seen at the time he fired the fatal shot, and this the court did in proper instructions. There was no evidence to warrant the court in submitting the question as to whether appellant was acting under an insane delusion in taking the life of Murry. There is no proof of delusional insanity in the record, and the trial court properly rejected prayers for appellant seeking to have such issue presented.

Bob Curtis, a talesman, stated on his voir dire that he had a "fixed opinion" as to the defendant's guilt formed from reading newspaper articles, and talking with persons who purported to give the facts in the case. The court over the objection of appellant held that Curtis was a qualified juror. The appellant excepted to the ruling, and peremptorily challenged the juror. Conceding that the answers of the juror prima facie rendered him incompetent, and that, in the absence of further examination into his competency, the court should have excused him for cause, still there is no showing in the record that appellant had exhausted his peremptory challenges. It does not appear, therefore, that appellant was prejudiced by the ruling of the court. It does not appear that by the ruling of the court appellant was compelled to accept some juror that was unsatisfactory to him. The appellant, not having exhausted his peremptory challenges, waived any error the court may have committed in not excusing the juror for cause. York v. State, 121 S. W. 1070; Glenn v. State, 71 Ark. 86, 71 S. W. 254; Caldwell v. State, 69 Ark. 322, 63 S. W. 59.

Counsel for the state denounced the defendant in argument as an "assassin and cold-blooded murderer." The language, at most, could only have been accepted by the jury as the opinion of the zealous prosecutor from his view point of the evidence. The jury had heard all the evidence, and they were sworn to form their opinion from the evidence and the law applicable thereto. It is not probable that a sensible jury would mistake the denunciation of zealous counsel for proof in the case, and be misled thereby to appellant's prejudice. Such arguments are in bad form, but it is not error to permit them, especially under facts and circumstances such as are detailed in this record. K. C. S. Ry. Co. v. Murphy, 74 Ark. 256, 85 S. W. 428. From the standpoint of the state such opinions as the prosecutor expressed were reasonable and legitimate deductions to be drawn from the evidence.

The court permitted witness Carson, the deputy sheriff and jailer, to give his opinion as to the sanity of appellant while he was in jail, when no foundation had been laid for such opinion. But the court cured any error in this by instructing the jury not to consider such opinion in making up their verdict. Carr v. State, 43 Ark. 99; Johnson v. State, 60 Ark. 45, 28 S. W. 792.

It may be conceded that the confession of appellant, made to the deputy sheriff Tod-

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hunter and constable Boaz after they had taken him into custody, was, under the circumstances detailed by them, not a voluntary confession, and that therefore the court erred in permitting evidence of such confession to go to the jury. But we see nothing in the confession as shown by the testimony of these witnesses that was prejudicial to appellant. The deputy sheriff after taking appellant into custody told him that "it looked like there was a pretty hard case against him." To this appellant replied, "Charley Buck shot a man, and got off with about five months." Appellant urges that this "testimony tended to create in the minds of the jury a belief that this appellant thought lightly of human life, and believed that he could kill a man and get off with a few months as Buck had done." But the testimony could not reasonably have so impressed the jury; for it was but the expression of a hope on the part of appellant that, although his case might seem to the deputy sheriff to be a "pretty hard one," yet, in view of the light punishment Buck had received for killing a man, appellant might also hope to be similarly dealt with. It must be borne in mind that appellant was claiming that he acted in self-defense. In view of this claim, it was but reasonable for him to express the belief, in answer to the deputy's question, that he (appellant) might not fare any worse than Buck had done for killing a man. We do not see that this part of his confession could have prejudiced him. Taking the confession as a whole, it did no more than to connect appellant directly with the killing. The testimony of witness June Lawson shows that appellant confessed to the killing before he was arrested, and before he made the confession to the officers. It is not contended that the confession to June Lawson was involuntary. Appellant also on the witness stand confessed to the killing. That is all that the confession to the officers tends to show. So we are convinced that, although this confession might not have been free and voluntary, evidence of it in the light of the testimony of June Lawson and of appellant himself could not have been prejudicial.

Appellant insists that the court erred in dismissing the duly elected sheriff and his sworn deputy, Carson, and in designating Combs, a bystander, to summons the jury to try the case, and insists that the motion asking for the discharge of the sheriff and Carson did not contain sufficient allegations for said motion to be considered by the court, and the evidence adduced was not sufficient to justify the court in denying the sheriff and his deputy, Carson, the right to summons the jury to try the appellant, and in giving to Combs, a bystander, the right to summons said jury. Section 2350, Kirby's Dig., provides: "The court may, for sufficient cause, designate some other officer or person than the sheriff to summon jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially." The prosecuting attorney moved the court to designate some other than the sheriff to select talesmen to serve as jurors after the regular panel had been exhausted, setting up, among other things, "that J. C. Reed, sheriff of Washington county, is so biased and prejudiced in favor of the defendant in the above-entitled cause that said sheriff will not summon a jury free from bias and prejudice." It was also alleged that "J. C. Reed, sheriff, was related in some degree by affinity or consanguinity to the defendant." The court, after hearing evidence on the motion, granted it and designated J. G. Combs sheriff. It will serve no useful purpose to review the evidence adduced on the hearing of the motion. The trial judge must necessarily have large discretion in determining what is "sufficient cause," in order to carry out the salutary purposes of this statute. The Legislature did not designate what would constitute a "sufficient cause," but wisely left that to the discretion of the trial courts. We find no abuse of the discretion in the present case of which appellant can complain. The jury was duly selected, and it is nowhere shown that any juror selected by the special sheriff was prejudiced against appellant.

We have examined the objections to the rulings of the court in the giving and refusing of prayers for instructions. It could serve no useful purpose to discuss these at length. The charge as a whole is clear, consistent, and exceptionally free from error. It covers accurately every phase of the evidence, and announces familiar principles that have been often repeated in many decisions of this court.

The appellant has had a fair trial. The judgment is therefore affirmed.

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SEXTON v. STATE.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. CRIMINAL LAW (§ 1175*)—APPEAL—PREJUDICE.

Where, in a prosecution for rape, the state's evidence showed that defendant was successful and committed rape if he made any assault at all on prosecutrix, while he denied that he had ever had intercourse with her either with or without her consent, he cannot complain of a conviction of assault with intent to rape.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3179–3182; Dec. Dig. § 1175.*]

2. RAPE (§ 48*)—EVIDENCE—DESCRIPTION OF ACCUSED.

Where an officer who arrested accused for rape testified that, having heard of the crime and having seen defendant, he went to the house where prosecutrix was staying, evidence that she made complaint there, whereupon witness went with her father to procure a warrant for defendant's arrest, was not objectionable as evidence that prosecutrix gave witness the name or description of her assailant, and that, on the strength of this, the witness caused defendant's arrest.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67–69; Dec. Dig. § 48.*]

3. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

An officer making an arrest may testify as to his reason no further than that there was an outcry or information furnished him of the commission of a crime, and that thereupon he proceeded to search for and apprehend the criminal, it being improper for him to testify to hearsay information acquired from prosecutrix as to the description or identity of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

4. RAPE (§ 48*)—EVIDENCE—COMPLAINT—CROSS-EXAMINATION.

While the state in a prosecution for rape may show that the prosecutrix made complaint of her injury, the facts stated by her in such complaint can only be brought out by accused on cross-examination, unless defendant undertakes to impeach prosecutrix's testimony on the point, when the particular facts may be proved by the prosecution to corroborate her testimony.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67–69; Dec. Dig. § 48.*]

5. RAPE (§ 38*)—CORROBORATION—PRIOR DECLARATIONS OF ACCUSED.

In a prosecution for rape, the state was entitled to prove that some four or five months before the crime was committed accused, while in the custody of the officer, saw prosecutrix, and stated concerning her, "There is a girl I would like to get hold of. I'll be damned if I don't ruin her," and, being asked if he thought he could ruin her, stated, "If I didn't, I would come damn near it," to corroborate prosecutrix's testimony that defendant came to her house about two weeks before he ravished her, and said he wanted to "scuffle with her," but, that when she declined, he went away without attempting to do anything, and, when he returned at the time he ravished her, he said to her, "I've got you now," and threw her down on the bed and ravished her, defendant having denied that he had ever had or tried to have intercourse with her, or that he ever made any improper proposals to her.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 38.*]

6. WITNESSES (§ 329*)—CROSS-EXAMINATION.

Where, in a prosecution for rape, M. testified as defendant's witness that prosecutrix and her father spent the night after the offense was claimed to have been committed at witness' house, and that she made no statement to him that night as to the assault, and on the next morning he heard her ask her father if defendant's father had paid him any money, and defendant attempted to prove by other witnesses that prosecutrix and her father were trying to extort money from defendant's family to prevent prosecution, the state was properly permitted on cross-examination to show that on the evening of the day of the offense prosecutrix went to M.'s house, where her father was at work, and complained that night to M. and his wife of the outrage, and told her father the next day, and that M. received information from his wife the night of the alleged assault, and told prosecutrix's father, advising him to have defendant arrested, and that the father, when told, threatened to kill defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.*]

Appeal from Circuit Court, Independence County; Charles Coffin, Judge.

Charles Sexton was convicted of assault with intent to rape, and he appeals. Affirmed.

Oldfield & Cole, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Defendant, Charles Sexton, was indicted for the crime of rape, alleged to have been committed by having carnal knowledge of one Maud Bethel forcibly and against her will, and on trial therefor he was convicted of assault with intent to commit rape, his punishment being fixed by the jury at confinement in the penitentiary for three years.

Maud Bethel testified that the defendant on the day named in the indictment came to her home, and forcibly and against her will had sexual intercourse with her. The defendant denied this, and testified, on the contrary, that he had never had sexual intercourse with Maud Bethel either with or without her consent. The jury settled the issue by their verdict, which the evidence was sufficient to sustain. The tendency of the evidence was to show that the defendant was successful in his attempt and committed the crime of rape, if he made any assault at all on the girl, but the jury released him from the penalty of the higher crime, and found him guilty only of the lower crime of assault with intent to commit rape; and he cannot complain at this leniency. Benton v. State, 78 Ark. 284, 94 S. W. 688; Price v. State, 82 Ark. 25, 100 S. W. 74.

The defendant objected to the introduction of certain testimony by the state, and saved his exceptions to the ruling of the court in admitting it. The first exception insisted on here is that to a portion of the testimony of a witness named Birmingham. This witness

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see the girl, and, after having heard her complaint, went with her father to procure a warrant for defendant's arrest. The portion of his testimony quoted by counsel for defendant as objectionable is as follows: "Q. Where was it she made the complaint? A. At Riley Milligan's. Q. Who was present? A. Riley Milligan and Riley's wife. Q. In getting a complaint from her at the time, were Riley Milligan and his wife present at the time? A. That she gave me the complaint? Q. Yes. A. Yes; they were both present. Q. If questions were asked her concerning this affair, who asked them? A. Riley Milligan. (Objected to by defendant, overruled, exceptions saved.) Q. Where were you at the time, and where were these other parties at the time she made the complaint? A. I was at Riley Milligan's in the house, or on the little porch between the houses, rather, and they were there, too. Q. What was done in reference to this matter? (Objected to by defendant.) Q. In other words, was the process issued or asked for for the apprehension of this defendant? (Objected to by defendant, overruled, and exceptions saved.) A. Yes, sir. Q. Where did you go after that? A. I went back to the meeting ground, and learned that the boy had his gun and was gone. (Objection sustained.) Q. What did you go to the meeting ground for? A. I went over there for church, and to see if he (defendant) was there, and he was gone. I had understood that he was going over there to meeting." Further statements along the same line were made by the witness, but the above serves to show the part objected to by the defendant. The basis of defendant's objection to this testimony is that, in effect, it was allowing the witness to state that the girl in making her complaint to him gave the name or description of her assailant, and that on the strength of it the witness at once caused a warrant of arrest to be issued for the defendant's apprehension. Such is not, we think, the effect of his statements. He merely stated that she made complaint in his presence, and that immediately thereafter he went with her father to procure a warrant. His testimony does not show that he obtained from her information as to her assailant's identity, for he expressly stated that, before he went to see the girl, he had already heard about the commission of the crime, and had been over to defendant's house to see him. This court in a similar case said: "The rule on this subject is that the officer making the arrest, as in this case, should testify on the stand no further as to his reason for seeking and arresting the criminal than that there was an outcry or information furnished him in other ways of the commission of the crime, for his use in making the arrest, but not for his use as a witness; for it is but hearsay after all." Davis v. State, 63 Ark. 470, 39 S. W. 356. In Williams v. State, 66 Ark. 264, 50 S. W. 517, Judge Riddick, speaking for the court, stated the law on the subject to be as follows: "It is competent on a charge of rape for the state to show that the prosecuting witness made complaint of her injury, but the particular facts stated by her are not admissible on direct examination. They may be brought out by defendant on cross-examination; and, if the defendant denies that the prosecuting witness made complaint, and undertakes to impeach the testimony on that point, then the particular facts stated by her may be proved by the prosecution, in order to confirm her testimony that she made complaint." To the same effect, see Skaggs v. State, 88 Ark. 602, 113 S. W. 346. We are of the opinion that the testimony admitted in this case does not offend against the rules of law stated in the cases cited above, and that no error was committed in this respect.

The next assignment of error is as to the admission of the testimony of the witness Tom Wilson concerning an alleged remark made about the girl Maud Bethel four or five months before the crime is said to have been committed. The testimony objected to is as follows: "I had defendant under arrest, and we passed where the girl and three smaller children were in the field playing. As we passed, we spoke to the girl, and he said: 'There is a girl I would like to get hold of. I'll be damned if I don't ruin her.' I asked him if he thought he could ruin her, and he said: 'If I didn't, I would come damn near it.'" This testimony is first objected to on the ground that it is not shown definitely that the remarks applied to the prosecutrix; but we are of the opinion that it is shown by the testimony of this witness that under the circumstances the remarks must have applied to this girl. He evidently was referring to a girl of sufficient age for sexual intercourse, and the others in the party were small children, to whom the remarks could have had no application. We think, also, that the testimony was competent as tending to corroborate the testimony of the prosecutrix; for the remark of the defendant was a declaration as to the sinister purpose which he harbored at that time, and the girl's testimony tends to show that he afterwards put his atrocious design into execution. She stated that the defendant came to her house on an occasion about two weeks before he ravished her, and said he wanted to "scuffle with her," but that she declined, and he went away without attempting to do anything, and that at the time he ravished her he came

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again to the house, and when he came in said, "I've got you now," and threw her down on the bed and ravished her. He denied that he had ever had intercourse with her or had ever tried to do so, or had ever made any improper proposals to her.

The only other assignment of error is as to matter brought out by the prosecuting attorney on cross-examination of Riley Milligan. Maud Bethel testified that on the evening of the day the defendant ravished her she went to Milligan's house where her father was at work, and there spent the night; that she told Milligan and his wife that night of the outrage perpetrated on her, and told her father the next day. Milligan was called to the witness stand by the defendant, and testified in chief that Maud and her father spent the night in question at his house, but that she made no statement to him that night concerning the assault on her; that the next morning he heard her ask her father if Mr. Sexton, defendant's father, had paid him any money. The defendant had attempted to prove by other witnesses that Maud and her father were trying to extort money out of the Sextons to prevent prosecution; and the prosecuting attorney was permitted to show by Milligan on cross-examination that he received information through his wife that night of the alleged assault on the girl by defendant, and that he told the girl's father of it that night and advised him to have the defendant arrested; that the girl's father when told of the outrage threatened to get his gun and kill the defendant. We think this was legitimate cross-examination. The witness had stated in his examination in chief that the witness and her father had spent the night in his, Milligan's, home without anything being said about the assault, and that the next morning they were heard talking about getting money from defendant's father. The cross-examination developed the fact that the witness received that night full information concerning the outrage, and communicated it to the girl's father, whose indignation was aroused to a high pitch and that the witness advised the prosecution of the defendant.

We are unable to discover anything in the testimony which was prejudicial to the defendant except the contradiction of his witness Milligan, and that was legitimate.

Judgment affirmed.

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HAYNES-LANGENBERG MFG. CO. v. HOUSER et al.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

TRIAL (§ 143*)—QUESTIONS OF LAW OR FACT—CONFLICTING EVIDENCE.

Where the evidence of two sets of witnesses is conflicting, the issue is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by the Haynes-Langenberg Manufacturing Company against Thomas V. Houser, Joseph L. Mount, and others. Judgment for plaintiff, and Mount and others appeal. Affirmed.

John B. Dempsey and Conrad Paeben, for appellants. Carl Otto, for respondent.

REYNOLDS, P. J. Suit for debt against the defendant Houser, principal contractor, and to enforce a lien against the lot of buildings erected thereon against the other defendants, as owners of the property. There was conflicting evidence as to the date of completion and acceptance of the work and machinery.

Error is assigned on the refusal of the court to instruct the jury to find for defendants—outside of defendant Houser—against plaintiffs' claim for a mechanic's lien, to the instructions given, and to the verdict sustaining the lien. An examination of the record as set out in the abstract fails to sustain any of these assignments. The main question in the case is one of fact, involving the date of completion of the work or acceptance of it as complete, and as to whether the lien account was filed within four months thereafter. If one set of witnesses gave the facts and dates correctly, the lien should stand. If the other set is followed, the verdict and judgment are wrong. This presented an issue for the jury, who were correctly instructed, and found for the debt as well as the lien—in fact, Houser, the contractor debtor defendant, does not appeal.

The judgment is affirmed. All concur.

COFFMAN et al. v. GATES et al.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

1. PARTITION (§ 39*)—SUIT IN EQUITY—JURISDICTION.

A partition suit which deals with equitable estates and interests is in equity, and a court of chancery has jurisdiction over it notwithstanding the statutory remedy in partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 93–96; Dec. Dig. § 39.*]

2. PLEADING (§ 210*)—EQUITY—DEMURRER.

A demurrer to an amended answer and cross-bill in a suit in equity, which does not raise a question against the sufficiency of the pleadings, but which alleges new matter in pais, is improper.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 210.*]

3. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

The decision on appeal that the circuit court in partition in equity has jurisdiction to reimburse one holding an interest in the land in fee and the remainder in trust for expenses incurred in defending an action in ejectment determines his right to reimbursement, and a pleading after amendment demanding reimbursement in a larger sum is not demurrable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Petition by Ella Gates Coffman and others against John J. Gates and others for partition, in which James C. Ghio files a cross-bill. From a judgment for James C. Ghio on his cross-bill defendants Mary E. Layton and others appeal. Affirmed.

Geo. E. Smith, for appellants. W. B. & Ford W. Thompson, for respondents.

GOODE, J. This case was here on appeal before, and the report of the decision is in 110 Mo. App. 475, 85 S. W. 657, where a full statement of the intricate facts out of which the controversy grew will be found. To make our present decision intelligible, it is necessary to restate the case in part. John B. Ghio died in 1885, leaving a will wherein he devised and bequeathed his property to three executors and trustees, namely, his widow, Elizabeth, his son James C., this respondent, and William Booth. The will is not before us, but from statements in the briefs and recitals in the record it appears said executors had power to lend the funds of the estate, and lent $10,000 to Jacob and Lavina Gates, taking notes from the borrowers secured by a deed of trust on a tract of land in St. Louis county known as the "Gates farm." There was also a residuary bequest (we suppose after paying debts and specific legacies) to said executors as trustees, with the direction to divide the residue of the estate into three equal portions, of which one part should be turned over to James C. Ghio, one-third be held for Mary X. Barada, wife of Francis X. Barada, for her life and then to go to her children in fee, and one-third be held for Mary O. Cummisky. The portions of said Mary Barada and Mary Cummisky were bequeathed to the trustees for certain uses set forth in the will. The Gates loan of $10,000 was part of the residue of the estate, and hence was subject to the trusts declared in the will. The loan made to the Gateses by the executors and trustees was not paid, and there was a foreclosure under the deed of trust. By agreement of the parties in interest, James C. Ghio, one of the three residuary legatees un-

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der the will, was appointed to purchase the property at the foreclosure sale, to take and hold as provided in the will of his father, to wit, an undivided one-third of the property so purchased in fee, and the other undivided two-thirds in trust, one-third for Mary Barada and her children, and one-third for Mary Cummisky. He made the purchase at the foreclosure sale, and the trustee in the deed of trust executed a conveyance to him, setting out the capacity in which he bought and took title to the land. The interests of Mary Barada and her children and of Mary Cummisky were subject to sale and conveyance only by the trustees named in John B. Ghio's will and according to its provisions. James C. Ghio took possession of the land thus purchased, and collected the rents and profits for himself as one of the parties in interest and as trustee for Mary Barada and Mary Cummisky, the other parties. Subsequently Mary Barada died, and her children inherited her interest. While James C. Ghio was in possession on these terms, actions of ejectment were instituted against him by the children and heirs of one John Gates, deceased. There was a great deal of litigation between said Gates heirs and Ghio. He succeeded in defeating some of the actions instituted by them, but one ejectment suit was successful to the extent that Ella Gates, daughter of John Gates, recovered an undivided eleven-sixteenths of the land and $2,165 damages for its detention and $35 for the monthly rents and profits. Said ejectment action was instituted against William and Albert Seibert, who were tenants under James C. Ghio. Ghio defended the litigation instituted by the Gates heirs, both in behalf of himself and in behalf of his co-owners, the cestuis que trustent, Mary Barada and her children and Mary Cummisky. In doing this Ghio paid a considerable sum of money for attorney fees and costs, besides paying, in the long run, some $4,062 on the judgment in favor of Ella Gates in the ejectment suit; the rents and profits having accumulated during the appeal to the Supreme Court. Ghio gave an appeal bond in that case, and was compelled in an action on his bond to pay the judgment. Subsequently Ghio brought an action for himself and also for the trustees as co-owners with him, which resulted in Ella Gates relinquishing a portion of her interest in the premises, and in that suit, too, Ghio incurred expenses in behalf of his co-owners. Ella Gates married a man named Coffman, and she and her husband and C. N. Travous, who acquired an interest in the land from her, instituted this action against the other owners for a partition. Among the defendants when the decree distributing the proceeds of the land came to be entered were James C. Ghio, Mary Harbaugh, and Mary E. Layton. By consent of parties an interlocutory decree in partition was given defining the interests of all the owners. The land was ordered sold. This was done, and the sale approved. The decree found James C. Ghio as an individual was entitled to five forty-eighths interest in the proceeds of the sale, and Mary Harbaugh, Andrew Barada, and Mary E. Layton were allowed their distributive shares. Ghio had filed an answer and cross-bill, in which he set up the amount he had paid in consequence of the judgment in ejectment in favor of Ella Gates, and in prosecuting and defending the litigation he had conducted with the Gates heirs, both for himself and as trustee for his co-owners, and alleged the interests of Mary Harbaugh, Andrew Barada, and Mary Layton in the proceeds of the sale should be charged, respectively, with certain sums on account of said expenses; the other defendants in whose behalf Ghio had litigated having already contributed their proportion of what he had been compelled to pay. The court denied his claim, and ordered the distributive shares of those persons paid to them, and Ghio appealed to this court. The decision on the appeal was that James C. Ghio had acted in good faith in bearing the expense and trouble of the litigation with the Gates heirs, both for himself and the parties jointly interested with him, and that he was entitled in equity to contribution from them as claimed in his answer and cross-bill. It was further determined that the jurisdiction of the circuit court in the proceeding was of an equitable nature and it had power to adjust the claims of all the parties in interest, citing certain cases, among them Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339. Other cases were cited to show the right of one in good faith who maintains litigation to protect a fund in which he is jointly interested with others to be reimbursed his outlay. This partition suit is not a statutory one, but was in equity; for it dealt with equitable estates and interests, and the jurisdiction of courts of chancery over suits of that nature has not been ousted by our statutory remedy in partition. Holloway v. Holloway, supra. The judgment of the circuit court against Ghio's right to recover was reversed and the cause remanded, with directions to proceed with it in accordance with the opinion. After the case was remanded, James C. Ghio filed an amended answer and cross-bill, which in no way differed from the one first filed and passed on by this court, except the amounts of certain items of expense, which had been incorrectly stated in the first answer and cross-bill, were changed. The appellants filed a demurrer to the amended answer which was overruled. They refused to plead further. The court entered final judgment in favor of James C. Ghio, and this appeal was taken.

The grounds of demurrer are that the pleading does not state a cause of action, improperly unites two causes of action, one in favor of James C. Ghio as an individual and the other in favor of him as a trustee,

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requiring different issues, proofs, and judgments; that the affirmative matter pleaded in the answer was not a defense or a counterclaim against the plaintiffs, and had no relation to the subject-matter of the partition suit; that the case stated in the answer was not a cross-bill within the rules of chancery practice, but a new proceeding not germane to the partition suit, and then alleged final distribution had been ordered January 7, 1903, and after this the court had no further power or jurisdiction to hear and determine other issues in the cause nor to enter a further and second final decree. The last ground of the demurrer makes that document a "speaking demurrer," because, instead of raising a question against the sufficiency of defendant's answer, it alleges new matter in pais, which cannot be done. Story's Eq. Plead. (10th Ed.) § 448. It is apparent from the statement of the other grounds of demurrer that they were all adjudicated on the former appeal wherein we cited authorities to show such equities of the parties to a partition suit as are here involved might be settled in the suit by a court of chancery jurisdiction. Having ruled James C. Ghio was entitled to compensation on a pleading identical with the one now before us, except as to amounts, there is nothing for us to consider. It is true Ghio in his individual right was a party to the litigation with the Gates heirs, as well as in his capacity of trustee for Mary Barada and her heirs and Mary Cummisky, and as an individual would have no claim for contribution. Suffice to say he asks none, but only as trustee.

The judgment is affirmed. All concur.

BREEDING v. NELSON.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

1. REPLEVIN (§ 116*)—APPEAL—DISMISSAL.

Where defendant in replevin, who appealed from a justice's judgment, was in possession of the property, he had no absolute right to dismiss his appeal, and thereby escape an order for the return of the property or judgment against him and his sureties on the appeal bond.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 446; Dec. Dig. § 116.*]

2. JUDGMENT (§ 299*)—MODIFICATION AT SUCCEEDING TERM OF COURT.

The rule that, when final judgment is entered at one term, it cannot be altered or modified at the succeeding term, is subject to the qualification that, if a motion to modify is filed at the term when the judgment was entered, and is carried over to the next term without a ruling, it may be disposed of at the subsequent term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 583; Dec. Dig. § 299.*]

3. JUSTICES OF THE PEACE (§§ 166, 189*)—JUDGMENTS — ORDERS — CONSTRUCTION — MODIFICATION.

In replevin before a justice, plaintiff had judgment for a return of the property, and defendant was given a lien for the expenses of caring for the property. Defendant appealed, but thereafter moved to dismiss the appeal, which was done at the April term. Subsequently plaintiff moved to set aside the dismissal, and for an affirmance of the judgment. This motion was not disposed of at the April term, but went over to the June term, when the court entered an order reciting the submission, and adjudging that the judgment of the justice be affirmed, and plaintiff recover the property, defendant to recover from plaintiff the amount originally adjudged for expenses, for which sum a lien was declared. *Held*, that the intention was to sustain the motion to set aside the dismissal and then enter judgment of affirmance, and in substance, this was the effect of the order, though the court did not in words sustain the motion nor order the dismissal set aside, and therefore the appeal was to be treated as though the cause stood at the June term and thereafter for action, relieved from the obstacle of a judgment rendered at a previous term, so that the court had jurisdiction of the cause at the June term, could enter judgment of affirmance, and afterwards, during such term, modify the judgment if it saw proper.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 646, 733; Dec. Dig. §§ 166, 189.*]

4. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL—REINSTATEMENT.

Rev. St. 1899, § 672 (Ann. St. 1906, p. 686), provides that a judgment shall not be stayed, reversed, or impaired for any mispleading, miscontinuance, or discontinuance, insufficient pleading, jeofail, or misjoining issue. *Held*, that where defendant, instead of adhering to his original position that a judgment dismissing his appeal from a justice's judgment precluded any further action after a motion to set aside such judgment had been withdrawn, submitted evidence and participated in the trial in the appellate court on the merits, the judgment of dismissal was to be considered as set aside, though the record failed to show except inferentially that this was done.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 166.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Enoch Breeding, trustee, etc., against E. H. Nelson. From the judgment, defendant appeals. Affirmed.

This appeal calls into question the jurisdiction of the circuit court when the judgment appealed from was rendered. The action is replevin, and was begun before a justice of the peace, where it resulted in a judgment for the plaintiff for the property, subject to a lien found to exist in favor of defendant. The judgment pronounced was that plaintiff recover from defendant the property, and defendant recover from plaintiff $323.30, for expenses incident to the property, for which sum a lien was declared, and execution was ordered to enforce payment if it was not voluntarily made. An appeal was taken to the circuit court, where, at the April term, 1906, and on May 22d, the defendant, who was appellant in said court, appeared and moved to dismiss the appeal, and the court entered an order dismissing it at defendant's cost. On May 31st following plaintiff moved to set aside the dismissal of the appeal previously made at the request of de-

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erty had always remained in possession of defendant, a dismissal of the appeal would operate to release the sureties on the appeal bond, throw the plaintiff back for recovery of his property on the judgment of the justice, and subject to a lien declared in defendant's favor. Said motion of plaintiff to set aside the judgment of dismissal and for a judgment of affirmance was not disposed of at the April term, but went over to the June term, and on July 9th, of the latter term, was submitted to the court. The court entered an order reciting the submission, and that the court had heard and considered the motion, and it appearing from an inspection of the record that on May 22d the court, at defendant's motion, had dismissed the appeal, it was considered and adjudged that the judgment of the justice entered December 7, 1905, be in all things affirmed, and plaintiff have and recover from the defendant and his sureties on the appeal bond the property in question, and defendant recover from plaintiff the sum of $323 for expenses connected with the property, and for that sum a lien was declared. It will be observed the court did not in words sustain the motion plaintiff had filed to set aside the judgment of dismissal, nor order the dismissal set aside, but affirmed the justice's judgment. Afterwards, and during the June term, to wit, September 29, 1906, plaintiff by counsel filed a motion to amend the entry of July 9th, affirming the judgment of the justice. The grounds of this motion were that the judgment of the justice contained a finding of $323 in favor of defendant on his counterclaim for keeping the property and declared a lien for said sum; that this part of the justice's judgment, as well as the other, was affirmed by the circuit court; that a finding in defendant's favor on the counterclaim was a variance from the court's own finding of facts, and was not justified or supported, but was without warrant of law, because the court had "no jurisdiction to render an affirmative judgment for money damages against the plaintiff on her counterclaim in her replevin suit." The court was asked to strike out the portion of its judgment of affirmance in respect of the counterclaim, or else to vacate the judgment of affirmance entirely and set the cause down for trial. This motion passed over from the June to the October term, 1906, and on November 20th was sustained by setting aside the prior judgment of affirmance. The effect of this order was that the judgment rendered at the June term, 1906, affirming the judgment of the justice, was set aside at the October term. Thereafter, at the same term and on November 26th, plaintiff, by leave of court, withdrew the motion he had filed at the April term, to wit, May 26, 1906, to affirm the judgment of the justice of the peace, and filed a motion to assess value of property." It began by reciting plaintiff, by leave of court, had withdrawn his motion to set aside the dismissal and affirm the judgment of the justice of the peace, and, in lieu of said motion, filed a motion, the contents of which we abridge. It recited the nature of the action, and that it was for the recovery of two vehicles and a horse detained by the defendant under an alleged liveryman's lien for board and keep, and then recited the judgment of the justice, the taking of the appeal by defendant, and the dismissal of the appeal on May 22d. It next averred the judgment of the justice was incomplete and of no avail against the sureties on the appeal bond because it did not set forth and determine in the alternative the value of the property wrongfully detained. The value is then alleged; i. e., that the one-horse wagon involved in the controversy was worth $150 and the runabout $175. Nothing is said about the value of the mare, though the justice had found plaintiff was entitled to the possession of a bay mare. The motion then proceeded to state the latter part of the justice's judgment, which was in favor of defendant and against plaintiff on the counterclaim, and alleged it was given without warrant of law, as the justice had no jurisdiction to render judgment for money damages in a replevin suit. The court was asked to hear evidence as to the value of the wagon and runabout, and render judgment against defendant and his sureties on his appeal bond, affirming the judgment of the justice touching plaintiff's ownership of the two vehicles and right of possession, and adjudging plaintiff have and recover from defendant and his sureties in the alternative the sum of $325, the value of said vehicles so detained; further, that the court render judgment against plaintiff and in favor of defendant for the mare, but that plaintiff have and recover of defendant his costs. It will be seen said motion called on the court to try the case and determine the rights between the parties. It was continued to the April term, 1907. At the April term the court entered an order purporting to sustain the motion and set the cause down for hearing. A term bill of exceptions was filed, and afterwards, at the June term, 1907, the court rendered a judgment in which it recited the cause had come on "for hearing for assessment of the value of the personal property in controversy," and described in the statement as a one-horse wagon and a one-horse runabout. The court found the value of the former at $85 and the latter at $75, or a total of $160, and ordered the judgment of the justice affirmed in part, and that plaintiff recover of defendant the possession of the wagon and runabout, or, at his election, the value of the property so assessed and this recovery be

against defendant and his sureties on his appeal bond. It was further adjudged that defendant have and retain possession of the horse sued for and described in the complaint.

Geo. W. Lubke and Geo. W. Lubke, Jr., for appellant. Herbert N. Arnstein, Warren Hilton, and Peers & Peers, for respondent.

GOODE, J. (after stating the facts as above). As defendant, who appealed from the justice of the peace, was in possession of the property, he had no absolute right to dismiss his appeal, and thereby escape an order for a return of the property or judgment against him and his sureties on the appeal bond. Munley v. King, 40 Mo. App. 531. It is a sound proposition of law, as contended by defendant's counsel, that, when final judgment is entered in a cause at one term, it cannot be altered or modified at the succeeding term. But this rule is subject to the qualification that if a motion to modify is filed at the term when the judgment was entered, and is carried over to the next term without a ruling, it may be disposed of at the subsequent term. Harkness v. Jarvis, 182 Mo. 231, 81 S. W. 446. If the court at the June term had expressly ordered the judgment of dismissal entered at the April term set aside in accordance with plaintiff's motion, there could be no question that the whole case would have been reopened for further proceedings. By inadvertence the court affirmed the judgment of the justice without expressly setting aside the dismissal, instead of setting it aside and then entering the affirmance. But the entire tenor of the order made at the June term shows the intention was to sustain the motion to set aside the dismissal and then enter judgment of affirmance; and, considered according to its substance, this was the effect of the order. Lane v. Dowd, 172 Mo. 167, 72 S. W. 632. Therefore the appeal should be treated as though the cause stood at the June term and thereafter for action relieved from the obstacle of a judgment rendered at a previous term. Hence the court had jurisdiction of the cause at the June term, could enter judgment of affirmance, and afterward, and during said term, might modify this judgment if it saw proper. Plaintiff filed a motion to have it modified, which motion went over to the October term; and under the authority of Harkness v. Jarvis and the settled rule might be acted on at that term. And so the proceeding continued until it was finally heard on the evidence adduced by the respective parties.

The question of jurisdiction now raised may be considered from another point of view. Instead of standing on the position he took that the judgment of dismissal at the April term precluded any further action after the motion to set aside said judgment had been withdrawn, defendant submitted evidence and took part in the trial on the merits. The fifth clause of the statute of jeofails says the judgment in a cause shall not be stayed, reversed, or impaired "for any mispleading, miscontinuance or discontinuance, insufficient pleading, jeofail or misjoining issue." Rev. St. 1899, § 672 (Ann. St. 1906, p. 686). In Thurman v. James, 48 Mo. 235, that clause of the statute was construed when the point in dispute was precisely the one here. The cause had been dismissed and the record failed to show, except inferentially, that the judgment of dismissal had been set aside. The court held a dismissal amounted to a discontinuance within the meaning of the statute, and, as the parties had afterwards submitted themselves to the jurisdiction, this prior discontinuance did not affect the subsequent proceedings. It was also said the order of dismissal ought to be considered as having been set aside, inasmuch as the parties appeared and went to trial and the court took jurisdiction of the case, and rendered judgment in it.

The judgment is affirmed. All concur.

REGENT LAUNDRY CO. et al. v. GOODMAN et al.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909. Rehearing Denied Nov. 2, 1909.)

APPEAL AND ERROR (§ 511*)—RECORD—MATTERS TO BE SHOWN—BILL OF EXCEPTIONS—MAKING AND FILING.

A bill of exceptions cannot prove itself, and, where all that appears in the abstract are recitals in two bills of exceptions that they were signed and filed and made of record, they cannot be considered on appeal, as those facts should be established by proper entries, abstracted in the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2319; Dec. Dig. § 511.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by the Regent Laundry Company and another against Nat. J. Goodman and another. Plaintiffs took a nonsuit, with leave to move to set the same aside. From an order overruling the motion, plaintiffs appeal. Affirmed.

Taylor R. Young and Geo. W. Lubke, for appellants. Nathan Frank, for respondents.

REYNOLDS, P. J. This action was commenced by attachment and summons. On the trial of the plea in abatement, under the direction of the court, the jury returned a verdict in favor of the defendants, and on a trial on the merits the court instructed that plaintiffs could not recover. They took a nonsuit with leave to move to set the same aside, which motion was duly filed and overruled.

Counsel for respondents make the point

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that it nowhere appears in the record proper that any term bill covering the proceedings at the trial of the plea in abatement was filed, and that it nowhere appears in the record proper that a bill of exceptions was filed covering the proceedings at the trial on the merits. An examination of the printed abstract, the case being here on what is known as "short record or transcript," sustains their claims. All that appears in the abstract are recitals in the two bills of exception that they were signed and filed and made of record. This court and our Supreme Court have held, in too many cases to require citation for the education and information of the profession, that a bill of exceptions cannot prove itself, and that there must be proper entries, abstracted in the record itself, to establish those facts. Much as we dislike to dispose of a case on what appear as mere technicalities, we are bound by the decisions of our own and of the Supreme Court to do so in a clear case such as this.

Finding no error in the record proper, the judgments of the circuit court on the plea in abatement, as well as on the case on its merits, must be, and are, affirmed. All concur.

WILSON v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

1. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE — DIRECTING VERDICT.

In an action by a servant for injuries received while helping to move a car partly loaded with ties, where it was not conclusively shown that he was careless in a way that helped bring about the accident, it was not error to refuse to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT — NEGLIGENCE OF MASTER — ASSUMPTION OF RISK.

Plaintiff, a servant, was standing upon a pile of ties, which had been loaded upon a car under the direction of defendant's foreman, in the act of reversing the trolley, when the pile gave way and he was injured. He was acting under the commands of the foreman at the time. The evidence for plaintiff tended to show that the ties were negligently piled. *Held*, that the neglect of the master to furnish a reasonably safe place for a servant to work, though with the servant's knowledge, does not make the danger arising therefrom a risk assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 584; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—INSTRUCTIONS.

An instruction, in an action by a servant for personal injuries, which, after setting out the different acts of negligence, required the jury to find they occurred, "thereby directly contributing to cause plaintiff's said injuries," was erroneous for failing to require a finding that those acts caused the injuries, since the defense of contributory negligence was in the case, and there was no evidence to prove the accident was in any degree the intervening act of a third person, or of a force of nature.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1145; Dec. Dig. § 291.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by John C. Wilson against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Boyle & Priest and T. E. Francis, for appellant. A. R. & Howard Taylor, for respondent.

GOODE, J. This plaintiff was hurt while working at his task as an employé of defendant company, and brought this action to recover damages. He was helping move a car load of ties at the time. The car had been run on a spur track to be loaded with ties, and was stopped at a short depression in the track, which caused the rear end to be lower than the front, and the car stood tilted. It was a flat car about 36 feet long and 9 feet wide. The ties were 7 feet long and perhaps 6 inches thick, and were placed lengthwise across the car. At the west or rear end were braces against which the ties rested; but there were no braces at the front. At that end was what is called a "vestibule," containing the controller and other appliances used in operating the trolley car. We understand a full load of ties, or 250, would have extended the load forward to where it would be supported by braces connected with the vestibule. The car was started before it was fully loaded, there being but 232 ties on it, leaving a space 4 feet wide between the front end of the load and the vestibule. The testimony differs as to the manner in which the front end of the pile was built up. The proper manner, according to the witnesses, would have been to "step the ties"; that is, have them ascend like stairs, the first tie of each layer from the bottom retreating the width of one tie. The testimony for plaintiff goes to show this was not done, but the load was built up perpendicularly in front; whereas, the witnesses for defendant testified it was "stepped." The pile remained in position as long as the car was stationary with its rear lower than the front; but when it started the motorman ran it very rapidly, and after leaving the spur, and as plaintiff was in the act of reversing the trolley so the car would move in another direction, the pile of ties gave way at the front end, letting him fall to the floor and falling on him, breaking his left ankle and inflicting other injuries. It is conceded plaintiff was performing his duty at the time, and was not out of place on top of the pile; in fact, he had to climb there to manipulate the trolley. But it is contended

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he caused the pile of ties to topple and fall by carelessly stepping on those right at the end of the pile, and, perhaps, an inference of negligence on his part which contributed to the injury might have been drawn by the jury from the evidence. This defense was interposed by answer, and also that plaintiff assumed the risk. The acts of negligence assigned in the petition are failure of defendant's foreman in charge of the work to cause the pile of ties to be blocked or fastened at the front so as to prevent them from falling; ordering the car to be moved while in a negligent condition, by which we understand the pleader to mean, before the load was complete or braced; and in ordering plaintiff to go on the car and ties and operate the trolley while the pile was negligently unbraced.

The court refused to direct a verdict for defendant as requested, and in this no error was committed, for it is certain plaintiff was not conclusively shown to have been careless in a way that helped bring about the accident, and neither did he assume the risk of injury from the ties having been piled carelessly and insecurely and the car being moved by the direction of the foreman while they were piled thus. The work of loading the ties was done under the eye of the foreman, and plaintiff was obeying his command when hurt. Therefore there can be no question about defendant being in fault if the ties were carelessly built up and in a way to endanger plaintiff unnecessarily. But it is argued if the pile was perpendicular, as he said, the danger was obvious, and he took the risk. This point need not be elaborated, for it is settled by Wendler v. House Fur. Co., 165 Mo. 527, 65 S. W. 737; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Blundell v. Elevator Co., 189 Mo. 552, 88 S. W. 103. The case of Hager v. Railroad, 207 Mo. 302, 105 S. W. 744, is invoked as having altered the rule in regard to the assumption of the risk; but it does not alter it in a manner relevant to the present case, if at all. The fact which suffices to distinguish this controversy from that one is that it was not incumbent on defendant to move the car in question while it was in an insecure and dangerous condition, and plaintiff was not engaged by defendant to assist in any such work; whereas, the court found from the evidence in the Hager Case it was the duty of the Terminal Association and its employés to remove and transfer cars whether said cars were in good or bad order (loc. cit., page 316 of 207 Mo., 105 S. W. 744). We understand it was part of Hager's regular employment to work about cars in bad order, and presumably more unsafe than those in good order.

The judgment must be reversed because in the first and main instruction for plaintiff, after the different acts of negligence had been hypothesized, the jury was required to find they occurred, "thereby directly contributing to cause plaintiff's said injuries," instead of finding those acts caused the injuries. As the defense of contributory negligence was in the case, and there was no evidence to prove the accident was in any degree the intervening act of a third person, or of a force of nature, this form of instruction falls within the decisions of Hof v. Transit Co., 213 Mo. 445, 111 S. W. 1166, and Krehmeyer v. Transit Co. (Mo.) 120 S. W. 78.

The judgment is reversed, and the cause remanded. All concur.

GROSHONG v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909. Rehearing Denied Nov. 2, 1909.)

1. CARRIERS (§ 315*) — STREET RAILROADS — TIME TO ALIGHT—PETITION.

Where, in an action for injuries to a passenger by the premature starting of a street car, plaintiff's petition did not aver that a signal was given to stop the car on the west side of a cross-street, or that that was the regular stopping place, but only charged that plaintiff signaled the operating servants to stop the car at the intersection of certain streets "a regular stopping place for the discharge of passengers," and that the car stopped there, plaintiff was not committed to the theory that the west side of the street intersection was the regular stopping place for the discharge of east-bound passengers, nor was she required to prove the same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1281; Dec. Dig. § 315.*]

2. CARRIERS (§ 321*)—INJURY TO PASSENGER—INSTRUCTIONS—THEORY OF CAUSE.

Where, in an action for injuries to a street car passenger by an alleged premature start, plaintiff did not allege that the west side of a street intersection was the customary stopping place for the discharge of east-bound passengers, the court's refusal of plaintiff's request, failing to hypothesize as an element of plaintiff's proof that the west side of the intersection was the regular stopping place, and the giving of an instruction for defendant that if the jury believed the regular stopping place was on the east side of the intersection, and that there was no regular stopping place on the west side, it was plaintiff's duty to wait until the car reached the east side of the street, and, if her injuries were caused by her attempt to alight before such point was reached, while the car was in motion, she could not recover, was error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1335; Dec. Dig. § 321.*]

3. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—PREMATURE START.

Where the gist of a passenger's case was that the street car was halted to let her alight in obedience to her signal, and was negligently started while she was doing so, she was entitled to have the jury pass on the weight of the evidence supporting such case, though she was in error as to her claim that the car always stopped at the west side of the street intersection.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1335; Dec. Dig. § 321.*]

4. TRIAL (§ 262*)—INSTRUCTIONS—REQUESTS.

The insertion in an instruction requested by plaintiff of a requirement that the jury must find that the west side of a street intersection

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was the regular stopping place for streets cars traveling in the direction plaintiff was going at the time she was injured in attempting to alight did not preclude her from having the case submitted to the jury in another instruction, to the effect that, if the car was halted in obedience to her signal to permit her to alight, and was started carelessly while she was doing so, she was entitled to recover, regardless of the question whether the car had stopped at its usual stopping place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 661; Dec. Dig. § 262.*]

5. CARRIERS (§ 303*)—INJURIES TO PASSENGERS—PREMATURE START.

Where a street car stopped at a crossing in response to a signal that a passenger desired to alight, there was a fair inference that the operatives knew, or should have known, that some person desired to alight, and should have exercised care not to start until assured that no one was in the act of alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216–1243; Dec. Dig. § 303.*]

6. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—TIME TO ALIGHT—NEGLIGENCE.

An instruction omitting to require the jury to find that the crew in charge of the car from which plaintiff attempted to alight when injured by an alleged premature start knew or by ordinary care could or should have known before starting the car that she was attempting to alight was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

7. CARRIERS (§ 280*)—INJURIES TO PASSENGERS—CARE REQUIRED.

An instruction only requiring of the carrier's servants the use of ordinary care to prevent injury to a passenger calls for a standard of care below the legal requirement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Fannie Groshong against the United Railways Company of St. Louis. From an order granting plaintiff a new trial after verdict against her, defendant appeals. Affirmed.

Boyle & Priest and Glendy B. Arnold, for appellant. John A. Talty and Selleck & Sanders, for respondent.

GOODE, J. This appeal comes here from an order granting plaintiff a new trial after a verdict against her. The order said the new trial was allowed "on the ground that the court had erred * * * in admitting on behalf of defendant, and over the objection of plaintiff, incompetent, immaterial, and irrelevant evidence." But we are more impressed by another error now assigned in support of the order. Counsel for plaintiff insists the court erred in ruling on instructions; and, to pass on this proposition, the pleadings and evidence must be noticed. Plaintiff resided at No. 1637 Washington avenue, St. Louis, and about noon of the day of the accident took an east-bound car on that avenue to go to the office of a physician at No. 1230 Olive street. When the car reached a point between Twelfth and Thirteenth streets, which run north and south intersecting Washington avenue, she pushed an electric signal button, notifying the conductor of her wish to alight at Twelfth street. In response to the signal, the car came to a stop at the west crossing of Twelfth and Washington avenue. She testified she had ridden frequently on that line of cars, it always stopped at the west crossing of Twelfth street, and she always got off there. On the day of the accident, as she was leaving the rear platform, and while she had one foot on the step and was about to put the other on the street, still holding to a handrail, the car started, throwing her to the ground and injuring her. This is her story of the occurrence. The testimony for defendant tended to prove plaintiff attempted to get off the car while it was in motion; that no stop was made at the west crossing of Twelfth street and Washington avenue, but she attempted to alight while the car was crossing over Twelfth street, falling about one-third of the way from the tracks which ran north and south on Twelfth street and the west sidewalk of said street—that is to say, the car, when she stepped off, had not proceeded east on Washington avenue as far as the tracks which ran along Twelfth street and which it would have to cross, but had only traversed two-thirds of the distance of Twelfth street to those tracks. The evidence further tended to prove the cars never stopped at the west crossing of Twelfth street and Washington avenue, but at the east crossing, and a city ordinance was introduced requiring east-bound cars on Washington avenue to stop to allow passengers to alight at the east crossing of any street, and making it a misdemeanor for any motorman or conductor to violate the section. In the petition plaintiff alleged, among other things, that she signaled the men who were operating the car to stop "at the intersection of Twelfth street and Washington avenue, a regular stopping place for the discharge of passengers, for the purpose of alighting; and, by reason of said signal, defendant's servants and agents did stop said car at said streets and plaintiff did leave said car," and while she was in the act of leaving it, and before she had time to reach the pavement, the car was negligently started, etc.

The court refused two instructions requested by plaintiff of the following import: If the jury found from the evidence plaintiff signaled defendant's servants to stop on the west side or crossing of Twelfth street and Washington avenue for the purpose of allowing her to alight, and in response to said signal they did so, and while plaintiff was in the act of alighting, etc., the servants caused the car to start forward before she had a reasonable time to get off, and there-

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by threw her to the street and injured her, and the servants in charge of the car knew, or by the exercise of ordinary care could or would have known before starting, and in time to have averted the injury to plaintiff, that plaintiff was attempting to alight therefrom, and if she was exercising ordinary care at the time, she was entitled to recover. The second of the refused instructions was like the one just epitomized, except that it omitted to require the jury to find the crew in charge of the car knew, or by ordinary care could or would have known before starting and in time to have averted the injury to plaintiff, that she was attempting to alight. This instruction, of which complaint is made, was given at defendant's request: That if the jury believed from the evidence the regular stopping place for the discharge of passengers from east-bound cars on Washington avenue was on the east side of Twelfth street, and there was no regular stopping place on the west side, it was the duty of plaintiff to wait until the car reached the east side of Twelfth street; and, if the jury found the injuries she sustained were caused by her falling from the car while attempting to alight while it was in motion and before it reached the east side of Twelfth street, she was not entitled to recover.

This appeal was argued on the assumption that the petition averred plaintiff signaled for the car to be stopped at the west side of the intersection of Twelfth street and Washington, "a regular stopping place for the discharge of passengers, and by reason of the signal the car was stopped at said place." On looking at the petition, we find it does not aver the signal was given for a stop on the west side, or that said side was the regular stopping place; but only avers plaintiff signaled the servants operating the car to stop at the intersection of Twelfth street and Washington avenue, "a regular stopping place for the discharge of passengers," and the car was stopped there. That averment did not commit plaintiff to the theory that the west side of Twelfth street was the regular stopping place for the discharge of east-bound passengers, and did not require her to prove it was. In this respect the petition was like the one in Cobb v. Railroad, 149 Mo. 135, 50 S. W. 310. Therefore the refusal of the two instructions requested by her and the giving of the one requested by defendant of which complaint is made cannot be justified on the ground the latter submitted the only case stated in the petition, and the former one not stated. But plaintiff testified the cars always stopped on the west side, and she always got off there; and this circumstance, in connection with the fact that one of the instructions given at her request required the jury to find she signaled for the car to stop "at the intersection of Twelfth street and Washington avenue, and in response to said signal said car did stop on the west side of Twelfth street to allow her to get off the car, and that said place was the regular stopping place for the discharge of passengers," etc., is said to preclude a recovery unless the jury found the west side of Twelfth street was a regular stopping place for the discharge of passengers. The argument at the hearing was that the west side was where passengers were always discharged; further, that she testified to ringing for a stop, and, if the usual stopping place was the east side, the car must have stopped there, instead of on the west side, or, if it stopped on the west side, the car crew had no reason to suppose she would attempt to get off there, and hence defendant is not answerable for the starting of the car while she was getting off unless they knew she was. This reasoning is fallacious. The gist of plaintiff's case was that the car was halted to let her alight in obedience to her signal, and was started carelessly while she was doing so. If these things were supported by evidence, she was entitled to have the jury pass on the weight of it, even though she was in error about cars always stopping on the west crossing. If said car stopped on said crossing in response to her signal, as she testified, the inference is fair that the operatives in charge knew, or should have known, somebody intended to get off, and should have been careful not to start until assured no person was in the act of alighting. Cobb v. Railroad, 149 Mo., loc. cit. 145, 50 S. W. 310; Jones v. Traction Co. (Mo. App.) 118 S. W. 675. The insertion in the first instruction given at her request of a requirement for the jury to find the west side was the regular stopping place, even if the language of the instruction fairly bears that interpretation, which is dubious, did not preclude her from having the case submitted to the jury in another instruction stating only facts essential to her recovery. An instruction requiring the jury to find one unnecessary fact was no obstacle to granting another which required them to find none but necessary facts. The first of the refused instructions requested by plaintiff should have been given; the second one was rightly refused, for it did not require the jury to find the car crew knew, or by even the highest care would have known, plaintiff was alighting in time to avoid hurting her. It should be said the first instruction as requested only bound defendant's servants to use ordinary care, which is below the legal requirement.

The order for new trial is affirmed, and the cause remanded. All concur.

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1. RAILROADS (§ 350*)—ACCIDENTS AT CROSSING—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Whether a person injured in a railroad crossing accident was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166–1192; Dec. Dig. § 350.*]

2. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

Where, in an action for injuries in a crossing accident, seven or eight instructions were given advising the jury plaintiff could not recover if his negligence contributed to the accident, and presenting the issue in its various phases, such instructions sufficiently informed the jury on that issue to render harmless the refusal of a requested charge, even if sound, that if plaintiff sat back in the buggy just as the horses stepped on the track, and made no further effort to discover any approaching train, and if he had listened and looked long enough he could have seen the train and whipped up the horses and gotten over safely, he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

3. RAILROADS (§ 334*)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

It was not error to refuse to instruct that it was contributory negligence for plaintiff not to whip his horses across the track on the discovery of a train near him, if thereby he could have escaped, since the peril may have been so imminent and terrifying as to excuse him for failing to adopt the best course.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1027; Dec. Dig. § 334.*]

4. RAILROADS (§ 345*)—INJURIES TO PERSONS ON TRACK—ACTIONS—PETITION.

A petition for injury in a railroad crossing accident alleged that the two original companies, lessor and lessee, had united and consolidated "under and in accordance with the requirements of the laws of the state of Illinois, and that the corporate name of the consolidated company is the C. Company, the defendant herein." It was also alleged that defendant was liable "under the laws of the state of Missouri." *Held*, that the allegation relative to the requirements of the laws of Illinois was made to show authority for the consolidation, and not for the purpose of counting on a liability imposed on defendant consolidated company by those laws for the torts of its constituent companies so as to make it incumbent on plaintiff to introduce such a statute in proof of his allegation and preclude him from recovering at common law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1114; Dec. Dig. § 345.*]

5. CORPORATIONS (§ 590*) — CONSOLIDATED COMPANIES—LIABILITY FOR TORTS OF CONSTITUENT COMPANIES.

A consolidated corporation is liable for the torts of the constituent companies, whether it is an entirely new corporation, or one of the old companies has absorbed the other.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2365; Dec. Dig. § 590.*]

Appeal from Circuit Court, Audrain County; Jas. D. Barnett, Judge.

Action by Walter Palmer, by next friend, against the Chicago & Alton Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brewster, Perren & Mayer for appellant. Brewster, Perren & Mayer for respondent.

GOODE, J. Plaintiff is a negro boy who sues by his next friend for a personal injury received in a collision of a locomotive of the defendant company with a buggy in which plaintiff was driving. The accident happened on the night of September 9, 1905, after midnight, and at a crossing which is near, but east of, the abandoned station of Larrabee. This plaintiff worked on a farm five or six miles northeast of Larrabee. One Saturday evening he and another negro boy drove from the farm where plaintiff lived to the town of Sturgeon, seven or eight miles southwest of Larrabee and about twelve miles southwest of where plaintiff lived. He visited his father and mother in Sturgeon, attended a social gathering at a church, and perhaps loitered about a saloon. He may have been intoxicated, but much of the evidence looks like he was not. He and his companion started for home about midnight in a buggy drawn by a team. Behind them were two white men, farmers in the vicinity, of the names of Devert and Palmer. A third negro boy accompanied the men in the buggy, riding a horse belonging to one of them. The occupants of the second vehicle had nothing to do with plaintiff and his companion; but the members of the two parties seem to have been acquainted, and to have passed a few words now and then when the buggies happened to come close enough to each other for conversation to occur. Plaintiff, Palmer, and his companion were in advance of the other buggy, and continued to be. They drove along about seven miles until they drew near Larrabee station, and near to the crossing of the road they were on and the railroad at a point some distance east of the station. The country about there is level, and the railroad track runs due east and west. The wagon road on which plaintiff was driving proceeds in a northeasterly direction until it is 150 yards south of the railroad crossing, and there branches; one fork leading to the north, and another, a wagon road, going eastwardly. At this point one of the men in the rear buggy, R. L. Palmer, got out and mounted his horse to travel east alone; his companion, Devert, intending to go on north in the buggy. The third negro boy, who had been riding the horse, relinquished the animal to its owner, Palmer, and got into the buggy with Devert. This white man, Palmer, should not be confused with the plaintiff. What is material about the incident at the fork of the road is that the white man, Palmer, testified he there heard a rumble, thought of the approach of

a train, and warned Devert to look out for it as he (Devert) drove on toward the crossing. Palmer said he could not see the train. There was a hedge along the west side of that part of the country road extending to the right of way, and it is conceded this hedge would obstruct the view of a person driving northward until he entered the right of way; but the evidence tends to show the view was unobstructed by the hedge from thence to the track, a distance of 47 feet, and that, after getting on the right of way, no obstruction of vision intervened to the west of the crossing, except a wing fence 3 or 4 feet high and some cattle chutes 160 yards further west.

Plaintiff testified when he reached the right of way he rose to his feet, looked out of the buggy, still standing until the horses reached the track, drove the team in a walk to the track, when the engine struck the buggy, hurled it and plaintiff 100 feet or more up the track, and killed his companion. The horses were found hitched to the wagon pole further north on the wagon road. He testified that, though he was looking to the west, he neither saw nor heard the approaching train, and never knew what hit him. The neglect alleged was failure to sound crossing signals. The top of the buggy was up, and the curtains down. The night was wild and very dark. It was raining hard, and a strong wind was blowing from the north which drove the rain into the faces of the occupants of the buggy. The railroad track was two feet above the surrounding country. It was upgrade from the crossing toward Larrabee, and ordinarily a train coming from the west would be visible from the crossing for a long distance. When the witness Palmer heard the rumble of the train, he judged it was a half mile west, and another witness said that from observations he had made a train might be seen from the crossing clear to Clark, five miles away, and from the edge of the right of way would be visible to a person sitting in a buggy 1,275 feet away, or at the water tank. The train was a short one, consisting of an engine, tender, and caboose, and was running, the engineer said, at a speed of 35 miles an hour. He testified there was a lighted headlight on the front of the engine; but there was testimony tending to prove the contrary. The engineer said the night was so dark he could not see further than the front of his engine, did not see the buggy or team, hear the collision, or become aware he had struck anything until he found portions of the buggy on the front of the engine when he reached Mexico, 20 miles from the place of the accident. The evidence tended strongly to prove no bell was rung or whistle sounded as the engine approached the crossing, and it is conceded the finding of the jury for plaintiff settled this issue of fact. The company operating the road at the time of the accident was the Chicago & Alton Railway Company; but this action was instituted against the Chicago & Alton Railroad Company, it being alleged the latter, on September 10, 1905, was the lessor of the Chicago & Alton Railway Company of the railroad track and right of way mentioned, and that on or about March 8, 1906, said two railroad companies were consolidated pursuant to the provisions and requirements of the laws of the state of Illinois, and all their capital stocks, corporate rights, franchises, immunities, and privileges of every kind passed by the consolidation and merger to the Chicago & Alton Railroad Company, the defendant herein, which since said date is and has been the owner and possessor of all the railroad property and operating the same, and has become and is liable for the debts and liabilities of both the companies. There was evidence to prove those statements. The answer was a general denial and a plea of contributory negligence. The defendant requested the court to direct a verdict in its favor at the conclusion of the evidence, and, for the refusal of this and certain other rulings on requests for instructions, says the judgment in plaintiff's favor given pursuant to the verdict of the jury ought to be reversed.

1. A persuasive argument has been made against plaintiff's right to a verdict, on the theory that the evidence proves his own negligence contributed to the accident, which argument is to be considered in connection with plaintiff's right to the benefit of all inferences the jury properly might draw regarding the facts. Montgomery v. Railroad, 181 Mo. 504, 79 S. W. 930. If we accept plaintiff's testimony, he was perfectly careful as he approached the track, both in respect of looking and listening for a train; but counsel say his testimony must be disregarded because circumstances show it cannot be true, and that therefore the question is for the court. Sanguinette v. Railroad, 196 Mo. 466, 95 S. W. 386. It is said there were green lights on the sides of the engine and a coal oil headlight was burning, and plaintiff must have seen some of those lights as he approached the track, if he was standing up in the buggy and looking and listening for a train, as he swore; that the man Palmer heard the train when he got out of the buggy to mount his horse at the fork of the wagon road, and shouted a warning to Devert, thus proving it was possible to hear the train; and that plaintiff must have heard it, since he was nearer the track than said witness. If those facts were undisputably true and stood alone, they would be convincing against the truth of plaintiff's testimony; but they are to be weighed with other matters in proof. The witness Palmer testified to the best of his knowledge there was no headlight on the locomotive; that he saw none. Counsel for defendant account for this statement by saying the headlight was a coal oil lamp set back in a lantern, did not throw much light ahead, and was

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fireman opened the fire box of the engine to put in fuel. The degree of brilliancy of this glare, and whether or not it was thrown at a time when plaintiff could have seen it if he had been looking, are left indefinite. Neither is there testimony as to how brilliant the green lights were on the sides of the engine, or how far they could be seen through the thick weather of that night. It looks like plaintiff could only have seen the one on the south side as he drove northward, and considering the state of the weather, we cannot say as a matter of law he was bound to see this lamp, or, indeed, any of the alleged lights about the locomotive, had he been attentive. Moreover, the jury fairly might infer there was no headlight burning, and might find there was no glare from the fire box of a kind to warn plaintiff as he approached the track. We do not feel authorized to hold otherwise, in view of the engineer's statement that the illumination cast by the headlight failed to reveal to his gaze the buggy and team on the track. If this statement is true, the condition of the atmosphere prevented lamps from shining far. We are much impressed by the testimony of the engineer that he could not see ahead of the locomotive.

The witness Palmer said he heard the rumble of the train after he got out of the buggy, and had not heard it before. Devert, who remained in the buggy, did not hear it until Palmer spoke about it. A blast from the whistle or ring of the bell might have reached plaintiff when the rumble of the train would not. The noise of the wind and rain, and especially the patter of the rain on the top and sides of the buggy, would tend to drown the rumble. It is significant that neither the engineer or fireman in the cab, nor the conductor or a brakeman in the cupola of the caboose, saw or heard the collision. The reasoning against plaintiff's right to recover strikes us as inconclusive, and, on the whole, we think the question of his contributory negligence was for the jury. It is useless to discriminate the numerous cases dealing with similar contentions, as each case stands on its own facts, and we have found no precedent for denying redress as a court matter on such facts as are here.

2. Error is assigned on the refusal to instruct that it was the duty of plaintiff carefully to look and listen for an approaching train at the crossing; that this duty was positive and continuous until he had passed over the crossing in safety, and if the jury believed he sat back in the buggy just as the horses stepped on the track, and made no further effort to see or hear an approaching train, and believed if he had listened and looked long enough he could have seen the train, and could have whipped up the horses accident, and presenting the issue in its various phases, were given, and these sufficiently informed the jury on this issue to render the refusal of the instruction in question harmless, even if it was a sound charge. It was not sound, for it took for granted the duty was incumbent on plaintiff to whip his horses across the track upon the discovery of a train near him, if thereby he could have escaped, and that, if he failed to do so, he could be cut out of a verdict. The court had no right to tell the jury it was contributory negligence on plaintiff's part not to pursue that particular course, even though thereby he could have saved himself. The emergency of the peril may have been so imminent and terrifying as to excuse him for failing to adopt the very best expedient possible under the circumstances. Donahue v. Railroad, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; Kloiber v. Railroad, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

3. At the date of the accident the railroad and the train of cars were operated by the Chicago & Alton Railway Company under a lease from the Chicago & Alton Railroad Company. Both were Illinois companies, and subsequently they consolidated under the name of the Chicago & Alton Railroad Company, this defendant. The point is raised that defendant is not liable for the tort of the Chicago & Alton Railway Company, the former lessee, and did not become liable in consequence of the consolidation. The petition says the two original companies, the Chicago & Alton Railway Company and the Chicago & Alton Railroad Company, united, merged, and consolidated on March 8, 1906, "under and in accordance with the requirements of the laws of the state of Illinois, * * * and the corporate name of the consolidated company is the Chicago & Alton Railroad Company, the defendant herein." We think the words "under and in accordance with the laws of the state of Illinois" were intended by the pleader to designate the statutes of Illinois; and, indeed, the articles of consolidation introduced by plaintiff show, in the concluding clause of article 7, the consolidation was under a statute. But the averment regarding the requirements of the laws of Illinois was made to show authority for the consolidation, and not for the purpose of counting on a liability imposed on the consolidated company by those laws (statutes) for the torts of the constituent companies. This conclusion is enforced by an averment further down in the petition that the defendant became liable to be sued in this action "under the laws of the state of Missouri." Plaintiff did not allege a statute of Illinois which made defendant liable for the torts of one of the old companies, thereby making it incumbent on him to in-

troduce such a statute in proof of his allegation and precluding him from recovering at common law as the petition stood. In the absence of proof of a controlling statute, the question must be disposed of according to common law and by the weight of authority in Illinois, and generally this makes the defendant liable. Chicago, etc., Railroad v. Ashling, 160 Ill. 373, 43 N. E. 373; Id., 56 Ill. App. 327. This is true whether the consolidated company was an entirely new corporation, or one of the old companies absorbed the other. The first clause of the articles of consolidation said the consolidation should be "effected by consolidating and merging all and singular the property and franchises of the party of the first part into the party of the second part," and the second clause said the name of the consolidated company should be the "Chicago & Alton Railroad Company." The old Chicago & Alton Railroad Company was the party of the first part in the articles, and the Chicago & Alton Railway Company was the party of the second part. Hence it looks like the consolidation was effected by merging the property and franchises of the old railroad company in the railway company and giving the latter the former's name. However, we consider this point immaterial, because, if the Chicago & Alton Railway Company remained in existence and absorbed the former Chicago & Alton Railroad Company, as the railway company was actually operating the line when plaintiff was hurt, it would, of course, be liable. If the consolidated company was a new corporation, it is liable for the torts of the constituent companies. Chicago, etc., R. R. v. Moffitt, 75 Ill. 524; Railroad v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Columbus, etc., R. R. v. Powell, 40 Ind. 37; Cleveland, etc., R. R. v. Prewitt, 134 Ind. 557, 33 N. E. 367; Sappington v. Railroad, 37 Ark. 23; Berry v. Railroad, 52 Kan. 774, 36 Pac. 724, 39 Am. St. Rep. 381; 1 Elliott, Railroads, §§ 329, 334, and cases cited in notes; and see note to Atlantic, etc., R. R. v. Johnson, 11 L. R. A. (N. S.) 1119, where the cases dealing with this question are collected.

Though we cannot know the fact judicially, a statute of Illinois provided the new company should be liable. Hurd's Rev. St. Ill. 1905, p. 510, § 65; Chicago, etc., Railroad v. Ashling, 160 Ill. 373, 43 N. E. 373. Though the seventh clause of the articles of consolidation does not cite the statute, it retains the liability of the consolidated company in the statutory language. Said clause of the articles reads: "As provided in the statute in such case made and provided, this consolidation shall not affect suits pending in which such consolidating corporations shall be parties, nor affect causes of action, nor the rights of persons, in any particular." Maybe that recital is sufficient proof of the statute. As to that we do not say, but hold defendant is answerable regardless of a statutory liability, and that the petition does not declare on the latter.

The judgment is affirmed. All concur.

LEWIS v. WABASH R. CO.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—PETITION.

Where a petition alleged that defendant's engineer in charge of an engine by which plaintiff was injured was incompetent, in the habit of violating the company's rules, and did not exercise ordinary care, as it knew or might have known, and that the injury resulted from the engineer suddenly starting the engine as plaintiff was about to board it in the performance of his duty, without ringing the bell or whistling in accordance with a custom, and that by reason thereof plaintiff was injured, it stated a cause of action for common-law negligence in the retention of an incompetent servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 835; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—RAILROADS—OPERATION.

Where a petition stated a cause of action for injuries to a servant in the operation of a railroad engine, resulting from the negligence of the engineer, under Rev. St. 1899, §§ 2873, 2874, 2875 (Ann. St. 1906, pp. 1655–1657), repealing the fellow servant defense, it was not material that the petition also contained an unproved allegation alleging the hiring and keeping of negligent employés in order to state a cause of action at common law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—RAILROAD OPERATIVES.

Where it was customary not to move a railroad engine from under an archway without ringing the bell or blowing the whistle, a servant whose duty it was to keep the oil cans on the engines full, and who boarded the engine while under the archway for that purpose, was entitled to presume that it would remain stationary until he was warned by a bell or whistle that it was about to move.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 724; Dec. Dig. § 236.*]

4. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

Where plaintiff alleged two grounds of recovery and was not permitted to recover on one of them, instructions, proceeding on the theory that such cause of action was the only one alleged, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

5. WITNESSES (§ 321*)—EVIDENCE (§ 591*)—CREDIBILITY—TRUTH OF TESTIMONY.

A party calling a witness may vouch for his credibility and be precluded from impeaching it; but he does not vouch for the truth of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099–1100; Dec. Dig. § 321;* Evidence, Cent. Dig. § 2440; Dec. Dig. § 591.*]

6. TRIAL (§ 121*)—ARGUMENTS OF ATTORNEY.

Where a physician employed at defendant's railroad hospital, who had cared for plaintiff, was examined as plaintiff's witness, a statement made by plaintiff's attorney in argument that he would not reflect on the testimony of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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physician, but would ask whether he was a willing witness and favorable to plaintiff, was a fair comment on the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294–298, 300; Dec. Dig. § 121.*]

7. MASTER AND SERVANT (§ 135*)—INJURIES TO SERVANT—RULES—CUSTOM.

Where a settled custom not to move an engine from under an archway without ringing the bell or blowing the whistle had been followed with the sanction of defendant, it thereby acquired the efficacy of a rule which plaintiff was entitled to have observed, and the violation of which would constitute a tort to the same extent as if it had been printed and published.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 271; Dec. Dig. § 135.*]

8. DAMAGES (§ 130*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff's back and groin were injured, besides bruises on various parts of his body which made him sore and stiff, and which continued to the trial. He testified that his arm and shoulder still hurt him, that he had pains through the right chest to the top of the shoulder and collar bone, and that he suffered pains in his back and through the groin. He was in the hospital for several days, and since the accident had not been able to sleep on his right side or do heavy work. His earning capacity had been diminished, and he had lost time from work. *Held*, that a verdict for $1,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357–367, 370, 371; Dec. Dig. § 130.*]

Appeal from Circuit Court, Audrain County; Jas. D. Barnett, Judge.

Action by R. J. Lewis against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This plaintiff was hurt while working as an employé of defendant in its yards at Moberly. In said yards were a turntable, a locomotive house, and a brick archway about 50 feet in length, through which engines were run to and from the turntable. The space between the parts of the wall of the archway and a locomotive when one was on the track in it was not wide enough for a man to pass. There were what the witnesses called brick "benches" jutting from the side of the wall, and a person would be caught between them and the engine. Paul Plowman was a hostler in the yards, and it was his duty to act as engineer in running locomotives back and forth through the archway. Sometimes a locomotive would stand for a while under the archway, and the usage was to give warning by whistling or ringing the bell of an intention to start it before starting, so any one in the archway or working about the engine might take precautions to prevent himself from being caught between the wall and the engine. Plaintiff's duty was to see that the oil cans on locomotives were kept full, and to do this it was necessary for him to climb on the engines. One evening while a locomotive was standing under the arch, and Plowman, the hostler or engineer, was in the cab, plaintiff approached the engine for the purpose of attending to the oil cans. The evidence goes to prove Plowman was aware of plaintiff's movements and purpose; but, just as plaintiff put his foot on the step of the engine to board it, Plowman, without whistling or ringing the bell, opened the throttle and started the engine forward suddenly, catching plaintiff between it and the wall or "benches" projecting therefrom, and rolling him along between them until the engine emerged from the archway, when he fell to the ground, after having been carried 30 feet or more. He reported the accident to the foreman, but remained in the yards two or three hours, when he felt so bad he had to go home, and the next day he entered defendant's hospital, where he remained under treatment for more than a month. The physician in charge of the institution said that when plaintiff entered he was suffering from a severe contusion of the right thorax, was unable to move his right shoulder, was treated for these injuries while in the hospital, and was discharged "in fairly good shape." Plaintiff's testimony was that he received other injuries, to wit, to the back and in the groin, besides bruises about various portions of his body which made him sore and stiff and had continued to the date of the trial. He testified his arm and shoulder still hurt him, that he still had pains through the right chest to the top of the shoulder and collar bone, had suffered from pains in his back and through the groin while he was in the hospital, and the third day he was there had coughed up blood, since the accident never had been able to sleep on his right side, could do no heavy work, his earning capacity had been diminished, and he had lost time from work. For defendant the testimony was that while the engine was moving plaintiff ran around the front of it and even with the cab, caught his overcoat on the air drum which projected two or three inches beyond the cab, and then passed to the rear and out of the archway. The petition alleged it was the usage in the yard to give warning by bell or whistle before starting an engine, but Plowman was an incompetent, negligent, and careless man, in the habit of violating the rules and regulations of the company, and had not been exercising ordinary care in the operation of engines, as defendant knew, or might have known. No proof of this averment was introduced, and the court instructed the jury it was unsustained by the evidence, which showed Plowman was competent to handle an engine. The petition alleged further that, as plaintiff was in the act of entering the engine in the discharge of his duty, the engineer, without whistling or ringing the bell, suddenly started the engine backward at a rapid speed, thereby preventing plaintiff from getting aboard, striking him, and throwing him against the wall and rolling him between

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the engine and wall for 30 feet, meanwhile striking, crushing, and squeezing him with different parts of the engine. Plaintiff's injuries, suffering, and losses are next averred, and then that they were "distinctly caused and produced by the negligence of the defendant aforesaid."

A peremptory instruction for a verdict in defendant's favor was refused, and the cause was submitted to the jury under instructions, as to some of which errors are assigned. The instructions, given and refused, besides the request for an order for a verdict, were, in substance, as follows: At the request of plaintiff, the court gave instruction No. 1, which was to the effect that if the jury believed at the time in question it was the plaintiff's duty to go on the engine in the yards and remove the oil cans therefrom and fill and replace them, and if the jury believed it was the "rule, practice, and custom of the defendant not to start or move any engine in said yards without giving a signal by the ringing of the bell or the blowing of the whistle," and if the jury further believed the plaintiff in the discharge of his duties attempted to mount this engine for the purpose of removing the oil cans therefrom, and while he was in the act of doing so the person in charge of it suddenly, negligently, and carelessly started it backward without giving any signal, without ringing the bell or sounding the whistle, and as the result thereof plaintiff was thrown against the brick wall and injured, they would find for the plaintiff. Plaintiff's second instruction was on the measure of damages, and told the jury, if they found for the plaintiff, they would take into consideration his health and condition before the injury complained of, as compared with his condition in consequence of the injury, the nature, extent, and character of the injury, if any, his bodily pain and mental anguish, his loss of time, together with all of the facts and circumstances of the case, and would assess his damages at such a sum as would be a fair and just compensation. On behalf of defendant the court gave four instructions. The first told the jury the plaintiff, to recover, must establish: First, that the engine stopped in the archway; second, while it was stopped, plaintiff attempted to get upon it; and, third, as plaintiff attempted to get upon it, the person in charge started it, without giving any signal, and so violently it threw plaintiff against the wall and injured him, or that he was struck by the engine and injured. The second instruction was to the effect that if the plaintiff could, by the exercise of ordinary care, have discovered that the engine was about to start, or was starting, and could have released his hold and thereby prevented the injury, the jury should find for defendant. This instruction also advised the jury as to the meaning of ordinary care. The third instructed the jury plaintiff must establish that the said Paul Plowman in charge of the engine was negligent, and such negligence was the proximate cause of the injury, and there was no evidence Paul Plowman was incompetent and an improper man to handle an engine. Defendant's fourth instruction was to the effect that if the jury believed plaintiff attempted to pass between the engine and the wall, and was injured thereby, he could not recover. The court refused three instructions offered by defendant. The first was to the effect that when a party calls a witness he vouches for the credibility of such witness and the truth of his statements; the second, that if the jury believed the hostler in charge of the engine in question was a competent workman for the work for which he was engaged at the time of his employment, and was a competent workman at the time of the accident, plaintiff could not recover; the third told the jury, unless they found the principal or vice principal of the defendant charged with the duty of hiring the hostler in charge of the engine in question at the time of the accident failed to exercise ordinary care in selecting said hostler, although they might find said hostler was incompetent, they would return a verdict for defendant, and the burden was on the plaintiff to prove ordinary care was not used in the selection of the hostler.

The jury returned a verdict for plaintiff in the sum of $1,000, and in due time defendant filed a motion for new trial and a motion in arrest of judgment, which motions were overruled, and defendant appealed.

J. L. Minnis and Robertson & Robertson, for appellant. P. H. Cullen and Rolla McIntire, for respondent.

GOODE, J. (after stating the facts as above). 1. Defendant's counsel objected to the reception of testimony, saying the petition stated no cause of action, and this was the only attack on that pleading prior to verdict, except by two irrelevant motions. It is argued the petition counts only on common-law negligence in the retention of an incompetent servant; but, if it does, it states a cause of action, and the objection was rightly overruled.

2. As the averment of retention of a careless engineer was not made good by proof, a nonsuit was claimed on the theory that the aid of the statutes was not invoked, and there was a failure to prove the petition in its entire scope and meaning. Perhaps the pleader thought plaintiff was not engaged in operating work in the meaning of section 2873, Rev. St. 1899 (Ann. St. 1906, p. 1655), which takes away the fellow-servant defense when a railroad employé is injured while thus engaged by the negligence of another employé, and thought, too, plaintiff and the engineer would be fellow servants within the definitions contained in sections 2874 and 2875 of the statutes, and, so thinking, inserted an averment in the petition which

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would state a case at common law. In an action on the statutes, such an averment is not indispensable, but if made does not prevent the petition from stating a case, and, if other essential facts are alleged and proved, it is no matter that the charge of hiring or keeping careless hands remains unproved. The question then is whether this petition states a good case without the unproved allegation; one good in view of the statute which excludes the defense that plaintiff's injury was due to the carelessness of a fellow servant. We have no doubt it does. It should be remarked just here that the question has not been raised whether plaintiff's status as an employé was such as to entitle him to maintain an action under the statute; the contention being he has pleaded no action of that kind. Allegations of a usage to give signals before starting an engine, as a warning to employés who might be endangered by its movement, and that the engine which hurt plaintiff was started without giving a signal, in violation of the usage, and while plaintiff was in the act of boarding it, sufficed to state a case.

3. The instructions given and refused have been digested in the statement, and it is apparent from them the case was fairly submitted. If the evidence for plaintiff was true, his hurts were due to gross neglect on the part of the engineer, and plaintiff was not at all in fault, for at the time he was attending to his work in the usual way, and had the right to expect the locomotive to stand still until he was warned by bell or whistle it was about to move. The second and third of the refused instructions proceeded on the notion that the petition counted exclusively on negligence in retaining the engineer when he was known, or might have been known, to be incompetent; but, as we have seen, that was only one of the alleged acts of negligence and on which no recovery was permitted, and plaintiff was entitled to have the jury pass on the other allegation.

A party calling a witness may vouch for his credibility and be precluded from impeaching it; but he does not absolutely vouch for the truth of his testimony, and no party is concluded by the statements of any one witness in a case, but is entitled to have the jury weigh it in connection with all the evidence adduced. Helling v. Order of Honor, 29 Mo. App. 309; King v. Insurance Co., 101 Mo. App. 163, 76 S. W. 55. Hence the first of the three refused instructions was unsound. It related to the testimony of the surgeon of defendant's hospital, who was put on the stand by plaintiff, and we overrule the assignment of error in refusing the request; also, overrule the exception to the remark of plaintiff's counsel in his address to the jury, wherein he said he would not reflect on the testimony of the physician, but would ask whether he was a willing and talkative witness and favorable to the plaintiff. That was a fair comment on the evidence.

An objection to the first instruction granted for plaintiff and, indeed, to his right to have the case submitted to the jury at all, is that he failed to prove any "rule, practice, and custom," as alleged, to give warning of the starting of engines in the yards. The idea is that at most a usage or custom was proved, but no written and promulgated rule. All the evidence, including the testimony of the foreman of the yards, was that it had been customary to whistle or ring the bell before starting a locomotive into motion; but it was not proved the company had adopted a formal rule. The purpose of a rule, if prescribed, would have been to regulate the manner of moving engines for the safety of employés, and, if a settled custom or usage had been followed with the sanction of the company, this was in effect a rule which plaintiff was entitled to have observed for his protection, and the violation of it was as much a tort as if it had been printed and published. Rutledge v. Railroad, 123 Mo. 121, 134, 24 S. W. 1053, 27 S. W. 327; 1 Labatt, Master & Servant, § 213a.

4. We have examined some points made regarding the improper admission of evidence, but do not deem them well taken.

5. Finally, it is insisted the verdict was excessive. Study of the testimony regarding the sufferings of plaintiff, the length of time he was disabled, and the reduction of his earning capacity by half, has convinced us this position is untenable.

The verdict was reasonable, and the judgment will be affirmed. All concur.

REYNOLDS v. UNITED RYS. CO.

(St. Louis Court of Appeals. Missouri. Oct. 1909.)

1. TRIAL (§ 252*)—INSTRUCTIONS—SUPPORT IN EVIDENCE.

In an action for personal injuries from a collision between plaintiff's wagon and a street car, an instruction that if the jury find for plaintiff it should assess his damages at a sum which will be fair compensation for expenses incurred in employing others to assist him in his business, and for medicines and medical attention, etc., was error; there being no evidence of expense incurred in the employment of others to assist him in his business, nor of the amount paid for medicine or medical supplies, nor of loss of business.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries by collision with a street car, a count based upon the vigilant watch ordinance had been abandoned, the giving of an instruction based upon the ordinance was prejudicial error, though the ordinance is merely declaratory of the common law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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8. APPEAL AND ERROR (§ 627*)—DISMISSAL—DELAY IN FILING ABSTRACT.

Where respondent had not asked that an appeal be continued or reset, but had filed brief and argument, and argued the case orally when reached, a meritorious appeal will not be dismissed on motion, because of appellant's failure to file the abstract with the clerk of this court at least 30 days before the cause was set for argument, as required by rule 15 (112 S. W. vi); the penalty under rule 23 being discretionary with the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2749; Dec. Dig. § 627.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Thomas Jefferson Reynolds against the United Railways Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The petition filed contained two counts; the first count founded on what is known as the "vigilant watch" ordinance of the city of St. Louis, and the second on common-law negligence. The cause of action is based on a collision between plaintiff's wagon and an on-coming car of defendant. At the time of the accident plaintiff was driving along the tracks of defendant's road, and, at a point where an excavation in the street alongside of the tracks rendered it impracticable to use the street, his wagon was overtaken and run into by a car operated by defendant company, plaintiff thrown off and hurt, and his horses so injured that one of them died; the load in the wagon also being damaged. The evidence tended to show that the value of the horse which died as the result of the injuries was $225; the damage to the other horse, $200; the wagon which was demolished was valued at $175, and would cost $225 to replace it with a new one; that plaintiff's clothes were damaged in the amount of $10; he was idle four weeks or more on account of his injuries, which consisted of a scalp wound, cuts and bruises on his face, head, and shoulder; his back was wrenched, his hip and knee injured, followed by general physical weakness, pains, and trouble in his head and body. At the close of the evidence plaintiff dismissed as to the first count and went to the jury on the second.

Among the instructions given at the instance of plaintiff are two, numbered 2 and 3, and as follows: "(2) The court instructs the jury that, by the terms of the ordinance read in evidence, the defendant's motorman in charge of the car that collided with the vehicle of which plaintiff was an occupant (if you find that the said car did so collide with said vehicle) was bound to keep a vigilant watch for persons on foot and vehicles, either upon defendant's track or moving towards it, and on the first appearance of danger to such person or vehicle the person or persons in charge of said car were bound to use ordinary care to stop said car in the shortest time and space possible under the circumstances, by reasonable use of the means at his command, and a failure to keep such vigilant watch and to so stop said car upon the first appearance of danger (if defendant's said servant did so fail) was negligence upon the part of the defendant, and if you find that such negligence caused said injury to plaintiff's person and damage to his property, and if the plaintiff in said vehicle was exercising ordinary care at the time of and before said injury in averting injury from collision with said car, then plaintiff is entitled to recover. (3) If the jury find for the plaintiff it should assess his damages at such sum as it believes from the evidence will be a fair compensation to him: First, for any pain of body or mind that the plaintiff has suffered, caused directly by his injuries; second, for any expenses necessarily incurred by plaintiff in employing others to assist him in his business, caused directly by his injuries; third, for any expenses necessarily incurred by plaintiff for medicines and medical attention, directly caused by his injuries; fourth, for any loss which the plaintiff sustained to his wagon, team, or clothes, caused directly by defendant's negligence—all of which damages taken together should not exceed the sum of $3,260."

There was a verdict of $1,800 in favor of plaintiff, followed by a judgment for that amount. After an unsuccessful motion for a new trial and duly saving exceptions, defendant appeals.

Boyle & Priest, for appellant. Fred. A. Mayhall, for respondent.

REYNOLDS, P. J. (after stating the facts as above). We are compelled to reverse the judgment in this case. The instruction as to the measure of damages is erroneous. There was no evidence of any expense incurred or paid out by plaintiff in the employment of others to assist him in his business while suffering from his injuries. There is no evidence of amount paid for medicines or medical attention. There is no evidence of damage by loss of business.

The second instruction, in so far as founded on the "vigilant watch" ordinance, should not have been given. The count sounding on that was abandoned. The ordinance is not mentioned in the count on which the case went to the jury. While our courts have held that this ordinance is merely declaratory of the common law, this ruling has always been made in cases in which the ordinance was pleaded. In this second instruction the ordinance is distinctly embodied. Sepetowski v. Railroad Co., 102 Mo. App. 110, 76 S. W. 693, was a case before a justice of the peace, where no pleadings are required. In all the cases from Rapp v. Transit Co., 190 Mo. 144, 88 S. W. 865, to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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White v. Railroad Co., 202 Mo. 539, 101 S. W. 14, the ordinance was pleaded in the count on which the case went to the jury. The ordinance given in evidence in this case was before the jury. They were instructed under it, and yet the count sounding on it had been abandoned. We think this was error to the prejudice of the defendant.

Counsel for respondent move to dismiss the appeal for failure to file the abstract with the clerk of this court at least 30 days before the cause was here set for argument, and he invokes rule 12 of our court. Rule 12, as amended July 20, 1909, does not take effect until January 1, 1910. See 135 Mo. App. vii, 121 S. W. xx. Rule 23 of our former rules is in force as to all cases on the October, November, and December, 1909, docket. This case was on the October, 1909, docket. Under rule 23 of the rules governing this case (see 134 Mo. App. x, 112 S. W. viii), failure to comply with rule 15 is penalized at discretion of the court, by dismissal or continuance and resetting of the cause. We decline to dismiss the appeal, as we consider it meritorious, and we hardly suppose counsel for respondent desires that it be continued or reset. At least he has not asked that and has not only filed full brief and elaborate and careful argument, but argued the case orally when it was reached on the docket.

The motion to dismiss the appeal is overruled, and the judgment of the circuit court is reversed, and the cause remanded. All concur.

SLEZAK v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1909.)

1. STREET RAILROADS (§ 114*)—INJURIES TO PERSONS ON TRACK—SUFFICIENCY OF EVIDENCE.

Evidence in an action for injury to a driver of a steam roller in being thrown therefrom by a street car colliding with it *held* to support a finding that the motorman could by ordinary care have avoided the collision after the danger became apparent.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 114.*]

2. APPEAL AND ERROR (§ 971*)—DISCRETION OF LOWER COURT—OPINION EVIDENCE—QUALIFICATION OF WITNESS.

Witness testified that he had timed a street car but once, but that he was familiar with the running of cars, had frequently observed them, and that his estimate of the speed of the car in question was based on his observations. *Held*, that to allow him to give his estimate was not such an abuse of the court's discretion as warranted interference by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

3. DAMAGES (§ 132*)—EXCESSIVE—PERSONAL INJURIES.

Plaintiff, while driving a steam roller, was thrown therefrom by a street car colliding with it. He testified that prior to his injury he was in good health; that he had operated a steam roller about eight months in a season; that he received from $3.50 to $4 a day; that since his injury he was disabled in his limbs; that he had tried to work, but, owing to his disabilities, had been unable to do anything except light work and for short periods; that he had lost wages for nearly two years; that he continued to suffer pain. A physician who treated him testified that he would never fully recover, and another physician that his injuries were permanent. He incurred a doctor's bill of $50 to $75, and a bill of $100 for medicine. *Held*, that a verdict of $2,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

4. STREET RAILROADS (§ 118*)—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

In an action for injury to a steam roller driver thrown therefrom by collision with a street car, the court charged that if the motorman failed to keep a vigilant watch for vehicles on the track, or to exercise ordinary care to control or stop the car and avoid the collision, and plaintiff was exercising ordinary care, then he was entitled to recover. In another instruction ordinary care was defined to mean such care as a person of ordinary prudence would exercise under similar circumstances. *Held*, that there was no error in the use of the words "vigilant watch," taking the instruction in its entirety, and particularly when considered in connection with the instruction defining ordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. § 118.*]

5. STREET RAILROADS (§ 118*)—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

A requested charge that there was no evidence that the motorman was running the car, which collided with plaintiff's steam roller, at a high and reckless speed, and that that charge of negligence was withdrawn from the jury's consideration, was defective, and would have been confusing, in that it failed to define what would have been a high and reckless speed under the circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. § 118.*]

6. TRIAL (§ 140*)—QUESTIONS OF LAW OR FACT—CREDIBILITY OF WITNESSES.

It is for the jury to determine what weight to attach to the testimony of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Frank Slezak against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Action for personal injuries resulting from a collision between a street car, operated by the defendant St. Louis Transit Company, and a steam roller, driven by plaintiff, as engineer. The petition charges common-law and ordinance negligence, and avers that on July 6, 1904, while plaintiff, then in the employ of the city of St. Louis and operating a steam roller on Twenty-Second and Morgan streets, was crossing defendant's track to the south, "defendant's servants in charge of their east-bound car on Morgan street carelessly and without using any care to control or stop said car and prevent it colliding with said steam roller, and whilst running said car at a high and reckless speed, and in disregard of warnings to stop said car, caused and suffered said car to collide with said

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steam roller, whereby plaintiff was thrown from said roller and caused to fall and sustain permanent injury upon his right shoulder and the muscles and tendons thereof, and also upon his right leg and the muscles and tendons thereof, and also to injure his hearing, and to bruise and lacerate his head and face." The petition also pleads what is known as the "vigilant watch" ordinance, requiring that the motormen on street cars should keep a vigilant watch for vehicles on the track or moving towards it, and that, upon the first appearance of danger to such vehicle, the car should be stopped within the shortest time and space practicable under the circumstances. It is then charged that defendant's servants at the time of the collision failed to keep such vigilant watch and failed to so stop said car, which violation of the ordinance, it is charged, directly contributed to cause plaintiff's injury. The petition further avers that by his injuries so sustained plaintiff has suffered and will suffer great pain of body and mind, has been disabled from labor, has lost and will lose the earnings of his labor, has incurred and will incur large expenses for medical and surgical attention and nursing, all to his damage in the sum of $4,499, for which sum he prays judgment. The answer is a general denial, accompanied by the averment that the plaintiff's injuries, if any sustained, were caused by his own carelessness and negligence in attempting to drive a steam roller across the track immediately in front of a moving car. The reply was a general denial. The suit was originally against the St. Louis Transit Company & United Railways Company, but on motion of plaintiff an order was entered dismissing the suit against the United Railways Company.

On a trial before the court and jury evidence was introduced tending to show the following facts: The plaintiff and other employés of the city had been engaged with the steam roller in question on the day mentioned, rolling macadam in the block north of Morgan street, between Morgan street and Franklin avenue. Having completed the work in that block, the roller, with its attending workmen, was proceeding south on Twenty-Second street to roll the macadam in the block between Morgan street and Lucas avenue. It was a bright, clear, day, and the time between 2 to 2:30 p. m. Morgan street at that time was occupied by the defendant with a single track, located about the center of the street, on which track defendant operated its street cars for the carriage of passengers east-bound on said street. It was downgrade, defendant's tracks approaching Twenty-Second street from the west, as far as two or three blocks west from Twenty-Second street. When the steam roller in charge of plaintiff, on its way south, reached Morgan street, the watchman or flagman for the city who attended the roller, and whose duty it was to watch at street crossing and see whether the way was clear for the passage of the roller over the crossing, signaled plaintiff to stop the roller to allow one of defendant's cars going east to pass. Plaintiff did stop the roller in obedience to the signal, and allowed the car to pass east. There is much discrepancy in the evidence as to the distance from the track the stop was made. Witnesses for the plaintiff located the stop at about 10 to 15 feet from the track, while the evidence for the defendant located the stop at from four to six feet from the track. After this car going east had passed the roller, the watchman, one Brady, went forward, and signaled plaintiff to move on south across the car track. Brady testified that, before doing so, he looked west, and that there was no car approaching from the west in sight; that, when he looked again, which was as the wheels of the roller were going on the track, he saw a car coming east, and that it was then in the middle of the block between Twenty-Second and Twenty-Third streets, about 200 feet away; that he immediately waived a signal for the car to stop; that the car did not stop, but ran down at a high speed, and struck the wheel of the roller and knocked it off the track, with the rear end of the roller about 18 feet from the point of collision.

The roller weighed about 17 tons. It was constructed with two wheels in the rear about 8 feet high and with a small guide-wheel in front. The machine was of iron, and about 16 feet long with rollers in front. It was reversible, and could be moved with either end in front. On the day of the accident the roller was moving south along Twenty-Second street to Morgan street, with the rear of the machine south and in front. After the signal was given to go ahead with the roller—that is, after the first car passed—the machine moved to and on to the track, with the end of the machine to which were fixed large wheels in front. The machine while moving to and on to the track moved very slowly, "about half the speed of a slow walk of a man." There was evidence for plaintiff tending to show that the rear wheels going south got on the track and about to the south rail. The plaintiff and his witnesses testify that, when the wheels of the roller were on the track and the street car then in the middle of the block, say 150 or 200 feet away, Brady, the watchman, waved his flag to stop the car, and the plaintiff and a workman on the roller both waved their hats and hands at the motorman to stop. He did not stop, but ran the car down and collided with the roller knocking the roller to one side as before mentioned. As a result of the collision, the plaintiff was thrown from his place on the roller to near the southeast corner of the street, and sustained the injuries complained of.

There was evidence that the car was running at a speed of 25 miles an hour. The motorman, however, called as a witness by

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plaintiff, testified that the car was running 8 to 10 miles an hour. He also testified that he could stop the car in 50 or 60 feet under the circumstances, and that the car was equipped with air brakes, which were in good order. He further testified that he did not try to stop the car until it was within 40 feet of the roller, testifying that it was not until then that he realized there was danger of the collision; that he began to give an alarm by loud ringing of the gong when the car was midway of the block, or about 150 to 200 feet away from the roller. There was a conflict of evidence over the question of the extent of the injuries and damages sustained.

The evidence for the plaintiff, given by himself was: That prior to the injury he was a sound man in good health and strength. That he was a stationary engineer. Had been employed as such by the city of St. Louis to operate a steam roller for two seasons, running about eight months each; the one when injured being his third season. That his wages were from $3.50 to $4 per day. That since his injury he is disabled in his limbs. That he had tried to work, but, owing to his disabilities, has been unable to work except light work and for short periods. That since his injury, July 6, 1904, to the date of the trial, April 27, 1908, he had been able to work, all told, as much as one year. That as a result of his injuries to his leg he had to have four operations, cutting out the putrid matter that had formed in the wound. That his shoulder was so injured he could not lift any weight, and he cannot stand on his leg any length of time because it hurts him all the time. He continues to suffer pain. The hearing of one ear is impaired and almost lost. A physician who treated him for six weeks testified that plaintiff will never fully recover from his injuries, and that they are permanent. Another physician testified that the injuries are permanent. Plaintiff had incurred a doctor's bill of $50 to $75, and had paid out for medicines $100.

The court at the instance of plaintiff gave three instructions as follows:

"(1) If the jury find from the evidence in this case that on the 6th day of July, 1904, the defendant was using and operating the railway and car mentioned in the evidence for the purpose of transporting persons for hire from one point to another in the city of St. Louis as a street railway company; and if the jury find from the evidence that Twenty-Second street and Morgan street at the places mentioned in the evidence were open public streets within the city of St. Louis at said time; and if the jury find from the evidence that on said day the plaintiff was in the service of the city of St. Louis as engineer of the steam roller mentioned in the evidence, and if the jury find from the evidence that the plaintiff on said day was operating said steam roller going across Morgan street on Twenty-Second street at the crossing of said streets, and whilst doing so defendant's east-bound car, mentioned in the evidence, collided with said steam roller and injured the plaintiff on his shoulder, leg, head, and face as mentioned in the evidence; and if the jury find from the evidence that defendant's motorman in charge of said car failed to keep a vigilant watch for vehicles on said track, or failed to exercise ordinary care to control or stop said car and avoid causing said car to collide with said steam roller, and that thereby said car was caused to collide with said steam roller and injure the plaintiff as mentioned in the evidence; and if the jury find from the evidence that the plaintiff was exercising ordinary care to look and listen for said car and avoid injury therefrom—then plaintiff is entitled to recover, and the verdict should be for the plaintiff.

"(2) If the jury find for the plaintiff they should assess his damages at such a sum as they believe from the evidence will be a fair compensation to him: First. For any pain of body or mind which the jury believe from the evidence he has suffered or will hereafter suffer by reason of said injuries and directly caused thereby. Second. For any loss of the earnings of his labor which the jury believe from the evidence he has sustained, or will hereafter sustain, by reason of said injuries and directly caused thereby. Third. For any expenses necessarily incurred for medicines, medical, or surgical attention to the reasonable value thereof, which the jury believe from the evidence the plaintiff has incurred by reason of said injuries, and directly caused thereby.

"(3) The court instructs the jury that by the words 'ordinary care' as used in the instructions is meant such care as a person of ordinary prudence would exercise under the same or similar circumstances."

At the instance of the defendant the court gave five instructions as follows:

"(1) Even though the jury believe from the evidence in this case that the motorman in charge of the car failed to keep a vigilant watch, and failed to stop the car in the shortest time and space possible after the roller was started towards the track into danger, and that said car was being run at a negligent rate of speed, yet, if you further believe from the evidence that the plaintiff ran the roller into danger of collision with said car when said car was so dangerously near as to render a collision unavoidable by the motorman while in the exercise of ordinary care in watching for the roller and in running and stopping said car, the plaintiff is not entitled to recover, and your verdict will be for the defendant.

"(2) The court instructs the jury that if you believe from the evidence in this case that the collision and injuries complained of were the direct result of the mutual and concurring negligence of the plaintiff and the motorman in charge of the car, and that if

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it had not been for the joint negligence of plaintiff and the motorman, if you so find, the collision and injuries would not have occurred, then the plaintiff is not entitled to recover, and your verdict will be for the defendant.

"(3) The court instructs the jury that the law casts the burden upon the plaintiff to establish his case by a preponderance of the evidence, and the jury will return a verdict for defendant if the evidence is clearly balanced, or if it preponderates for defendant. While the preponderance of the evidence does not consist wholly in the greater number of witnesses testifying the one way or the other, yet the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point in this case is a proper element for the jury to consider in determining where lies the preponderance of the evidence.

"(4) The court instructs the jury that you are the sole judges of the weight and credibility of the evidence in this case. It is for you to determine on which side of the case the evidence preponderates, and in fixing and determining the weight and credibility to be given the testimony of the several witnesses who have testified before you and all the evidence as a whole you should look to the manner and demeanor of the witnesses while testifying, to their willingness or unwillingness to answer upon the one side or the other, if any, to their intelligence or the want of intelligence, to whether or not any witness is interested in the case, to his feelings of prejudice or bias towards either party, if any, to his knowledge of and opportunities for knowing the facts to which he testifies, to the probability or improbability of the facts to which he testifies, to whether or not he has made contradictory statements either in court or out of court concerning the material facts involved in this case; and, after considering all these things, you should then fix and determine the weight and credibility to be given to the evidence of each and every witness testifying in the case and the evidence as a whole. In this connection you are further instructed that, if you believe that any witness in this cause has willfully sworn falsely to any material fact or facts in issue, then you are at liberty to disregard all or any portion of the testimony of such witness.

"(5) The court instructs the jury that if you believe from the evidence in this case that plaintiff drove the steam roller onto defendant's track in such close proximity to the moving car as to render it impossible for the motorman, while in the exercise of ordinary care, to stop the car and avoid the collision and injury to plaintiff, then the plaintiff is not entitled to recover, and your verdict must be for the defendant."

The defendant also asked for an instruction for nonsuit at the close of plaintiff's case and again at the close of the case, which the court refused to give. The court also refused six other instructions asked by defendant which are not necessary to be set out as the refusal to give defendant's instruction No. 3 and the instructions for nonsuit are the only ones on which assignment of error is made in the brief filed. Defendant's refused instruction No. 3 is as follows: "The court instructs the jury that there is no evidence in this case that the defendant's motorman was running the car at a high and reckless speed, and that charge of negligence in the petition is withdrawn from your consideration." In the statement and brief of the appellant error is also assigned to the giving of plaintiff's instructions Nos. 1 and 3. There was a verdict for plaintiff for $2,000, and, after an unsuccessful motion for new trial, the case is brought here by appeal, exception having been duly saved to the action of the court in the admission and exclusion of testimony, to the giving and refusing of instructions, and in overruling the motion for a new trial.

Boyle & Priest, for appellant. A. R. & Howard Taylor, for respondent.

REYNOLDS, P. J. (after stating the facts as above). We have read the evidence as abstracted by defendant's counsel in connection with the assignments of error relied on. These assigned errors are (1) that there is no evidence in the record that the motorman could by the exercise of ordinary care have avoided the collision after the danger became apparent; (2) that there is no certain testimony of persons qualified to speak as to the rate of speed of the car; (3) that the verdict is the result of passion and prejudice; (4) that it was reversible error to have permitted, over objection, a witness, who was neither qualified either by training or by observation so to do, to give his opinion on the speed of the car; (5) that plaintiff's first instruction was erroneous, and, finally, that the court erred in refusing defendant's third instruction, because the charge that the car was being run at a reckless rate of speed was untrue, and should, therefore, have been withdrawn from the jury.

As to the first point made, that there is no evidence in the record that the motorman could, by the exercise of ordinary care, have avoided the collision, after the danger became apparent, it is sufficient to say that there was evidence tending to support such a finding, and that this assignment is not well taken.

Nor is the proposition that there is no certain testimony of persons qualified to speak as to the rate of speed of the car sustained by the record. While it is true that only one of the witnesses, Brady, testified to having previously timed cars running in the city, and that that witness testified that he had only done so on one occasion, his testimony,

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as well as that of the other witnesses, was to the effect that they were familiar with the running of cars in the city of St. Louis, and had frequently observed them, and they testified that their estimate of speed was based on their observations. The action of the trial court in allowing the witness Brady to testify as to his estimate of the speed of the car was within the sound discretion of the court on the evidence which was brought out as to Brady's qualification, and is not such an abuse of the discretion of the court as warrants interference by this court with that action. The action of the court in admitting this testimony in no manner is in conflict with the ruling on that matter made in Stotler v. Railroad, 200 Mo. 107, 98 S. W. 509. On the contrary, we think it was in line and in entire harmony with the law as there laid down.

We cannot say in reviewing the testimony in the case, and considering the nature of the injuries to plaintiff and their extent and duration, that the verdict is the result of passion or prejudice. There is testimony to the effect that he had lost wages for nearly two years, and that his daily wage before the accident was $3.50. He was put to expense, and he is entitled, over and above these items, to compensation for his sufferings as well as for the impairment of his earning capacity. In the light of this evidence, we cannot declare that this verdict is either excessive, or that it shows evidence of passion or prejudice on the part of the jury. The second instruction given at the instance of plaintiff correctly directed the jury as to the measure of damages, and in our opinion the verdict is warranted by the testimony and responsive to that instruction.

Error is assigned to the giving of the first instruction at the instance of plaintiff. The particular error assigned to this instruction is the use of the expression to the effect that, if the jury found that the motorman failed "to keep a vigilant watch" for vehicles on the track, etc., plaintiff can recover. The contention is that the instruction should merely have required the motorman to exercise ordinary care in looking and watching for plaintiff. As we understand the decision of the Supreme Court in Schmidt v. St. Louis R. R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380, there was no error in the use of the words, "vigilant watch," in this instruction, when taking the instruction in full, particularly so when considered in connection with the instruction as to ordinary care, as defined in plaintiff's third instruction.

Nor can we agree with the fifth proposition of the defendant, that it was error to refuse the defendant's third instruction. There was evidence in the case as to the speed at which the car was running and much conflict of evidence as to that, but it cannot be said that the charge of a reckless rate of speed was either unproved or had been abandoned by the plaintiff. Furthermore, this third instruction, as asked, was defective, and would have been confusing, in that it failed to define to the jury what would have been considered a high and reckless rate of speed under the circumstances of the case.

On a review of all the evidence in the case and the instructions given, we find no error that warrants us in saying that the case should be reversed. Counsel for appellant vigorously and earnestly assail the credibility of the witnesses produced by plaintiff. In the fourth instruction given at the instance of defendant the jury was fully and carefully instructed as to the credibility of the witnesses. That question was accurately placed before the jury. The witnesses were before the jury. The jury heard and saw them, and with this cautionary instruction it was for the jury to determine what weight to attach to their testimony.

On consideration of the whole case we fail to discover in it any reversible error, and the judgment of the trial court is affirmed. All concur.

THIEBES-STIERLIN MUSIC CO. v. WEISS.

(St. Louis Court of Appeals, Missouri. Oct. 19, 1909.)

1. STATUTES (§ 241*)—PENAL STATUTES—CONSTRUCTION.

A penal statute is to be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

2. INTOXICATING LIQUORS (§ 116*)—REGULATIONS — MUSICAL INSTRUMENTS IN DRAMSHOP—STATUTES—CONSTRUCTION—"MUSICAL INSTRUMENT"—"PERFORMING UPON"—"HAVING" THE SAME PERFORMED ON.

Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), forbids a dramshop keeper to keep, exhibit, or use, or suffer to be kept, exhibited, or used in his dramshop, a piano, organ, or other musical instrument whatever, "for the purpose of performing upon or having the same performed upon in such dramshop." *Held* that while a Regina Concerto, which is a musical machine set playing by dropping a coin in a slot, and thereby releasing the spring setting the machinery in motion, is a musical instrument, and winding it up and dropping a coin in the slot constitutes performing on it, it is not such a musical instrument as the Legislature meant to designate in the statute, which meant the keeping of an instrument with the intention of the dramshop keeper to perform on it himself or engaging some one else to do so; the word "having" in the phrase "having the same performed on" not being synonymous with "permitting," but importing making an arrangement to have an act done.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 116.*

For other definitions, see Words and Phrases, vol. 4, pp. 3219-3220.]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

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Action by the Thiebes-Stierlin Music Company against Joe Weiss. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Stewart, Elliott, Chapline & Blaney, for appellant. Charles H. Brock, for respondent.

GOODE, J. On February 23, 1905, plaintiff, a corporation, sold to defendant an instrument or machine known as the Regina Concerto. The purchase price was $750, of which defendant paid $250 in cash and gave his note for $500, payable in installments thereafter, which note he secured by a chattel mortgage on the instrument. He afterwards defaulted in paying the installments of his note, and the present action in replevin was instituted to recover possession of the instrument under the terms of the chattel mortgage. The cause was submitted to the court on stipulated facts, and we will cull from the stipulation such facts as we deem material to the decision. The defense to the action rests on the notion that the chattel mortgage executed by defendant to plaintiff was void and gave no security because the instrument was purchased by defendant to be used in violation of section 3018 of the statutes (Rev. St. 1899 [Ann. St. 1906, p. 1729]) of which unlawful purpose plaintiff had knowledge when the sale was made and the mortgage executed. Instead of quoting the section as printed in the statutes, we will copy the original act (Laws 1889, p. 104) including the title:

"An act to prevent any dramshop keeper from keeping or permitting to be kept in or about his dramshop certain musical instruments, any billiard, pool or other gaming table, bowling or ten-pin alley, cards, dice, or other device for gaming or amusement.

"Section 1. Dramshops not to keep gaming tables, etc.—penalty.

"Be it enacted by the General Assembly of the state of Missouri, as follows:

"[Section 1.] A dramshop keeper shall not keep, exhibit, use or suffer to be kept, exhibited or used, in his dramshop any piano, organ or other musical instrument whatever, for the purpose of performing upon or having the same performed upon in such dramshop, nor shall he permit any sparring, boxing, wrestling or other exhibition or contest or cock fight in his dramshop; and it shall be unlawful for any dramshop keeper to set up, keep, use or permit to be kept or used in or about the premises of his dramshop by any other person, or run or to be run in connection with such dramshop, in any manner or form whatever, any billiard table, pool table or other gaming table, bowling or ten-pin alley, cards, dice or other device for gaming or playing any game of chance; and the keeper of such dramshop shall not permit any person in or about his dramshop to play upon any such table or alley, or with cards, dice or any gaming device of any kind. Every person violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than ten nor more than fifty dollars, and in addition to such fine, shall forfeit his license to keep a dramshop for the term of two years next thereafter.

"Approved June 17, 1889."

Plaintiff admits knowing the appliance was purchased to be used in a saloon defendant kept in the city of St. Louis, but contends the statute, when properly construed in connection with the title of the original act, refers only to pianos, organs, or other instruments like them; that these words in the act "or other musical instrument whatever" must be construed according to the doctrine ejusdem generis, and held to include only musical instruments similar to pianos and organs, and the Regina Concerto is not a musical instrument within the statutory meaning of those words. It is agreed an organ produces music when air is pumped into an air chest; that it causes certain valves to open through which air from the chest enters and sets in motion a reed; that the valve is opened by a person striking a key as he sits before the instrument and pumps air by moving the pedals. Pianos are agreed to be instruments wherefrom music is produced by the vibration of wire strings stretched over a sounding board; they being caused to vibrate by a person striking a key on the key board and causing a hammer to strike a string. The Regina Concerto is built in the shape of a cabinet, and produces music in several ways; i. e., by the vibration of a wire drawn over a sounding board, beating of drums, ringing of bells, and clashing of cymbals. It works automatically, and is so constructed that it is impossible for any one to play on it. The music is produced by power furnished by a quadruple spring motor contained in the cabinet, which is wound by a crank on the outside of the cabinet. When the motor is wound up, if a coin is dropped into a slot, music will be produced. Ten steel disks are in a chamber at the bottom of the appliance, each 32 inches in diameter and one-eighth of an inch thick. On the reverse side of the disks are innumerable projections like those on a cylinder in a music box. When the disk revolves, the projections catch star wheels running across the cabinet, and causes these wheels to revolve and touch the end of a hammer, whereupon the hammer strikes wires drawn over a sounding board. The drums, bells, and cymbals may all be set playing at the same time. It is agreed "piano" is a generic word covering all instruments where a player strikes a key, thereby causing a hammer to strike a wire stretched over a sounding board, and the term "organ" means an instrument where

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a player pumps air into an air chest and by touching a key causes a reed to vibrate; that in the musical world the Regina Concerto is regarded as a machine, and not as a musical instrument. We will add to the above description of the Regina Concerto that a picture in the record shows it is in the form of an upright cabinet which presents the appearance of a book case, except there are disks in it instead of shelves. It stands about eight feet high, and is, in fact, a musical slot machine, which is set playing by dropping a coin into a slot after the motor has been wound taut by turning a crank.

The statute invoked in defense is one forbidding a dramshop keeper to keep, exhibit, or use, or suffer to be kept, exhibited, or used "in his dramshop a piano, organ or other musical instrument whatever, for the purpose of performing upon or having the same performed upon in such dramshop." We ask whether the appliance in controversy is a musical instrument within the meaning of the statute, which, of course, being penal, is to be construed strictly. The question may be otherwise framed in these words: Did defendant violate the statute by keeping the appliance in his saloon? We consider it a musical instrument; one that could be performed on, and that winding it and dropping a coin in the slot would constitute performing on it. These things are true as they are understood in common speech. Its only purpose was to give forth musical sounds, and we reject the contention that it was not a musical instrument.

We reject, also, the argument that performing on a musical instrument consists only in playing on it in a common way, as by fingering the key board of a piano or the strings of a guitar; drawing the bow of a violin across the strings, or breathing into a horn. Nevertheless we do not think the appliance was such a musical instrument as the Legislature meant to designate in the statute. It will be observed the offense of a dramshop keeper consists not only in keeping, exhibiting, or using a musical instrument, or suffering it to be kept, exhibited, or used, but in doing so "for the purpose of performing upon or having the same performed upon" in his dramshop. If these words are to have any force, they must be held to mean the instrument must be kept, exhibited, or used by a dramshop keeper with the intention to perform or have some one else perform on it. There is no proof or agreement defendant kept the appliance to perform on it in person. What, then, is the meaning of the words "or having the same performed upon in such dramshop"? Can they be construed to mean that, if a dramshop keeper keeps an automatic musical instrument for the entertainment of any one who may wish to perform on it, and suffers any one to do so for his own amusement, the statute is violated? We think not, and that what is meant is keeping a musical instrument in a dramshop with the intention of the dramshop keeper to perform on it himself, or engage some one else to do so.

The agreed statement of facts only says plaintiff knew at the time the note and chattel mortgage were given defendant was conducting a dramshop and the Regina Concerto was bought to be placed therein, and that part of the money paid on the note had been dropped into the instrument in the form of nickels. This admission does not go to prove defendant bought the instrument for the purpose of performing on it, or having some one perform on it in the statutory sense. The word "having" as here used is not synonymous with "permitting," but imports making an arrangement to have an act or task done. There can be no doubt about the aim of the Legislature in enacting the statute in question. It was to prevent saloons from being made attractive by strains of instrumental music which would tend to draw persons into those places and increase the use of intoxicating liquors. We take it the language employed was considered broad enough to cover such musical instruments as were customarily used in dramshops at the time the statute was enacted, and played on by the proprietor or an employé. Probably instruments like the Regina Concerto were not used in saloons, or but little used, and hence the language of the statute was not directed against them and fails to include them though the object aimed at would be assisted if it did. Direct legislation against slot machines did not begin until later. The keeping of gaming tables and devices for gaming, like faro banks, roulette, and keno, was prohibited as far back as 1879, and perhaps further. Rev. St. 1879, § 1547; Rev. St. 1889, § 3808. But it was not until 1901 that the statute was amended so to include slot machines adapted to gambling uses. Sess. Acts 1901, p. 130 (Ann. St. 1906, p. 1404). By that act section 3808 of the Statutes of 1889 was changed to read as it does in the present Revision, wherein the keeping of slot machines for gambling purposes is expressly forbidden. Rev. St. 1899, § 2194 (Ann. St. 1906, p. 1404). Our opinion is that the language employed in the present statute forbidding the keeping of musical instruments in dramshops precludes the idea that the keeping of an instrument like the one in controversy would be an offense under the statute, and that the act was thus drawn because the use of such instruments in saloons was not at the time so general as to draw the attention of the Legislature to the evil and cause the employment of apt words to forbid the keeping of them.

We have said nothing about whether, under the doctrine of ejusdem generis, the words "or other musical instrument whatever," following the words "a piano, organ," and read in connection with the title of the act, which speaks of "certain musical instruments," can be held to include an instrument like the

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Regina Concerto. Said doctrine is applicable to cases of this character. State v. Gilmore, 98 Mo. 206, 11 S. W. 620. We think it is unnecessary to go into that phase of the case, for it is clear to our minds that on a proper construction of the language of the statute, without reference to said rule of construction, the instrument in controversy was not covered.

Therefore the judgment will be reversed and the cause remanded. All concur.

142 Mo. A. 579

OREY et al. v. MOLLER et al.

(St. Louis Court of Appeals. Missouri. Oct. 11, 1909.)

1. HABEAS CORPUS (§ 117*)—RES JUDICATA—CUSTODY OF CHILD.

Adverse determination of a proceeding in the circuit court by a father to obtain the custody of his infant daughter was not res judicata of his right to recover the custody of the child in habeas corpus in the Court of Appeals.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 119; Dec. Dig. § 117.*]

2. HABEAS CORPUS (§ 99*)—RIGHT TO CUSTODY.

While the child's welfare is the main consideration of the courts in determining the question of custody, the father as the natural parent has the first claim to the child's custody, unless he is unworthy; has abandoned it; is incapable to care for it; or there is some other strong reason for denying his right.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;* Parent and Child, Cent. Dig. §§ 4–32.]

3. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD—ADOPTED PARENT.

Where a father had never surrendered his right to the custody of a child, the mere fact that the child's adoptive parents were better off financially than the father should not be regarded as a controlling circumstance in determining the question of custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;* Parent and Child, Cent. Dig. §§ 4–32.]

4. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILDREN.

A father left his wife in Indiana prior to the birth of the child in controversy, with the wife's consent, to obtain work in Montana. During his stay there he refused to consent to his wife's parting with the child. The mother placed the child in the custody of a children's society, from which it was adopted by defendants. The father afterwards returned to his family, and sought to regain the custody of the child. His character was good, and he was a hard-working, economical man, inclined to use his wages to provide for his family. *Held*, that he was entitled to the child's custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;* Parent and Child, Cent. Dig. §§ 4–32.]

Habeas corpus, on petition of George Orey and another against Roy E. Moller and others. Decree for petitioners.

A. S. Philips, for petitioners. W. A. Coley and Robt. A. Swink, for respondents.

GOODE, J. The petitioner George Orey seeks by a writ of habeas corpus issued from this court to obtain the custody of his daughter, Georgia, a child born October 2, 1908, and hence a few days over a year old. On May 5, 1909, Mary Orey, mother of the child and wife of the petitioner, placed the child in the Children's Home Society of Missouri, a corporation chartered under the laws of the state, with power, under certain circumstances, to receive from parents the release of their parental rights over children. Rev. St. 1899, c. 35 (Ann. St. 1906, pp. 2014, 2015). Afterwards the child was placed by the Children's Home Society in the family of Roy E. Moller, said family consisting of Roy E. Moller and his wife, who resided at Maplewood, in St. Louis county. Those persons and the Children's Home Society executed a deed of adoption of the child on July 13, 1909, but the deed was not recorded in the office of the recorder of deeds of the county until August 24, 1909, which was after the institution of a prior proceeding by the petitioner before the judge of the circuit court of St. Louis county to recover the child. The circumstances leading up to the child being put in the Children's Home by its mother were these: The petitioners George Orey and his wife married in Vincennes, Ind., and lived there until September, 1908, at which time they had four children. He is a man 30 years old, and she a woman somewhat younger. Orey had an uncle living in Butte, Mont., who desired him to come out there to live. Orey is by trade a plumber; and, as he understood plumbers received higher wages in Montana than in Indiana, he desired to go. At that time the birth of the child in controversy was expected to occur inside a month, and a physician had been engaged to attend the mother during confinement. However, she coincided with her husband in his view that it was best for him to go west, and he went with her approval and consent. They owned an equity in a home in Vincennes, which he sold, turned over $50 of the money to his wife, and retained the remainder, $90, to pay his expenses to Butte, and to live on there until he could get work. He expected to remit money for expenses to his wife as soon as he began to draw wages. When he got to Butte, he found he could not get work unless he became a member of a Plumbers' Association, and that for some reason the association would not admit him to membership. Hence he worked at several jobs to earn a living for himself and family. He got employment on a ranch, as a bridge carpenter on a railroad, then as a common laborer, and again as a bridge carpenter. Between September and Christmas he sent his wife money three times, in all $60. Meanwhile she had moved to St. Louis to be with her mother, bringing with her one child, and leaving the others in an orphan's home in Vincennes.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

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She lived in St. Louis with her mother, giving birth, as stated, to the child in controversy in October. When she was strong enough, Mrs. Orey sought employment to help maintain herself and children, and was taken into the service of the St. Louis House and Window Cleaning Company. She worked hard, getting up at 3 or 4 o'clock in the morning to do scrubbing in a restaurant. Her husband wrote to her, and she to him, fortnightly, but he did not send her any money during March, April, and the fore part of May. He explained this as due to the fact he was working for a railroad company, and could not draw his wages under the company's arrangement for paying their employés. Mrs. Orey felt unable to look after the baby on account of the work she was doing, and for this reason placed it in the home. She wrote her husband she was thinking of doing so, and he objected, telling her to hold onto it as long as possible. When she wrote him she had put it in the home, he said he was coming back soon and would reclaim it. Orey saved his money, and in the summer returned with some $200. He at once set about getting his daughter from the home, but the manager would not tell him where it was. He ascertained it had been put in the family of Mr. and Mrs. Moller, and demanded it of them, but they refused to relinquish it. He then instituted a proceeding to recover it by habeas corpus, but the first application was determined against him in the circuit court of St. Louis county, and he then instituted the present proceeding in this court. The evidence shows without controversy that Orey is a steady and industrious man, and of good moral character. The Mollers appear to be excellent people, and in good financial condition. They have become attached to the child and desire to retain it, whereas Orey and his wife, from the natural affection of parents, desire to recover it in order to bring it up with its brothers and sisters, enjoy its companionship, and rear it according to their religion; they being Catholics and the Mollers Protestants.

The decision of the learned circuit judge adverse to the petitioner cannot be taken as res judicata of his right. Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. Brushing aside all technical grounds, like the omission to record the deed of adoption until the institution of the first proceeding by habeas corpus, and the further question as to whether the deed by the mother was so drawn and under such circumstances as to bind anybody, we go to the merits of the case as between the petitioner, the father of the child, and the respondents. It is true in controversies over the custody of children their own welfare is the main consideration of the courts in determining the question of custody. Nevertheless, the father, as the natural parent, has the first claim, unless he is unworthy to have the care and maintenance of his child; has abandoned it; is unable to take care of it; or there is some other strong reason for denying him the right. Weir v. Marley, supra. The mere fact that the adoptive parents are better off financially than he ought not to be regarded as a controlling circumstance, or poor parents might be denied the rearing of their children. Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48. It is plain in the present case that Orey had in no way relinquished his rights as a parent. He never signed a deed releasing them, or consenting to the adoption of the child, and indeed protested even against his wife's putting it in a home. It is true in one of his letters he told her "to hold onto it as long as possible," and it is argued this was an implied consent to her surrendering the custody of it when it became impossible for her to support it. The remark implied she might make some temporary arrangement for the care of the child, but cannot be reasoned into consenting to relinquish it altogether, or that it might be adopted by some one else to the exclusion of his right to reclaim it when able to do so. Nothing had been intimated to him concerning such a course. His character has been proved good, all the evidence going to show he is a hard-working, economical man, and inclined to use his wages to provide for his family. The fact that he left his wife shortly before their child was expected to be born, and went West hunting employment, though much dwelt on as prejudicial, is not so, since he took this course with her judgment and approval, in the hope of bettering the lot of the family. Such vicissitudes are liable to occur in the life of any family, particularly in that of a poor one. It appears Orey did the best he could all along for his wife and children, is now with them earning a living wage in St. Louis, and we think his right is clear to have his daughter turned over to him. All concur.

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MISSOURI, K. & T. RY. CO. OF TEXAS v. ROMANS.

(Supreme Court of Texas. Nov. 3, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—PLACES FOR WORK—QUESTIONS FOR JURY.

In an action by a railroad employé for injuries received by stepping into a concealed hole while shoveling ballast into cars, evidence *held* insufficient to go to the jury on the question whether defendant was negligent in placing an inexperienced hand at work with the ground in that condition.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 198*)—"FELLOW SERVANTS."

Where men are employed by a railroad company to load cars, and each man is paid according to the work done and each worked separately and independently of the others in different places, and had no control over the work, they are not fellow servants, although they are employed in the same grade and character of the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 198.*

For other definitions, see Words and Phrases, vol. 8, pp. 2716–2730; vol. 8, p. 7662.]

3. MASTER AND SERVANT (§ 285*)—QUESTIONS FOR JURY—CAUSE OF INJURY.

In an action against a railroad company for injuries to an employé received while loading a car, evidence *held* to make the condition which really caused plaintiff's injury a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. W. Romans against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, where the judgment was affirmed (114 S. W. 157), and it brings error. Reversed and remanded.

Coke, Miller & Coke and Jno. T. Craddock, for plaintiff in error. B. O. Evans, Thompson & Meade, and C. L. Elder, for defendant in error.

WILLIAMS, J. The defendant in error recovered the judgment from which this writ of error is prosecuted for damages for a personal injury received by him in the service of the plaintiff in error. The facts upon which his right of recovery depends are thus stated by the Court of Civil Appeals: "Plaintiff at the time of the injury was in the employ of defendant, loading cars with gumbo at a plant owned and controlled by defendant. At said plant there were three large embankments of burnt gumbo in parallel rows several hundred yards in length, probably 100 feet wide, and 12 to 15 feet high. These embankments were made originally by scooping out a ditch in the ground, piling dirt, old timbers, and coal therein, in alternate layers, and burning the black soil in this way so as to form a ballast known as 'burnt gumbo.' When the ballast in these embankments was ready to be moved, flat cars were run in on a track built parallel with and near to the edge of one of the embankments, and the ballast was thrown upon these cars with scoop shovels by men employed to do that at so much per car. These men so employed in loading the cars worked independently of each other, and according to their own methods and practically in their own time, there being, however, a foreman who inspected the cars as to quality and quantity when loaded, accepted them when sufficiently loaded, and gave to the individual loader credit for the car at the agreed price. The loading was begun at the outer edge of the embankment, and, when a few feet from the side of the embankment had been thus loaded and removed, the track crew would move the track nearer to the embankment from time to time, and the loading would then proceed until the whole of the embankment had been loaded. * * * Plaintiff had partly loaded a car when he stopped work for the night, and, when he returned next morning, the car had been moved some hundred feet or more from the position it occupied the evening before. In attempting to throw a shovel of gumbo on the car, he made a misstep, and his foot went into a hole, which caused him to fall across a ridge of gumbo that had formed along the edge of the cross-ties by some of the gumbo falling as it was being loaded, and thereby hurt himself as complained of. The hole into which he stepped and caused his fall was approximately 2½ feet long, 2 feet wide, and 1½ feet deep. This hole was filled, or nearly so, with fine dust or soot from the gumbo, which obscured the hole, and said hole was not seen by plaintiff, nor was its existence known to him. Plaintiff was inexperienced in the work, having only been employed at this work five days, a Sunday intervening. Defendant had a track crew out there who worked on and moved the track and leveled up the ground when necessary. The evidence fails to disclose how the hole came to be there, nor is the evidence sufficient as to circumstances to warrant a conjecture as to how it was produced." It is not to be understood from this statement that the evidence showed that the track on which stood the car which was being loaded by plaintiff had ever been moved, or that the track crew had ever worked over this ground after first laying the track, or that the condition had even arisen in which it would have been their duty to go over it. These things are all left to conjecture.

We must hold that the evidence is legally insufficient to give rise to any just inference of negligence on the part of the defendant. The fact upon which plaintiff must

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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found a right of recovery is the existence of a hole concealed by the soft matter with which it was apparently filled; for we cannot agree that such a hole unconcealed at a place like this would be any more dangerous or any more evidence of negligence than a like hole would be if located by a wagon into which a servant is shoveling dirt or other matter. The risk from such a condition would be so slight and so obvious that the servant might well be expected to guard himself against it, and this would require no more experience than is possessed by the average adult. The place here in question is not like a depot platform, or a railroad track, or other similar place, and the same diligence in keeping it is not to be expected. There might be negligence in causing or permitting the existence of a hole concealed as this one was at any place where people ought to be expected to pass, but, to show it, the evidence must justify the inference that some of the employés of the defendant for whose conduct it is responsible caused that condition, or knew, or with ordinary care would have known, of its existence and have remedied it before plaintiff was hurt, and that some such happening as that of plaintiff's hurt could reasonably have been anticipated. As the Court of Civil Appeals have said, it cannot in any way be inferred how this hole was caused. The evidence fails to supply any fact from which any one can say when, how, or by whom the condition which made the use of the premises dangerous to plaintiff was produced. The evidence equally fails to show that the condition had existed so long as to justify an inference that the defendant knew, or by the exercise of any degree of diligence that could be exacted of it ought to have known, of it before plaintiff was hurt. If we undertake to determine the responsibility of the defendant for the acts or omissions of any of its servants, or of any class of its servants, we are at once confronted with the inquiry, what servant, or class of servants, caused or negligently permitted this condition? No hypothesis on which liability could be founded is supported by evidence, unless it is true that the mere existence of the hole in the condition described by the witnesses is of itself evidence of negligence. This could only be said if it were true that a hole so situated could not probably have existed without knowledge on part of some employé of defendant for whose negligence it is responsible, supposing that employé had exercised proper diligence; and it seems obvious that this is not true. The very gist of plaintiff's complaint is that the hole was concealed. It is not shown that any one ever saw it before the accident. It may have existed before the bed was laid, or have been caused in the burning, or have been excavated in the removal of the gumbo, or afterwards, and may have become filled as described by the witnesses at any stage of the work. It does not even appear whether or not the whole was in ground before covered by the gumbo beds. The Court of Civil Appeals says that the defendant ought not to have put an inexperienced servant to work at such a dangerous place, but this assumes the very fact to be proved, which is that the defendant is chargeable with knowledge of the condition that made the place dangerous. Besides, we cannot see that inexperience of the plaintiff has anything to do with the question. The concealed hole was as dangerous to an experienced as to an inexperienced servant, and either would have had sufficient knowledge to avoid such a risk if known to him.

It is further said that the track crew should have remedied the condition, but it is not shown that they had been over the ground after first laying the track, or that the circumstances had ever existed in which, in the proper discharge of their duties, they should have gone over it, or that had they done so the hole would have been discoverable by them. It does not appear that the hole was in existence and discernible at any time when they had worked or should have worked about this place. This incompleteness of the evidence renders it impracticable to discuss several of the questions of law raised by the parties with any certainty that they are the real questions in the case. For instance, the Court of Civil Appeals held that those who worked in filling other cars with gumbo at other times and places than those at which plaintiff was hurt were not his fellow servants, and to this we agree. They were not working at the same time and place nor on the same piece of work. But how is it possible to say that any act of those servants produced the condition in question, or, if so, that such act was negligent, when we cannot even conjecture how the hole was caused?

The Court of Civil Appeals further says: "That the place where the work of shoveling ballast was being done was constantly changing in the progress of the work does not affect the question at issue. It is true that the shoveling of the gumbo from the ground would have a tendency to leave the surface of the ground uneven, but not to the extent that it was so rendered by the hole into which the plaintiff slipped and caused him to fall. There is no evidence showing any other hole in like dimensions on the ground, or one that approximated its extent similarly situated; therefore such changing conditions have no application to this proposition." There was evidence of a statement of the plaintiff that he was hurt because he stood in an unusually low place, and had to throw higher, and there was evidence that the bed of the pit was made by the use of scrapers, not as level as a floor, but as level as the scrapers would leave it. It is evident that in shoveling the gumbo from such a place inequalities in the ground might be produced,

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and the mere doing of such work might produce transitory conditions the mere allowance of which would not constitute negligence on the part of the employer. The particular spots where shoveling was to be done were not permanent places kept by the master wherein the servant was to do his work, but were temporarily used and constantly changing. What the condition really was that caused plaintiff's injury was a question for the jury under proper instructions.

There is a qualification, applicable to such situations, of the general principle as to the master's duty in keeping the places where his servants are to do their work. Labatt, Master and Servant, § 588; 26 Cyc. 1324. Whether or not this should be given in a charge to the jury will, of course, depend on the facts developed at another trial, and whether or not those facts are sufficient to authorize the submission of the cause to a jury. As the evidence now stands, it furnishes no legal basis for a recovery by plaintiff.

Because of the insufficiency of the evidence the judgment must be reversed; but, as the facts may be more fully developed at another trial, the cause will be remanded.

Reversed and remanded.

TEXAS & P. RY. CO. et al. v. HUBER et al.

(Supreme Court of Texas. Oct. 27, 1909.)

REMOVAL OF CAUSES (§ 19*)—ACTION AGAINST FEDERAL CORPORATION.

An action brought against a corporation created by an act of Congress, for liability arising from negligence is removable to the federal court on petition of defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 46; Dec. Dig. § 19.*]

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Mrs. M. E. Huber and others against the Texas & Pacific Railway Company and others. Judgment for plaintiffs and defendants bring error. Reversed and remanded.

See also 95 S. W. 568.

W. L. Hall and T. B. McCormick, for plaintiffs in error. W. T. Strange, Cockrell & Gray, and M. M. Parks, for defendants in error.

GAINES, C. J. Mrs. M. E. Huber, for herself and as next friend for her minor child, Georgia Huber, brought this suit against the Texas & Pacific Railway Company and R. J. Oliphant to recover for the killing of Lawrence Huber, the husband and father, respectively, of plaintiffs, which killing it is alleged was occasioned by the negligence of defendant's servants operating a locomotive engine against and over the deceased. The two defendants duly moved that the cause be transferred to the federal court for trial, on the ground that the Texas & Pacific Railway Company was chartered by an act of Congress, and the application was overruled. The case went to trial and resulted in a judgment in favor of the plaintiffs against the railway company and against them in favor of Oliphant. That judgment was reversed and the cause remanded for a new trial as to the Texas & Pacific Railway Company, but was affirmed as to Oliphant. When the case was called for trial the second time in the district court, the Texas & Pacific Railway Company presented its petition and bond in due form for removal to the federal court, alleging that it was a corporation duly created by an act of the United States Congress. The application was again denied, and the case went to trial upon its merits and resulted in a judgment for the Texas & Pacific Railway Company, from which plaintiffs have appealed.

The Texas & Pacific Railway Company cross-assigned as error in the trial court the failure to transfer the case to the United States Circuit Court for the Northern District of Texas. The case of Matter of Dunn, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558, is the most recent decision of the Supreme Court of the United States upon this subject, and we are unable to distinguish that case from this. That was a case in which Mrs. Dunn for herself and others brought suit against the Texas & Pacific Railway Company in a state district court at Dallas, Tex., and also against C. W. Slayter and Carl Rasmussen, who were, respectively, engineer and fireman on the Texas & Pacific Railway to recover damages for the negligent killing of J. J. Dunn, the husband of one of the plaintiffs and the father of the others. An application was filed, which was joined in by all of the parties defendants, to remove the case to the Circuit Court of the United States for the Northern District of Texas, and the application was granted. Thereupon the plaintiffs in the suit filed an application in the Supreme Court of the United States praying that the District Judge of the United States for the Northern District of Texas and his court be commanded to disregard the order of removal of the state court, and to dismiss the case out of his court. The application was denied, and it was held that the case was properly removed. As this is the latest decision of the Supreme Court of the United States upon the subject, we are constrained to hold that the application to remove in this case should have been granted.

The judgment is therefore reversed, and the cause remanded for procedure in accordance with this opinion.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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BENEVIDAS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1909. On Motion for Rehearing, Nov. 3, 1909.)

1. CRIMINAL LAW (§ 1156*)—APPEAL—NEW TRIAL—REVIEW.

Alleged misconduct of the jury in reaching their verdict by lot being cognizable by the trial court, its conclusion, unless clearly wrong and unsupported by the testimony, will not be interfered with on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1156.*]

2. CRIMINAL LAW (§ 1144*)—APPEAL.

In the absence of a statement of facts, the appellate court will not assume that the charge in a criminal case was prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Law, § 3032; Dec. Dig. § 1144.*]

On Motion for Rehearing.

3. CRIMINAL LAW (§ 1064*)—APPEAL.

Where no complaint of the court's charge is made in the motion for new trial, as required by Code Cr. Proc. 1895, art. 723, alleged error therein will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683; Dec. Dig. § 1064.*]

Appeal from District Court, Gonzales County; M. Kennon, Judge.

Callatino Benevidas was convicted of assault with intent to murder, and appeals. Affirmed.

W. B. Green, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Gonzales county on a charge of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a period of four years.

1. There is no statement of facts in the record. The motion for a new trial is confined to the single ground of the misconduct of the jury, in that they arrived at their verdict by lot; the allegation being in substance that, after the jury had arrived at the conclusion that appellant was guilty, the penalty was determined in the following manner: Eight of the jurors were in favor of assessing defendant's punishment at 5 years in the penitentiary, and four of the jurors were in favor of assessing his punishment at 2 years in the penitentiary, and that they agreed in advance that each juror should state the number of years he was in favor of assessing, and that the total sum thus agreed on should be divided by 12, and that the quotient should be the term assessed against appellant, and that the jury should be bound by the result thus to be ascertained, and that the aggregate number of years amounted to 48 years, and this sum divided by 12 made the verdict of 4 years. Evidence was heard on this motion, and two of the jurors, Willard and Griffin, by their testimony in substance affirmed the truth of the grounds contained in the motion. This allegation, however, was in substance disproved by the testimony of six others of the jury. The facts touching this matter are authenticated in proper bill, which we have carefully examined. We held in the late case of Fox v. State, 53 Tex. Cr. R. 150, 109 S. W. 370, that where the question of misconduct of jury was made the matter of diligent inquiry by and under the direction of the trial court, and there was ample evidence to sustain the findings of said court that there was no such misconduct, the action of the court will not be disturbed. It was also stated in the case of Holt v. State, 51 Tex. Cr. R. 15, 100 S. W. 156, that "where, upon motion for new trial after conviction of murder, the affidavit of two of the jurors claiming that the verdict was reached by lot, and nine of the jurors testified that no such agreement was made, the court was authorized under the testimony to determine that the verdict was not reached by lot." The same conclusion, in substance, was reached in the case of Goodman v. State, 49 Tex. Cr. R. 191, 91 S. W. 795, and this ruling is supported by many other decisions of this court. Matters of this sort are cognizable by the trial court, and, unless the conclusion there reached is clearly wrong and unsupported by the testimony, we feel like we ought not to and cannot interfere.

2. In the brief filed herein by counsel for appellant complaint is made of the court's charge. This cannot avail appellant, for two reasons: In the first place, in the absence of statement of facts, we would not be authorized to assume that the charge was hurtful to appellant; and, again, no complaint of the court's charge was made in motion for a new trial.

As presented, there is no error for which we would be authorized to reverse the judgment of conviction, and it is accordingly affirmed.

BROOKS, J., absent.

On Motion for Rehearing.

RAMSEY, J. Counsel for appellant calls our attention to a very patent and obvious error of fact in the opinion of the court heretofore rendered. It is therein stated that there was no statement of facts contained in the record. This statement is wholly inaccurate. Excuses for oversight in so stating are unnecessary, and, considering the care we should exercise in respect to such a matter, ought to be, and doubtless would be, unavailing. However, this misstatement of fact in no way affects the accuracy and correctness of the opinion. There was no complaint of the court's charge made in motion for a new trial, and under the terms of article 723 of our Code of Criminal Procedure of 1895, and a long line of de-

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cisions in this state, we are not authorized to consider matters raised on the appeal.

The motion for rehearing is accordingly overruled.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1909. Rehearing Denied Nov. 3, 1909.)

1. WITNESSES (§ 350*)—CREDIBILITY—INDICTMENT FOR CRIME.

On a prosecution for manslaughter, where accused, on cross-examination, in answer to a question as to his reason for firing a second shot into a saloon after shooting decedent, stated that his purpose was to keep any one from coming out and shooting him down, and that he did not shoot at one C., son of decedent, it was competent to ask him if he had been indicted for assault with intent to murder C., to show his motive for the statement and to affect his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

2. HOMICIDE (§ 338*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if admission of the testimony was error, it was harmless, where the jury gave accused the minimum punishment for manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 713; Dec. Dig. § 338.*]

Davidson, P. J., dissenting.

Appeal from District Court, Cooke County; Clem B. Potter, Judge.

Sam Davis was convicted of manslaughter, and appeals. Affirmed.

Potter & Culp and Davis & Thomason, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

The only bill of exceptions in the record presents the following: While defendant was upon the stand as a witness in his own behalf, and while he was being cross-examined by R. R. Bell, private counsel for the state, and after the defendant had testified that he did not shoot at Ray Clark, or see Ray Clark when he fired into the saloon, said state's counsel asked the defendant the following question: "You have been indicted for assault with intent to murder in the Ray Clark case?" To this the defendant's counsel objected, because the record is the best evidence, and because an indictment found by the grand jury is no evidence of guilt, and because it is an effort to get before the jury the opinion of the grand jury in reference to the transaction now being investigated. The objections being overruled by the court, appellant answered that he had been indicted by the grand jury for assault with intent to murder Ray Clark. The following transcript from the stenographer's notes is attached to this bill and made a part of the judge's qualification thereto: "Cross-examination of Sam Davis by R. R. Bell: Q. What was your reason for shooting the second shot? A. To hold the front of that house, to keep any one from coming out of that house and from shooting me down. Q. You have been indicted for assault to murder in the Ray Clark case? A. Yes, sir; I guess I have. I am under bond. The Court: I don't think it is material. Q. You claim that you didn't shoot at Ray Clark at all? A. No, sir; I didn't. Q. And what was your explanation? A. I said I shot down through the house for the purpose in order to hold the front of that house, to keep any one that might be in the house from coming out and shooting me down. I knew Dud Clark worked in that house, and, of course, I expected him to come with both hands full of six-shooters."

This testimony was admissible. Appellant had stated he shot into the house to keep any one from coming out of same to assault him. Now, to show the motive for making said statement, the state called upon appellant to prove that he was indicted for shooting at Ray Clark, and that that is the reason he swore he did not shoot at Ray Clark, but merely shot into the house to keep some one from coming out of the house; that he knew Dud Clark worked in the house, and expected him to come out with both hands full of six-shooters. Where a party gives testimony, it is always germane, proper, and legitimate to show a motive for said statement, and certainly, if appellant is indicted for assault to murder upon Ray Clark, this would give him a strong motive for swearing that he did not shoot at Ray Clark, and the fact that at the time he gave such testimony he was indicted becomes a pertinent inquiry, and goes to that extent to discredit the accuracy of his statement when he says he did not shoot at Clark. This is not a case where there is a bare controversy in the testimony; but the defense is trying in this testimony to make out a perfect defense and to show a legitimate and lawful purpose in all of his acts which were part and parcel of the res gestæ of the transaction. Now, when he states he did not shoot at Clark, it very pertinently suggests itself to any one's mind that he might be preparing a defense to the indictment for assault with intent to murder said Clark, or at lease the fact of being indicted suggested that this might be his motive for so swearing, and, therefore, goes to reflect upon the credibility of the statement and general credibility of the witness.

In this connection the court charged the jury as follows: "You are instructed that the defendant cannot be convicted in this case for shooting at or threatening to shoot at any other person than the deceased. He is on trial alone for the killing of Lowe Clark." To this extent this was clearly a

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admitted. Appellant does not complain of the lack of proper limitation of the testimony; but the objection that appellant makes is that it was an indirect way of eliciting the opinion of the grand jury in reference to a material part of the evidence upon this trial. We do not think there was any error in the admission of the testimony. This is especially so in the light of the verdict in this case, which was for two years, the minimum punishment for manslaughter. The evidence clearly supports the verdict. The jury having given appellant the minimum punishment, we cannot see how the testimony, even if erroneous, could have injured appellant.

Finding no error in the record, the judgment is in all things affirmed.

DAVIDSON, P. J. (dissenting). This conviction was for manslaughter; the punishment assessed being two years' confinement in the penitentiary.

The serious question urged by appellant is that the facts are not sufficient to support the conviction for manslaughter; that it was a case purely of self-defense. Pretermitting a discussion of this question, the evidence is very cogent showing that appellant acted only in self-defense. There had been trouble between the parties in which the deceased was the aggressor. While these troubles were of a wordy nature, the evidence is that the deceased was the provoking party. After the last wordy altercation, in which threats were made by deceased and intimations that he would renew the troubles, the parties separated, and appellant armed himself in anticipation of further trouble. While walking along the sidewalk with a friend en route to a wagon yard to get his team for the purpose of leaving town, appellant passed the door of a saloon in which was stationed the deceased, his son, and a friend. There is some contradiction at this point as to who spoke first. The difficulty occurred, and deceased was shot by appellant. The evidence is to the effect that deceased was making a demonstration to draw a pistol, and a pistol was found upon his body. Appellant fired one other shot, but not at the deceased. The state contended that appellant fired this shot at Ray Clark, son of deceased. Appellant's evidence is to the effect that the shot was fired into the saloon generally—not at anybody at all, but as a warning to those on the inside, who were friends of the deceased, not to make a further attack upon him.

In this condition of the record, and while appellant was upon the stand testifying in his own behalf, a bill of exceptions recites the following: That while appellant was being cross-examined by private counsel representing the state, and after appellant testified he did not shoot at Ray Clark, or see Ray Clark when he fired into the saloon, said with attempt to murder in the Ray Cla case?" Appellant objected, because the re ord is the best evidence, and because an i dictment found by the grand jury is no ev dence of guilt, and because it is an effort get before the jury the opinion of the gra jury in reference to the transaction now u der investigation. The objections being ove ruled, the witness was required to answ that he had been indicted by the grand ju for assault with intent to murder Ray Clar In connection with this, and as a part c the bill, it is recited that the stenographer' notes, which are made a part of the qualifica tion of the bill, show: "Q. What was you reason for shooting the second shot? A To hold the front of that house, to keep an one from coming out of that house and fron shooting me down. Q. You have been indict ed for assault to murder in the Ray Clark case? A. Yes, sir; I guess I have. I am under bond." Then follow the objections of appellant. The court said: "I don't think it is material. (Defendant excepts.) Q. You claim that you did not shoot at Ray Clark at all? A. No, sir; I didn't. Q. And what was your explanation? (Defendant objects.) A. I said I shot down through the house for the purpose in order to hold the front of that house, to keep any one that might be in the house from coming out and shooting me down. I knew Dud Clark worked in that house, and, of course, I expected him to come with both hands full of six-shooters."

We are of opinion that this evidence was inadmissible. It was but the expression of the grand jury of what they thought of the case, and of the shooting, and appellant's connection with it. The indictment against appellant for the shooting at Ray Clark was a part and parcel of the transaction under investigation, if as a matter of fact he did shoot at him. It was denied by appellant, and the finding of the grand jury, as shown on the face of the bill of the indictment, was used to contradict appellant on this issue. It was but their opinion, and was not legitimate testimony for the purpose of impeachment. See Long v. State, 17 Tex. App. 128; Shamburger v. State, 24 Tex. App. 433, 6 S. W. 540; Taylor v. State, 50 Tex. Cr. R. 381, 97 S. W. 474; Moore v. State, 46 Tex. Cr. R. 54, 79 S. W. 565; De La Garza v. State (Tex. Cr. App.) 61 S. W. 484. It will be noted that between the testimony of appellant and Ray Clark there is a sharp conflict, as set out in the bill of exceptions. The testimony of Ray Clark, or that for the state, is to the effect that appellant fired the second shot into the house where Ray Clark was for the purpose of killing Ray Clark. Appellant's testimony is directly to the effect that he shot into the front of the house to prevent those whom he says were in conspiracy against his life from coming out to where he was to kill him. A conflict of evi-

dence will not justify the introduction of testimony to impeach or sustain a witness. Long v. State, 17 Tex. App. 128; Rushing v. State, 25 Tex. App. 607, 8 S. W. 807; Britt v. State, 21 Tex. App. 215, 17 S. W. 255; McGrath v. State, 35 Tex. Cr. R. 413, 34 S. W. 127, 941; Harris v. State (Tex. Cr. App.) 45 S. W. 714; Murphy v. State (Tex. Cr. App.) 40 S. W. 978; Jacobs v. State, 42 Tex. Cr. App. 353, 59 S. W. 1113.

Here firing of the second shot was proved by the state and the appellant. There was no conflict upon this question; the conflict being in regard to the reason for firing the second shot. The indictment, or the fact that it was returned by the grand jury against appellant, charging him with assault with intent to murder Ray Clark, could have no bearing upon this issue, and was thoroughly illegitimate. It was but the opinion of the grand jury, found in the fact of the return of the bill, that they believed appellant shot at Ray Clark, and did not, as he testified, shoot to prevent Clark and others from coming out of the house and making an attack upon him. This act of the grand jury could not be used to settle or prove which theory was correct. As before stated, it would be but a conflict in the evidence, and only upon the purpose for which appellant fired the shot. Under this state of case, under all the authorities, this evidence was not permissible, either to sustain the state's evidence or to impeach appellant. Here, the issue as to the shooting being admitted, it was a sharp contest between the testimony of Clark and appellant as to the purpose, and the act of the grand jury is thrown into the scale to determine that fact against appellant's testimony. They saw proper to believe Clark, and thus found the indictment. It was but their conclusion of the effect of Clark's testimony as against appellant's. The authorities cited are, I think, in point, and settle the matter for appellant, and against the state's contention.

Believing there was error in the admission of the testimony, and of such a nature as to require a reversal of the judgment, I respectfully enter my dissent, and believe the judgment ought to be reversed, and the cause remanded for another trial.

PHILLIPS v. STATE.

(Court of Criminal Appeals of Texas. June 9, 1909. Rehearing Denied Nov. 3, 1909.)

1. CRIMINAL LAW (§ 1038*)—APPEAL—INSTRUCTIONS — OMISSION — NECESSITY OF REQUEST.

Failure to charge on alibi is not ground for reversal, unless appellant requested a special instruction covering the question which was refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

2. CRIMINAL LAW (§ 1173*)—INSTRUCTIONS—ALIBI.

In a prosecution for hog theft, the court charged that if defendant was present with another, and they or either of them, acting with a common purpose into which defendant entered, undertook to steal a hog, then defendant would be a principal, and that defendant's mere bodily presence without participating in the intent would not make him guilty as the principal, nor would his subsequent receipt of some of the stolen meat make him guilty of theft, but that it must be shown that he participated in the original taking. *Held*, that the court's failure to affirmatively charge on alibi was not ground for reversal under Code Cr. Proc. 1895, § 723, providing that a conviction shall not be reversed unless the alleged error was calculated to prejudice defendant's rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3165; Dec. Dig. § 1173.*]

Appeal from District Court, Cherokee County; James I. Perkins, Judge.

Gabe Phillips was convicted of hog theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of hog theft; his punishment being assessed at two years' confinement in the penitentiary.

The alleged owner lost two hogs. They were white in color. Appellant and a number of other negroes were charged with the theft of a hog. The taking of the hogs occurred on Saturday evening. The search for the hogs was made on Monday, and freshly killed hog meat found secreted at the residence of the different parties. Much of this meat was from a hog that had been skinned. The meat had all been secreted in different ways. At appellant's house the meat was found under the floor wrapped in a sack. The state's case was shown by circumstantial evidence. A negro girl testified she saw a white hog in the door of appellant's house on Sunday morning, at which time it was intact except the head was gone. There are other circumstances tending to connect appellant with the matter of more or less cogency, but we deem it unnecessary to go into a detailed statement of these matters. Appellant took the stand, and denied having any connection with the theft of the hog as well as having received any of the stolen meat. He accounted for having hog meat by reason of a purchase of meat about two weeks prior to this transaction, and it may be fairly assumed that he had made the purchase of meat about which he testified, and about the time he stated. The meat, however, that he purchased was not skinned, nor did it have any shot in it; the seller testifying that the hog from which the meat came which he sold appellant was not shot, but that he had knocked it in the head with an axe. The meat found under appellant's house had small sized shot in it about No. 4 or No. 6.

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There are no bills of exception in the record. There were some exceptions noted in the statement of facts, but in such a general confused way that they do not sufficiently present any matter for revision.

The charge of the court is criticised sharply, the principal contentions being, first, the failure of the court to charge alibi; and, second, that it did not sufficiently charge the jury that, if appellant only received meat and was not connected with the original taking, he could not be convicted under this indictment, it being only for theft. The charge in this respect is as follows: "All persons are principals who are guilty of acting together in the commission of an offense. So, in this case, if the hog or hogs were fraudulently taken as alleged in the indictment, and the defendant was present with another or others at such taking, and they or either of them, acting with a common purpose and design into which defendant entered, and which he understood, to steal such hog or hogs, shot and took such hog or hogs, then in such case the defendant would be a principal in such theft, no matter what part he performed in such unlawful taking, or whether he in fact gave any physical aid or not in such act of taking. On the other hand, mere bodily presence of the defendant, without participation in the intent and purpose to commit the theft, would not make him guilty as such principal, nor would his subsequent receipt and concealment of some of the stolen meat knowing it to be stolen (if it was stolen and he did receive it) of itself make him guilty of the theft. In order to convict the defendant, the jury must find that he participated as a principal in the original taking. But if two hogs belonging to McGill were stolen at or about the same time, and the defendant participated as a principal in the theft of either, it would be sufficient for his conviction, and it would be immaterial whether he participated in the theft of both or as to which particular hog of the two he helped to steal." The court also gave a charge on circumstantial evidence. Appellant did not request special instructions. His objections to the charge are urged in motion for a new trial. In the recent case of Jones v. State, 53 Tex. Cr. R. 131, 110 S. W. 741, 126 Am. St. Rep. 776, the rule was laid down in regard to charges on alibi and the failure of the court to give same that it would not be ground for reversal unless appellant requested special instructions covering that question and it was refused, and it was further held in that case that the charge given sufficiently covered that question. The charge in this case perhaps more strongly presents the question of alibi than was done in the Jones Case, supra. Under that authority, this contention of appellant is not well taken. While the charge in regard to concealing property is rather negatively given, yet the jury are instructed that he would not be guilty as a principal if he received and concealed the stolen meat, knowing it to be stolen, if it was stolen, and he received it; that this would not constitute him guilty of theft. The court further stated to the jury that, in order to convict appellant, they must find that he participated as a principal in the original taking, and this charge was given directly in connection with reference to the clause in regard to receiving and concealing stolen property. Under the provisions of article 723 of the Code of Criminal Procedure of 1895, as construed by this court, this charge seems to be sufficient; at least, it is not sufficiently erroneous to require a reversal. We would suggest, however, that wherever issues are presented by the testimony that a pertinently affirmative charge be given presenting those matters. But, as the record is before us, we are of opinion the errors are not of sufficient importance to require a reversal. Therefore the judgment is affirmed.

FULKERSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1909.)

1. ASSAULT AND BATTERY (§ 54*)—AGGRAVATED ASSAULT—GRAVITY.

Where defendant struck prosecutor eight or ten blows on the head with a ticket punch, inflicting wounds, knocking him down, and rendering him unconscious, from which he was confined to his bed for a time, and one of the wounds was 2½ inches long, breaking the skin and penetrating to the bone, the injury was sufficiently serious to sustain a conviction of aggravated assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 75, 78; Dec. Dig. § 54.*]

2. CRIMINAL LAW (§ 614*)—CONTINUANCE—ABSENCE OF WITNESS—REQUISITES.

A second or subsequent application for a continuance for absence of a witness must show that the testimony cannot be procured from any other source known to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312–1314; Dec. Dig. § 614.*]

3. CRIMINAL LAW (§ 595*)—CONTINUANCE—ABSENCE OF WITNESS — NATURE OF EVIDENCE.

A continuance for absence of a witness was properly denied, where the testimony was hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1327; Dec. Dig. § 595.*]

4. CRIMINAL LAW (§ 1166*)—CONTINUANCE—ABSENCE OF WITNESS—PREJUDICE.

Accused was not prejudiced by the denial of his application for a continuance for absence of certain witnesses, where he produced a witness who was present and who testified as an eyewitness to all the facts which it was averred could be proved by the missing witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3111; Dec. Dig. § 1166.*]

Appeal from Denton County Court; Lee Zumwalt, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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J. H. Fulkerson was convicted of aggravated assault, and he appeals. Affirmed.

Garnett & Eldridge and Hopkins & Milliken, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal prosecuted from a conviction for the offense of aggravated assault, obtained in the county court of Denton county.

The testimony of the state is to the effect, in substance, that appellant, practically without excuse, struck one T. E. Gerren, while his back was towards him, some eight or ten blows on the head with his ticket punch, inflicting serious wounds, knocking him down, and rendering him unconscious. The record shows that the wounds were of such gravity as to confine Gerren to his bed, and that one of them was 2½ to 3 inches long, breaking the skin and penetrating to the bone. Appellant claimed he acted in self-defense, and on this issue the testimony was decidedly conflicting. The case was tried before the court without the intervention of a jury. The state's evidence, if believed, makes out a case.

1. Among other things, it is urged there is no sufficient evidence that the injury was serious, as that term is used in the statute, and we are referred, to sustain this proposition, to numerous decisions of this court. It seems to the writer that the decisions have gone very far on this line, and have required the injuries to be indeed serious in fact before a conviction could be sustained under this subdivision of our statute. Each case, after all, however, rests somewhat on its own facts. Our judgment is, however, that as here presented the evidence is sufficient. Wilson v. State, 34 Tex. Cr. R. 64, 29 S. W. 41, and Stevens v. State, 27 Tex. App. 461, 11 S. W. 459.

2. When the case was called for trial, appellant made his second application for a continuance for want of the testimony of J. M. McCommas, who was alleged to reside in the city of Dallas, and R. M. Low, who was alleged to reside at Letot, in Dallas county. No process was issued for either of these witnesses until on or about the day the case was called for trial, which was on the 21st day of January, 1908. The application itself shows that it was the second application. Among other essentials required in a second or subsequent application is that same shall show that the testimony cannot be procured from any other source known to defendant, and it has been uniformly held that an application which fails to show this is insufficient. McCulloch v. State, 35 Tex. Cr. R. 268, 33 S. W. 230; Pinckord v. State, 13 Tex. App. 468; Henderson v. State, 5 Tex. App. 134. It also appears, by an affidavit of McCommas attached as an exhibit to the application, that he was not a witness to the difficulty, but had talked to a news man on the train, who said to him, in substance, that Gerren, the assaulted party, had cursed Fulkerson, and Fulkerson told him to sit down, when Gerren made a play to draw something from his pocket, when Fulkerson hit him. So, in any event, the case ought not to have been continued under any circumstances for the testimony of this witness. In view of the contest filed by the county attorney, it is far from certain that the witness R. M. Low in fact lived in Dallas county, and, as presented, in any event it is not certain under any circumstances that the court would have been warranted in granting the application. Whatever may be true of this matter, it is certain that, in view of the fact that appellant produced a witness who was present, one Harlow, who testified as an eye-witness to all the facts, in substance, which it was averred could be proven by the missing witnesses, the court did not err in overruling the application.

There is no other matter of record that requires notice. The case was essentially one of fact, which was submitted to the trial court, who had far better opportunities than we could have of judging of the credibility of the witnesses, and under the settled rules there is no reason why we could or should interfere.

Finding no error in the record, the judgment of conviction is in all things affirmed.

BROOKS, J., absent.

MORRIS v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Nov. 3, 1909.)

1. INDICTMENT AND INFORMATION (§ 125*)—SUFFICIENCY—DUPLICITY.

An indictment charging that accused unlawfully kept and exhibited, for the purpose of gaming, a gaming table and bank, is not duplicitous as charging the keeping and exhibiting of a gaming table for the purpose of gaming, and also the keeping and exhibiting of a bank for the same purpose.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125;* Gaming, Cent. Dig. §§ 224, 232.]

2. GAMING (§ 98*)—PROSECUTION—EVIDENCE.

Evidence *held* sufficient to sustain a conviction under an indictment charging the keeping and exhibiting, for the purpose of gaming, of a gaming table and bank.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291–298; Dec. Dig. § 98.*]

3. GAMING (§ 102*)—PROSECUTION—INSTRUCTION.

In a prosecution for keeping and exhibiting, for the purpose of gaming, a gaming table and bank, the game being monte, failure to charge what is a banking game was not error; the statute expressly defining monte to be a banking game.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 102.*]

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4. GAMING (§ 102*)—CRIMINAL OFFENSES—INSTRUCTIONS.

Penal Code 1895, art. 388a (Acts 30th Leg. 1907, p. 108, c. 49), makes it a penitentiary offense to exhibit, for the purpose of gaming, any policy table, or gaming table, bank, wheel, or device which has no name, etc. Article 384 expressly enumerates monte as a banking game. *Held*, that in a prosecution for keeping and exhibiting, for the purpose of gaming, a gaming table and bank, where there was no question that, if monte was dealt or exhibited, it was for the purpose of obtaining bets, failure to charge that the banking or dealing of the game of monte at a place not usually resorted to for gaming is not a felony under article 388a was not error.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 102.*]

5. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Evidence simply of an impeaching character is not such newly discovered evidence as will warrant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2331, 2332; Dec. Dig. § 942.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Lee Morris was convicted of gaming, and appeals. Affirmed.

A. W. Bloor, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charges that appellant "did then and there unlawfully keep and exhibit, for the purpose of gaming, a gaming table and bank." Appellant moves in arrest of judgment, because the indictment is duplicitous, in that it charges appellant with keeping and exhibiting a gaming table for the purpose of gaming, and that it charges him with keeping and exhibiting a bank for the purpose of gaming. This form of indictment has been sustained, as being not subject to this criticism, by the decisions. See Tellison v. State, 35 Tex. Cr. R. 389, 33 S. W. 1082; Parker v. State, 13 Tex. App. 213; Campbell v. State, 2 Tex. App. 187. And it is the same form of indictment found in Pruitt v. State, 53 Tex. Cr. R. 316, 109 S. W. 171. We are of opinion that the indictment is not duplicitous, nor subject to criticism.

Appellant asked a special instruction to the jury to return a verdict of not guilty, on the ground the evidence is not sufficient. This was refused by the court, and correctly. The evidence, in substance, is that appellant exhibited a game of monte at what is known as "Brock's Club"—that is, the club over Brock's saloon, in what is called the "First Ward." The testimony for the state shows that money was bet at this banking game. This was denied by appellant. There was quite a lot of testimony pro and con in regard to it; the issue being sharply drawn that appellant did exhibit and deal monte, and that there was betting at the game.

It is contended that the court erred in not defining what is a banking game. We are of opinion this was not necessary, where the banking game is one enumerated and designated as such by the statute. Pruitt v. State, 53 Tex. Cr. R. 316, 109 S. W. 171. The statute expressly defines monte as a banking game.

It is also contended that the court erred in not instructing the jury that the banking of, or dealing, a game of monte at a place not usually resorted to for gaming, is not a felony under article 388a of the Penal Code of 1895 (Acts 30th Leg. 1907, p. 108, c. 49). We do not think there is any merit in this contention. Article 388a makes it a penitentiary offense to exhibit, for the purpose of gaming, any policy table, any gaming table, bank, wheel, or device which has no name, etc. Article 384 of the Penal Code expressly enumerates monte as a banking game. There is no question, under the facts of this case, that, if monte was dealt or exhibited, it was for the purpose of obtaining bets, because the parties bet at the bank under the state's testimony. This was, of course, denied by appellant; but that issue was settled by the jury. There is, therefore, no merit in appellant's contention that, before it would be a felony to exhibit a banking game, it must be exhibited at a place where people resort. Of course, somebody must resort to the game in order to have a bettor when the bank is exhibited; but this is not part of the definition of the offense, as it is with reference to some of the gaming laws. It is a violation of the law to exhibit for the purpose of gaming the bank games mentioned at any place or time. It is not necessary that it be exhibited at a place where people usually resort.

Appellant also suggests newly discovered testimony; but he admits it is not within the rule laid down by the statute. The evidence is simply of an impeaching character, and in fact, as the matter is presented, it does not come within the rules of newly discovered evidence from any standpoint. By proper diligence the testimony could have easily been obtained, if it existed.

As the record is presented to us, we are of opinion this judgment should be affirmed; and it is accordingly so ordered.

GROSZOEHMIGEN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 13, 1909. Rehearing Denied Nov. 3, 1909.)

1. JURY (§ 103*) — JURORS — COMPETENCY—OPINION.

Where a juror testified that he had formed an opinion from reading newspapers, which it would take evidence to remove, but that, if chosen, he could and would lay aside his opinion and

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[Ed. Note.—For other cases, see Jury, Cent. Dig. § 475; Dec. Dig. § 103.*]

2. HOMICIDE (§ 183*)—EVIDENCE—RELEVANCY.

Where, in a prosecution for assault with intent to murder, defendant's theory was that the relations of his wife had taken all the property he had and caused a separation between them, evidence that prosecutrix's uncle, after the assault, obtained from defendant a check for $348.05, was res inter alios acta, and not admissible as tending to show a conspiracy.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 183.*]

3. CRIMINAL LAW (§ 730*)—APPEAL—MISCONDUCT OF ATTORNEY—PREJUDICE.

An improper remark of the district attorney, in argument, that defendant would be lucky even if he got the limit, because, had prosecutrix's parents been of a different nationality, he would have been killed, was not ground for reversal; the court, on objection, having ordered counsel to confine himself to the facts, and having instructed the jury not to consider the remarks in arriving at a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

4. HOMICIDE (§ 304*)—ASSAULT TO MURDER—ACCIDENTAL SHOOTING—INSTRUCTIONS.

An instruction that if the jury believed from the evidence, or had a reasonable doubt, that defendant drew his pistol, not to assault prosecutrix, but to protect himself from danger taken from his standpoint at the time, and while endeavoring to make prosecutrix and her companions talk to him relative to getting his wife back, prosecutrix took hold of the barrel of the pistol, which, in the scuffle, was accidentally discharged and prosecutrix was wounded, defendant should be found not guilty, sufficiently presented the theory of accidental shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. § 304.*]

5. CRIMINAL LAW (§ 800*)—INSTRUCTIONS—USE OF TERMS—SCUFFLE.

Where the state's evidence showed that defendant pulled his pistol and presented it to the breast of the prosecutrix, that she grabbed and pushed it away, and by that means it was discharged, a reference by the court to such transaction, in its instructions, as a "scuffle," was not so misleading as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 800.*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Arthur Groszoehmigen was convicted of assault with intent to murder, and he appeals. Affirmed.

Chambers, Hertzberg & Barrett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder; his punishment being assessed at 10 years' confinement in the penitentiary.

Substantially the evidence is that appellant married the daughter of Gus Real. There came up some family disturbance, and his wife finally went to her father's home and refused further to live with appellant. Previous to his wife returning to her father, his sister-in-law, the assaulted party, was at the place. When this was over, she desired to return home, and appellant accompanied her. En route, her testimony is that appellant made love to her, and wanted her to run away with and marry him; that they would go to Mexico. This she declined. Later on appellant went to her father's residence, and at some point about the premises, away from the residence, renewed his offers of love and marriage, accompanied by threats in case of refusal. On the day of the assault the assaulted party and her sister and brother were in a wagon, returning from San Antonio to their residence some miles in the country, when they met appellant, who had been down to the family residence to interview his wife. A conversation occurred, which was interrupted by appellant's horse and buggy going away, which he followed, and the wagon drove on. When they reached the gate near the residence, they found appellant had preceded them to that point, had hitched his horse, and was awaiting their arrival. When they came, he walked up to the wagon and engaged them in a conversation, the details of which we deem unnecessary to narrate. While so engaged he drew his pistol. The state's evidence shows that he presented it at the breast of the assaulted girl. She grabbed the pistol and pushed it away. The pistol fired, and she was shot in the stomach.

The contention of the state is that it was an intentional shooting. Appellant's contention was that he had the pistol out, did not point it, and that the girl, in seizing the pistol, caused it to fire accidentally; that he had no intention of shooting her. There was quite a lot of testimony in regard to the family troubles. Appellant testified he stopped the wagon in order to request an intervention on the part of those in the wagon to induce his wife to return and live with him. He denied everything in regard to offers of love and marriage to the assaulted party, stating that he had no intention to do so, and never made any such offers, and that at the time of the shooting he was trying to induce them to get his wife to return and live with him; that "he only loved his wife and child." It is agreed that appellant had furnished money to his father-in-law on two occasions, at one time $125, and the other $100. His contention is that his father-in-law compelled him to furnish the money, or ordered him to do so, while the evidence for the state is to the effect that he furnished it willingly, for the support of his wife and child. There is also evidence that a note of $1,400, guaranteed by a lien on land, was also delivered by appellant to the father-in-law. Appellant's contention is that this $1,400 note was forced out of him in order to get his property away from him. The state's

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evidence is to the effect that the note was turned over willingly by appellant for the benefit of his wife and child, at any rate for the child. This, perhaps, is a sufficient statement of the case to review the questions.

1. The first bill of exceptions was reserved to the ruling of the court permitting the witness Hildebrand to sit as a juror in the case. The bill recites that, in answer to questions propounded by counsel for appellant, he stated that he had formed an opinion as to the guilt or innocence of the defendant, such as would influence his action in arriving at a verdict. Challenge for cause was interposed. The court signed the bill, with the qualification that the juror stated that, while he had formed an opinion from reading the newspapers as to the guilt or innocence of the defendant, he could lay same aside and not be influenced thereby, and could try the case according to law and under the evidence, as shown by answers which were set out in Exhibit A, attached to and made a part of the bill. To these questions bearing upon this particular phase of it the witness answered that "the opinion I have would not influence me as a juror, but it would take evidence to remove it," and this in regard to the guilt or innocence of the accused. Upon a further examination he stated that he could and would lay aside whatever opinion he had as to the guilt or innocence of defendant, and go into the jury box, and give him a fair and impartial trial according to law. The court then asked witness: "What about your opinion?" Witness answered: "The opinion I have formed is from reading the papers. The Court: Simply from reading newspapers? A. Yes, sir; I knew nothing of the facts, except what I saw in the papers. If what the papers said was true, then I have formed an opinion. The Court: Is it just from newspaper reading? You have not talked with any of the witnesses? A. No, sir; I know nothing about it. The Court: The opinion you have is from the newspapers? A. From reading the papers alone. The Court: Cannot you lay aside your opinion, and go into the jury box, and try the case according to the law and the evidence? A. I think so. By Mr. Baker: Give the court a positive answer. A. I could and would. By Mr. Chambers: I believe that you answered that you had formed an opinion from reading the papers, and it would require evidence to remove that opinion? A. I have simply an opinion. Q. And it would require evidence to remove it? A. Yes, sir. The Court: Will you try this man according to any opinion you may have formed from reading the newspapers? A. No, sir; it is merely an opinion from reading the papers. It is not a definite conclusion. The Court: Would that opinion influence you in finding a verdict? A. It would not influence me a particle. The Court: Would you leave it aside, and try the case according to the law and the evidence? A. Yes, sir. The Court: I think he is qualified. By Mr. Chambers: We except to the juror, because we consider him disqualified, and we desire it to be shown that we have exhausted all our challenges. The Court: I understand that it will not require any evidence to remove that opinion. A. No, sir; it is formed from reading the papers. The Court: You can go into the jury box free from any opinion, and be ready and willing to receive law and evidence, and decide according to the law and evidence. A. Yes, sir. The Court: He is qualified. Mr. Chambers: Note our exception." The contention by appellant is that the juror was disqualified, and the inference is that he had exhausted his peremptory challenges. The question is whether or not the juror was disqualified from sitting in the case. Under the decisions, we think this must be answered in the negative. See Morrison v. State, 40 Tex. Cr. R. 473, 51 S. W. 358; Tellis v. State, 42 Tex. Cr. R. 574, 61 S. W. 717; Trotter v. State, 37 Tex. Cr. R. 468, 36 S. W. 278; Parker v. State, 45 Tex. Cr. R. 334, 77 S. W. 783. These cases seem to be in point, as well as some of the authorities cited in the above citations.

Another bill of exceptions recites that appellant offered in evidence a check for $348.05, drawn on the Alamo National Bank in favor of Adolph Real, an uncle of the prosecuting witness, and said money was retained by said relative. It is contended this check was admissible to show a conspiracy. Appellant's theory was that the relatives of his wife had taken all of the property he had, and caused the separation of himself and wife. This check was offered in evidence while appellant was on the stand in his own behalf. The bill is signed, with the qualification that the above transaction occurred after the date of the alleged shooting, and occurred between defendant and one Adolph Real, an uncle of the prosecuting witness, and was irrelevant and immaterial, and res inter alios acta, and, having occurred after the assault, could not affect the case, as shown by Exhibit A attached. The exhibit shows, in substance, as follows: That the check was for $348.05, drawn on the Alamo National Bank. The question was asked: "How did he manage to cash that check?" Mr. Baker stated: "That is a transaction which occurred between other parties. The Court: Yes; I do not see anything material in that. Mr. Chambers: I want to show that there was a conspiracy existing. Mr. Baker: Let counsel show the conspiracy first. Mr. Chambers: There was a conspiracy existing to get the property, and I am showing that the relatives of the wife had the property. We expect to show by this witness that Mr. Real came and got the check for $348.05, and after cashing it the money was to be brought to defendant, and he has not seen Mr. Real since. Mr. Real is not the father of the defendant's wife; but he

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is a relative, and knew all about the matter, and he got the check and kept the money. Mr. Baker: When was this money supposed to have been gotten? Mr. Chambers: We will show all that. A. It was after the shooting. The Court: It has absolutely no bearing on this case. Mr. Chambers: We except." This is the bill, with the exhibit. We are not cited to any authorities that would make this transaction admissible as evidence. Nor do we understand how a financial transaction occurring between an uncle of the injured woman and appellant in regard to the $348.05 could have affected the prior transactions which resulted in the shooting of the girl. It would seem, from the exhibit to the bill, that Adolph Real kept the money himself. Such is the statement of counsel. We are of opinion that, as this matter is presented, this character of testimony was not admissible to show why appellant shot his sister-in-law, or throw any light upon that transaction. These were matters occurring between other parties, and, so far as the bill would indicate, without any bearing at all on the assault, or the trouble between appellant resulting in the shooting of his sister-in-law. We are, therefore, of opinion there was no error in rejecting this testimony.

Another bill of exceptions is reserved to the closing remarks of the district attorney, wherein he used the following language to the jury: "That defendant would be, indeed, lucky, even if he got the limit, because, had parents of Martha Real been of a different nationality, he would have been killed." Appellant then and there, at the time of the making of said remark, excepted, and tendered his bill. This bill is qualified as follows by the court: "That counsel for the state was stopped from making such remarks, and ordered to confine himself to the facts, and the jury was instructed by the court not to consider the remarks of the district attorney at arriving at a verdict." We are of opinion that such remark as the one quoted should not be indulged; but, as explained by the court, under instructions given the jury in regard to the matter, we are of opinion that it is not of sufficient importance to require a reversal of the judgment.

It is contended that the court erred in not giving certain requested instructions. These are not contained in the record, only being mentioned in motion for a new trial. The court charged the jury in regard to assault with intent to murder and aggravated assault, and we are of opinion that the charges sufficiently presented the issues raised by the testimony. There was evidence which called for instructions on both theories, and we think they were sufficiently presented.

It is contended, further, however, that the court did not sufficiently charge the theory of accidental shooting. This portion of the charge reads as follows: "If you believe from the evidence, or have a reasonable doubt, that defendant, at the time of the alleged assault, drew his pistol, not for the purpose of making an assault upon Martha Real, but for the purpose of protecting himself from any real or apparent danger, taken from his standpoint at the time, and whilst endeavoring to make Martha Real and her companions talk to him relative to getting his wife back to him, and whilst so engaged, if you further believe, or have a reasonable doubt, that Martha Real took hold of the barrel of the pistol held by defendant, and in the scuffle that then ensued, if any, the pistol was accidentally discharged, and Martha Real thereby wounded, in such event you will find the defendant not guilty." We are of opinion that this, under the circumstances, is a sufficient presentation of the theory of accidental shooting.

Nor do we think that the further contention that the evidence fails to show "a scuffle" is well taken. While, accurately speaking, perhaps, there was not a scuffle, the state's evidence shows that appellant pulled his pistol and presented it at the breast of Martha Real; that she grabbed and pushed it away, and by this means it was discharged. Appellant's statement is, in substance, that he had the pistol out, and that she grabbed it, and it was accidentally discharged. If the scuffle was rather of a slight nature, still the use of the word "scuffle" in this connection is not of sufficient importance, if erroneously used, to require a reversal of the judgment. The jury could not have been misled by the use of this word under the facts, and we would not feel justified in reversing the case for this matter.

Finding no error of sufficient importance to require a reversal of the judgment, it is ordered that it be affirmed.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1909.)

CRIMINAL LAW (§ 103*)—COURTS—JURISDICTION—TRANSFER—ORDER.

Where an indictment charges a misdemeanor, the record must show an order transferring the cause from the district to the county court for trial, in order to show the jurisdiction of the county court to sustain a conviction there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 213; Dec. Dig. § 103.*]

Appeal from Delta County Court; C. C. Dunagan, Judge.

Earnest Harris was convicted of misdemeanor, and he appeals. Reversed and remanded.

Newman Phillips, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

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of counsel to the effect that no such order existed, and that the indictment was in the county court without such order of transfer. It is further agreed that the judgment should be reversed on account of the want of such order of transfer. Under the law, this order of transfer is necessary to show the jurisdiction of the county court attached, and to show authority in the county court to try the case under an indictment, and where there is no order of transfer the conviction cannot be sustained. All the authorities in Texas so hold, and such is the settled law.

The judgment is reversed, and the cause is remanded.

BROOKS, J., absent.

MOODY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1909.)

1. INDICTMENT AND INFORMATION (§ 140*)—MOTION TO QUASH—PRESENCE OF UNAUTHORIZED PERSON BEFORE GRAND JURY—BURDEN OF SHOWING.

On a motion to quash, the burden is on accused to show the presence of an unauthorized person before the grand jury, when it was deliberating upon the indictment against him or voting upon it.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 140.*]

2. GRAND JURY (§ 34*)—PRESENCE OF UNAUTHORIZED PERSON DURING DELIBERATION.

The fact that the assistant district attorney was present and examined witnesses in the grand jury room, and consulted with the grand jury regarding the case of accused, is not equivalent to proof that he was present when the grand jury was deliberating upon the indictment against accused, in violation of Code Cr. Proc. 1895, arts. 414, 559.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. § 34.*]

3. SODOMY (§ 7*)—TRIAL—INSTRUCTIONS.

An instruction, on a trial for sodomy, that if the jury had a reasonable doubt as to penetration of the animal they should acquit, sufficiently covered the question of penetration.

[Ed. Note.—For other cases, see Sodomy, Dec. Dig. § 7.*]

4. SODOMY (§ 6*)—EVIDENCE—SUFFICIENCY.

Evidence *held* to support a conviction of sodomy.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 7; Dec. Dig. § 6.*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

T. H. Moody was convicted of sodomy, and he appeals. Affirmed.

W. S. Anderson and Samuel Belden, for appellant. F. J. McCord, Asst. Atty. Gen., and C. M. Chambers, Asst. Dist. Atty., for the State.

Before proceeding to trial, appellant, through his counsel, filed a motion to quash the indictment herein, for the reason, in substance, that at the time such grand jury was hearing testimony given by witnesses in said cause against appellant one C. M. Chambers was present with said grand jury, and examined the witnesses against appellant, and advised with and counseled said grand jury in its secret deliberations; that said Chambers was not a member of the grand jury, and was a person not authorized by law to be present with them at said time. The motion also questioned the validity of the appointment of Chambers as assistant district attorney, and averred that there was no provision for the election of such officer by the people, or for his appointment by the Governor. The motion is quite elaborate; but, in the view we take of the case, it has no relevancy to the only matter which can be considered. The court heard evidence on this motion, and it appears from the agreed statement of facts, first, that Chambers had been appointed assistant district attorney by the Governor on March 19, 1909, had given bond as required by law, and that said appointment was made, and said Chambers duly and legally qualified, in accordance with the law enacted by the Thirty-First Legislature, and by virtue of such appointment represented the state, and examined the witnesses in the grand jury room, and consulted with the grand jury regarding the case of T. H. Moody, but was not present at the time the grand jury voted on returning said bill. Articles 414, 415, and 416 of the Code of Criminal Procedure of 1895, are as follows:

"Art. 414. Attorney Representing the State may Go Before, etc.—The attorney representing the state may go before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment or voting upon the same.

"Art. 415. Attorney may Examine Witnesses, etc.—The attorney representing the state may examine witnesses before the grand jury, and may advise as to the proper mode of interrogating them, if desired, or if he thinks it necessary.

"Art. 416. Grand Jury may Send for Attorney Representing the State, etc.—When any question arises before a grand jury respecting the proper discharge of their duties, or any matter of law about which they may require advice, it is their right to send for the attorney representing the state and take his advice thereon."

The law makes the following provision with respect to setting aside indictments for

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causes similar to the motion here. Article 559, Code Cr. Proc. 1895, is as follows:

"A motion to set aside an indictment or information shall be based on one or more of the following causes, and no other: (1) That it appears by the records of the court that the indictment was not found by at least nine grand jurors, or that the information was not presented after oath made as required in article 467. (2) That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same."

The motion was made under the second clause of the above article of our Code of Criminal Procedure, and it is clear that, if in the matters complained of in this section of the article was violated, the indictment must be set aside, and this without reference to the legality of the appointment under which Chambers held the office. He would have no more right to be present in the grand jury room while the grand jury was deliberating upon the accusation against appellant, or were voting on same, if the appointment were valid, than if it were not. The district attorney himself would have no such right; nor would the district judge have such right; nor, indeed, any other person in official or private life. This was thoroughly well settled in the case of Rothschild v. State, 7 Tex. App. 519. In the later case of Stuart v. State, 35 Tex. Cr. R. 440, 34 S. W. 118, it was held that the testimony of the assistant county attorney that he was present in the grand jury room, "that he examined the witnesses for them, and was present with them during their investigations and deliberations on these cases," was sufficient proof to invalidate the indictment, although it was shown that he was not present when they voted on the same. In other words, that unexplained evidence of the presence of the assistant county attorney, there being no explanation of what was meant by "deliberations and investigations," must be held to have meant that he was present when the grand jury was discussing the propriety of finding a bill of indictment, and while they were deliberating upon the accusation against the defendant.

In this case, however, the agreed statement of facts negatives the idea that Chambers was present while the grand jury was voting upon the indictment, or that he was present while they were deliberating upon said matter. It is well settled in this state that the burden rests upon appellant to bring himself within the terms of the statute, and to show a violation of same, before an indictment will be set aside and the defendant discharged. Sims v. State (Tex. Cr. App.) 45 S. W. 705. The fact that Chambers was present and examined the witnesses in the grand jury room, and consulted with the grand jury regarding the case, is not equivalent to proof that he was present when the grand jury was deliberating upon the accusation against the appellant. It does not appear in the testimony to what the consultation related. It might easily have been meant to apply to some mere matter of examination of witnesses, procuring additional testimony, postponing the case, or any one of a hundred things that did not touch the deliberations of the grand jury as to the guilt or innocence of the appellant, or as to whether the evidence was sufficient to justify the return of an indictment. Charges such as these must be sustained by the evidence, and in no case should the deliberations of a grand jury be set aside, unless on fair and convincing proof that the facts required to be shown by the law are in evidence. The agreement here does not meet the demands of the law, and the court did not err in overruling the motion.

It becomes unnecessary, therefore, as we believe, to either decide or discuss the matter of the regularity of Chambers' appointment, if, indeed, such question could be raised in this character of proceeding, which we need not decide.

The other grounds relied on for reversal, are, among other things, first, the refusal of the special charge asked by appellant with respect to penetration of the animal mistreated by appellant. The charge of the court sufficiently covers this question. It instructs the jury, in substance, that, if they have a reasonable doubt as to penetration, they would acquit.

The other matter of substance, is that the evidence is insufficient to support the verdict. The character of the charge is almost inconceivably shocking, and yet it was sustained by a witness who testified with the utmost positiveness to every fact essential to a conviction. This evidence was not shaken or disputed, substantially, except by the testimony of appellant himself. There was some testimony of the physician as to the possibility of the offense being committed under the conditions testified to by the witnesses; but we do not deem this so conclusive as to justify us in setting aside the verdict of the jury.

Finding no error in the judgment, it is hereby in all things affirmed.

BROOKS, J., absent.

Ex parte HUGHES.

(Court of Criminal Appeals of Texas. Oct. 20, 1909.)

WITNESSES (§ 297*) — PRIVILEGE — TESTIMONY TENDING TO INCRIMINATE WITNESS.

Bill of Rights, art. 1, § 10, and Code Cr. Proc. 1895, art. 4, provide that an accused shall not be compelled to give evidence against

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himself. *Held*, that where witness and his twin brother were both under arrest, charged with an assault on one S., there being only one blow struck, he was not guilty of contempt in refusing to answer questions asked him by the grand jury as to whether he was in the room when S. was assaulted, whether he assaulted S., and also as to where his brother was at the time, though he did not state that his answers would tend to incriminate him.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 297.*]

Application by Lucian Hughes for writ of habeas corpus. Applicant ordered discharged from custody.

Cooper & Stanford, for appellant. F. J. McCord, Asst. Atty. Gen., and Henry S. Bishop, Dist. Atty., for the State.

DAVIDSON, P. J. Applicant was adjudged by the district judge guilty of contempt of court for failing to answer certain questions before the grand jury. The agreed statement of facts and the decree of the court adjudicating the facts and reasons for adjudging applicant in contempt are set forth in the record.

The judgment of the court was entered on July 13, 1909, and recites that on a former day of the court, to wit, the day previous, the grand jury came into court, bringing applicant with them, and reported to the court in writing that applicant had been summoned and sworn as a witness, and had refused to testify to certain questions propounded by that body, and asking the court to compel applicant to make answer. The questions are set out as follows: "Were you in the Harrell pool hall, in Amarillo, Potter county, Tex., July 2, 1909, when A. B. Short was assaulted there?" The court informed the witness that he would have to answer; but witness declined to do so, giving as a reason that he was under bond, charged with the same offense as that inquired about in said question. The court considered the matter, and ordered him to answer; otherwise, he would be held in contempt of court. The grand jury and witness retired, and the witness persisted in refusing to testify to the questions. The grand jury again came before the court, bringing applicant with them, and through their foreman presented another report and complaint in writing, informing the court that witness again refused to testify in obedience to the order the court had previously granted, and they reported they had again sworn witness, and asked him in regard to the matter the following certain questions, which are all shown in writing, to wit: "Where were you on the evening of July 2, 1909, about 7 o'clock, when A. B. Short was assaulted in the Harrell pool hall, in Amarillo, Potter county, Tex.?" and "Did you hit or assault the man, A. B. Short?" and "What has Luther Hughes ever told you about the said assault upon A. B. Short?" The witness again declined to answer, for the reason that he was under bond for the same offense inquired about, whereupon the court asked witness in person if he refused to answer said questions. He answered in the affirmative, and, still refusing to testify, he again gave as his reason for so doing that he was under bond for the same offense inquired about in said questions, but did not say that the answers would incriminate him. The court then and there informed appellant, that the grand jury had a right to inquire about these matters, and that the questions were each and all proper questions, and if he refused he would be held in contempt of court and dealt with accordingly. He still refused to testify, or answer the questions, whereupon the court entered his order holding witness in contempt of court, entered a fine, and sent him to jail until he should be willing to testify. The judgment entered fined him $100 for contempt of court and committed him to jail until he testified. Subsequently he informed the court that the answers would incriminate him. It appears from the record that one Short was struck with a billiard cue in the pool hall mentioned, and that applicant and his brother Luther were very much alike in personal appearance, being twin brothers. Both of them were placed under arrest, charged with the offense, applicant's bond being fixed at $500, and he was charged with assault upon A. B. Short by striking him with a billiard cue.

Applicant's contention is that the fine for contempt is illegal, and in violation of the Constitution and laws of this state, which protect him from being forced to give evidence against himself in a case wherein he is prosecuted. We are of opinion this contention is sound. Section 10, art. 1, of the Bill of Rights, and article 4 of the Code of Criminal Procedure of 1895, provide that an accused party "shall not be compelled to give evidence against himself." The forms of the questions set out in the order adjudicated and entered by the court show the direct question was put to the applicant as to whether or not he struck A. B. Short, and also as to where his brother was at the time. Both of these questions would tend to criminate, or might tend to criminate, applicant, and if he inflicted the blow upon Short would actually do so. Of course, he could not be forced to testify, if he testified to facts that showed his brother was not present, as there was only one blow struck, for this would be equally criminative evidence. After the judgment was entered, it is further shown that applicant conferred with his counsel and assigned the further reason that it would incriminate, or tend to incriminate, him to answer the questions. In stating the matter to the court, without consultation with the attorneys, the applicant stated he was under arrest for the same offense. The two answers are practically the same. Having been

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charged with the offense inquired about, he was relieved from answering the questions. The court was not justified in fining him for contempt of court in failing or refusing to answer. This question is not a novel one in Texas, and has been before the court several times. Ex parte Park, 37 Tex. Cr. R. 590, 40 S. W. 300, 66 Am. St. Rep. 835; Ex parte Wilson, 30 Tex. Cr. R. 630, 47 S. W. 996; Ex parte Sauls et al., 46 Tex. Cr. R. 209, 78 S. W. 1073. For other authorities, see cases cited.

We deem it unnecessary to discuss the matter further, in view of the plain provisions of the Constitution, the statute, and the adjudicated cases construing these provisions of the Bill of Rights and the statute.

It is ordered that applicant be discharged from custody.

BROOKS, J., absent.

RAILEY v. STATE.

(Court of Criminal Appeals of Texas. June 19, 1909. Rehearing Denied Nov. 3, 1909. Second Motion for Rehearing Ordered Filed Nov. 10, 1909, and Mandate Ordered Held Up.)

1. BURGLARY (§ 2*)—ELEMENTS OF OFFENSE—CONSTRUCTION OF STATUTES.

Pen. Code 1895, art. 838, provides that burglary is constituted by the entrance of a house by force, threats, or fraud, with intent to commit a felony or theft. Article 839 provides that one is guilty of burglary who, with intent to commit a felony or theft, by breaking enters the house in the daytime. Article 841 provides that the entry may consist of the entry of any part of the body, or that the offense may be constituted by the discharge of firearms into the house with the intent to injure the person therein. *Held*, that article 841 is but an addition to articles 838 and 839, and under the three articles, burglary may consist of entering a house by force, etc., or in entering a house and remaining therein with the intent to commit a felony, or by the discharge of firearms into a house with the intent to injure the person therein, and the intention need not be to commit a felony.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 1–3; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 1, pp. 908–911; vol. 8, p. 7593.]

2. CRIMINAL LAW (§ 802*)—DISMISSAL OF PROSECUTION.

It being per se burglary to shoot into a house with the intent to injure any person therein, it is immaterial whether accused, in a prosecution for such an offense, was guilty of assault with intent to murder, and it was not error to permit the prosecuting attorney to dismiss indictments charging accused with assault to commit murder before trying him for the burglary, arising out of the same transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 688–697; Dec. Dig. § 302.*]

3. JURY (§ 72*)—COMPLETING PANEL.

Where a regular panel of jurors was tested on their voir dire, only 22 qualified, and the court ordered 25 talesmen to be brought in to complete the list of 24 names from which the parties should select a jury, and 18 of the talesmen qualified, it was not error to refuse to have the names of the 22 jurors of the regular panel, and all of the talesmen who had qualified, placed in the box and drawn therefrom in the regular way, until the panel of 24 was completed, and to grant the request only in so far as securing the names of 2 additional jurors from the list of talesmen, was concerned.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 333–347; Dec. Dig. § 72.*]

4. WITNESSES (§ 344*)—IMPEACHMENT—ISOLATED INSTANCES OF TEMPER.

In a prosecution for burglary by shooting into a dwelling house, where accused claimed that prosecuting witness had struck accused's wife and called her insulting names, and prosecuting witness testified that he never used violent language towards any one, and that his wife was never violent in language or conduct, evidence, to impeach the prosecuting witness, of a person that he had once gone to prosecuting witness' residence, and that prosecuting witness, without provocation or excuse, had spoken in a loud and angry manner in Mexican, and acted in a violent manner, was inadmissible as evidence merely of previous altercations with other parties.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120–1125; Dec. Dig. § 344.*]

5. BURGLARY (§ 39*)—EVIDENCE—REPUTATION.

Under Pen. Code 1895, art. 841, making it burglary to discharge firearms into a house with intent to injure a person therein, such an act constitutes burglary per se, and in a prosecution therefor, evidence of the general bad reputation of the alleged injured person for peace and quiet in the community, going merely to corroborate testimony that he had assaulted accused's wife, and tending to show that the shooting was only an aggravated assault, and not an assault with intent to murder, was properly excluded.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 39.*]

6. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for burglary, where accused introduced indictments against him charging assaults with gun on prosecuting witness and on prosecuting witness' wife, and also motions of the district attorney to nol. pros. them, error, if any, in permitting the district attorney to testify that his reasons for dismissing the indictments were that in his judgment the same facts were the basis of prosecution under those indictments that were the basis of the present prosecution, and that the state could not carve two convictions out of the same facts, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 869*)—EVIDENCE—NOLLE PROSEQUI—DISCRETION OF COURT.

Motions of a district attorney to dismiss indictments are addressed to the discretion of the court, with which the jury has nothing to do, and hence in a burglary case, evidence of other indictments against the accused for assault with intent to murder, growing out of the same transaction, and that they had been dismissed, was improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 869.*]

8. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINIONS.

In a prosecution for burglary by shooting into a house with intent to injure a person therein, prosecuting witness testified that just prior to the offense, he had had an altercation with accused's wife, in which she was the aggressor, which she denied on the stand. A witness for the state on cross-examination testified that he witnessed the occurrence, and that he did not see a certain witness of accused

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present, a boy eight years old, who had testified that he was present and had heard prosecuting witness call accused's wife certain insulting names and had seen him slap her, etc. *Held*, that it was not error to exclude a question whether, if the boy said he was there, witness would dispute it, as it called for the witness' opinion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

9. CRIMINAL LAW (§ 1167*)—APPEAL—CURE OF ERROR—ADMITTING ONE COUNT OF INDICTMENT.

Action of the court in submitting only the first count of an indictment cured any error it committed in refusing to sustain a motion to require the state to elect which count would be relied on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101–3106; Dec. Dig. § 1167.*]

10. CRIMINAL LAW (§ 730*)—IMPROPER ARGUMENT—ACTION OF COURT.

Error in the argument of state's counsel that accused had interposed technical objections which prevented the state from proving certain facts was cured where, after objection by accused thereto, the court instructed the jury not to consider the argument, and at the conclusion thereof gave a special charge again instructing them to the same effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

11. CRIMINAL LAW (§ 730*)—APPEAL—CURE OF ERROR—IMPROPER ARGUMENT.

Error in argument of a district attorney, who stated, "Let us now get rid of slop that is always injected in a criminal trial by the defendant," was cured where, after objection by accused, the court charged the jury not to consider the argument, and at the conclusion thereof, at accused's request, gave a special charge to the same effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

12. CRIMINAL LAW (§ 726*)—APPEAL—REVIEW—IMPROPER ARGUMENT.

Accused's counsel, in his argument, after stating that children are usually truthful, stated that the Savior had said, "Suffer little children to come unto me, for of such is the kingdom of Heaven." In reply, state's counsel used this language: "The Gentleman who uttered the expression, 'Suffer little children to come unto me for of such is the kingdom of Heaven,' lived nearly 2,000 years ago, and did not know of the juvenile laws and courts of Texas, and of the small boys who have been juveniled under that law." *Held*, that the state's counsel's retort did not constitute error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 726.*]

13. CRIMINAL LAW (§ 857*)—TRIAL—MISCONDUCT OF JURY—RECEIVING ADDITIONAL EVIDENCE.

Receiving, by the jury, of additional evidence other than that introduced on the trial, if it injuriously affects, or could injuriously affect, accused's rights, is ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. § 857.*]

14. CRIMINAL LAW (§ 862*)—MISCONDUCT OF JURY.

In a prosecution for burglary, by shooting into a house with intent to injure a person therein, where the state's theory was that accused fired on account of indignities offered his wife, and accused claimed that when he reached the window, the injured person attempted to shoot him with a pistol or gun, and that he fired for self-preservation, evidence that one of the jurors who had been on the building when it was constructed, and had some personal knowledge of its location, drew a diagram, which the jury substituted for two diagrams introduced in evidence, of the interior of the room in which the injured person was when the shot was fired was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2055; Dec. Dig. § 862.*]

Appeal from Criminal District Court, Harris County; E. R. Campbell, Judge.

T. L. Railey was convicted of burglary, and appeals. Affirmed.

Brockman, Kahn & Williams, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

The indictment contains two counts. The first charges burglary by shooting a gun into the dwelling house of Charles Schmidt, with intent to injure Charles Schmidt; and the second count charges burglary in that said appellant did break and enter with intent to commit a felony, in this: That he, the said T. L. Railey, did then and there discharge firearms, to wit, a gun, into the said dwelling house of the said Charles Schmidt, with the intent then and thereby to unlawfully kill and murder the said Charles Schmidt. The court submitted alone the first count in the indictment.

Bill of exceptions No. 1 complains that before this cause was called for trial, cause No. 15,548 being upon call, the district attorney filed his nolle prosequi dismissing cause No. 15,548 pending in said court, wherein this defendant was charged with assault with a gun upon Charles Schmidt, the alleged injured party in this case, with the alleged intent to murder the said Charles Schmidt, alleged to have occurred on the 30th day of April, 1908, in Harris county, Tex., and which cause was based upon the same identical facts as are the basis of this transaction, to wit, the shooting into the house of the alleged injured party, Charles Schmidt, and to which motion, to nol. pros. by the district attorney defendant objected on the ground that said cause No. 15,548, being based upon the same identical facts and the same identical transaction upon which the indictment in this cause was based, it was important to a fair judicial determination of the charge in this case that said cause No. 15,548 be first tried; that the issue of whether or not defendant, if guilty, was guilty of assault to murder, or of aggravated assault, or not guilty, be determined, that he might be able to present to the court such pleas of former jeopardy or former acquittal as might arise from the verdict of the jury under a prosecution of said cause No. 15,548, because the offense of burglary by the law of this state, as defined by articles 838 and 841 of the Penal Code of 1895, could only

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be constituted by an unlawful entry with the intent to commit theft or a felony; and, should the jury in said cause No. 15,548 find defendant guilty of aggravated assault under the facts in evidence in this case, and it is here stated as a fact that defendant then and there claimed that the facts which would be adduced on the trial on behalf of defendant would show that, immediately prior to the shooting, the alleged injured party, Charles Schmidt, slapped the wife of defendant in the face in view of defendant, defendant being at that time 200 or 300 feet distant, and also called defendant's wife vile names, which insulting conduct as to said names was made known to defendant as soon as he reached the place where his wife was, he having immediately, upon seeing said Schmidt slap his wife, gone hastily towards where his wife and said Schmidt were, and on his approach said Schmidt went into his own house, followed by his own wife, and upon defendant getting to where his (defendant's) wife was, she stated to him that said Schmidt, in addition to striking her, had called her "a bitch" and "a whore," and had used other insulting language to and towards her, and that defendant was greatly outraged by said matters, and immediately went into his own house, which was within a few feet of where said assault occurred, and got his shotgun, and went upon the premises of the said Schmidt, and called to him from the gate to come out of the house, that he wanted to see him, and, hearing no response, went through the gate to the immediate yard surrounding the house of said Schmidt, and towards the door of the said house, and had passed beyond a certain window going towards said door when he heard the voice of said Schmidt in said house at about said window, and turning and stepping back to a point opposite said window, saw said Schmidt, and called to him to come out of the house, that he wanted to see him, and said Schmidt then made a demonstration to reach for a pistol, according to the testimony of defendant, which defendant testified he saw lying on the table near said Schmidt, and that defendant called to him to stop, and, said Schmidt not stopping, defendant fired one barrel of his double-barreled shotgun, which was loaded with small shot, at said Schmidt, the other barrel being loaded but not discharged, and defendant stating that the reason he did not fire said other barrel, which there was nothing to prevent him from doing, was that he saw, after he had fired the first barrel, that said Schmidt did not appear to intend to make any further attempt to injure him (defendant) then; that the shooting into said house could not amount to a felony, and therefore could not constitute such an entry as would go to constitute the act of burglary under the law as defined in said articles 838 and 841 of the Penal Code of 1895, and that it was necessary to try cause No. 15,548 first in order to ascertain the above facts. As appellant insists, article 838 of the Penal Code of 1895 provides that burglary is constituted by the entrance of a house by force, threats, or fraud, with intent to commit a felony or the crime of theft. Article 839 of the Penal Code of 1895, provides that he is also guilty of burglary who, with intent to commit a felony or theft by breaking, enters the house in the daytime. Article 840 of the Penal Code of 1895 provides that it is not necessary that there should be an actual breaking to constitute the offense of burglary, except when the entry is made in the daytime. Article 841 provides the entry is not confined to the entrance of the whole body. It may consist of the entry of any part for the purpose of committing a felony, or it may be constituted by the discharge of firearms or other deadly missiles into the house with the intent to injure the person therein. Appellant contends that article 841 does not define a separate and distinct offense, but is explanatory of articles 839 and 840, and that there cannot be burglary unless the intent is to commit a felony or the crime of theft, and therefore, to discharge firearms into the house with intent to injure, an intent to injure not necessarily being a felony, that it would not be burglary, unless there was a felonious purpose.

In the case of Garner v. State, 31 Tex. Cr. R. 22, 19 S. W. 333, we used this language: "Article 707 of our Penal Code (the old number which corresponds with article 841 of the present Code) defining what constitutes an entry in burglary, declares that 'it may be constituted by the discharge of firearms or other deadly missile into the house, with intent to injure any person therein.' Under this provision of the statute, to discharge firearms into a house with intent to injure any person therein is per se burglary, and constitutes all the force and entry that is necessary and essential to that crime. Our conclusion is that the indictment in this case is not defective, for the reason stated by appellant's counsel in his motion to quash; and we are further of opinion that it sufficiently charges a burglary by the discharge of firearms into a house with intent to injure the persons therein. The indictment is in substantially the same language as that used for a similar offense in the case of Searcy v. State, 1 Tex. App. 440, and which indictment was pronounced to be good by the opinion of the court in that case." We hold that article 841 is but an addition to articles 838 and 839, and that the true construction to be placed upon it would be to make article 838 read as follows: The offense of burglary is constituted by entering a house by force, threats or fraud at night, or in a like manner entering a house and remaining concealed therein with the intent in either case to commit a felony or the crime of theft, or it may be constituted by the discharge of firearms or other deadly missile into a house

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with intent to injure the person therein. The Code itself provides that same must be construed as one harmonious whole, and each provision thereof given validity and force without regard to the distinction that existed at common law between the construction of civil and criminal statutes. In the light of this rule of construction, both statutory and common law, we hold that it would be a strained construction to hold that the intent to injure must be a felony, since this would destroy the liberal wording and evident intent of the law. Article 838 says if one enters a house with intent to commit a felony, he is guilty, and then article 841, which makes it a burglary to shoot firearms into a building with intent to injure an occupant of the building, clearly was designed and intended to set up the offense or mode and method of committing the crime of burglary.

In the case of Hammons v. State, 29 Tex. App. 445, 16 S. W. 99, a converse rule appears to have been laid down to that here announced, but a careful reading of said last-cited decision would show that it was only articles 838 and 839 there under consideration, and not article 841, and any expressions in said opinion to the contrary clearly appear to be dicta. So, reverting to the action of the district attorney, complained of in the above bill of exceptions, we say the court did not err in permitting the dismissal of the assault with intent to murder case, since the state can carve, in drawing its indictments, any offense defined by the statute out of any given state of facts, dismiss either one of the indictments, and try for the other. Certainly, if it is per se burglary to shoot into a house with intent to injure any person therein, it would become utterly immaterial whether appellant was guilty of murder or assault. In other words, being per se burglary to shoot into a house with intent to injure an occupant thereof, it becomes immaterial whether the party had a felonious purpose or not, and if appellant, being apprised of the insults and indignities offered his wife, shot at the prosecuting witness upon first meeting, and the same should only be aggravated or simple assault, waiving the burglary feature, still these facts would become immaterial if he intended to injure the party in the house. The object and purpose of article 841 of the Penal Code of 1895 was to protect the sanctity of the home, and to punish the ruthless shooting into same by any one where the purpose of so doing was to injure an occupant of said home or house. It follows, therefore, the court did not err, from any standpoint, in permitting the district attorney to dismiss the indictment above discussed.

Bill of exceptions No. 2 complains of the same matter, in substance, discussed in bill No. 1.

Bill of exceptions No. 3 complains that the regular panel of jurors for the week having been tested on their voir dire as to their qualifications, and only 22 having qualified, the court ordered 25 talesmen to be brought in to be tested on their voir dire, out of which to complete the list of 24 names, from which list the parties should select a jury, and, 13 of said talesmen jurors having qualified, defendant then requested the court to have the names of said 22 jurors of the regular panel, and all of said talesmen who had qualified, placed in the box and shaken up and drawn from the box in the regular way, until a panel of 24 was completed, which request the court refused to grant as to the said 22 regular jurors, but did grant said request in so far as securing the names of two additional jurors from said list of talesmen was concerned. There was no error in the ruling of the court.

Bill of exceptions No. 6 complains that defendant having called Frank Frost, who was duly sworn as a witness in his behalf, and who testified that he knew the complaining witness, Charles Schmidt, and his wife, and that he (witness) on a certain occasion, when said Schmidt had taken up the horse of the witness, went to the place of residence of the said Schmidt, and that said Schmidt, without provocation or excuse, spoke in a loud and angry manner to him, but spoke in Mexican, and that he could not understand that language, but the conduct of the said Schmidt was violent, which testimony, after it was given, was, upon motion of the state, stricken out, over the objection of defendant made at the time; and appellant further offered to prove by said witness the above said facts to which he had testified, and further that the wife of said Schmidt at said time, and in the same connection, attempted to strike the witness, which was also without provocation or excuse, and which testimony the witness would have given had he been permitted, and which testimony was then and there stated to be offered in contradiction of the statement of the said Schmidt that he was not a man that ever got mad as claimed by defendant in this case, and that he never used violent or profane or indecent language, or conduct, to or towards any one, and that his wife was never violent in language or conduct, and as an impeachment of said Schmidt and his wife as witnesses in this case, and as shedding light upon the probable conduct of said Schmidt and his said wife at the time said Schmidt assaulted the wife of defendant as claimed by defendant and his wife, and his (defendant's) witness Willie Schubert. We do not think this testimony was admissible. Previous altercations with other and different parties could not throw any light on this question. If appellant had laid a predicate to impeach said prosecuting witness Schmidt, asking said Schmidt if he had not had a difficulty with the witness, then said witness could have been introduced to impeach said Schmidt on said question, but isolated in-

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stances of temper or quarrels is not a compliance with the rules of evidence to prove reputation.

Bill of exceptions No. 7 shows the defense introduced three witnesses, each of whom testified to the general bad reputation of the alleged injured party, Charles Schmidt, for peace and quiet in the community in which he resides, and defendant then offered to further prove by each and all of said witnesses that they were acquainted with said Schmidt's habits and disposition and his general reputation as to using violent, profane, and indecent language and conduct to and towards others, and specially when he was angered at any one, and it was at the time stated to the court to be offered in connection with the general bad reputation of said Schmidt for peace and quiet, as bearing on the general issue of the conduct of the said Schmidt to the wife of defendant at the time of the alleged assault of said Schmidt on the wife of defendant, and the alleged use by said Schmidt to the wife of defendant of vile and insulting language, just a few moments before the shooting occurred, and as bearing on the probable conduct of said Schmidt at the time of the alleged shooting of said Schmidt by defendant. Under the facts of this case we do not think this testimony is material, since, as stated above, the testimony could only go to corroborate the fact that the prosecuting witness had assaulted appellant's wife; and, it being burglary per se to shoot into a house to injure the prosecuting witness, then the testimony becomes immaterial, since it could only serve to corroborate appellant's theory that the assault was an aggravated assault, and not an assault with intent to murder; and under the statute above discussed, it being immaterial whether it was an assault to murder or aggravated assault, then it follows that the testimony was immaterial.

Bill of exceptions No. 8 complains practically of the same error of the court in refusing to admit reputation of the prosecuting witness as discussed in the above bill.

Bill of exceptions No. 11 shows that W. G. Love, district attorney, being on the stand as a witness in behalf of the state, in the state's rebutting testimony was permitted to state and testify to the jury that his reasons for dismissing the indictments in cause No. 15,548 and cause No. 15,549, the first alleging an assault by defendant with a gun upon the alleged injured party, Charles Schmidt, and the second charging such an assault with said same intent upon Mrs. Charles Schmidt, and both of which were based on the shooting which is the basis of this prosecution, was because in his judgment the same facts were the basis of said prosecution that are the basis of this prosecution, and that the state could not carve "two convictions" out of the same facts, and that for that reason he nolle pros'd said indictments, and elected to try defendant upon the indictment in this cause, to which testimony when offered, and before it was given, defendant objected on the ground that same was the opinion of said witness, and was admitting said opinion of said witness before the jury as evidence, that in his judgment and opinion the defendant was guilty in this case, and that when the jury had convicted defendant in this case, according to said opinion of said witness that the state could not then carve "another conviction" out of the same facts, and that the same was not the statement of any facts, and that the nolle prosequi entered in said causes stated the reasons for their being entered, and that the said opinion of said witness was irrelevant, immaterial, and incompetent as evidence to prove any fact or issue in this case. The court overruled the objections, and witness was permitted to testify as above detailed. This bill is allowed with the following qualification: "The indictment in causes Nos. 15,548 and 15,549 referred to, together with the motions of district attorney to nol. pros. the same, had been admitted in evidence on behalf of the defendant over the objection of the state, and the testimony above objected to was admitted on behalf of the state to explain to the jury why said cases had been nol. pros'd by the district attorney." Certainly, in the light of the court's explanation, if error at all, the testimony of the district attorney was harmless. The defense had insisted upon introducing the indictments charging appellant with assault with intent to murder upon prosecuting witness, Schmidt, and his wife, and the reasons of the district attorney for nol. pros'ing same, and it could do no harm to amplify the reasons for nol. pros'ing the indictments. None of the testimony, however, ought to have gone before the jury. It is a matter addressed to the discretion of the court, and with which the jury had nothing on earth to do, but certainly appellant cannot complain, after the indictments were introduced and the reasons for nol. pros'ing also introduced, that the district attorney explained to the jury.

Bill of exceptions No. 12 shows that the state's witness Jack Hagerman, being on the stand for the state in its rebutting testimony, and being on cross-examination, the said witness having testified on the day of the occurrence alleged in the indictment in this cause he went to the place known as the "Jones' place," which was in sight of what occurred between the state's witness Charles Schmidt and defendant's wife, which immediately preceded the shooting, and that he saw defendant's wife at her buggy and apparently unhitching her horse, and saw her grab her buggy whip out of her buggy and go to the fence and put her foot on the first board of the fence as if she was going to get over with the whip in her hand, but that he would not say that she was unhitching the horse, or what occurred prior to that time, and the state's witness, Charles Schmidt,

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having testified that defendant's wife slapped at him three times across the fence and that he jumped back each time, and that she then ran to her buggy and grabbed the whip and came back to the fence with it, and defendant's wife having testified that said Schmidt slapped her at the fence, and then started as if to get over the fence, and that she then went to the buggy and got her whip with the intention of defending herself as best she could against said Schmidt should he cross the fence to continue his assault on her; and the witness further testified that he did not see defendant's witness Willie Schubert, a small boy about eight years old, who had testified that he was present, and had gone to where Mrs. Railey was to take her some meat that had been left by a butcher at his mother's for Mrs. Railey in the absence of Mrs. Railey, and that he heard said Schmidt call Mrs. Railey "a bitch" and "a whore" and some other ugly names, and saw him slap her, and that he then left and went to his home, his mother living upstairs over said "Jones' place," and defendant then asked said witness Hagerman, the following question: "If that little boy says he was out there, you wouldn't undertake to dispute that he was not, would you?" and to which question the witness would have answered, had he been permitted to do so, that if the little boy said he was there, he would not dispute it, and which was at the time stated by defendant to be offered for the purpose of testing the extent to which the witness would assert that the little boy was not present at the time of the alleged assault upon, and insulting conduct towards, defendant's wife by the state's witness, Charles Schmidt. This testimony was utterly inadmissible. It called for an opinion of the witness. The court approves the bill, however, by stating, that the state also objected to the form of the question as being improper, and the court only sustained the objections as to the form of the question, and stated to counsel for defendant at the time that he might ask the witness any question, or questions, which would elicit the fact of whether or not said boy, Willie Schubert, was present at said time and place, or whether the witness saw said boy, and thereafter counsel for defendant did propound proper questions to said witness, which elicited the following testimony from him: "I will not undertake to say that he was not there [referring to said boy, Willie Schubert]. I will not do that now; I say that I did not see him there."

Bill of exceptions No. 13 complains the court erred in refusing to sustain a motion of appellant to require the state to elect which count in the indictment would be relied upon for a conviction. The court merely submitted the first count in the indictment. This cured surely any error in the ruling of the court.

Bill of exceptions No. 14 complains that the state argued to the jury as follows: "The defendant interposes technical objections, and in that way prevents the state from proving certain facts." This bill is allowed with this explanation: "After the objection by defendant to the language used as set out above, the court instructed the jury not to consider said argument, and at the conclusion of the argument, at defendant's request, gave to the jury defendant's special instruction No. 1, again instructing them that they should not consider said language." The explanation cured any possible error in the argument. Bill No. 15 complains, in substance, to same facts as those stated in bill No. 14.

Bill of exceptions No. 16 complains, in substance, of the following statement in the closing argument by the state: "Let us now get rid of slop that is always injected in a criminal trial by the defendant." The explanation to this bill says that after the objection of defendant to the language used, as above set out, the court instructed the jury not to consider said argument, and at the conclusion of the argument, and at defendant's request, gave to the jury defendant's special instruction No. 3, again instructing them that they should not consider said language. This bill and bill No. 17 complain practically of the same matter. In the light of the explanation of the court none of this argument was prejudicial to appellant.

Bill of exceptions No. 19 shows that defendant's counsel, in course of his argument, after stating that children are usually truthful, stated that the Savior had said, "Suffer little children to come unto me, for of such is the kingdom of Heaven." In reply to this, state's counsel used this language: "The Gentleman who uttered the expression, 'Suffer little children to come unto me for of such is the kingdom of Heaven,' lived nearly 2,000 years ago, and did not know of the juvenile laws and courts of Texas, and of the small boys who have been juvenlled under that law." Waiving the sacrilege of the suggestion of the state's counsel, we do not think there was any error in the retort made upon appellant's argument.

Bill of exceptions No. 21 complains of the misconduct of the jury who, after they retired to consider their verdict, received other evidence in the absence of defendant, of a material character, other than that adduced upon the trial of this cause, in this, to wit: That one or more of said jurors whose name or names defendant is unable to now give, drew a diagram of his or their own, which was substituted for the two diagrams introduced in evidence of the interior of the room in which the said Schmidt was at the time the shot was fired; one of said substituted diagrams having been drawn by the said Schmidt, and the other by the state's witness J. A. Voss. We have carefully reviewed the matter complained of in this bill, and think that the mere fact that one of the jurors had been on the building when it was constructed, and had some personal knowl-

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edge of its location, did not and could not have injured appellant for him to state the knowledge that he had of the location of the building, in the light of this record, since appellant says when he reached the window that the injured party attempted to shoot him with a pistol or gun, and a pistol is frequently called a gun, and that he fired for self-preservation. The state's case is that he fired on account of the indignities offered appellant's wife. So we see nothing in the plat suggested by the jury that could injure in the remotest appellant's rights. Of course the question is well settled that additional evidence that injuriously affects, or could injuriously affect, the rights of a defendant is a proper ground to reverse a case. One or more maps were introduced. The bill presenting this matter is too long and voluminous to copy in this opinion. Suffice it to say that there was no error prejudicial to appellant. Furthermore, the bill presenting the matter does not appear to be signed by the judge.

The charge of the court in all respects properly presents the law of this case, and presents the doctrine of reasonable appearances of danger, as well as actual danger from the defendant's standpoint, authorizing the jury to resolve each reasonable doubt in behalf of the appellant. We have carefully reviewed seriatim all of appellant's contentions, and do not believe there is any error in this record authorizing a reversal of the judgment, and same is in all things affirmed.

Second motion for rehearing ordered filed November 10, 1909, and mandate ordered held up.

GILBERT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1909.)

1. CRIMINAL LAW (§ 1173*) — APPEAL — INSTRUCTIONS.

Where the evidence on a trial for burglary shows that the freight cars entered were at the same place and the entry made at the same time, the failure in the charge to limit the evidence that other cars had been entered than the one as to which the state elected to prosecute to the showing of intent could not have injured accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164–3168; Dec. Dig. § 1173.*]

2. BURGLARY (§ 46*)—CRIMINAL LAW (§ 1144*) —TRIAL—INSTRUCTIONS.

It was unnecessary for the instructions to give the number of the freight car alleged to have been burglarized, where the state had elected to prosecute for a car named; but it must be assumed, in the absence of anything to the contrary, that that fact was stated to the jury, and that they understood that they were limited to the particular car as to which the state elected to prosecute.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 115; Dec. Dig. § 46;* Criminal Law, Cent. Dig. § 3032; Dec. Dig. § 1144.*]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

John Gilbert was convicted of burglary, and he appeals. Affirmed.

Horace Williams and W. J. Wasson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal is prosecuted from a judgment of conviction had in the district court of Dallas county, Tex., on November 8, 1908, convicting appellant of the crime of burglary of a railroad car, and assessing his punishment at confinement for three years.

A number of questions are raised in the record, but most of them are conceded, with admirable candor, by appellant, to be without merit. It is claimed, however, that the court erred in failing in the charge to limit the effect of the evidence that other railroad cars were broken and entered at the same time and place when the car in question was broken and entered; and again that in this case there was a general charge in the indictment of the burglary of a railroad car, and the evidence developed the burglary or entry at least of five cars at the same time and place, and the court required the state to elect upon which car it was relying for a conviction, and the state having elected, as shown by an order made in the case, to prosecute for the burglary of car C., M. & St. P. No. 82076, the court should in terms have confined the attention of the jury to that particular car in the charge. Again, it is complained that the testimony in the case rests upon direct evidence, and, the court having given a charge on circumstantial evidence, that this was confusing and misleading, in that it tended to draw the consideration of the jury away from the question of the accuracy of vision of the witness, in what counsel denominate "the remarkable identification," to the question of the effect of defendant's presence in the car.

The evidence in the case briefly shows that a number of freight cars, all sealed, left the city of Dallas in a train on the Cotton Belt road about 7 o'clock p. m. of the night in question, and that they arrived at Noel about 8 o'clock the same evening, and were placed on the side track. The evidence also indicates that at the same time and place five of these cars, including car C., M. & St. P. No. 82076, were entered. Appellant was seen by more than one person about the car, and was identified by at least one witness positively as having been in the car when the parties appeared on the scene. He jumped out, and was later captured, lying flat on the ground near by; and while being conveyed to the jail he escaped, and was soon thereafter arrested. The evidence does not distinctly show that these cars were coupled together at the time, but it does show that they were at the same place; that the entry was made at the same time, for the reason that the

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had been made very soon after they arrived at Noel. So it is seen that the entry of the cars was made while under the dominion and control of the station agent at Noel, and practically at the same time and place, so as to constitute, as we believe, one and the same transaction. Indeed, we think it was literally, in a legal sense, the same burglary, and but one offense, and the conviction under which appellant rests here would bar further prosecution. Wright v. State, 17 Tex. App. 152; Adams v. State, 16 Tex. App. 162; Hirshfield v. State, 11 Tex. App. 207.

We recognize the rule laid down by this court in many cases, and among others those cited by appellant (Scott v. State [Tex. Cr. App.] 68 S. W. 680; Long v. State, 11 Tex. App. 381; Carter v. State, 23 Tex. App. 508, 5 S. W. 129; Wheeler v. State, 23 Tex. App. 598, 5 S. W. 160; Mayfield v. State, 23 Tex. App. 645, 5 S. W. 161; Cravey v. State, 23 Tex. App. 677, 5 S. W. 162; Barnes v. State, 28 Tex. App. 29, 11 S. W. 679; Hanley v. State, 28 Tex. App. 375, 13 S. W. 142, and numerous other cases), that where cotemporaneous crimes are admitted in evidence under circumstances justifying their admission, the court should ordinarily limit the effect of such testimony for the purposes of showing intent, motive, system, or other like purposes. However, it has been held in very many cases that it is only necessary for the court to charge upon and limit the evidence showing other extraneous crimes, when there is danger of conviction for the offenses not charged, or where there might be an unwarranted use of such testimony, to the prejudice of the defendant in the case in which he is being tried. Here, as we think, the crime being single and of the same character of moral turpitude, the entries being of cars in possession of the same person, and, therefore, of the same ownership in the legal sense, that the failure to limit this testimony could not, in the nature of things have injured appellant. Again, we think it was unnecessary for the charge of the court to name the particular number of the car alleged to have been entered. When, as in this case, there had been an election to prosecute for the burglary of the car named, it must, in the absence of evidence to the contrary, be assumed that this fact was stated to the jury, and that they would have understood that they were limited in their evidence to the particular car upon which the state elects to prosecute.

In respect to the charge of the court on circumstantial evidence, there was a state of case, we believe, under which the jury would have been justified in convicting appellant, even if they should not have believed the testimony of the witness who claimed to have seen him actually in the car. While a charge on circumstantial evidence was not, as we the contrary was rather favorable to him than otherwise. The evidence of appellant's guilt is conclusive, nor do we believe that, fairly considered, there is any error in the record which would justify or require us to reverse the case.

The judgment of the court below is therefore affirmed.

BROOKS, J., absent.

TEXAS & P. RY. CO. v. HENSON et al.

(Court of Civil Appeals of Texas. June 19, 1909. Rehearing Denied Oct. 6, 1909.)

1. CARRIERS (§ 4*) — ACTIONS — VENUE—WHO ARE CARRIERS—BELT LINE RAILROAD—"COMMON CARRIER."

A belt line railway company, chartered as a railroad company, owning four or five locomotives and one flat car and about 14 or 15 miles of track, which makes connection with various railroad companies, and switches cars for these companies to stockyards and other railroad connections, but which has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contract with them, and is paid for its services by the railroad companies, is not a "common carrier" within the meaning of Acts 1905, p. 29, c. 25, § 1, providing that any common carrier doing business as such in the state may be sued for any cause arising out of transportation in any court of competent jurisdiction in any county in which such carrier does business, or has an agent or representative.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462–478; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 2, pp. 1313–1319; vol. 8, p. 7607.]

2. PARTIES (§ 51*)—ADDITIONAL PARTIES.

Sayles' Ann. Civ. St. 1897, art. 1208, providing that before a case is called for trial additional parties may, when they are necessary or proper parties to the suit, be brought in, does not authorize the bringing in of a party defendant, unless such party was properly suable in the county where such suit is pending.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 51.*]

3. TRIAL (§ 251*)—INSTRUCTIONS.

In an action against a railway company for damages from negligence in handling a shipment of cattle, it was not error to refuse defendant's instruction submitting the question of plaintiff's contributory negligence in failing to feed and water the stock before shipment, where there is no plea of such contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

4. CARRIERS (§ 215*) — CARRIAGE OF LIVE STOCK—FACILITIES—STOCK PENS.

It is the duty of a railway company to furnish sufficient suitable pens and facilities at its terminus for delivering cattle shipped over its line, and the crowded condition of the stockyards at its terminus will not relieve it from liability for damages from negligence in handling a shipment of cattle.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.*]

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5. Evidence (§ 497*)—Opinion Evidence—Mixed Question of Law and Fact.

In an action against a carrier for damages to a shipment of cattle, caused by negligence of the carrier, evidence by plaintiff that the loss in price per head on his cattle was $2 or $2.50 was not a violation of the rule that a witness cannot express an opinion upon a mixed question of law and fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2285–2288; Dec. Dig. § 497.*]

Appeal from District Court, Midland County; Jas. L. Shepherd, Judge.

Action by R. N. Henson and others against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ed W. Smith, for appellant. Caldwell & Whittaker and Capps, Cantey, Hanger & Short, for appellees.

SPEER, J. R. N. Henson sued the Texas & Pacific Railway Company to recover $1,975 damages for negligence in handling a shipment of cattle from Stanton to North Ft. Worth. The defendant answered, and impleaded the Ft. Worth Belt Railway Company. This latter company, after being cited, filed its plea of privilege to be sued in Tarrant county, the county of its domicile, which plea was heard on its merits and sustained by the court. There was a verdict and judgment for the plaintiff against the Texas & Pacific Railway Company for $1,800, and that company has appealed.

Whether or not the court erred in sustaining appellee Ft. Worth Belt Railway Company's plea of privilege depends upon the proper construction of Acts 1905, p. 29, c. 25, prescribing parties to and venue of suits against railroad corporations. Section 1 of that act is as follows: "That whenever any passenger, freight, baggage or other property has been transported by two or more railroad companies, express companies, steamship or steamboat companies, transportation companies or common carriers of any kind or name whatsoever, or by any assignee, lessee, trustee or receiver thereof, or partly by one or more such companies, or common carriers, and partly by one or more assignee, lessee, trustee or receiver thereof operating or doing business as such common carriers in this state, or having an agent or representative in this state, suit for damage or loss or for any other cause of action arising out of such carriage, transportation or contract in relation thereto may be brought against any one or all of such common carriers, assignees, lessees, trustees or receivers so operating or doing business in this state, or having an agent or representative in this state, in any court of competent jurisdiction in any county in which either of such common carriers, assignees, lessees, trustees or receivers operates or does business, or has an agent or representative; provided, however, that if damages be recovered in such suits against more than one defendant, not partners in such carriage, transportation or contract, the same shall on request of either party be apportioned between the defendants, by the verdict of the jury, or if no jury is demanded, then by the judgment of the court." From a reading of this article it is apparent that the Legislature intended it should be effective as to those transportation companies operating as common carriers, and unless appellee the Ft. Worth Belt Railway Company is a common carrier under the general acceptation of that term, then there is no authority in law for holding it in the present suit to answer in a county other than that of its domicile. The facts show that while this company is chartered as a railroad company, yet its business is not that of the ordinary railroad corporation. It owns four or five locomotives, and one flat car, about 14 or 15 miles of track near the city of Ft. Worth, making connection with various railroad companies, and is engaged in the business of switching or transferring cars for these railroad companies from their various connections with its line to the Ft. Worth stockyards and to other railroad connections. It has no depot or loading facilities, furnishes no cars, makes no charges against shippers—in fact is a stranger to the shipping contract entered into by the various railroad companies—but its compensation consists in fixed charges of from $1 to $2 per car for handling such cars, which charges, under the rule promulgated by the Railroad Commission, are required to be absorbed by the railroad company engaging its services. Under these circumstances we hold that the Belt Railway Company is not a common carrier within the meaning of the act above quoted, but that the same was merely the agent of the appellant, employed by it as a means of carrying out the contract of shipment with appellee Henson, and as such was properly dismissed from the suit in Midland county. Tex. & Pac. Ry. Co. v. Scoggin & Brown, 40 Tex. Civ. App. 526, 90 S. W. 521. While there may be some contrariety of holding on this question, still we think the weight of authority, as well as the better reason, is in favor of the conclusion we have here reached.

In Elliott on Railroads, paragraph 1399, it is said: "If the transfer company simply acts as an agent of the initial carrier in transferring the goods, then the transfer company cannot be justly regarded as a connecting carrier, nor can it be so considered where the initial carrier simply employs it for its own convenience. Ordinarily the question whether the transfer company was or was not an agent or employé of the initial carrier must be determined from the facts of the particular case." So in Moore on Carriers, § 43, it is said: "But a corporation which, being under no legal obligation to do so, voluntarily

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contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman." The text of these two writers appears to be based upon, and is supported by, the case of Ky. & I. Bridge Co. v. Louisville & N. R. Co. (C. C.) 37 Fed. 567, 2 L. R. A. 289, 2 Interst. Com. R. 351. Article 1208, Sayles' Ann. Civ. St. 1897, authorizing the making of additional parties, is also cited by appellant, but this statute will not authorize the making of a party defendant, unless such party was properly suable in the first place in the county where such suit is pending. St. L. S. W. Ry. Co. v. McKnight, 99 Tex. 289, 89 S. W. 755. It is hardly necessary for us to add that we are not discussing the question of Ft. Worth Belt Railway Company's liability for any act of negligence, but merely its right to be sued in the county of its domicile as affected by the statutes referred to.

In the trial of the case on its merits there was no error in refusing appellant's special charge No. 4, seeking to have submitted the issue of appellees' contributory negligence in failing to feed and water the stock while in the pens at Stanton, since there was no plea of contributory negligence in this respect.

Appellant fails to state any evidence that would authorize the giving of special charge No. 1, excluding a recovery for delays occurring prior to the delivery of the cattle in question to it, and indeed our examination of the record fails to discover any evidence tending to show much damages.

It was the duty of appellant to furnish suitable pens and facilities for delivering cattle at its Ft. Worth termination, and the requested special charge No. 8, excusing it for all damages growing out of a crowded condition of the stockyards, was therefore erroneous in assuming that it was not liable for such crowded condition.

It was permissible, we think, to allow appellee Henson as a witness to state that the loss in price per head on his cattle at their destination was $2 or $2.50, and such ruling did not violate the principle that a witness cannot express an opinion upon a mixed question of law and fact. C., R. I. & T. Ry. Co. v. Halsell, 35 Tex. Civ. App. 126, 80 S. W. 140; Red River, T. & S. Ry. Co. v. Eastin & Knox, 39 Tex. Civ. App. 579, 88 S. W. 530; F. W. & D. C. Ry. Co. v. Waggoner National Bank, 36 Tex. Civ. App. 293, 81 S. W. 1050. The authorities cited by appellant, notably H. & T. C. R. R. Co. v. Roberts (Tex.) 108 S. W. 808, Id. (Tex. Civ. App.) 109 S. W. 982, and G., C. & S. F. Ry. Co. v. Kimble (Tex. Civ. App.) 109 S. W. 234, are not in point, since there the testimony condemned consisted in the expression of opinion by witnesses as to what would constitute "a reasonable time" or "reasonable care," and the like—evidently mixed questions of law and fact.

Other assignments of error not discussed are disposed of in our conclusions with respect to appellee Ft. Worth Belt Railway Company's connection with the shipment.

We find no error in the judgment, and it is affirmed.

SAMPLES v. WEVER.†

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 23, 1909.)

1. TRIAL (§ 343*)—VERDICT—CONSTRUCTION—AIDER BY PETITION.

The petition may be looked to to aid in construing the verdict.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 343.*]

2. TRIAL (§ 333*)—VERDICT—SUFFICIENCY.

Where, in an action on a note and to foreclose a vendor's lien, the petition set forth the note, with date, principal amount, rate of interest, rate of attorney's fees, a verdict for plaintiff "for the amount of principal, interest, and attorney's fees due on the note sued on," was sufficiently definite to fix the amount due.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 333.*]

3. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—ERROR IN VERDICT.

Where, in an action on a note, the jury found for plaintiff for the amount of principal, interest, and attorney's fees due, less $43, with interest on same, and it appeared that the $43 was deducted from the principal of the note, which consequently carried interest from its date, the error in the verdict as to the $43 allowed defendant was not prejudicial to him.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1070.*]

4. PUBLIC LANDS (§ 178*) — CONVEYANCE BY GRANTEE—CONSIDERATION.

A sale of public land, the title to which is in the state, is not a consideration for the promise to pay another therefor.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 178.*]

5. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—SALE—FORFEITURE.

A sale of school land prior to the adoption of Acts April 19, 1901 (Laws 1901, p. 294, c. 125), is governed by the law of 1895 (Laws 1895, p. 63, c. 47), requiring forfeitures of sales of school land for nonresidence to be declared by the commissioner.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

6. PUBLIC LANDS (§ 178*)—SCHOOL LANDS—SALE—FORFEITURE.

Where a purchaser of school land while the law of 1895 (Laws 1895, p. 63, c. 47), requiring forfeitures of sales of school land for nonresidence to be declared by the commissioner, was in force, conveyed land to a grantee, who received possession before a forfeiture for the purchaser's abandonment had been declared, the grantee took such title as would support an action against a mere trespasser.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 178.*]

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† Writ of error denied by Supreme Court.

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7. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—SALES—ERRORS IN APPLICATION.

Where the application for the purchase of school land erroneously stated that the applicant was an actual occupant of a designated section while he was in fact an occupant of another section, the mistake could be corrected and the applicant's purchase was not absolutely void.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

8. VENDOR AND PURCHASER (§ 15*)—SALES OF LAND—CONSIDERATION.

A purchaser of three sections of school land obtained a good title to one section only, and gave to the vendor a note for a part of the price. The purchaser received possession of the section to which he acquired a good title, so that he could acquire title to the other two sections. This section, together with the improvements, might equal in value all that the purchaser agreed to give for the whole. *Held*, that there was neither a total nor a partial failure of consideration for the note, but the vendor could recover thereon.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 15.*]

9. BILLS AND NOTES (§ 489*)—DEFENSES—TOTAL FAILURE OF CONSIDERATION.

Under a plea of total failure of consideration for a note sued on, a partial failure may be shown.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

Appeal from District Court, Scurry County; C. C. Higgins, Judge.

Action by E. B. Wever against Z. F. Samples. From a judgment for plaintiff, defendant appeals. Affirmed.

A. C. Wilmeth and Stephens & Miller, for appellant. Ed J. Hamner, for appellee.

CONNER, C. J. This suit was instituted by appellee, Wever, against appellant, Samples, on a promissory note executed by Samples to Wever June 15, 1901, for $1,000, payable 12 months after date, with interest and attorney's fees, and to foreclose the vendor's lien on the following tracts of land situated in Scurry county, viz.: School land sections 97, 102, and 103, block 97, Houston & Texas Central Railway Company surveys. Appellant, Samples, defended upon two grounds: First, a total want of consideration in the note, in that it had been obtained by false and fraudulent representations as to the title of two of the three sections of land for which the note and $1,000 in cash had been given; second, a subsequent agreement by the terms of which the original sale was canceled, a new deed made to section 103, and the note sued on to be returned to Samples for cancellation. The trial resulted in a judgment in appellee's favor for $1,840.20, with foreclosure of the vendor's lien on said three sections of land, and from this judgment Samples has appealed.

Several errors have been assigned, but, in the view we have taken of the case, we think they may be disposed of in a general way. The following facts seem to be undisputed: Said section 103 was duly sold by the state to appellee as an actual settler August 28, 1899, which sale was in good standing at the time of appellee's conveyance of the section to appellant on June 15, 1901. Section 97 was duly sold by the state to one J. N. Burke as an actual settler on August 28, 1899, at $1.50 per acre. Some time in July, 1900, Burke negotiated a sale of section 97 to appellee, and abandoned the section, making formal conveyance thereof to appellee on the 1st day of January, 1901. Section 102 was awarded to one Carruthers by the Commissioner of the General Land Office, who purchased or purported to purchase as an actual settler upon school land section 88 as his home section. Carruthers at the time, however, was an actual settler upon section 112, in the same block, instead of upon section 88; it not appearing that Carruthers ever abandoned his actual settlement upon section 112, nor how it happened that in making his application for the purchase of section 102 he stated his actual occupancy as being upon section 88, instead of 112. At a date and in manner not clearly shown Carruthers sold section 102 to appellee, and appellee's application to purchase 102 as additional to his home section 103 appears to have been rejected by the Commissioner of the General Land Office, possibly because his application was not accompanied by a written transfer from Carruthers. In the condition of title thus stated, on June 15, 1901, appellee, Wever, conveyed all three of said sections 97, 102, and 103 to appellant; appellant giving therefor $1,000 in cash and executing the note sued upon in this case, which reserved the vendor's lien upon the land. The evidence is conflicting on the issue of whether at the time of this sale appellee represented that he had good title to all of the sections named. But, however this was, soon thereafter it was learned that section 97 was subject to forfeiture because of Burke's said abandonment, and section 102 subject to forfeiture because of Carruther's want of actual settlement on said section 88, and appellant went to appellee, complaining of such defect of title, and appellee, so appellant testifies, but which appellee denied, agreed to adjust the matter by making a separate conveyance to appellant of section 103, of which appellant was then an actual occupant, having received possession at the time of the original sale, and to return the note sued on, he (appellee) to retain the cash paid. The facts show that, in fact, appellee then made a quitclaim deed separately conveying to appellant section 103 for the recited consideration of $700. Appellee testifies, however, that he did not read the deed, and, in effect, that it was executed for appellant's convenience, and not in rescission of the original sale. At all events, the original awards to section 97 and section 102 were later forfeited by the Commissioner of the General Land Office and the lands reawarded

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subsequent agreement, by the terms of which the note sued upon was to be returned to appellant, and instructed the jury, in event of a finding in appellant's favor on that issue, to find for him. No complaint is made of the charge in this respect, but the court further charged that if the award of section 97 to Burke was not canceled until November 11, 1901, after appellant's sale to appellee, appellee had such title at the time of the original sale as was the subject of contract, and that if at the time of the award of 102 to Carruthers he resided upon and occupied section No. 112 as a home, and that the award to section No. 102 had not been canceled by the state until March, 1902, appellee had such right to section 102 at the date he sold the same to appellant as was the subject of contract. These general instructions, which are assigned as error, were followed by a further instruction to the effect that if the jury found that at the date of appellee's conveyance to appellant appellee had such title to sections 102 and 97 as were subject to contract, and that appellant later purchased these sections upon the same terms upon which they were originally sold to Burke and Carruthers, respectively, then the verdict should be for appellee for the amount of the note sued on, principal, interest, and attorney's fees, "less the amount of money which the defendant Samples paid to procure the repurchase of said land, and such other expenses, if any, shown by the evidence which were reasonable and necessary to procure the title to said land."

The verdict is objected to as too indefinite to warrant the judgment, "in that it fails to fix the amount due on the note sued on, and in that it fails to fix the amount to be deducted from the amount found due on the note." The verdict, in so far as necessary to notice, is as follows: "We, the jury, find our verdict in favor of the plaintiff against the defendant, Samples, for the amount of principal, interest, and attorney's fees due on the note sued on, less the amount of $43, with interest on same, and the foreclosure of the vendor's lien on all the lands described in plaintiff's petition." We fail to find reversible error in the respect here pointed out. The appellee's petition fully set forth the note with its date, principal amount, rate of interest, rate of attorney's fees, etc., which can be looked to in aid of the jury's verdict, and, when so considered, certainly was sufficiently definite to fix the amount due on the note. See Darden v. Mathews, 22 Tex. 320; Veck v. Holt, 71 Tex. 715, 9 S. W. 743; James v. Wilson, 7 Tex. 231; Newcomb v. Walton, 41 Tex. 318; Pearce v. Bell, 21 Tex. 688. If, in any event, there was error in respect to the $43 allowed appellant, it is certainly harmless, the note, which consequently carried interest from its date, and therefore more favorable to appellant than he had a right to demand.

The second and third assignments, however, are more serious, and for convenience will here be stated together:

"Second Assignment of Error: The court erred in the second pargraph of the charge in instructing the jury that, because no forfeiture had been declared, 'E. B. Wever at the time of the sale to Samples had such title to said section No. 97 as was a subject of contract.'"

"Third Assignment of Error: The court erred in the third paragraph of the charge in instructing the jury, with reference to section 102, because no forfeiture had been declared, 'that the plaintiff had such title in section 102 at the date that he sold same to defendant, Samples, as was subject to contract.'"

The contentions are that the charges quoted in the assignments injected false issues in the case and were misleading; it being insisted that when Burke ceased to reside upon and improve section 97, which he did before the sale to appellant, such abandonment worked a forfeiture of his purchase without action on the part of the Commissioner of the General Land Office under the act of April 19, 1901 (Laws 1901, p. 294, c. 125), and that the purchase by Carruthers was void ab initio, and that hence as to these two sections there was a total failure of consideration under the decisions of Lamb v. James, 87 Tex. 485, 29 S. W. 647; Rayner Cattle Co. v. Bedford, 91 Tex. 642, 45 S. W. 554; Williams v. Finley, 99 Tex. 468, 90 S. W. 1087; and other cases. These decisions undoubtedly support the proposition that a sale of public lands, the title to which is in the state, will not constitute a consideration for the promise to pay therefor by a vendee of another without title, but it is to be observed here that section 97 was sold to J. N. Burke on February 27, 1900, and section 102 was awarded to Carruthers in June, 1898. The forfeiture clause of the act of April 19, 1901, therefore, contrary to appellant's contention, did not apply, but instead the law of 1895 (Laws 1895, p. 63, c. 47), which required forfeitures of sales of school land for nonresidence to be declared by the commissioner. See Bates v. Bratton, 96 Tex. 280, 72 S. W. 157; O'Keefe v. McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534; Bumpass v. McLendon, 45 Tex. Civ. App. 519, 101 S. W. 491. The title, therefore, to section 97 at the time of appellee's sale to appellant was not in the state—at least not in the state in the sense that it was on the market and subject to purchase by any other person. The statute authorized a sale by Burke, he being the actual

occupant, and the sale to him being in good standing. Appellee, therefore, to whom Burke conveyed, having received possession from Burke, as the evidence tends to show, took such title as would support an action against a mere trespasser, even though cause for forfeiture existed. See Dowding v. Ditmore, 26 Tex. Civ. App. 606, 65 S. W. 486. Appellee's right, if any, to section 102 under his purchase from Carruthers may not appear to be so good. The evidence tends to show, however, that under his purchase from Carruthers, to which appellee testified without objection, appellee took possession together with some improvements thereon, and, if the recitation in Carruthers' application to purchase section 102 that he was an actual occupant of section 88 was a mistake, as appellee insists, then it can hardly be said that the sale to Carruthers was absolutely void. In such event, Carruthers being an actual occupant of section 112, the mistake might have been rectified by the Commissioner of the General Land Office. Ratliff v. Terrell, 97 Tex. 522, 80 S. W. 600. But, whatever else may be said, it seems to us that we must, at least, impute to the verdict of the jury in appellee's favor a finding to the effect that by virtue of appellee's possession of and title to, such as it was, sections 97 and 102, appellant likewise received possession of these sections, and had the same awarded to him as additional to section 103, to which appellant undoubtedly received title from appellee. Indeed, we fail to see how under the undisputed evidence it can be said that the consideration of the note sued upon wholly failed. As before stated, it is undisputed that appellee's conveyance to appellant to section 103 was good. By virtue thereof he received possession, and was placed in position which enabled him as an actual occupant of section 103 to acquire perfect title to sections 97 and 102. The verdict of the jury establishes the fact that appellee made no new agreement; that he did not agree to return the note sued upon; and it is perfectly clear that to the extent at least of the value of section 103 the failure of consideration pleaded was not well taken. It is true that under a plea of a total failure of consideration a partial failure may be shown, but appellant neither pleaded nor offered proof of the relative values of sections 97, 102, and 103. If it was conceded that appellee had no title to either section 97 or section 102, or both, we would be at a loss to determine to what extent, if at all, appellant should be allowed an abatement on the note in controversy. For aught that appears in either pleadings or facts, as established by the verdict of the jury, section 103 with the improvements thereon, which appellant undoubtedly received, may in value have equaled all that appellant ever agreed to give for the whole. It is true that appellant testified that in the new agreement section 103 was valued at $700, but this was denied by appellee, and the verdict of the jury is in his favor. So that, as before stated, in the condition of the pleading and proof, and in view of the undisputed evidence, we fail to see how we can afford appellant any relief.

We conclude that the judgment must be affirmed.

STADTLER v. SOUTH TEXAS LUMBER CO.

(Court of Civil Appeals of Texas. Oct. 16, 1909.)

1. SALES (§ 359*)—ACTION FOR PRICE—EVIDENCE.

In an action for lumber sold and delivered to a contractor for use in the construction of buildings, evidence *held* to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1056; Dec. Dig. § 359.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.

Where, in an action for goods sold, the court on conflicting evidence found that the goods were not to be paid for until a specified time, which was less than two years before action brought, an assignment that the court erred in overruling the plea to the jurisdiction because all sums sued on as due on the account over $500 were barred by the two-year statute of limitations must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

3. EVIDENCE (§ 205*)—ADMISSIONS—INDEBTEDNESS.

In an action on open accounts for goods sold and delivered, evidence that the items of the respective accounts were admitted by defendant as correct, and that he gave orders on third persons for the accounts which orders were not paid, was admissible to establish the correctness of the accounts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 703, 704; Dec. Dig. § 205.*]

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Action by the South Texas Lumber Company against C. H. Stadtler. From a judgment for plaintiff, defendant appeals. Affirmed.

D. T. Garth, for appellant.

BOOKHOUT, J. This is a suit by appellee to recover of appellant on two accounts for lumber alleged to have been sold by appellee to appellant and one Hayes, composing the firm of Stadtler & Hayes. It was alleged that Hayes was insolvent, and the suit was brought solely against Stadtler. Defendant answered by general and special exceptions, denial under oath of the justness of the accounts sued upon, except as to $242.84, and accord and satisfaction. A jury was waived, and the cause was tried by the court, resulting in a judgment for plaintiff for $2,404.66,

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lows: "The lower court erred in rendering judgment for appellee, South Texas Lumber Company, against defendant, C. H. Stadtler, as the judgment is without evidence to support same, is contrary to the law and evidence, and wholly against the great weight and preponderance of the evidence." This assignment is not sustained. The suit was on two open accounts, which were itemized and alleged to be attached to the petition, and designated, respectively, as "Exhibits A and B." These accounts were for lumber sold and delivered by plaintiff to Stadtler & Hayes to be used in the erection of the St. Agnes Academy and the Brazos Hotel at Houston, aggregating $2,404.66. Stadtler & Hayes had contracts for the erection of these buildings, but failed to complete them, and the owners took charge of and completed them. After they failed on their contracts and the respective owners had taken charge of the properties and completed the buildings, the appellant Stadtler and Timmons, the agent of plaintiff, went over the accounts between plaintiff and defendant and agreed upon the amounts due plaintiff for each of the respective jobs, and Stadtler gave orders on the St. Agnes Academy and Brazos Hotel for the lumber sold by plaintiff to defendant for each of these buildings. The evidence in our opinion was sufficient to show that the items set forth in the accounts sued on were correct, and that defendant owes plaintiff the respective amounts therein charged, aggregating the amount of the judgment.

The second assignment of error is as follows: "The lower court erred in overruling defendant C. H. Stadtler's plea to the jurisdiction of the court because the evidence is uncontroverted that the lawful amount in controversy in this case was less than $500, that the evidence showed that all sums sued upon as due by said account over and above $500 was barred by the two-year statute of limitation." This assignment is submitted as a proposition. The defendant plead limitation to a part of the items sued on, alleging that the lumber was to be paid for as sold and delivered. The plaintiff replied that the amounts were not to be paid until the buildings were completed, and that less than two years had elapsed from the completion of the buildings to the time of filing suit. There was evidence both ways on this issue, and the trial judge found in favor of plaintiff, and, there being evidence to support his finding, this assignment is overruled.

It is contended that the trial court erred in admitting certain testimony of the plaintiff's witness A. D. Timmons. While A. D. Timmons was testifying for plaintiff, he was asked the following question: "State whether true," to the answer to which question defendant objected, because the account sued upon by plaintiff was denied by defendant under oath, and could only be proved up by original and best evidence and the evidence offered was only secondary evidence, and was not admissible; (2) that the account as undertaken to be proved up by said witness Timmons was not shown to be compared by said witness to the books of the South Texas Lumber Company nor books of original entry; (3) that the account as attempted to be proved up by said witness had not been compared to the account sued upon, and was not shown that it was in fact a copy of the account sued upon by plaintiff, nor were any of the items therein shown to be the same items as in the account sued upon by plaintiff. The court overruled the objections of the defendant, and the said witness testified as follows: "The account I now examine which is attached to the deposition of H. A. Hurt was sold to Stadtler & Hayes by the South Texas Lumber Company. It was made by Mr. Stadtler to build the St. Agnes Academy and Brazos Hotel. I went over the account with Mr. Stadtler, and he O. K'd. it. He gave me an order on the owners of the buildings for the money due us on the account he and I went over." There was no error in admitting the testimony to show that the items of the respective accounts were admitted by Stadtler as correct, and that he gave an order on each of the owners of the buildings for the accounts then owing. It is not claimed that either of these orders had been paid, and the evidence, as a whole, is sufficient to show that the exhibits attached to the petition are for the same accounts admitted by Stadtler to be correct.

Finding no error in the record, the judgment is affirmed.

ZUMWALT v. TEXAS CENT. R. CO.

(Court of Civil Appeals of Texas. June 26, 1909. Rehearing Denied Oct. 6, 1909.)

1. MASTER AND SERVANT (§ 92*) — MEDICAL TREATMENT—LIABILITY FOR MALPRACTICE.

Where a railroad company undertakes, as a pure charity, to furnish medical treatment to sick or injured employés, the company need only exercise due care in the employment of a prudent physician, and it is not liable beyond this for the negligence of the physician employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.*]

2. MASTER AND SERVANT (§§ 92, 284*)—MEDICAL TREATMENT — LIABILITY FOR MALPRACTICE.

A railroad company retained a part of the wages of its employés for medical treatment at a hospital, and agreed to furnish medical treatment to sick and injured employés. The employés had no control over the fund or in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

employment of physicians. The company employed a chief surgeon to establish a suitable hospital, and to appoint local surgeons, in consideration of receiving such fund. *Held*, that it was for the jury to determine whether the company's hospital department was conducted as a mere charity, and not for profit; and, if the jury found that the hospital department was conducted for profit, the company would be liable for the malpractice of the surgeon employed to treat an injured employé.

[Ed. Note.—For other cases, see Master and Servant. Cent. Dig. § 143; Dec. Dig. §§ 92, 284.*]

Dunklin, J., dissenting in part.

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Action by J. L. Zumwalt against the Texas Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Prendergast & Williams, for appellant. J. A. Kibler and Cureton & Cureton, for appellee.

CONNER, C. J. Appellant sued the appellee company to recover damages for the loss of an eye caused by the alleged negligence of Dr. S. Webb, the chief surgeon of appellee's hospital department at Walnut Springs. The defense was that the department was conducted without profit and as a charity. After the introduction of the evidence the jury were peremptorily charged in appellee's favor, and from the verdict and judgment in accord with such instruction this appeal has been prosecuted.

The action of the court is not defended on the theory that the evidence did not raise the issue of negligence on Dr. Webb's part, so that there remains for our determination the single vital question of whether the court was justified in giving the peremptory instruction to find for appellee, on the ground that the evidence conclusively showed that appellee, in the undertaking of its hospital and treatment of sick and injured employés, was engaged in a charity. Appellee affirms that it was, and that therefore it is liable only for negligence in the employment of the surgeon. This appellant denies. The evidence relevant to the question is to the effect that appellant in April, 1907, had been employed by the appellee company, and was located at Walnut Springs; that as such employé he was engaged as a boiler maker, receiving pay at the rate of 38 cents an hour for the time employed, working 10 hours a day; that the wages of appellee's employés were paid monthly, there being deducted out of each month's wages the sum of 50 cents for medical treatment at the hospital. Appellant thus states it: "Each and every month we were paid by the company our full month's pay, with the exception of 50 cents, which was deducted by the railroad company for medical treatment at the hospital. The money was not turned over to us to pay into the hospital fund, but the company in the first place deducted the 50 cents from our salary or from our pay check, and for this 50 cents per month the company was to give its employés medical treatment in its hospital. Other than this 50 cents per month no further charge was to be made for medical treatment at this hospital or by the company physician." It was otherwise shown that the appellee was a railroad company operating a line of railroad from Waco to Walnut Springs and other places; that appellant was injured and treated by Dr. Webb, who had been employed and was acting in accordance with a written contract, whereby Dr. Webb agreed to act as chief surgeon of the appellee company, and as such to establish and maintain at Walnut Springs "an adequate and suitable hospital," at his own expense, for the treatment of all employés of appellee who were "entitled to hospital privileges" as provided in the contract, and to furnish all instruments, devices, appliances, medicines, and other necessaries "for the proper treatment of all such employés and to treat such employés who were entitled to hospital privileges under this contract, or the rules and regulations" of appellee governing in the matter, in consideration of which appellee agreed "to collect from all of its white employés, except its general officers, the sum of fifty cents per month as hospital fees," and to deliver the same to Dr. Webb as compensation for his services, etc. The contract further provided that Dr. Webb should appoint local surgeons at all important towns on the line of appellee's railway, and that such local surgeons might be called by appellee "to treat in cases of emergency any employé entitled to hospital privileges," and that the fees of such local surgeons for such services should be deducted by appellee from the hospital fund provided for. Appellee also agreed, as part compensation to all local surgeons appointed under the contract, to furnish them annual transportation over its line of road without cost to Dr. Webb. The contract provided that it should "continue in force for a term of five years" from its date, "subject, however, to be terminated by either party hereto by giving written notice of sixty days to the other party of his intention so to do." Mr. Hamilton, appellee's vice president and general manager, testified that the average number of men employed by the company during the year 1906 was about 723, for 1907 about 980; that during the year 1907 there was received from the employés as hospital fees $4,445; that the money is received by the defendant company, and in the course of business deposited in the First National Bank of Waco, and, the payments of the pay roll and the payments to the chief surgeon are made by checks on the First National Bank; that the deduction from the wages of the employés is sent to

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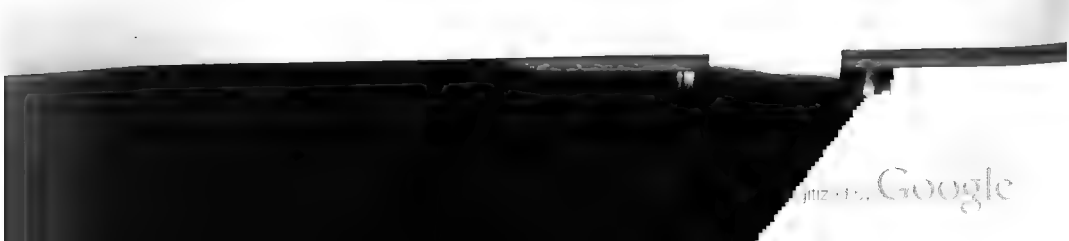
pellee was without negligence in his employment.

Appellee relies, in support of the court's action in giving the peremptory instruction, upon the case of the G., H. & S. A. Ry. Co. v. Hanway (Tex. Civ. App.) 57 S. W. 697, by the Court of Civil Appeals for the Fourth District, and the case of the same railway company against Scott, by the same court, in 44 S. W. 589; but, if these cases are subject to the construction given them by appellee, we feel constrained to differ from them. We feel no inclination to disagree with the great weight of authority to the effect that, where a railroad company or person undertakes as a pure charity to furnish medical treatment to a sick or injured person, the duty of such company or person only requires the exercise of due care in the employment of a prudent and careful physician, and that such company or person cannot be made liable beyond this for negligence on the part of the physician, and the case of Railway v. Scott, 18 Tex. Civ. App. 321, 44 S. W. 589, may be said to fall fairly within that rule. The case of Railway v. Hanway, above cited, however, seems more clearly to support appellee's position, and we do not know that we should undertake to distinguish it from the case now before us, save that it does not very clearly appear from the report of the case that the railway company entered into any undertaking with its employés to treat them for the monthly deductions from their wages, as we think the evidence in the case before us tends to show. But whether in this respect the cases are distinguishable or not, it is to be noted that the Supreme Court was apparently careful not to approve the Hanway Case when called upon to review it, as will appear from the report in 94 Tex. 76, 58 S. W. 724, and we therefore feel less hesitation in following our own views.

In the case of Texas & Pacific Coal Co. v. Connaughten, by this court, reported in 20 Tex. Civ. App. 642, 50 S. W. 173, the company employed and paid physicians, and undertook to treat its employés when sick or injured, deducting, as here, 50 cents per month from each employé's wages. The employés, as here, had no interest in the fund thus raised, nor in its distribution, and it was held that the engagement of the company was not a charity, and that it was liable for the negligence of its physician. It is true that it was there shown that after the payment of all hospital expenses there was a balance of several thousand dollars arising from the deduction made from the wages of the employés, which went to the credit of the company, and in this respect that case is distinguishable from the Hanway Case, as clearly pointed out by the Supreme Court in the wages of employés by the terms of the contract with Dr. Webb are to be applied in the payment for the services of Dr. Webb as chief surgeon, and of local surgeons, it seems to us that it is a misnomer to designate as a pure charity the conduct of appellee's hospital department. The evidence certainly tends to show that the hospital was conducted as a distinct department of appellee's business as a carrier; that it distinctly agreed with the employés, including appellant, for the sum of 50 cents per month to be deducted out of the wages due such employés, to furnish them medical and surgical treatment in case of sickness or injury during employment. It does not appear that the employés were permitted to have any control whatever over the fund thus raised, or in the employment of the chief surgeon or other attendants, nor did they have voice otherwise in the distribution of the fund so contributed. While it appeared that during the life of the present contract with Dr. Webb all proceeds of the fund are to be devoted to the payment of his services and the services of his assistants, neither the contract nor appellee's general plan in the management of the department furnishes any evidence that it is thus always to be continued, or that, in event of a future contract whereby the company should be able to secure the services of a sufficient number of physicians and surgeons to conduct its hospital department for a less sum than should be derived from deductions made from the wages of its employés, the excess should belong to the employés rather than to the appellee company. By the terms of the agreement between the company and its employés, as the evidence tends to show, the deductions were at all events to be made and at all events went to the credit of appellee's general fund in the bank, and in the very contract made with Dr. Webb appellee recognizes that certain of its employés, who include appellant, were "entitled" to treatment. If so entitled by virtue of an "understanding" or agreement on appellee's part with its said employés in consideration of the monthly deductions from their wages, as appellant's evidence at least tends to show, then appellee cannot escape from its obligation to the employés to furnish suitable medical and surgical services, in event of their sickness or injury, whatever might be the state of the accumulated fund.

The fact that it does not appear, as in the Connaughten Case, that there is under the contract with Dr. Webb a distinct pecuniary profit in the conduct of the hospital department should not, it seems to us, be conclusive. As an incident to its main business it may be deemed to be otherwise beneficial and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profitable. We would feel a hesitancy in saying that as so incidental to its business as a railway carrier it is outside of the scope of its corporate powers to maintain a hospital department. Aside from charitable purposes, for which railway companies are not organized, it may be said to be in the pecuniary interest of such a company to maintain a state of health and capability among its employés as instrumentalities of its business. Why should it be said that this is in no sense of profit to appellee? True, perhaps, no direct pecuniary benefit is received, but the same may be said to be the case in the conduct of its machine shops and other departments, where its insensate physical properties are repaired when injured. At least it seems to us that it was for the jury and not the court, to say from all the circumstances, including its general plan, whether appellee's hospital department was conducted as a mere charity and not for profit. While we are aware that authorities may be found of a contrary tendency, among which may be noted the case of U. P. Ry. Co. v. Artist, by the Circuit Court of the United States for the District of Wyoming, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, we are nevertheless not entirely without authority in general support of the views we have expressed. Thus, in the case of Sawdey v. Spokane Falls & N. Ry. Co., by the Supreme Court of Washington, reported in 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880, where a hospital fund was provided, as here, from monthly deductions of the wages of the railway employés, it was said that if the respondent (the railway company) "did contract for a consideration, to treat its employés for any injury they might receive while in its employ, it is liable for the malpractice of the surgeon employed to treat the appellant; and this question, as we say, should have been submitted to the jury." We approve the quotation as applicable here; and, while it has been said that charity "covereth a multitude of sins," we do not think this mantle should be used to hide the wrongs, if any, of which appellant complains, if in fact committed under the circumstances and with agreement as alleged by him. See, also, Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, by the Supreme Court of Utah, 32 Utah, 46, 88 Pac. 691, 8 L. R. A. (N. S.) 161; Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

We conclude that the court erred in giving the peremptory instruction, and that the judgment should be reversed, and the cause remanded, for trial in accordance with the views herein expressed.

DUNKLIN, J., dissents in part.

STALEY & BARNSDALL v. DERDEN.

(Court of Civil Appeals of Texas. Oct. 16, 1909.)

1. COURTS (§ 163*)—COUNTY COURT—JURISDICTION—INJUNCTION AFFECTING INTEREST IN LAND.

Plaintiff conveyed to defendant the oil and other mineral estate in certain land, with the right to drill wells, lay pipes, etc., for the term of 25 years, and as long thereafter as oil, etc., should be found in paying quantities; it being stipulated that the grant was not intended as a franchise merely, but as a conveyance of the property for the purpose stated. As part of the consideration, defendant agreed to give plaintiff one-eighth of the oil produced, the same to be delivered to plaintiff in the pipe line, free of charge. *Held*, that the contract was a conveyance of an interest in land, so that the county court had no jurisdiction to compel defendant by injunction to handle oil, to be thereafter severed from the land, in a given way, and to deliver one-eighth of it to plaintiff each month.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410–411; Dec. Dig. § 163.*]

2. COURTS (§ 169*)—COUNTY COURT—JURISDICTION — INJUNCTION — AMOUNT IN CONTROVERSY.

The constitutional provision limiting the jurisdiction of the county court to suits where the amount in controversy exceeds $200 and does not exceed $1,000 applies to writs of injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–416; Dec. Dig. § 169.*]

3. COURTS (§ 170*)—COUNTY COURT—JURISDICTION — AMOUNT IN CONTROVERSY — INJUNCTION—PLEADING.

To confer jurisdiction on the county court to enforce a contract whereby defendant, in consideration of a grant of the oil in certain land, agreed to give plaintiff a portion of the oil to be produced, it was necessary to allege the value of such oil to be within the limits prescribed by the constitutional provision regulating the jurisdicton of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.*]

Appeal from Navarro County Court; J. M. Blanding, Judge.

Action by W. L. Derden against Staley & Barnsdall. From an order granting an injunction, defendants appeal. Reversed, and injunction dismissed.

Richard Mays, for appellants. W. J. McKie and E. J. Gibson, for appellee.

RAINEY, C. J. This is an appeal from an order entered by the county judge of Navarro county, granted in chambers, restraining appellants from using and converting the one-eighth part of the product from the Derden premises, the same being described in plaintiff's petition, until further order of the court, and requiring them, pending the litigation, to file monthly statements, showing the amount of the oil production from said premises, and also requiring appellants "to connect and impound a full one-eighth of the oil production each month into a single tank located on the premises, that is free of leaks, and that will hold said oil, and such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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tank as is now connected with the pipe line of the Navarro Refining Company, which tank the defendant is directed to point out to the plaintiff, W. L. Derden, and thus the defendant is required to deliver into actual possession of the said Derden each month hereafter, but including the month of March, his full one-eighth of the production from the Derden premises, after which said defendant is directed to permit said Derden either to remove said one-eighth of the production from the premises, either in wagons, or by having it run into the pipe line of the Navarro Refining Company, and this without interference on the part of said defendants." A plea to the jurisdiction of the court was overruled, and the injunction, as stated, was granted. The suit of appellee was to recover of Staley the sum of $600, the value of oil converted, and for damages done him by the violation of certain provisions of an oil contract entered into with said Staley, the sum total sued for being less than $1,000. Barnsdall, after the making of said contract, became a partner of Staley, and made himself a party defendant to said suit.

The terms of the contract between Derden and Staley, bearing upon the matters in controversy, stated in appellants' brief, are as follows: Derden conveyed to Staley the petroleum oil, and other mineral estate, in and to several tracts of land contiguously situated, aggregating about 1,200 acres. It was stipulated in the conveyance that Derden did "bargain, sell, alien and convey unto the said W. H. Staley, all of the oil, gas, coal and other minerals in and under said premises, together with the right of ingress and egress at all times, for the purpose of drilling wells for oil, gas and other minerals, and for operating for minerals, and to lay all pipes he shall deem it necessary and proper for the conduct of operations, for the preparation of work thereon, and for the production on said premises, and for the drilling, mining and transporting of oil, gas and other minerals on and from the said premises." Said conveyance also vested in Staley "the right of way over and across the said described lands, to be used in connection with the operation and production of the said lands and of such other premises and holdings of the said party of the second part (Staley), for the purpose of laying, operating and maintaining gas, oil and air lines, pipes, and he (Staley) shall have the right to erect along the said right of way, and at such other place or places, as he shall deem proper and convenient to erect, construct and maintain a telephone or telegraph line or lines, and for that purpose, to plant a proper and sufficient line of poles in and upon the said land, and shall also have and maintain such pumping plants for all oil, air and water, or either, as he (Staley) shall deem necessary and proper, and shall at all times have the right to enter upon said premises for the purpose of maintaining and repairing any and all of the said lines and other structures and appliances which he may place on said premises. The said W. H. Staley to have and to hold the premises, rights and privileges herein granted to him, his heirs and assigns, for the term of twenty-five years, from the date hereof, and as long thereafter as oil, gas and other minerals are found on said premises in paying or profitable quantities." It is further provided that: "In laying and placing the said oil, gas and air lines over, across and upon the said premises, I (Staley) agree to bury the same a sufficient depth below the surface, so as that the same shall in no way interfere with the cultivation and agricultural use of the said lands. That whatever injury, if any, shall occur to any growing crop on said premises or pasture lands by the placing and erecting of derricks and machinery, and laying of pipes, and from the operation of drilling of wells on said premises, and on account of laying the oil, gas and air lines, are to be settled for by me (Staley) when the damage shall be estimated and agreed upon by and between the parties at interest (Staley and Derden) and if no agreement can be reached between me and such parties, or party, the arbitrators shall be selected, one each by the parties hereto, and they shall select the third, if necessary, and their estimate shall be paid by me."

It was expressly stipulated that "the grant made by the terms of this contract is not intended as a franchise merely, but shall be construed and held to be a conveyance of the said property described for the purpose hereinbefore mentioned, and both parties herein so intend." As a part of the consideration for said conveyance, Staley agreed to give Derden a royalty of one-eighth of the oil produced. The conveyance recites that: "I (Derden) reserving, however, to myself, the party of the first part, the one-eighth part of all the oil produced and saved upon and from said premises, the same to be delivered to, and received by me (Derden) in the pipe line, to my credit, free of charge." As a further consideration Staley agreed to begin operation for drilling of a well, within 60 days, and to drill as many as six wells each year successively, "until there shall be at least as many as one gas well for each 25 acres of said land, which shall prove to be gas territory, or, if oil wells are developed, then as many as one well to each 10 acres of said land, which may prove to be oil territory; but whether gas or oil, or both shall be found, I shall drill as many as six wells each succeeding year until the area of said territory shall be exhausted, or the premises shall be found or become unprofitable to prospect or operate, or be by me abandoned as to any unexplored part thereof." In consideration for the pipe line, pump station and right of way easement upon said land, Staley agreed to pay Derden the sum of $100 cash and $25 annually in advance, "so long

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as I (Staley) may use the said lines. In the event gas wells were developed with a sufficient supply of gas to justify the use of the same through the pipe line to be used off the premises, then I (Staley) agree to pay to the party of the first part (Derden) $100 per year, for each well from which gas is so used, the payments to be made quarterly, that is, $25 in advance every three months for each well so used. If gas is found on the premises Derden shall have the right, at his own expense and risk, to connect his residence in the city of Corsicana, with the gas main owned by me (Staley) and to use gas for domestic purposes free of charge or cost"—if coal shall be found in paying quantities, Staley to pay Derden four cents for each ton mined and marketed, payments to be made to Derden quarterly. Staley, when requested by Derden, shall bury all pipes used in the operation and production of oil and gas from the said wells; Staley "to have the use, free of charge, of any water, oil or gas, produced on the said lands for the purpose of drilling and operating on said premises in the production and securing of oil, gas and other minerals."

On the question of jurisdiction appellants contend that: "Appellee's cause of action, upon which the injunction issued, was that for specific performance of covenants contained in a conveyance with reference to land. Jurisdiction of the county judge to grant the writ cannot be acquired because of anticipation that oil might thereafter be severed from the realty and become personalty. On the date the writ was issued the oil was in place, and had not been severed, and was therefore a part of the realty, and had not become personalty. All of the severed oil had been disposed of on that date. The decree upon which the writ issued does not deal with oil then severed, but operates wholly upon oil to be thereafter severed in the future." There is no question as to the contract between Derden and Staley being a conveyance of an interest in land, and the general laws regarding real estate apply to its enforcement. Benavides v. Hunt, 79 Tex. 383, 15 S. W. 396; Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169. The county court has no jurisdiction to grant an injunction which affects an interest and estate in land. Scripture v. Kent, 1 W. & W., § 1057; Gascamp v. Drews, 2 W. & W., § 95. The injunction required the defendants thereafter to "impound a full one-eighth of all the oil production each month into a single tank located on the premises, that is free of leaks, and that will hold said oil, and such tank as is connected with the pipe line of the Navarro Refining Company, which tank the defendant is directed to point out to the plaintiff, W. L. Derden, and thus the defendant is required to deliver into actual possession of the said Derden each month hereafter * * * his full one-eighth of the production from the Derden premises, after which said defendant is directed to permit said Derden either to remove said one-eighth of the production from the premises, either in wagons, or by having it run into the pipe line of the Navarro Refining Company, and this without interference on the part of said defendant." This order directs the oil thereafter produced to be handled in a given way, and therein the court has assumed jurisdiction of oil that is real estate, and has not been severed from the land, thus attempting to enforce a contract relating to land, and which order affected the rights to an interest or estate in land. At the time the writ was granted it was not shown that any oil that had been severed from the land was on hand, and the court had no right to assume jurisdiction over the oil that was expected to be thereafter produced.

The appellant contends that "the jurisdiction of the county court to issue writs of injunction is limited. Before the county judge can exercise the power, it must affirmatively appear from the allegations of the plaintiff's petition that the value of the subject-matter, to protect which the intervention of the court's equity powers is sought, is more than $200, and does not exceed $1,000." The jurisdiction of the county court is limited by the Constitution to suits where the amount in controversy exceeds $200 and does not exceed $1,000. "The same rule is applicable to writs of injunction, which can only be issued by the county court when the matter in controversy exceeds $200 and does not exceed $1,000 in value." De Witt County v. Wischkemper, 95 Tex. 435, 67 S. W. 882. The original petition alleged, in substance, a breach of the contract, a conversion of oil to the value of $600, and damages to the premises and crops in the sum of $350. An amendment to the petition was filed, and, in addition to the averments in the original, set forth the violation of the contract by Staley, in converting the oil, refusal to pay or account for the oil produced, etc., and averred as follows: " 'In view of wrongs and injuries inflicted upon him by defendant, and in view of defendant's determination to continue to convert and appropriate all of the products of said wells to his own use and benefit, and in view of the facts and circumstances attendant upon the situation as above set out and explained, that plaintiff has no remedy at law, which is sufficient, adequate, and complete to protect him against the further wrongdoing and illegal and unlawful conduct of defendant towards this plaintiff, and that plaintiff is therefore entitled to invoke the equitable powers of this court to restrain and enjoin the defendant from the further illegal and unlawful conversion and appropriation of the daily output of said wells, and is entitled to receive relief by the issuance of a temporary writ of injunction of the nature hereinafter more fully demand-

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ed.' Plaintiff prayed for an injunction restraining Staley 'from using, appropriating, or converting any of the oil saved or produced upon said premises by said nine wells, which are not connected with said pipe line, viz., the pipe line of Navarro Refining Company, and that upon final hearing the injunction granted be perpetuated.'" The contract was to run for 25 years from its date in 1906, and the petition sought to enforce it as to the production of oil. There was no allegation as to the value of the oil to be produced. In order to confer jurisdiction on the county court to enforce the contract as to the oil thereafter produced, it was necessary to allege the value of such oil to be within the limits prescribed by the Constitution.

We are of the opinion that the county court exceeded its jurisdiction in granting said injunction, and the judgment relating thereto is reversed, and the injunction dismissed.

WOOLEY v. CORLEY.

(Court of Civil Appeals of Texas. Oct. 21, 1909. Rehearing Denied Nov. 6, 1909.)

1. JUSTICES OF THE PEACE (§ 79*)—PLEADINGS—WHAT CONSTITUTES—CITATION.

The citation in a justice's court is issued in advance of the appearance of the parties for pleading, and is not a part of the pleadings, and may or may not state plaintiff's cause of action, or may state a demand different from that pleaded in the petition, so that the county court could not look to the justice's citation to determine what was plaintiff's cause of action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 250; Dec. Dig. § 79.*]

2. JUSTICES OF THE PEACE (§ 174*)—APPEAL—AMENDMENT—NEW CAUSE OF ACTION.

Plaintiff's demand in a justice's court, as shown by the citation, was for $165 damages, for conversion by defendant, acting through his agents, of 55 trees of the value of $3 each, and the amended petition filed in the county court alleged that defendant, together with another, converted the same number of trees, made them into cross-ties, and laid the damage at 35 cents per tie, aggregating $154. *Held*, that the amendment did not state a cause of action different from that shown by the citation, not having changed defendant's liability.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 670; Dec. Dig. § 174.*]

3. JUSTICES OF THE PEACE (§ 174*)—APPEAL—AMENDMENT TO CONFORM TO PROOF.

Plaintiff, in an action in a justice's court, could amend his petition on appeal to the county court so as to conform it to the details of the evidence developed at trial, without violating the rule against pleading a new cause of action by amendment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 685; Dec. Dig. § 174.*]

Appeal from Red River County Court; J. M. Deaver, Judge.

Action by J. H. Wooley against Sam Corley. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

Chambers & Black, for appellant. Kennedy & Robbins, for appellee.

HODGES, J. On the 12th day of November, 1907, the appellant instituted this suit in the justice court of precinct No. 1 of Red River county against the appellee for damages for the conversion of 55 trees valued at $165. The case was tried on the 30th of December following, resulting in a judgment in favor of the defendant in the suit. The appellant, plaintiff below, appealed to the county court. The pleadings of the parties in the justice court were oral, and it appears from the record that the justice of the peace failed to make any notation upon his docket of what the pleadings were, as required by the statute. After being transferred to the county court, the cause was continued for one or more terms, and the parties filed written pleadings. The case was called for trial upon a pleading styled "The Second Amended Original Petition," in which the appellant thus states his cause of action: "That heretofore, to wit, at divers and sundry dates between the 1st day of September, A. D. 1907, and the 1st day of December, 1907, the defendant, Dr. Sam Corley, acting jointly with John Anderson, who resides near Clarksville, Tex., entered upon plaintiff's said land without plaintiff's consent or knowledge, and against his wishes, and cut therefrom 55 trees standing on said land, and which were the property of this plaintiff, and made them into 440 railroad cross-ties of the value of 35 cents each, and willfully and wrongfully converted said cross-ties to their own use and benefit, to plaintiff's great damage $154." And said second amended petition went further, and pleaded in the alternative as follows: "Plaintiff further alleges that in the event that the proof shows that the defendant, Dr. Sam Corley, was not a party to the original cutting of the trees and the making of the ties, and was in no way connected therewith, nevertheless he is still liable to plaintiff in the amount of damages above specified, for the following good and sufficient reason, to wit: That after said trees were cut the defendant, acting jointly with John Anderson, wrongfully converted said ties and sold them to John E. Barry and appropriated the proceeds to his own use and benefit, and that the defendant willfully and wrongfully converted the 440 ties in the way and manner aforesaid to plaintiff's great damage $154." In reply to this the appellee filed his second amended answer, in which appears the following objection, styled "An Exception to the Plaintiff's Petition": "On October 28, 1908, the defendant filed his second amended answer in reply to plaintiff's second amended petition, which said answer consisted of special demurrers, general denial, and special answer, none of which need be noticed here

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except his first special exception, which in substance was as follows: 'The defendant was sued in the justice of the peace court, and from a judgment rendered therein this case is now pending in this court on appeal, for an individual and separate tort alleged by plaintiff to have been committed by defendant, acting by and through his servants and employés, in entering upon plaintiff's land, and without his authority, consent, or knowledge, and cutting and causing to be cut therefrom 55 trees of the value of $3 per tree, and plaintiff's second amended petition sets up a joint tort with one John Anderson, committed at a different time, and a joint conversion of different property and of different cause of action, with new and different parties. It cannot and should not be considered by this court, but should be stricken out, and defendant discharged with his cost.'" This objection was treated by the court as an exception to the amended petition, was sustained, and the plaintiff's suit dismissed. Of this action the appellant complains in his first assignment of error.

The record contains no statement of facts, and the situation attending the action of the court and the evidence upon which he relied are presented in a bill of exception made out by the county judge, the parties being unable to agree upon a bill. This bill of exception shows that the cause was called for trial on the 28th of October, 1908, and was heard upon the defendant's exceptions to the plaintiff's amended petition. The court, after hearing the same and argument of counsel, sustained the exception; and, the plaintiff declining to amend, the case was dismissed. The bill, after reciting many things unnecessary here to mention, states that there was no evidence offered, or attempted to be offered, showing what the pleadings of the plaintiff in the justice court were, and that the court looked to the citation issued out of the justice court for the purpose of ascertaining what those pleadings were. From an inspection of the citation he concluded and held that the plaintiff's amended original petition alleges a conversion by joint tort-feasors, where as in the justice court a single and separate tort only was charged against the defendant in the suit. Upon this ground he sustained the exception as before stated. It is evident that the trial judge treated the citation issued out of the justice court as the plaintiff's pleading in that court. Article 358 of the statute (Sayles' Ann. Civ. St. 1897) provides that either party may plead any new matter in the county or district court which was not presented in the court below, but no new cause of action shall be set up by the plaintiff, etc. It is also provided by article 1599 that when a claim or demand is lodged with the justice of the peace for suit, it shall be his duty to issue forthwith a writ or citation to the defendant, and in addition to other requirements the citation must state the nature of the plaintiff's demand. When a proper objection is made to the petition of the plaintiff for violating the inhibition against the setting up of a new cause of action in the county or district court, this presents an issue of fact which must be determined in the same manner as are other issues of fact involved in the case, and not a question of law which the court may dispose of upon an exception without evidence. The citation is not a part of the pleading of the plaintiff in the justice court. Kerr v. Murrell, 1 White & W. Civ. Cas. Ct. App. § 890. It is a writ which the justice of the peace is required to issue, and with which the plaintiff presumably has no connection. It is issued in advance of the appearance of the parties for trial and pleading. It may or may not contain a statement of the cause of action as pleaded by the plaintiff. Certainly the law will not presume that it does. Upon the appearance of the defendant the plaintiff may state a cause of action entirely different from the nature of the demand embodied in the citation. If the defendant answers the demand as pleaded, he certainly is in no attitude thereafter to complain that the cause of action is not the same as that stated in the citation. We think the assignment of error should be sustained; that the court acted entirely without evidence to justify the ruling made.

But, assuming that the court's action was based upon sufficient evidence; that he had a right to consult the citation as the proper presentation of the nature of the plaintiff's cause of action in the justice court—we do not think it follows that he was justified in holding that the allegations contained in the petition in the county court were so different from the nature of the demand as stated in the citation as to constitute a new cause of action. The nature of the demand as stated in the citation was that the defendant in the suit, acting through his agents, converted 55 trees and made them into cross-ties, and places his damages at $3 per tree, total $165. In the amended petition filed in the county court he charges that the defendant, acting in conjunction with another, converted the same number of trees and made them into cross-ties, and lays the damages at 35 cents per tie, aggregating the sum of $154. The conduct for which the plaintiff in the suit sought redress was the wrongful conversion of the timber by the defendant. The fact that in one court he is charged with having committed the wrongs through agents, and in another court with having committed the same wrongs jointly with another party, does not change the nature of the trespass complained of. It neither increases nor diminishes the legal liability of the wrongdoer, nor does it charge him with a different tort. The defendant would be just as guilty, and his liability would be just as great, if he converted the timber in conjunction with another as if he

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had done it alone. The plaintiff in the suit had the right, if he felt disposed, to amend his pleading in the county court so as to conform his allegations to the details of evidence which the facts might develop upon the trial of the cause. If in doing so he states those details somewhat differently from the manner in which they were pleaded in the justice court, even though it amount to new matter, he does not thereby set up a new cause of action or violate the statute.

The judgment of the county court is therefore reversed, and the cause remanded.

DURHAM v. GARRETT et al.

(Court of Civil Appeals of Texas. Oct. 13, 1909.)

APPEAL AND ERROR (§ 719*)—ASSIGNMENT OF ERRORS.

Sayles' Ann. Civ. St. 1897, art. 1018, requires that an appellant or plaintiff in error shall file with the clerk of the lower court an assignment of errors. Supreme Court Rule 29 (67 S. W. xv) provides that the transcript must contain a copy of the assignment of errors filed in accordance with the rules of the district court. *Held*, that where the record fails to show any assignment of error filed with the lower court, and no error is apparent of record, the judgment below will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982; Dec. Dig. § 719.*]

Appeal from Hamilton County Court; A. E. Scott, Judge.

Action by J. J. Durham against E. A. Garrett and others. There was a judgment by default as against certain defendants and a directed judgment for another defendant, and plaintiff appeals. Affirmed.

B. N. Carter and R. Q. Murphree, for appellant. J. L. Lewis and Eidson & Eidson, for appellees.

RICE, J. This suit was brought by appellant against E. A. Garrett, J. W. Garrett, and W. W. Ledbetter to recover on two certain promissory notes, alleged to have been executed by E. A. Garrett in part payment for a stock of merchandise sold by appellant to said E. A. Garrett. Recovery is sought against Ledbetter solely upon the ground that he, subsequent to the execution of said notes, became a partner of said Garrett's in conducting said mercantile business. On trial, the Garretts having made default, judgment was entered in appellant's favor as against them for the amount of said notes. Ledbetter answered by general demurrer, general denial, and a special plea under oath, denying that he was a partner in said firm. Upon trial, after hearing all the facts, the court peremptorily instructed a verdict in favor of appellee Ledbetter, and verdict and judgment were rendered in accordance therewith, from which judgment this appeal is taken.

Although appellant has duly filed his brief complaining of several rulings of the court, amongst others the peremptory instruction in behalf of appellee Ledbetter, yet the transcript contains no assignment of errors as required by the statute and the rules, for which reason appellee objects to a consideration thereof by this court, and asks the affirmance of the judgment. Article 1018, Sayles' Ann. Civ. St. 1897, requires that the appellant or plaintiff in error shall, in all cases, file with the clerk of the court below an assignment of errors, distinctly specifying the grounds on which he relies before he takes the transcript of the record from the clerk's office, and that all errors not distinctly specified are waived. Rule 29 for the government of this court (67 S. W. xv) provides that before a case is properly prepared for submission the transcript must contain a copy of the assignment of errors filed in accordance with the rules of the district court.

Since the record fails to show that any assignment of error was filed in the lower court, and no error is apparent of record in the proceedings, there is no question before us for consideration, and it is our duty to affirm the judgment of the court below, and it is so ordered. See Bopp v. Ganzer (Tex. Civ. App.) 26 S. W. 444; Lewis v. Steiner, 84 Tex. 364, 19 S. W. 516.

Judgment affirmed.

ALLEN et al. v. HUTCHESON.†

(Court of Civil Appeals of Texas. Oct. 13, 1909. Rehearing Denied Nov. 3, 1909.)

CORPORATIONS (§ 317*)—MISCONDUCT OF OFFICERS—FRAUD.

A decree in a former suit to recover shares of stock of a corporation required the corporation to issue the certificates to A. impressed with trusts in favor of other parties, and to pay him dividends accruing thereon, and directed that all dividends and the earnings thereafter accruing should be prorated among A. and his cestui que trusts until the trusts were satisfied, when title to the stock should become absolute in A. A. prorated the dividends due at the time of the decree and one other dividend among the beneficiaries, and subsequently he and other persons claiming to be directors of the corporation, but who had not been legally elected, expended the earnings of the company for their salaries and in buying land in which they were interested and in boring an oil well without authority; A. knowing what was being done if he did not actively participate therein. *Held*, that their acts, if not actually fraudulent, constituted constructive fraud, so as to make them all liable to one of A.'s cestui que trusts for his pro rata share of the money earned by the corporation

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† Writ of error denied by Supreme Court.

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[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1407; Dec. Dig. § 317.*]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Action by J. C. Hutcheson against A. C. Allen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Masterson, Atkinson & Masterson, for plaintiffs in error. Hutcheson, Campbell & Hutcheson, for defendant in error.

NEILL, J. On August 15, 1903, the J. J. Tobin Oil Company was incorporated under the laws of this state, L. E. Daniell, J. J. Tobin, M. M. Jackson, Stephen Jackson, and M. A. Robertson being the original incorporators, and who were declared in the articles of incorporation to be the directors for the first year. The powers of the corporation, as declared in its charter, were "for the establishment of an oil company for the purpose of producing, selling, and marketing petroleum, with authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, and petroleum; also the right to erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of said association." The charter also provided that the place of business of the association should be in the town of Sour Lake, Hardin county, Tex., and that it should be its principal office, that its business should be transacted by five directors, who should be elected by the stockholders annually, on the first Tuesday in July, and that its capital stock should be $40,000, to be divided into 400 shares of $100 each. After its organization 100 shares of the capital stock, being one-half of the stock issued, became involved in litigation. In the suit A. C. Allen was plaintiff, and the Oil Company, L. E. Daniell, and others, among whom was J. C. Hutcheson, were defendants, or adverse parties. The cause just referred to was styled "A. C. Allen v. L. E. Daniell et al.," was numbered 3,439, and brought in the Sixty-First judicial district. On May 7, 1904, an agreed judgment was entered in that suit, the substance of which is as follows: A. C. Allen recovered against all defendants, all interveners, and parties to the suit the entire 100 shares of stock sued for (the certificates for the stock being specifically described in the judgment), charged with certain trusts impressed upon the stock by the judgment or decree, which are as follows: $15,450 for the benefit of A. C. Allen; $4,000 for the benefit of the First National Bank of Sour Lake, Tex., $7,000 for the benefit of Geo. W. Armstrong, and $10,750 for the benefit of J. C. Hutcheson. The judgment further orders that the oil company shall issue certificates for said 100 shares of stock to A. C. Allen in such way as he may retofore accrued on said 100 shares of stock, and dividends that may thereafter accrue thereon; that the money in the registry of the court of the Fifty-Fifth judicial district and in the First National Bank of Houston, Tex., be prorated among Allen, the First National Bank of Sour Lake, Geo. W. Armstrong, and J. C. Hutcheson, according to the several amounts allowed them by the decree; that all dividends and earnings which might thereafter accrue upon the 100 shares of stock should be prorated among A. C. Allen, the First National Bank of Sour Lake, Geo. W. Armstrong, and J. C. Hutcheson, proportionate to their several amounts until they shall have been fully paid and discharged, and that then the title to said 100 shares of stock should become absolute in A. C. Allen, and not before; that the oil company should at once put on the market and dispose of the oil then on hand, and deposit the money realized therefrom, applicable to said 100 shares of stock affected by the decree, in court for distribution as ordered.

At the time the agreed judgment was entered the company had four wells on its 10-acre tract at Sour Lake, one of which at that time was not productive, and had been abandoned prior to that time. One other produced very little, and after that time it did not pay to operate it. The other two produced large quantities of oil, and these conditions prevailed on the 1st of January following. The wells were operated under lease at that time, and the company received two-thirds of their gross production, amounting to about $5,000 per month, free of any expense. There were no outstanding debts against the company at that time. Prior to the date of the agreed decree the Tobin Oil Company was, by an order of the court, required to pay into the registry of the court, or into the First National Bank, the dividends due on the 100 shares of stock in controversy, which amounted to the sum of $16,039.15. The company obeyed the order by depositing that amount in said bank, and that money was on hand when the agreed judgment referred to was entered. There seems to have been no oil on hand at that time. On December 19, 1904, the books of the oil company showed a balance to its credit of $18,355.04, out of which a dividend of $11,550 was declared, one-half of which was payable to A. C. Allen on the 100 shares of stock held by him under the trust impressed by the decree aforementioned. At its close of business, on January 28, 1905, the books of the Tobin Oil Company had on hand $8,649.93, and there was also then due it from the Guffy Company for oil about $200. The $16,039.15, placed in the bank under the direction of the court, and one-half of the dividend of $11,550 declared by the company, was paid to Allen, and prorated

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Hutcheson receiving his pro rata share thereof. This was all the money he ever received from Allen, or any one else, upon the 100 shares of stock held by him under the decree charged with the trust thereby impressed thereon. L. F. Benckenstein acted as the president of the J. J. Tobin Oil Company on November 7, 1904, claiming to have been elected on August 13th of that year. At the same time T. H. Bass claims to have been elected secretary and treasurer of the company, and held said position from then until the suit was brought.

When this suit was instituted, L. F. Benckenstein, Mally Eastham, T. H. Bass, A. C. Allen, and John Lovejoy were acting as the directors of the oil company. Benckenstein and Eastham claim to have been elected members of the board of directors of the company on August 1, 1904, and T. H. Bass on August 19, 1904, and A. C. Allen and John Lovejoy on January 28, 1905. But it appears from the minutes of the proceedings on those dates that each of them was elected by the board of directors, instead of by the stockholders of the company, as provided by its charter. On the same day 99 of the shares of the stock covered by the decree above referred to were issued to A. C. Allen, and the other share to John Lovejoy, and registered on the books of the company in their names. On January 28, 1905, the sum of $1,250 apiece was voted to L. F. Benckenstein and T. H. Bass for salaries from August to February past, also resolutions were passed to buy one-tenth of an acre of land at Humble and 10 acres near Dayton, and to pay therefor $2,500. All these resolutions were passed by the votes of Benckenstein, Bass, and Lovejoy, though Allen was present, but not voting. Both Lovejoy and Allen were owners in common with S. Brown of the land so purchased, Allen having bought the land subsequent to May 7, 1904, for a much less price than it was sold to the Tobin Oil Company, and afterwards made Brown a deed to it. The money thus voted to Benckenstein and Bass by themselves was received by them, and the price of the land by Brown and his co-owners. The purported resolutions, thus appropriating this money of the company, were passed at a meeting purporting to be of its board of directors, held in the city of Beaumont, Jefferson county, instead of at its office and place of business, at Sour Lake, Hardin county, Tex. After this the remainder of the money, $7,399.61, was spent in boring a well for oil on the one-tenth of an acre at Humble purchased under and by virtue of said resolutions. No oil was obtained by this expenditure, which was made at the instance of Benckenstein, Bass, Allen, and Lovejoy, without the consent of its board of directors, and without Hutcheson's knowledge, and against his protest, made to Allen as soon as he heard of it. In the meantime the wells of the company penses of operating them. Upon the expenditure of the $7,399.61 in the fruitless effort to obtain oil at Humble, the company's resources were entirely consumed and it ceased to do business, and, in effect, became a bankrupt and ceased to pay its annual corporation tax from that time.

On these undisputed facts, substantially alleged in his second amended original petition, J. C. Hutcheson brought suit against A. C. Allen, T. H. Bass, L. Benckenstein, and the J. J. Tobin Oil Company, to recover of them the balance due him, as charged by the decree of May 7, 1904, on the 100 shares of stock held in trust by Allen for its payment. Allen denied any breach of the trust imposed upon him by the decree, or failure of his duty as a member of the board of directors to plaintiff, or of any participation in the acts of the other members of the board, which resulted in plaintiff's loss of the money claimed by him under said decree of the district court on the 100 shares of stock charged in his (Allen's) hands with its payment. Allen also filed a cross-bill interpleading other parties. The defendants Bass and Benckenstein interposed general and special exceptions to the plaintiff's petition, pleaded a general denial, and specially that each of them were duly elected members of the board of directors of the company; that they acquired in due course of business, in open market, for a valuable consideration, 100 shares of the capital stock of the oil company, which they then owned, that since their election as members of said board, each, in conjunction with its other members, has legitimately applied the income and profits of the company to the prosecution of its business and purposes, as authorized by its charter, and that neither of them has in any manner conspired with Allen, or any other person, to divert the assets of the corporation to any other purpose than its legitimate business, or in any manner sought to divert from plaintiff any dividends accruing to him or any other person, but, on the contrary, has faithfully applied to those entitled thereto all dividends which have accrued upon stock of said company.

The case was tried before a jury, whom the court instructed as follows: "The uncontroverted evidence in this case shows that, on the 28th day of January, 1905, the Tobin Oil Company had on hand $8,642.93, and that thereafter it invested in the boring of wells, in the Humble oil field, $7,399.61. You are further instructed that the resolution of the board of directors of the Tobin Oil Company, of January 28, 1905, voting to Bass and Benckenstein $2,500, and to S. Brown $2,500, for the use of Brown, Lovejoy, and Allen on a purchase of land, was illegal and void for the reason that the directors voting said amounts were personally interested therein; and you are further instructed that the pur-

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chase of the one-quarter of an acre of land in the Humble oil field, upon which they afterwards bored for oil, for $2,500, was made without any resolution or authority of the board of directors so to do; and you are further instructed that the subsequent expenditure of $7,399.61, in boring the oil well in the Humble field, was done without any authority of the board of directors of said company, and that the amount of money so expended was a complete loss. These dealings being without authority, without reference to whether they constituted actual fraud, did, at least, constitute constructive fraud, and that the defendants are liable therefor to the plaintiff for any injury occasioned him thereby; and you are further instructed that the plaintiff's proportion of the amount so expended amounted to $2,293. You are therefore instructed to return a verdict in favor of the plaintiff, against all of the defendants, for $2,293. You are further instructed to find against the defendant A. C. Allen on his cross-action against the defendants Bass and Benckenstein." A verdict was returned in accordance with the charge, and upon it the court rendered judgment in favor of J. C. Hutcheson against A. C. Allen, T. H. Bass, and L. F. Benckenstein and the J. J. Tobin Oil Company for the sum of $2,293, together with interest from its date at the rate of 6 per cent. per annum. From the judgment all the parties against whom it was rendered sued out this writ of error; but it is prosecuted by A. C. Allen alone, none other of the parties having filed a brief in this court.

It is complained that the court erred in giving the peremptory charge above quoted. If the foregoing undisputed facts do not conclusively show a fraudulent conspiracy on the part of defendants to deprive the plaintiff of the balance of his money with which the decree charged the 100 shares of stock, and imposed upon the J. J. Tobin Oil Company the duty of paying out of the dividends and earnings to Allen, to be paid by him as directed, they at least establish such constructive fraud as make them all liable to plaintiff for his pro rata share of the money earned by the corporation, and wrongfully appropriated, against the express commands of the decree, for back salaries, bits of land, and frittered away in proudly boring for oil in Humble fields. If it should be conceded that men can constitute themselves members of a board of directors of a corporation at so-called meetings of such a board, held in a city other than where its charter fixes its general office and place of business, and contrary to the law and the express provisions of its charter, which provide its directors shall be elected by its stockholders at a stockholders' meeting, it cannot be said that its directors can at such a meeting legally appropriate to themselves money of the company by their own vote, or that a director can in such manner make a sale in which he is interested to the corporation. A fortiori can this not be done where the money is earnings of the corporation, expressly appropriated by a decree of the court against the corporation, of which its board of directors are bound to take notice, to the payment of a debt due another party, as is indisputably shown by the evidence in this case. Nor can the one, on whom the duty of receiving the money from the corporation and distributing it among those entitled to it was imposed by the decree, stand idly by with folded arms while he sees the money thus appropriated, diverted from the purposes for which it was decreed, squandered and frittered away by the wrongful actions of those claiming to be the board of directors and managers of the corporation, and say, "I wash my hands of the whole matter." But when he sees, knows, or has reasonable grounds to believe that the money is being, or is about to be, so diverted, it is his bounden duty to invoke the power of the court which imposed the trust upon him, to prevent the dissipation of the fund, and have it paid him in order that he may discharge his duties as trustee to the beneficiaries. The undisputed facts in this case conclusively show that, if he did not actively participate in the diversion and misappropriation of the money, the defendant Allen knew, or had good reason to know, that it was being done, and that he failed to take any steps whatever to protect the beneficiaries of his trust, one of whom was the plaintiff in this case.

The judgment, as is shown by the facts, is so clearly just in the eye of equity that we deem it unnecessary to say more.

Affirmed.

STOCKARD v. REID.†

(Court of Civil Appeals of Texas. Oct. 16, 1909. Rehearing Denied Oct. 23, 1909.)

1. STATUTES (§ 5*)—ENACTMENT—SPECIAL SESSION—PROCLAMATION OF GOVERNOR.

Const. art. 3, § 40, prohibits legislation at a special session of the Legislature, except upon subjects designated in the Governor's proclamation calling such session, or presented to the session by the Governor. The proclamation of the Governor convening the Thirtieth Legislature in special session stated, as a purpose of the session, the enactment of laws simplifying the procedure in both civil and criminal trials. *Held*, that the purpose so stated was sufficient to authorize the enactment of Act May 14, 1907 (Laws 1907, p. 447, c. 8), relating to contests of local option elections.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. CONSTITUTIONAL LAW (§ 295*)—DUE PROCESS OF LAW—LOCAL OPTION ELECTION.

Act May 14, 1907 (Laws 1907, p. 447, c. 8), making a local option election and result declared by the commissioners' court binding unless contested within the time prescribed, and making the result of a contest binding though a person may not have been a party thereto, is not

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† Writ of error denied by Supreme Court.

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a denial of due process of law in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Dec. Dig. § 295.*]

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Action by Thomas T. Reid against J. T. Stockard. Judgment for plaintiff, and defendant appeals. Affirmed.

L. R. Calloway, R. S. Neblett, and W. W. Ballew, for appellant. W. J. Weavor, for appellee.

TALBOT, J. This suit was instituted by Thomas T. Reid, appellee, against J. T. Stockard, appellant, to enjoin and restrain him from engaging in the business of a retail liquor dealer in Navarro county, and from selling intoxicating liquor in violation of the local option law in Navarro county, and to restrain and enjoin him from storing intoxicating liquor in a certain house belonging to appellee and rented by appellant, and from using such house for that purpose.

The petition alleged, in substance, that the plaintiff, at the time of the presentation of his petition, was the owner, in fee simple, of the house and building situated on the corner of Tenth street and East Third avenue, in the city of Corsicana, Navarro county, Tex., and has owned said property for many years prior thereto; that the defendant, Stockard, had, before and at the time of the filing of this suit, the possession, management, and control of said property, and had stored and was keeping intoxicating liquors in said house and building for the purpose of selling the same; that said defendant has threatened, and is about, to use said house and building for the purpose of selling intoxicating liquors therein, and of engaging in and pursuing the occupation and business of a liquor dealer in said county in violation of law; that on the 15th day of June, 1907, an election was held by the qualified voters of Navarro county, Tex., under and by the authority of an order of the commissioners' court of said county, to determine whether the sale of intoxicating liquors in said county should be prohibited by law, and that a majority of the legal votes cast in said election were for prohibition, and that said election resulted in absolutely prohibiting the sale of intoxicating liquors within said county; that the result of said election has been duly declared and published in the manner and form, and for the length of time, required by law, and that the local option law is in full force and effect in said county, by reason of the result of said election; that, if the defendant is permitted to engage in and pursue the business of selling intoxicating liquors within the house and building above described, he will not only thereby create and promote a public nuisance, but the private interest and property of plaintiff will be materially injured; that plaintiff has no adequate remedy at law, but under chapters 77 and 81, pp. 156, 166, of the General Laws of the state of Texas, enacted by the Thirtieth Legislature, this plaintiff is entitled to a writ of injunction restraining defendant from using, or threatening to use, such house, premises, and building, with the intent to store, keep, sell, or dispense intoxicating liquors, or for the purpose of engaging in the business of the sale of intoxicating liquors therein in violation of law. The defendant answered, admitting that the election to determine whether or not the sale of intoxicating liquors should be prohibited in Navarro county was held as charged in plaintiff's petition, but averred that said election resulted against prohibition; that the commissioners' court of Navarro county, Tex., in obedience to article 3390 of the Revised Civil Statutes of 1895, met in special session on the 26th of June, 1907, for the purpose of counting the votes and declaring the result of said election, and declared the result of said election to be against prohibition, and published the result thereof as required by law; that thereafter, and within 30 days from the date the result of said election was declared to be against prohibition, L. E. McCormick and other citizens of Navarro county, Tex., filed a contest of said election in the district court of Navarro county, against C. L. Jester, county judge, and C. L. Knox, county attorney, of Navarro county, Tex., and by amended petition under Acts 1907, p. 447, c. 8, entitled, "Election Contest," relating to contests arising under the local option law; that when said contest was heard in the district court of Navarro county, and upon final hearing, the district judge sustained the election, and declared that a majority of the legal voters of Navarro county, Tex., in said election held on the 15th of June, 1907, had cast their votes against prohibition; that thereafter, and within the time provided by law, the contestants appealed said case to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Tex.; that said Court of Civil Appeals, upon hearing, reversed and rendered the decision of the district court of Navarro county, and held that a majority of the votes cast at said election were in favor of prohibiting the sale of intoxicating liquors in said Navarro county, and said Court of Civil Appeals reversed and rendered said cause, and ordered the commissioners' court of Navarro county to declare the result of said election to be in favor of prohibition; that the judgment of the Court of Civil Appeals was void, because under article 3397 said court had no power to reverse and render an election contest, and could only declare the election void and order a new election; that said election was void because notices thereof were in fact never posted by the clerk

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of the county court of Navarro county, nor under his authority, save one, neither for the time nor in the manner required by law; that notices at most were posted only by a volunteer, and that his act was repudiated and denied by the county clerk. Defendant further alleged that the act of the Thirtieth Legislature, approved by the Governor on the 14th of May, 1907, relating to contests of local option elections, which undertakes to prohibit appellant from inquiring into the validity of the local option election, is unconstitutional and void: (1) Because the subject of legislation therein was passed at a special session, and was never submitted to the Legislature by proclamation of the Governor convening the special session, nor in any message from the Governor; (2) said act of the Legislature is contrary to the fourteenth amendment of the Constitution of the United States, in that it undertakes to deprive appellant of the right to show that the prohibition law is not in force in Navarro county, and denies him his day in court, and deprives him of the rights, privileges, and immunities guaranteed by the Constitution of the United States by article 5 and said fourteenth amendment. The district judge in chambers heard the said petition, answer, and agreed statement of facts, and granted a temporary writ of injunction, holding that the act of 1907 was valid and constitutional, and that the election held on June 15, 1907, was valid and binding upon appellant, and that the result of the same cannot now be questioned, and that appellant can show no defense which would make said election void.

The first proposition presented and urged in this court is that the court below erred in holding the act of the Thirtieth Legislature, passed at its special session and approved May 14, 1907, relating to the contest of local option elections, valid, constitutional, and binding, for that said act is contrary to section 40, art. 3, of the Constitution of this state, because it relates to the contest of prohibition elections, and not to the procedure in a civil or criminal trial, and such legislation was not designated in the proclamation of the Governor convening said special session, nor presented by the Governor in any message to the Legislature. The act in question was passed at the special session of the Legislature convened by the Governor on the 13th day of April, 1907. The first paragraph or clause of the proclamation relating to the purposes for which this special session was called is as follows: "To enact adequate laws simplifying the procedure in both civil and criminal trials in the courts of this state, and for such reforms as may be practicable in our jury system." On the 16th day of April, 1907, the Governor sent to the Legislature a message, in which he said: "Upon the subject of simplifying the procedure in both civil and criminal trials, and also upon the needed reforms in our jury system, I again call your attention to the importance of these reforms, both to the counties and state and to the people who bear the burden of a system almost bewildering in its meshwork of technical absurdities. I cannot too strongly urge upon the Legislature the necessity for the reforms demanded." The foregoing excerpt from the Governor's proclamation and message contains, in our opinion, all that relates to the subject of the legislation under consideration, and it is agreed by counsel that, if nothing in the proclamation or message of the Governor embraces or includes the subject-matter of said act, then the same is unconstitutional and void under section 40, art. 3, of the Constitution of Texas. Section 40, art. 3, of the Constitution is as follows: "When the Legislature shall be convened in a special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

It has been held by the courts of this state, and of other states of high authority, in effect, that an act passed by the Legislature and signed by the presiding officers of each house, as provided by the Constitution, and which has been approved by the Governor, affords conclusive evidence that it was passed according to the Constitution, and that it is not competent for the courts to go behind the attestation and look to the journals of the houses, or receive other evidence to show the contrary. Williams v. Taylor, 83 Tex. 667, 19 S. W. 156; Railway Co. v. Hearne, 32 Tex. 547; Blessing v. Galveston, 42 Tex. 641; Usener v. State, 8 Tex. App. 177; Ex parte Tipton, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326; Railroad Co. v. Governor, 23 Mo. 353, 66 Am. Dec. 673; State v. Young, 32 N. J. Law, 29. In these cases, however, it was sought to defeat the law because not passed according to the procedure and method prescribed by the Constitution, and not because of a want of jurisdiction or authority of the Legislature to pass the law. In the case of Baldwin v. State, 21 Tex. App. 591, 3 S. W. 109, it was contended that the act of the Seventeenth Legislature (Laws 1882, p. 18, c. 17) levying an occupation tax upon persons engaged in the sale of the Illustrated Police News, Police Gazette, etc., passed at its special session, was unconstitutional on the ground that the Governor did not, by his proclamation convening said Legislature in special session, nor by any other means, designate or present it to said Legislature as a subject for legislation. This question was left undetermined by the Court of Appeals for the reason that the court was of the opinion that the proclamation of the Governor convening the Legislature conferred authority to enact the law. It was said, however, that, whether a court, even in such a case, could go behind a statute which was valid upon its face and inquire into the

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particular authority by virtue of which it was enacted was a question well worthy of serious consideration. But in the case of Manor Casino et al v. State (Tex. Civ. App.) 34 S. W. 769, the act called in question was passed at a special session of the Legislature, and was upon a subject not embraced in either the proclamation of the Governor or any message sent to it during its session, and it was held by the Court of Civil Appeals for the Third District that section 40, art. 3, of the Constitution was clearly mandatory and a limitation upon the authority of the Legislature in a special session to pass laws, and that an act passed violative thereof was void. That case was sought to be distinguished from the case of Williams v. Taylor, supra, and other cases to the same effect, upon the ground that it involved the want of jurisdiction and authority in the Legislature to act at all, whereas the manner of the exercise of authority after jurisdiction had attached was involved in the Williams-Taylor Case, and cases of similar import. As in the case of Baldwin v. State, supra, we find it unnecessary to a proper disposition of this case to decide the question, and shall leave it undetermined until a case arises in which it becomes necessary to do so. We are of the opinion that the language, "To enact adequate laws simplifying the procedure in both civil and criminal trials in the courts of this state," contained in the proclamation of the Governor convening the Thirtieth Legislature in special session, was sufficient, under section 40, art. 3, of the Constitution, to confer authority upon the Legislature to enact the law attacked in this proceeding.

Our attention has been called by counsel for appellant to the decisions of this state holding that a proceeding to contest an election is not a "suit, complaint, or plea" within the meaning of the Constitution, and an ingenious argument is made to the effect that the language of the proclamation under consideration should be construed in the light of those decisions, and, when so construed, it must be held that said language does not embrace the subject dealt with by the Legislature in the act in question, and that said act is condemned and prohibited by the section of the Constitution quoted. We do not concur in this view of the matter. In the cases in which it was held that the contest of an election was not a suit, complaint, or plea in the sense in which those words are used in the Constitution, the court was considering the question, whether or not the district court had jurisdiction to hear and determine such a contest, and such holding seems to have been predicated upon that provision of the Constitution conferring jurisdiction upon the district court of suits, complaints, or pleas wherein the matter in controversy is valued at, or amounts to, $500, exclusive of interest, and the fact that, as the primary and direct purpose and effect of the contest of an election was simply to determine the legality and fairness of the election, and involved a political or extrajudicial question to be regulated under the Constitution by the political authority of the state, such contest lacked the necessary elements of a suit, complaint, or plea within the meaning of the Constitution, and did not come within "either the law or equity jurisdiction of any of our courts." But by article 3397 of our statute, passed in view of the constitutional amendment, a proceeding to contest an election is cognizable before the district court, and rules of procedure governing its trial are provided; and, while it may not by reason of said statute have lost its distinctive character as a political proceeding, yet it must be admitted, we think, that the trial thereof is a "civil trial," within the contemplation and meaning of the language as used in the Governor's proclamation. The procedure, as provided by the statute referred to, and the conduct of the trial in such a case, with the exception that a jury is not allowed, if not identically the same, is very similar to that governing the trials of ordinary civil suits in this state, and the language used by the Governor comprehends within its meaning all civil trials. That it was so understood and construed by the Legislature and Governor is evidenced by the passage of the act by the Legislature and its approval by the Governor. The fact that the Governor called the attention of the Legislature in his message more specifically to other reforms suggested in the procedure in civil and criminal trials than to the subject-matter of said act does not, in our opinion, militate against the views we have expressed. It was not necessary for the Governor in his proclamation or message to suggest the specific legislation desired, and this fact seems to have been recognized by him, for he expressly stated in his message that he did not intend, by recommending certain legislation upon subjects specifically named in his message, to suggest a limit to the remedies which the Legislature might in their wisdom devise. In Railroad Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360, it is said: "If the act itself is within the scope of legislative authority, it must stand;" that "nothing but a clear violation of the Constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." We are of opinion that a fair, reasonable, and correct construction of the proclamation authorized the legislation in question.

The second proposition contended for by appellant is that the act of the Thirtieth Legislature under consideration violates the fourteenth amendment to the Constitution of the United States and article 5 of said Constitution, in that it undertakes to make an election held and the result declared by the commissioners' court binding upon ap-

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pellant, unless he contests the same, and makes the contest of an election, to which he was not a party, binding upon him; that any statute which undertakes to condemn a man and deprive him of life, liberty, or property without a hearing violates the law of the land and the Constitution of the United States in the particulars pointed out. It has been often held that the prohibition of the sale of intoxicating liquors within any prescribed territory of this state is clearly the lawful exercise of its police powers; that a statute, if all persons brought under its influence are treated alike under the same condition, does not, within the contemplation of the provisions of the Constitution of the United States referred to in appellant's proposition, deprive such persons of their property or property rights without due course of law. If the local option election held in Navarro county June 15, 1907, resulted in favor of prohibition, and we have held that it did (McCormick v. Jester [Tex. Civ. App.] 115 S. W. 278), and the commissioners' court of that county had at the time of the institution of this suit so declared, as required by the statute, which is not here denied, appellant could not thereafter legally engage in the sale of intoxicating liquors in that county. That the prohibition of such sales did not have the effect to imperil any pecuniary right of appellant or deprive him of any property is well settled. Therefore, the effect of declaring that the election had carried in favor of local option having deprived appellant of no pecuniary right, the question became as to him merely a political one, and the act of the Thirtieth Legislature, making an election held and the result declared by the commissioners' court binding unless contested within the time prescribed, and making the result of a contest of such election to which appellant was not a party binding upon him, is in no wise contrary to, or violative of, the fifth or fourteenth amendments to the Constitution of the United States. The local option election involved in this case was contested by L. E. McCormick and nine other citizens of Navarro county. The contestees were C. L. Jester and C. L. Knox, county judge and county attorney, respectively, of said county. The contest was originally filed July 26, 1907, and on the 31st day of August, 1907, and within 60 days from the taking effect of the act of the Thirtieth Legislature, passed May 14, 1907, the same contestants filed a second suit against the same parties, contesting the election under said act on substantially the same grounds set up in the first suit. These suits were afterwards, upon motion of the contestants, consolidated. A trial of the consolidated suits in the district court resulted in a judgment for the contestees, to the effect that said election resulted against prohibition. Upon appeal to this court it was held that the election resulted in favor of prohibition by a majority of 11 votes, and the judgment of the district court was reversed, and judgment rendered in favor of contestants. McCormick v. Jester (Tex. Civ. App.) 115 S. W. 278. This judgment was certified to the commissioners' court of Navarro county, and in obedience thereto that court declared the result of the local option election to be in favor of prohibition. The appellant's answer filed in this suit is, in effect, an attempt on his part to again contest the legality of said election. This we hold he cannot do. The result of the contest instituted by McCormick against Jester and others by the provisions of the act of 1907, which act we have held to be constitutional, finally settled all questions relating to the validity of said election, and is binding upon appellant.

In Hardy v. State, 52 Tex. Cr. R. 420, 107 S. W. 547, the appellant was charged with violating the local option law. Upon the trial in the lower court, more than 60 days after the taking effect of the act of the Thirtieth Legislature, passed May 14, 1907, he objected to the introduction of the order of election because of certain irregularities therein, and offered to prove that the county clerk did not at any time post any notices of the local option election. The objections to the order of election were overruled, and the testimony offered to show that the notices of election had not been posted by the clerk excluded. On appeal it was held by the Court of Criminal Appeals of this state that the action of the trial court was correct. In discussing the matter, Judge Brooks, speaking for the court, says: "Said act (passed May 14, 1907) provides that contests of elections that had theretofore been had must be contested within 60 days from the taking effect of said law, and not otherwise. The matters complained of would be mere irregularities at best, and this act makes valid and noncontestable anything pertaining to irregularities in the adoption of the local option law. The act itself provides that we shall conclusively presume that said election as held was valid in all things and binding upon all courts. We accordingly hold that said act is valid, and applies to all local option elections, and it clearly applies in this case."

What has been said disposes of the controlling questions in the case, and other questions raised need not be considered.

The judgment of the court below is affirmed.

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Ex parte BRADY. (Court of Criminal Appeals of Texas. Oct. 13, 1909.) Original application by J. H. Brady for writ of habeas corpus. Relator remanded to custody. B. E. Moore, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is an original application for writ of habeas corpus, involving the constitutionality of Acts 30th Leg. p. 278, c. 144, known as the "Wild Game Law." Relator was arrested for offering for sale and selling wild ducks after same had been killed in Texas. This same question was reviewed by the court in Ex parte Blardone, 115 S. W. 838, where we held the law constitutional. We see no reason for changing our decision. Relator is accordingly remanded to custody.

BROWN v. STATE. (Court of Criminal Appeals of Texas. Dec. 9, 1908. Rehearings Denied June 23, and Oct. 13, 1909.) Appeal from Tarrant County Court; R. F. Milam, Judge. Bud Brown was convicted of violating the election law, and he appeals. Affirmed. McCart, Bowlin & McCart and McLean & Scott, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the Terrell election law by advancing money to pay poll tax, and his punishment assessed at a fine of $300 and 60 days' imprisonment in the county jail. The question involved in this record was passed upon by us in the case of Solon v. State (decided at the recent Austin term of this court) 114 S. W. 849. We have had no reason to change our opinion there expressed as to the law of that case. Upon the authority of that case, the judgment herein is in all things affirmed.

DODD v. STATE. (Court of Criminal Appeals of Texas. June 23, 1909. Rehearing Denied Oct. 6, 1909.) Appeal from Hill County Court; Horton B. Porter, Judge. M. E. Dodd was convicted of crime, and appeals. Affirmed. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant prosecutes this appeal, but fails to send up a statement of the facts or any bills of exceptions. There being no error manifest of record, or presented, that would require a reversal, the judgment is affirmed.

DODD v. STATE. (Court of Criminal Appeals of Texas. June 23, 1909. Rehearing Denied Oct. 6, 1909.) Appeal from Hill County Court; Horton B. Porter, Judge. M. E. Dodd was convicted of an offense, and he appeals. Affirmed. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without a statement of facts or bills of exceptions. There is nothing, therefore, for this court to review. As the record presents the appeal, the judgment will be affirmed; and it is so ordered.

BROWN v. WALLIS. (Court of Civil Appeals of Texas. May 22, 1909. Rehearing Denied June 19, 1909.) Appeal from District Court, Wichita County; A. H. Carrigan, Judge. Action by J. S. Wallis against R. J. Brown. From a judgment for plaintiff, defendant appeals. Affirmed. Wolfe, Hare & Maxey and L. H. Mathis, for appellant. R. E. Taylor, W. T. Allen, J. H. Barwise, Jr., and J. T. Montgomery, for appellee.

SPEER, J. This is the second appeal in this case (see 101 S. W. 1068, 1070), and the third growing out of the same regrettable occurrence. In the companion case of King v. Brown, 93 S. W. 1017, the facts are fully stated, and in that opinion this court indicated its views of the law governing. Later, in a certified question in this case on the former appeal (101 S. W. 1068), these views were somewhat amplified; but the Supreme Court has differed from us on the law points involved (King v. Brown, 100 Tex. 109, 94 S. W. 328), and it is in accordance with the views of that court, rather than our own, that the present appeal must be decided. The facts developed on the last trial of this case are substantially the same as in the King-Brown Case, and the questions of law raised are for the most part disposed of in that opinion. No useful purpose would be served in discussing them in detail. We believe the last trial was had in accordance with the opinion of the Supreme Court, and the judgment is therefore affirmed.

LIVELY et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS. (Court of Civil Appeals of Texas. Oct. 30, 1909.) Appeal from District Court, Dallas County; T. F. Nash, Judge. Action by the Missouri, Kansas & Texas Railway Company of Texas against Hiram F. Lively and others. There was a judgment for plaintiff, and defendants appeal. Affirmed, on decision of Supreme Court (120 S. W. 852) in answer to certified questions. R. V. Davidson, Atty. Gen., Claud Pollard, Asst. Atty. Gen., Dwight L. Lewelling, Co. Atty., and J. Lawson Goggans, for appellants. Coke, Miller & Coke, Thomas & Rhea, and A. N. McKnight, for appellee.

TALBOT, J. This suit was instituted by the appellee, Missouri, Kansas & Texas Railway Company of Texas, against Hiram F. Lively, as county judge, and the county commissioners of Dallas county, Tex., constituting the board of equalization of said county, and Henry Jones, tax collector of Dallas county, to set aside alleged acts of said board of equalization and to enjoin the said tax collector from collecting or attempting to collect a portion of the tax upon the intangible assets of appellee. The petition alleged, in substance, that the state tax board, acting under an act of the Thirtieth Legislature, being chapter 17, p. 469, of the General Laws of the First Called Session, fixed, determined, and declared the value of its intangible assets at the full and fair market value thereof, and more than the full and fair market value of the same, and so apportioned to said county said assets, and that the tax assessor of said county has placed, set down, and listed said intangible assets upon the tax rolls of said county at the value fixed, determined, declared, and certified by the state tax board, and that the commissioners' court of said county, sitting as a board of equalization, approved the roll of the tax assessor, which contained the intangible assets of appellee as apportioned to said county at the full and fair market value thereof, etc.; that the property of taxpayers generally throughout the county for the year 1907, and for several years prior thereto, had been assessed, equalized, and placed on the tax rolls for taxing purposes at

not exceeding 50 per cent. of its value; that said undervaluation of property generally was by virtue of a fixed and established custom, usage, design, and intention; that the act of the board of equalization in so equalizing, or purporting to equalize, the property to said county, and in approving the lists of the tax assessor containing the intangible assets at full value, was intentional, arbitrary, and fraudulent, and plaintiff was by said act unjustly, arbitrarily, and illegally discriminated against; that the plaintiff tendered to the defendant Henry W. Jones, tax collector of Dallas county, the sum of $4,382.08 in full of all state and county taxes justly due by it in said county for the year 1907 on its tangible property therein, which said sum was received and accepted by the said tax collector in satisfaction of said taxes on plaintiff's tangible property; that appellee tendered to the tax collector of Dallas county, Tex., the taxes upon its intangible assets for said county at 50 per cent. of the value of same, which amount was accepted by the tax collector and receipted for on account, and the injunction sought was to restrain the collection of the remaining taxes upon 50 per cent. of the value of said intangible assets. The petition does not allege that the plaintiff sought before the board of equalization of Dallas county to have the value of its intangible assets reduced, or to have advanced the valuation of all other property in the county to its true value in money; nor does said petition show any excuse for plaintiff's failure to do so. The appellants demurred generally and specially to appellee's petition, and the demurrers were overruled. The case was submitted to the court without a jury upon an agreed statement of facts, from which it appears that property generally in the county had been assessed and equalized for taxation at a general average of 66⅔ per cent. of its value, and that the other material allegations of plaintiff's petition were established. The appellee having tendered in court the difference between the 50 per cent. and the 66⅔ per cent., the court rendered judgment for the appellee, setting aside the act of the board of equalization of Dallas county in equalizing the value of the intangible assets of appellee at full value, and restraining the tax collector of the county from collecting or attempting to collect from the appellee any tax upon its intangible assets in excess of the 66⅔ per cent. tendered. From this judgment, appellants appealed.

The controlling questions raised by the assignments of error are: "Is the act of the Thirtieth Legislature, passed at its called session in 1907, approved May 16, 1907 (Laws 1907, p. 469), and amending an act of the Twenty-Ninth Legislature, approved April 17, 1905, providing for the taxing of the intangible assets of certain corporations, and especially sections 16 and 17 of said first-mentioned act, repugnant to or violative of article 8, § 18, of the Constitution of Texas?" "Does the act of the Legislature in question violate article 8, § 1, of the Constitution of Texas, that taxation shall be equal and uniform?" "The plaintiff having failed to seek relief from the board of equalization, by asking for a reduction in the valuation of its intangible assets or for an increase in the valuation placed on other property generally, can it maintain an action to enjoin the collection of a portion of the tax upon its intangible assets? Or, in other words, did appellee have a full, complete, and adequate remedy at law?" "Was plaintiff entitled to the relief sought and obtained by the judgment of the district court, under the facts stated, on the ground that its intangible assets had been assessed at their full and fair market value or real value, while other property of Dallas county was generally assessed by the tax assessor of said county and approved by the commissioners' court of said county, sitting as a board of equalization, at less than its full value, in disobedience to the statute?" "If the state tax board fixed, determined, and assessed plaintiff's intangible assets at their full and fair market value, or real value, and so certified such valuation to the tax assessor of Dallas county, and other property generally in Dallas county was intentionally and in pursuance of a fixed and established custom and usage valued and assessed for taxation by the local assessing officers of said county at less than its full and fair market value, or real value, was appellee entitled to maintain this suit and obtain the relief sought?" "Under the facts stated, did the trial court err in rendering judgment in favor of the plaintiff perpetuating the injunction in this case and granting to it the relief sought?" The foregoing questions were by this court certified to the Supreme Court for adjudication, and the first two were by the Supreme Court answered in the negative, and the others favorable to appellee's contention; the court holding that, under the facts of the case, the trial court did not err in rendering judgment in favor of plaintiff, perpetuating the injunction theretofore granted and awarding to the plaintiff the relief sought by it. A full statement of the facts upon which a decision of the questions turned and an able and exhaustive discussion of them will be found in the opinion of the Supreme Court, published in 120 S. W. 852, and a repetition of the facts here and a further discussion of the said questions by this court would be superfluous. It is sufficient to say that we adopt the conclusions of the Supreme Court, as shown in the opinion to which we have referred. This requires an affirmance of the judgment of the court below; and it is accordingly so ordered. Affirmed.

CACHE VALLEY LUMBER CO. v. DURHAM. (Supreme Court of Arkansas. Sept. 14, 1908.) Appeal from Circuit Court, Lawrence County; Joseph W. Phillips, Judge.

PER CURIAM. Settled, and cause dismissed.

CASEY et al. v. WILLIS. (Supreme Court of Arkansas. Sept. 21, 1908.) Appeal from Poinsett Chancery Court; Edward D. Robertson, Chancellor.

PER CURIAM. Appeal dismissed, for want of service.

CHICAGO, R. I. & P. RY. CO. v. JACO et al. (Supreme Court of Arkansas. May 25, 1908.) Appeal from Circuit Court, Perry County; Edward W. Winfield, Judge.

PER CURIAM. Settled, and appeal dismissed.

CHOCTAW, O. & G. R. CO. v. DUKE. (Supreme Court of Arkansas. May 11, 1908.) Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

PER CURIAM. Settled, and cause dismissed by consent.

CINCINNATI COOPERAGE CO. v. McCALL. (Supreme Court of Arkansas. Oct. 5, 1908.) Appeal from Circuit Court, Searcy County; Brice B. Hudgins, Judge.

PER CURIAM. Affirmed as a delay case.

DAVIS et al. v. YOPP et al. (Supreme Court of Arkansas. Sept. 14, 1908.) Appeal from Prairie Chancery Court; John M. Elliott, Chancellor.

PER CURIAM. Compromised, and appeal dismissed.

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DODGE v. PLUNKETT et al. (Supreme Court of Arkansas. June 29, 1908.) Appeal from Circuit Court, Pulaski County; Jesse C. Hart, Judge.

PER CURIAM. Appeal dismissed for noncompliance with rule 9.

FAISST et al. v. FOURCHE RIVER LUMBER CO. (Supreme Court of Arkansas. Oct. 19, 1908.) Appeal from Perry Chancery Court; Jeremiah G. Wallace, Chancellor.

PER CURIAM. Affirmed by consent.

In re F. W. MAURICE et al. (Supreme Court of Arkansas. Oct. 26, 1908.) Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

PER CURIAM. Compromised, and judgment for amount agreed upon.

GIDEON v. STATE. (Supreme Court of Arkansas. May 25, 1908.) Appeal from Circuit Court, Izard County; J. W. Meeks, Judge.

PER CURIAM. Appeal dismissed, on motion of the Attorney General.

HUDSPETH v. STATE. (Supreme Court of Arkansas. May 25, 1908.) Appeal from Circuit Court, Pike County; James S. Steel, Judge.

PER CURIAM. Appellant pardoned, and appeal dismissed on his motion.

INTERSTATE MEDICAL ASS'N OF ARKANSAS v. ELLIOTT. (Supreme Court of Arkansas. May 4, 1908.) Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

PER CURIAM. Appeal dismissed for noncompliance with rule 9.

J. F. HASTY & SONS v. HOWARD COUNTY. (Supreme Court of Arkansas. Oct. 26, 1908.) Appeal from Circuit Court, Howard County; James S. Steel, Judge.

PER CURIAM. Reversed, on confession of error.

OWOSSO MFG. CO. v. GANN. (Supreme Court of Arkansas. Oct. 5, 1908.) Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

PER CURIAM. Compromised and settled, and cause dismissed.

Ex parte PERRINE. (Supreme Court of Arkansas. Oct. 12, 1908.) Appeal from Circuit Court, Union County.

PER CURIAM. Action of lower court denying bail reversed, and petitioner allowed to give bail.

REYNOLDS, DAVIS & CO. v. SINGLETERRY. (Supreme Court of Arkansas. Oct. 5, 1908.) Appeal from Circuit Court, Scott County; Jeptha H. Evans, Judge.

PER CURIAM. Affirmed, for noncompliance with rule 9.

ST. LOUIS, I. M. & S. RY. CO. v. LESSER-GOLDMAN COTTON CO. (Supreme Court of Arkansas. May 11, 1908.) Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

PER CURIAM. Settled, and judgment by consent.

ST. LOUIS, I. M. & S. RY. CO. v. PRESCOTT HARDWARE CO. et al. (Supreme Court of Arkansas. May 11, 1908.) Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

PER CURIAM. Settled, and judgment by consent.

ST. LOUIS, I. M. & S. RY. CO. v. STATE. (Supreme Court of Arkansas. May 25, 1908.) Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

PER CURIAM. Appeal dismissed, on motion of the Attorney General. See, also, 86 Ark. 518, 112 S. W. 150.

ST. LOUIS, I. M. & S. RY. CO. v. WALLER et al. (Supreme Court of Arkansas. May 11, 1908.) Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

PER CURIAM. Settled, and judgment by consent.

ST. LOUIS & S. F. R. CO. v. STATE. (Supreme Court of Arkansas. May 25, 1908.) Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

PER CURIAM. Appeal dismissed, on motion of the Attorney General. See, also, 86 Ark. 518, 111 S. W. 266.

SLIGO WAGON WOOD CO. v. JONES. (Supreme Court of Arkansas. Sept. 14, 1908.) Appeal from Circuit Court, Washington County; J. W. Meeks, Judge.

PER CURIAM. Affirmed, under rule 7 (120 S. W. v).

UPTON v. STATE. (Supreme Court of Arkansas. May 18, 1908.) Appeal from Circuit Court, Columbia County; George W. Hays, Judge.

PER CURIAM. Appellant pardoned, and appeal dismissed on his motion.

END OF CASES IN VOL. 121.

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Particular causes or grounds of action.

See Bills and Notes, §§ 465–524; Conspiracy, §§ 19, 21; Death, §§ 17–101; Forcible Entry and Detainer, §§ 6–29; Fraud, §§ 48, 58; Insurance, §§ 646–669; Libel and Slander, §§ 75–123; Malicious Prosecution, § 71; Money Received; Negligence, §§ 119–136; Taxation, §§ 581, 589; Trespass; Trover and Conversion, § 44; Work and Labor.

Breach of contract, see Contracts, § 346; Sales, §§ 369–388, 418.

Breach of contract to reorganize corporation, see Corporations, § 580.

Breach of covenant to construct railroad station, see Railroads, § 72.

Injuries from acts of servant, see Master and Servant, §§ 329–330.

Injuries from negligence of telegraph or telephone company, see Telegraphs and Telephones, §§ 66–74.

Injuries from operation of railroad, see Railroads, §§ 274–282.

Injuries from operation of street railroad, see Street Railroads, §§ 110–118.

Injuries from trespass by animals, see Animals, § 100.

Injuries to animals from operation of railroad, see Railroads, § 446.

Injuries to passenger, see Carriers, §§ 315–321.

Injuries to persons at railroad crossings, see Railroads, §§ 345–350.

Injuries to persons on or near railroad tracks, see Railroads, §§ 396–401.

Injuries to servant, see Master and Servant, §§ 256–296.

Negligent use of street, see Municipal Corporations, § 706.

Price of goods, see Sales, §§ 354–364.

Price of land, see Vendor and Purchaser, §§ 308, 315.

Recovery of land sold by vendor, see Vendor and Purchaser, §§ 251–296.

Recovery of tax paid, see Taxation, § 534.

Services, see Work and Labor.

Particular forms of action.

See Detinue; Ejectment; Replevin; Trespass, §§ 19–49; Trespass to Try Title; Trover and Conversion.

Particular forms of special relief.

See Creditors' Suit; Divorce; Injunction; Partition, § 39; Quieting Title; Specific Performance.

Abatement of street obstruction, see Municipal Corporations, § 697.

Admeasurement or assignment of dower, see Dower, §§ 62–109.

Alimony, see Divorce, § 252.

Cancellation of written instrument, see Cancellation of Instruments.

Construction of will, see Wills, § 697.

Determination of adverse claims to real property, see Quieting Title.

Enforcement of vendor's lien, see Vendor and Purchaser, § 280.

Establishment and enforcement of right of exemption, see Exemptions, §§ 119–149.

Establishment of boundaries, see Boundaries, §§ 35, 37.

Establishment of will, see Wills, §§ 300–371½.

Foreclosure of mortgage, see Mortgages, §§ 405–488.

Removal of cloud on title, see Quieting Title.

Setting aside foreclosure, see Mortgages, § 369.

Setting aside fraudulent conveyance, see Fraudulent Conveyances, §§ 295–309.

Particular proceedings in actions.

See Continuance; Costs; Damages; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Parties; Pleading; Reference; Removal of Causes; Trial; Venue.

Revival, see Abatement and Revival, § 72.

Verdict, see Trial, §§ 333, 343.

Particular remedies in or incident to actions.

See Attachment; Injunction; Receivers; Set-Off and Counterclaim; Tender.

Proceedings in exercise of special or limited jurisdictions.

Courts of limited jurisdiction in general, see Courts, §§ 159–183.

Criminal prosecutions, see Criminal Law.

Suits in equity, see Equity.

Suits in justices' courts, see Justices of the Peace, § 79.

Review of proceedings.

See Appeal and Error; Certiorari; Exceptions, Bill of; Justices of the Peace, §§ 146–189; New Trial.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 2. A thing not susceptible of being proved cannot be made the basis for a recovery in an action at law.—Evans' Adm'r v. Cumberland Telephone & Telegraph Co. (Ky.) 959.

§ 7. Where complainant was sui juris and pleaded the cause of action, defendant could not object that she sued because of the domination of a third person.—Diuguid v. Roberts (Ky.) 464.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 46. Under Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), an action of ejectment may be joined with an action for partition where they relate to the same land.—Grimes v. Miller (Mo.) 21.

§ 50. Under Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), there must be interests in common in the subject-matter of the litigation before a petition can unite parties as defendants.—Mann v. Doerr (Mo.) 86.

ACTION ON THE CASE.

See Trespass, §§ 19–49.

ACT OF GOD.

As cause of injuries to servant, see Master and Servant, § 97.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction in equity, see Cancellation of Instruments, §§ 14, 15.

ADJOINING LANDOWNERS.

See Boundaries; Fences.

ADJUDICATION.

Of courts in general, see Courts, §§ 89–97.

Operation and effect of former adjudication, see Judgment, §§ 682–725.

ADMEASUREMENT.

Of dower, see Dower, §§ 62–109.

ADMINISTRATION.

Of estate of decedent, see Executors and Administrators.

Of estate of ward, see Guardian and Ward, §§ 42–70.

ADMISSIONS.

As evidence in civil actions, see Evidence, §§ 205–231.

As evidence in criminal prosecutions, see Criminal Law, § 407.

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ADULTERY.

See Bigamy.

ADVANCEMENTS.

See Descent and Distribution, § 109; Wills, §§ 758–775.

ADVANCES.

By landlord to tenant, see Landlord and Tenant, § 254.

ADVERSE CLAIM.

To real property, see Quieting Title.

ADVERSE POSSESSION.

See Limitation of Actions.

Acquisition of right by abutting owner to maintain steps on sidewalk, see Municipal Corporations, § 667.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 4. Since January, 1893, limitation may run against the commonwealth, as expressly provided by Ky. St. § 2523 (Russell's St. § 240); Gen. St. c. 71, art. 3, § 10.—Richie v. Owsley (Ky.) 1015.

§ 13. One who had never been in possession of the land, nor paid taxes on it, *held* not entitled to maintain trespass to try title against one who had paid taxes for 16 years, and held it adversely for 5 years.—Kirby v. Boaz (Tex. Civ. App.) 223.

(B) Actual Possession.

§ 14. Claiming title to a strip of land, without actual inclosure or occupancy for 15 years, *held* not to give title by adverse possession.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 986.

§ 19. Actual possession may be acquired, either by physical inclosure of the whole boundary or of a part, under a claim of title to the whole, if no one else asserts title to any part on which claimant has so entered.—Richie v. Owsley (Ky.) 1015.

(C) Visible and Notorious Possession.

§ 30. Notoriety must be added to adverse possession before it can ripen into a title by limitation.—Johnson & Burr v. Elder (Ark.) 1066.

§ 30. An alleged tenant's attornment to plaintiff *held* not of sufficient notoriety to extend his possession of a part of the land to the entire tract claimed by plaintiff under a void tax deed.—Johnson & Burr v. Elder (Ark.) 1066.

(E) Duration and Continuity of Possession.

§ 44. The putting of stock on land in the summer or hogs in the fall and winter when there was mast, was not such continuous possession as was required to acquire title by adverse possession.—Ashcraft v. Courtney (Ky.) 625.

§ 44. To acquire title by adverse possession, the possession must be such as to give a cause of action for every moment of the fifteen years, and, if the possession is broken, the time must be counted from the break, and not from the to have been continuous.—Richie v. Owsley (Ky.) 1015.

§ 47. The possession of land by the vendee is not the possession of his vendor as against one who enters possession after the sale.—Kirby v. Boaz (Tex. Civ. App.) 223.

§ 57. Evidence *held* insufficient to show continuity of possession for the period of limitations so as to vest title in plaintiffs by adverse possession.—Ashcraft v. Courtney (Ky.) 625.

(F) Hostile Character of Possession.

§ 62. The widow's right to the occupancy of the messuages and plantation *held* incidental to her occupancy of her deceased husband's mansion house, and without the latter she has no right to the former, and, having no quarantine, there is nothing to prevent limitations from running when she takes possession.—Givens v. Ott (Mo.) 23.

§ 63. Where possession of real estate is hostile to any claim of right by a former owner, it sets the statute of limitation running, though the one in possession looks to the former owner for a conveyance.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 63. Where a grantee, under an executory contract for the sale of land, looks to his grantor for title, he cannot, as a general rule, claim that his possession was adverse to the grantor; but, where the grantee has paid for the land, his claim is hostile to any claim of the grantor.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 65. Occupancy by the grantor of plaintiff's alleged tenant, of an area beyond his boundary lines for 26 years, *held* to constitute a complete investiture of title in such grantor by adverse possession.—Johnson & Burr v. Elder (Ark.) 1066.

§ 68. One on whose possession of land title by adverse possession is based must be shown to have claimed to own the land at the time.—Richie v. Owsley (Ky.) 1015.

§ 70. A verbal sale of land and adverse possession under it *held* to vest a person with a good possessory title.—French v. Branger (Ky.) 437.

§ 70. A purchaser under a parol sale of land *held* to acquire title by limitation, though the sale is void under the statute of frauds.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 71. Where defendant took no title under certain deeds, they were available as color of title only to the land or interest within their terms.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 71. A grantee in a deed *held* to have acquired a valid title to the entire tract by adverse possession.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 71. A quitclaim deed is sufficient color of title to support a claim under the 5-year statute of limitations.—Merriman v. Blalack (Tex. Civ. App.) 552.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

§ 96. Evidence *held* to show that the adverse claimant to land was a trespasser not claiming to any well-defined boundary, and hence not to support a possessory title.—Le Moyne v. Roundtree (Ky.) 960.

§ 96. If an entrant goes on a boundary under a junior patent, entirely or partly within a senior grant or survey, he will be deemed in

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actual possession only of that actually inclosed, if the owner of the senior grant is then in actual possession, or if he be not, but enters before the junior patentee ripens title by adverse possession, the latter will be restricted to his actual close.—Richie v. Owsley (Ky.) 1015.

§ 98. One entering under paper title may look to it as showing extent of his claim and possession; or, if he enter without a paper claiming to a marked boundary, that fact may be shown as indicating the extent of possession.—Richie v. Owsley (Ky.) 1015.

§ 100. Occupation of a part of the land in controversy by plaintiff's alleged tenant under a void lease *held* insufficient to confer title to the whole tract on plaintiff by adverse possession.—Johnson & Burr v. Elder (Ark.) 1066.

§ 100. Where one enters under a deed, not from the true owner, and claims adversely, his deed is evidence of the extent and character of the possession, though not of title.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 100. The intention of one entering on land in the exercise of ownership *held* an element in determining the legal effect of his act.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 100. A purchaser under a parol purchase *held* to acquire title to the whole tract by adverse possession.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 100. One entering without a deed on a boundary plainly marked, with the intention of reducing the whole to his possession, *held* to reduce the whole to his actual possession.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 100. If one enters under paper title, it may be looked to as showing extent of his claim and possession; or, if he enter without a paper, claiming to a marked boundary, that fact may be shown as indicating the extent of possession.—Richie v. Owsley (Ky.) 1015.

§ 100. Actual possession may be acquired, either by physical inclosure of the whole boundary or of a part, under a claim of title to the whole, if no one else asserts title to any part on which claimant has so entered.—Richie v. Owsley (Ky.) 1015.

§ 100. Under the 5-year statute of limitations, a grantee who under a deed has color of title can only claim adverse possession to the interest conveyed.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 100. The grantee under a deed to undivided interests *held* not to have acquired adverse possession beyond the limits of the deed under the 10-year statute of limitations.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 103. One entering without a deed on a boundary plainly marked, with the intention of reducing the whole to his possession, *held* to reduce the whole to his actual possession.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114. Evidence *held* insufficient to show adverse possession against the commonwealth for the statutory period prior to the date of patent for land in controversy.—Richie v. Owsley (Ky.) 1015.

§ 116. In trespass to try title, when defendant claimed the whole tract by ten-year limitations, an instruction barring recovery thereunder, unless defendant's fencing and possession of a smaller tract in connection with his conduct would put a reasonably prudent person on notice that he claimed the whole tract, *held* proper, and not beyond the terms of Sayles' Ann. Civ. St. 1897, arts. 3343, 3344.—Hedrick v. Kilgore (Tex. Civ. App.) 892.

AFFIDAVITS.

Particular proceedings or purposes.

See New Trial, § 150.

Proceedings on appeal in forma pauperis, see Appeal and Error, § 389.

Showing qualifications of next friend in action by or against insane person, see Insane Persons, § 94.

To establish labor lien, see Master and Servant, § 82.

To impeach appeal record, see Appeal and Error, § 670.

Verification of account of witness for fees and mileage, see Witnesses, § 32.

Verification of petition to election contest, see Elections, § 285.

AGENCY.

See Principal and Agent.

AGGRAVATED ASSAULT.

See Assault and Battery, § 54.

AGGRAVATION.

Of damages, see Damages, § 62.

AGREEMENT.

See Contracts.

AIDER BY VERDICT.

In civil actions, see Pleading, §§ 409–435.

ALIENATION.

Right to alienate donation lands, see Public Lands, § 143.

ALIENS.

Escheat, see Escheat.

ALIMONY.

See Divorce, § 252.

ALTERATION OF INSTRUMENTS.

§ 27. In an action for balance due on an account, burden of proving a final settlement as shown by a check *held* to be on defendant.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

AMENDMENT.

Harmless error in rulings as to amendment of pleadings, see Appeal and Error, § 1041.

In particular remedies or special jurisdictions.

See Parties, §§ 80, 92; Trial, §§ 412, 424.

On appeal or writ of errror, see Appeal and Error, § 889.

Of particular acts, instruments, or proceedings.

See Execution, §§ 97, 436; Judgment, § 299.

Application to purchase school lands, see Public Lands, § 173.

Pleading, see Pleading, §§ 236–257.

Pleading, affecting limitations, see Limitation of Actions, § 127.

Record on appeal or writ of error, see Appeal and Error, §§ 638–653.

Report of road commissioners, see Highways, § 41.

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AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Courts, § 231.

ANIMALS.

Carriage of live stock, see Carriers, §§ 210–230.
Fence laws, see Fences.
Injuries from operation of railroads, see Railroads, §§ 413, 446.

§ 98. In an action for damages through trespassing stock getting over a fence at a certain point, that the fence at another point was not of lawful height *held* immaterial.—Montgomery v. Glasscock (Ky.) 668.

§ 100. In an action for damages through trespassing horses, evidence that the horses had a reputation for roguishness *held* inadmissible.—Montgomery v. Glasscock (Ky.) 668.

ANSWER.

In pleading, see Pleading, §§ 93–129.

APPEAL AND ERROR.

See Certiorari; Exceptions, Bill of; New Trial.
Appeal as constituting direct or collateral attack on judgment, see Judgment, § 518.
Appellate jurisdiction of particular courts, see Courts, §§ 207–231.
Costs, see Costs, §§ 238, 256.

Review in particular civil actions.

See Replevin, § 116.

Review in special proceedings.

For prohibition orders, see Intoxicating Liquors, § 130.
Probate proceedings, see Wills, §§ 359–371½.
To establish highway, see Highways, § 58.

Review of criminal prosecutions.

See Criminal Law, §§ 1020–1186; Homicide, §§ 338–340.

Review of proceedings of justices of the peace.

See Justices of the Peace, §§ 146–189.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 19. Where, in a suit involving the right of the grantee of standing timber to remove logs cut, the grantee before final decree removed the logs, an appeal from the decree, so far as it relates to such logs, will not be considered.—Griffin v. Anderson Tully Co. (Ark.) 297.

§ 20. Though the circuit court has, under Ky. St. 1909 § 966 (Russell's St. § 2813), exclusive original jurisdiction of an action for injunction, *held*, it cannot entertain such a case on appeal from a court having no jurisdiction.—Brady v. Brannon (Ky.) 679.

§ 20. Where the county court was without jurisdiction of a cross action, the Court of Civil Appeals had no jurisdiction to revise the trial court's action with reference thereto.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

§ 71. The statute gives no appeal from an order refusing to dissolve an injunction once granted.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

§ 73. Under Rev. St. 1899, § 806 (Ann. St. 1906, p. 769), an appeal does not lie from an interlocutory judgment for dower.—Reineman v. Larkin (Mo.) 307.

§ 79. A judgment is final although some of the parties sued were not served and did not answer and therefore the judgment in the case makes no mention of them.—Porter v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 897.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

In proceedings to obtain prohibition orders, see Intoxicating Liquors, § 130.

(B) Estoppel, Waiver, or Agreements Affecting Right.

§ 165. Parties against whom an injunction has been granted by filing a motion to dissolve, which was overruled, did not lose their right to appeal from the order granting the injunction.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(B) Objections and Motions, and Rulings Thereon.

§ 193. An objection that the complaint did not state facts entitling plaintiff to relief cannot be made for the first time on appeal.—Sidle v. Michark Mfg. Co. (Ark.) 349.

§ 197. Evidence to establish an equitable estoppel or an estoppel in pais having been admitted without objection, plaintiff could not object on appeal that such defenses were not pleaded.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

§ 207. In an action for an employé's death while engaged in putting fuel oil into an engine tender, remarks made in argument by plaintiff's counsel that plaintiff had labored under great difficulties at trial, was compelled to pull the testimony from unwilling witnesses, etc., *held* not reversible.—Houston & Tex. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 231. An objection to an instruction *held* too general to merit consideration.—Stone v. Stitt (Tex. Civ. App.) 187.

(D) Motions for New Trial.

§ 292. Errors in instructions not made a ground for a new trial do not constitute a ground for reversal.—Chesapeake & O. Ry. Co. v. Wendt (Ky.) 661.

§ 305. No exception having been taken to the action of the trial court in overruling a motion for a new trial, the appellate court cannot review the merits.—Wohradsky v. Wohradsky (Mo. App.) 159.

VI. PARTIES.

§ 334. On the death of one of a number of appellants, a cause may proceed on appeal without a revival.—Reineman v. Larkin (Mo.) 307.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 389. The pauper affidavit on appeal, under Rev. St. 1895, art. 1401, *held* insufficient when subscribed and sworn to before a notary public.—Spell v. Wm. Cameron & Co. (Tex. Civ. App.) 515.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

§ 437. A judgment adjudging title in plaintiff under the first count of the petition, stating a

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cause of action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), *held* admissible in evidence on the trial of the cause of action on the second count setting up a cause of action in ejectment, though appealed from with supersedeas.—Mann v. Doerr (Mo.) 86.

§ 447. A temporary injunction restraining defendant from doing a particular act *held* not suspended by an appeal under Gen. Laws 1907, p. 200, c. 107, with the supersedeas bond required by Rev. St. 1895, arts. 1404, 1406.—Ft. Worth Driving Club v. Ft. Worth Fair Ass'n (Tex. Civ. App.) 213.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 494. Where the record does not show any order made upon an application for a continuance, alleged error in overruling the application will not be considered.—Hedrick v. Kilgore (Tex. Civ. App.) 892.

§ 511. Recitals in the bill of exceptions that it was signed and filed and made of record are insufficient to permit the bill to be considered on appeal, as those facts must appear by the abstract.—Regent Laundry Co. v. Goodman (Mo. App.) 1082.

(B) Scope and Contents of Record.

§ 516. The record in a case at law consists of the record proper and the bill of exceptions.—Hanson v. Anderson (Ark.) 736.

§ 524. When a map or diagram is used, it should be incorporated in the record on appeal.—Phenix Jellico Coal Co. v. Lemp (Ky.) 418.

§ 525. Instructions cannot be considered by the appellate court where they are not made a part of the record by bill of exceptions or by order of court.—Runyons v. Burchett (Ky.) 975.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544. In an appeal from a judgment against an infant, the failure to secure the written acceptance of the person appointed as guardian ad litem is an error manifest on the face of the record and does not depend on the bill of exceptions.—Reineman v. Larkin (Mo.) 307.

(E) Abstracts of Record.

§ 582. The abstract may set out the evidence in a narrative form, except where the questions and answers are necessary to convey the meaning of the witness.—Doddridge v. Patterson (Mo.) 72.

§ 586. An abstract of record *held* fatally defective, where it nowhere appears at what term of court, if any, the motion for a new trial was filed or overruled, etc.—Flanagan Milling Co. v. City of St. Louis (Mo.) 112.

§ 586. In condensed form, an abstract should still preserve and evidence essential facts.—Flanagan Milling Co. v. City of St. Louis (Mo.) 112.

(F) Making, Form, and Requisites of Transcript or Return.

§ 601. The original statement of facts must be sent up on appeal to the Court of Civil Appeals, and the incorporation in the transcript of a copy thereof is not sufficient.—Vickrey v. Burks (Tex. Civ. App.) 177.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 627. A meritorious appeal *held* not to be dismissed upon motion for failure to file the abstract at least 30 days before the cause was set for argument, as required by rule 15 (112 S. W. vi); the penalty being discretionary under rule 23.—Reynolds v. United Rys. Co. (Mo. App.) 1093.

§ 631. The Supreme Court will not go to a manuscript full transcript for certain matters, but they must be abstracted in "print."—Flanagan Milling Co. v. City of St. Louis (Mo.) 112.

(I) Defects, Objections, Amendment, and Correction.

§ 638. An appeal *held* to be disposed of as if no statement of facts was in the transcript, where a copy and not the original was incorporated therein.—Vickrey v. Burks (Tex. Civ. App.) 177.

§ 644. Where a motion to strike out a part of the record is sustained, the part complained of is not physically cast out of court, but is merely ignored, and the same result can be accomplished by timely objection to anything incorporated in a transcript which has no place there.—Vickrey v. Burks (Tex. Civ. App.) 177.

§ 649. Plaintiff's remedy to correct the record as to the date of the filing of the court's conclusions of law and fact is by a proceeding in the trial court.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 649. Where appellee claimed that conclusions of law and fact had not been filed in the time stated by the record, the appellate court could delay a case until the record had been corrected in the trial court.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 649. Appellee *held* barred by laches from obtaining a stay of decision on appeal, pending proceedings in the trial court to correct the record, so as to show that conclusions of law and fact were filed too late.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 653. The Supreme Court *held* to have no power to amend a bill of exceptions to bring into it the evidence and instructions, which were not furnished the clerk.—Hanson v. Anderson (Ark.) 736.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 662. The transcript on appeal cannot be contradicted or augmented by the agreement of the parties.—Rogers v. McMillion (Tex. Civ. App.) 176.

§ 669. The record showing the date of filing the trial court's conclusions of law and fact cannot be impeached on appeal by statement of the judge.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 670. The record showing the date of filing the trial court's conclusions of law and fact cannot be impeached on appeal by affidavit.—Kimbell v. Powell (Tex. Civ. App.) 541.

(K) Questions Presented for Review.

§ 671. Where the facts relied on by appellant are not set out in his abstract, the court will not explore the transcript to ascertain them.—Eagle v. Board of Com'rs of Fencing Dist. No. 2, Lonoke County (Ark.) 340.

§ 671. Only such assignments of error as appear on the record can be considered on appeal.—Hanson v. Anderson (Ark.) 736.

XI. ASSIGNMENT OF ERRORS.

§ 719. Under Sayles' Ann. Civ. St. 1897, art. 1018, and Supreme Court Rule 29 (67 S. W. xv,) *held* that where the record fails to show any assignment of error filed, and no error is apparent of record, the judgment will be affirmed.—Durham v. Garrett (Tex. Civ. App.) 1141.

§ 724. Assignments of error which fail to point out wherein the error lies will be disregarded as contrary to rules 24–26 (67 S. W. xv).—Bynum v. Hobbs (Tex. Civ. App.) 900.

§ 728. Assignments complaining of rulings on evidence, failing to set out the objections and

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failing to contain any statement thereunder, were insufficient.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 728. An assignment of error will not be considered by the appellate court where the evidence relating to the assignment is not pointed out.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

§ 730. An assignment of error to the giving of a particular instruction *held* insufficient.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 730. An assignment of error *held* too general.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 742. Assignments complaining of rulings on evidence, failing to set out the objections and failing to contain any statement thereunder, were insufficent.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 742. A statement following an assignment of error to the admission of evidence which was merely a conclusion as to the effect of the testimony is sufficient.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 742. An assignment of error to the giving of a special charge *held* insufficient.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 742. Where the admission of bills of lading in evidence is objected to, but the record contains only the substance of the bills of lading, and no statement in verification of the objection, the objection is insufficient.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

§ 742. Where an assignment of error is not followed by a statement sufficient to explain it, as expressly required by Court of Civil Appeals Rule 31 (31 S. W. vii), it will not be considered.—Gilmer v. Veatch (Tex. Civ. App.) 545.

§ 742. Certain assignments of error to the exclusion of evidence *held* insufficient under Court of Appeals Rules 25 and 30 (67 S. W. xv, xvi).—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

§ 742. A statement under a proposition, which statement did not refer to any particular portion of the statement of facts in its support, *held* insufficient.—Bynum v. Hobbs (Tex. Civ. App.) 900.

§ 743. Assignments complaining of rulings on evidence, failing to set out the objections and failing to contain any statement thereunder, were insufficient.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 747. If an appellee is denied an instructed verdict to which he is entitled, he may have the ruling reviewed without a cross-assignment of error.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

XII. BRIEFS.

§ 758. An assignment in the brief complaining of the introduction of a land office copy of the classification and appraisement of lands in controversy, because of a specific indorsement, cannot be considered where the bill of exceptions extends as well to the classification and appraisement, which were admissible in evidence.—Bynum v. Hobbs (Tex. Civ. App.) 900.

§ 760. Appellant's brief should refer to the page of the transcript containing the matter supporting the assignments of error.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

In replevin suit, see Replevin, § 116.

§ 776. Where appellee had not appeared before the appeal was dismissed upon appellant's motion, no rights of appellee were prejudiced by the dismissal.—Ft. Worth & R. G. Ry. Co. v. Kinder (Tex. Civ. App.) 569.

§ 801. A motion to dismiss an appeal on the ground that notice was not given will be denied, where the evidence as to the notice was conflicting.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 807. Where appellee had not appeared when appellant had the appeal dismissed, that appellee intended at some time to ask the statutory damages for delay was not ground for reinstatement of the case.—Ft. Worth & R. G. Ry. Co. v. Kinder (Tex. Civ. App.) 569.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 856. The lower court will not be reversed in refusing a new trial because of insufficiency of the evidence to sustain the verdict where such ground is not incorporated in the motion for a new trial, although Kirby's Dig. § 6215, subd. 6, allows a new trial for insufficiency of evidence to sustain the verdict.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

(C) Parties Entitled to Allege Error.

§ 878. Instructions unfavorable to plaintiffs cannot be reviewed on appeal by defendant.—Baker v. Modern Woodmen of America (Mo. App.) 794.

§ 880. A point made in the appellate court, by a party other than the sole party affected, will be overruled without deciding whether it would be good if raised by the right party.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 881. In an action against a bank and a vendor to recover money deposited by a purchaser, *held*, that the vendor could not complain of the admission of evidence that he promised to furnish an abstract showing title, as varying the contract by parol, where he furnished a defective abstract, which he promised to, but never did, cure till after the date for paying the first installment, if at all.—Hunter v. Wallace (Tex. Civ. App.) 180.

§ 882. In an action to recover land, defendants *held* not entitled to complain that the court decided the issues presented in certain unnecessary pleadings.—Buchanan v. Boyd's Ex'r (Ky.) 981.

§ 882. A plaintiff procuring a judgment as prayed for in the first count of the petition, stating a cause of action under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), *held* not entitled on appeal to urge that the judgment was premature.—Mann v. Doerr (Mo.) 86.

§ 882. A reference in an instruction to irrelevant matter brought into the case by defendant, *held* not reversible error as to him.—Jenkins v. Clopton (Mo. App.) 759.

§ 882. Defendant cannot complain that an issue tendered by him was submitted to the jury, even if it was not within the allegations of the petition.—Jenkins v. Clopton (Mo. App.) 759.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 889. Where evidence on an issue was received without objection, the court on appeal will consider the pleadings as amended to conform to the proof.—Griffin v. Anderson Tully Co. (Ark.) 297.

(E) Presumptions.

§ 907. The appellate court will presume that an action was dismissed as to parties whom the record does not show were served, or answered, although there is no judgment entry of the dismissal.—Porter v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 897.

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§ 911. In view of the act of 1889 (Acts 1889, p. 152, c. 128), creating the Fourteenth and Forty-Fourth district courts of Dallas county, if necessary to sustain the validity of a judgment of the Forty-Fourth district court restraining issuance of execution on a judgment rendered in the other court, it could be presumed on writ of error that the injunction was issued in the Fourteenth district court and transferred to the Forty-Fourth district for trial.—Kruegel v. Rawlins (Tex. Civ. App.) 216.

§ 927. In determining the correctness of the direction of a verdict for defendant, the testimoney must be considered in the light most favorable to plaintiff.—Crawford v. Sawyer & Austin Lumber Co. (Ark.) 286.

§ 927. Where there was a peremptory instruction for defendant, plaintiff, for the purpose of testing the correctness of the instruction, is entitled to have the testimony for him taken as true, including such reasonable inferences as it warranted.—Gatz v. Harris (Ky.) 462.

§ 927. The court, in determining whether the motion for peremptory instructions should have been granted, must take as true the strongest legitimate view of the evidence in favor of the verdict, and disregard countervailing evidence.—Walton & Co. v. Burchel (Tenn.) 391.

§ 930. It should be assumed on appeal that the jury considered the charge as a whole.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 932. Rulings on the petition as to the allegations demanding exemplary damages *held* harmless, where the verdict includes actual damages only.—Temple v. Duran (Tex. Civ. App.) 253.

§ 933. An extension of time for filing motion for new trial will, in the absence of anything in the record to the contrary, be presumed to have been for the reason authorizing it under Civ. Code Prac. § 342.—Dickerson v. Eastern Kentucky Lumber Co. (Ky.) 662.

§ 933. An order for new trial on the ground of the verdict being against the weight of evidence is to be sustained, where there is substantial evidence to support a theory of the case contrary to the evidence.—Dickmann v. Hespos (Mo. App.) 325.

§ 933. Every presumption is to be indulged in favor of an order for new trial, without the ground therefor being assigned as directed by Rev. St. 1899, § 801 (Ann. St. 1906, p. 764).—Dickmann v. Hespos (Mo. App.) 325.

§ 937. Where the record shows a supersedeas bond, it will be presumed that a supersedeas issued.—Stewart v. Blue Grass Canning Co. (Ky.) 609.

§ 938. Testimony of witnesses, stricken out from the statement of facts by having pencil marks drawn across it, *held* to be treated on appeal as though the witnesses had never testified.—St. Louis, S. F. & T. Ry. Co. v. Wall (Tex. Civ. App.) 207.

§ 939. Where the record apparently contains a full abstract of the evidence, the court must presume that counsel for appellants obeyed the statutes, in the absence of a showing to the contrary.—Doddridge v. Patterson (Mo.) 72.

(F) Discretion of Lower Court.

§ 959. The setting aside of the submission and the allowing, before the taking of any proof, of an amended answer, which only states in a new form what has been stated in the original answer, *held* within the court's discretion, and not reviewable on appeal.—Lurker v. Ross (Ky.) 647.

§ 969. The ordering of a personal examination of plaintiff in a personal injury action is within the discretion of the trial court, and its exercise thereof will not be interfered with on appeal, unless manifestly abused.—Shamp v. Lambert (Mo. App.) 770.

§ 971. Under the evidence as to the qualification of witness, the admission of his estimate of the speed of the car in question *held* not such an abuse to the court's discretion as warranted interference by the Court of Appeals.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

(G) Questions of Fact, Verdicts, and Findings.

§ 999. Questions of fact are peculiarly within the province of the jury and the appellate court cannot interfere.—Jenkins v. Clopton (Mo. App.) 759.

§ 1001. A verdict is conclusive upon the Supreme Court where there is any evidence to support it.—Hurley & Ross v. Oliver (Ark.) 920.

§ 1001. The verdict and the judgment are conclusive unless flagrantly against the weight of the evidence.—Chesapeake & O. Ry. Co. v. Wendt (Ky.) 661.

§ 1002. A verdict on conflicting evidence will not be disturbed unless flagrantly against the evidence.—Cincinnati Abattoir Co. v. Stoller (Ky.) 642.

§ 1003. A finding not flagrantly against the evidence cannot be disturbed on appeal.—North British & Mercantile Ins. Co. v. Robertson (Ky.) 630.

§ 1004. It is only where the damages are so large as to appear to be the result of passion or prejudice that the Court of Appeals will interfere.—Cincinnati, N. & C. Ry. Co. v. Cooke (Ky.) 956.

§ 1008. A finding of the trial court sitting as a jury is as conclusive on appeal as the finding of a jury.—France v. Shockey (Ark.) 1056.

§ 1009. A chancellor's finding of fact will be sustained, unless against the preponderance of the evidence.—Sidle v. Michark Mfg. Co. (Ark.) 349.

§ 1009. The chancellor's findings of fact will be sustained if not against the preponderance of the evidence.—Claypool v. Johnston (Ark.) 941.

§ 1009. The Court of Appeals in a proceeding to set aside a deed will rely with confidence on the judgment of the chancellor in passing on the facts.—Diuguid v. Roberts (Ky.) 464.

§ 1009. The chancellor's finding will be upheld, though a different conclusion might have been reached, where the evidence is nearly balanced.—Rice v. Music (Ky.) 610.

§ 1009. In an equity case the Supreme Court will proceed de novo and make its own findings and enter judgment, if those of the trial court are not sustained by the evidence and law.—Givens v. Ott (Mo.) 23.

§ 1009. In an equity case, the Supreme Court should defer largely to the finding of the trial court as to issues of fact.—McCoy v. Randall (Mo.) 31.

§ 1011. A finding supported by the positive testimony of a party, and merely contradicted by the uncertain testimony of the adverse party having the burden of proof, is binding on the court on appeal.—Barrett v. Kern (Mo. App.) 774.

§ 1011. An assignment that the court erred in overruling a plea to the jurisdiction *held* not sustainable in view of the findings of the court on conflicting evidence.—Stadtler v. South Texas Lumber Co. (Tex. Civ. App.) 1132.

§ 1017. The findings of the master *held* as conclusive as the verdict of a jury.—Griffin v. Anderson Tully Co. (Ark.) 297.

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(H) Harmless Error.

§ 1027. Under Rev. St. 1899, §§ 659, 865 (Ann. St. 1906, pp. 679, 812), an error to be reversible must originally affect the merits, and it must not have been waived or cured.—Mann v. Doerr (Mo.) 86.

§ 1032. Where the bill of exceptions stated no facts showing a party injured by the admission of improper testimony, the court must presume that he suffered none.—Temple v. Duran (Tex. Civ. App.) 253.

§ 1033. Compelling the jury to find irrelevant facts before finding for plaintiff, *held* not prejudicial to defendant.—Jenkins v. Clopton (Mo. App.) 759.

§ 1036. Misjoinder of parties in an action to quiet title and in ejectment *held* not ground for reversal.—Mann v. Doerr (Mo.) 86.

§ 1040. Rulings on the petition as to the allegations demanding exemplary damages *held* harmless, where the verdict includes actual damages only.—Temple v. Duran (Tex. Civ. App.) 253.

§ 1040. The error in overruling exceptions to the petition insufficiently alleging grounds for exemplary damages is harmless, where the court confines the issue of exemplary damages.—Temple v. Duran (Tex. Civ. App.) 253.

§ 1041. Defendants *held* not prejudiced by the court's allowing an amended petition where the original one was sufficient to sustain a decree.—Diuguid v. Roberts (Ky.) 464.

§ 1041. Though an amended reply was filed to prevent the case going to the jury, the case will not be reversed and remanded for a jury trial on an issue playing no part in the action.—Buchanan v. Boyd's Ex'r (Ky.) 981.

§ 1041. Whether the court was right in requiring plaintiff to allege that it did not know which state of facts on which he relied in his petition was true *held* immaterial in a case wherein he conformed to the court's rulings, and the whole matter was placed in issue and trial had on the merits of the whole case.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

§ 1042. No possible prejudice could have resulted from striking a paragraph of the answer, where the court admitted all evidence offered by defendants on the issue thereby raised.—Hurley & Ross v. Oliver (Ark.) 920.

§ 1042. Where, notwithstanding the court struck a paragraph of the answer, it admitted evidence on the issue thereby raised, if defendants wished to introduce additional evidence they should have stated that they were surprised at the change of ruling, and should have asked for a continuance, and, not having done so, they cannot thereafter complain.—Hurley & Ross v. Oliver (Ark.) 920.

§ 1047. Erroneous rulings on evidence *held* harmless.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 1047. Where no injury is shown, any error in refusing counsel a longer time to examine witnesses is harmless.—Stephenville North & South Texas Ry. Co. v. Moore (Tex. Civ. App.) 882.

§ 1050. Admission of improper evidence, consisting of physician's opinions, based on objective symptoms, *held* not harmless to defendant.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 1050. In an action for the death of one engaged in putting fuel oil in an engine tender by slipping on a greasy fuel box lid in descending from the tender, admission of testimony that decedent was slow, and the engineer often hurried him in filling the tender, *held* not reversible error.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 1050. In an action for the death of an employé while engaged in filling a tender with fuel oil, by slipping on a fuel box lid, where the engineer and fireman were the only persons present at the time of the accident, admission of testimony by the engineer, in answer to questions as to whether the fireman was at trial, etc., and was still in the company's employment, *held* not reversible error.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 1050. In a suit for specific performance, evidence of the possession of plaintiff's assignor when the contract was made was harmless.—Durham v. Breathwit (Tex. Civ. App.) 890.

§ 1051. Admission of incompetent evidence of a fact otherwise shown by undisputed evidence is not prejudicial.—St. Louis, I. M. & S. Ry. Co. v. Sanders (Ark.) 337.

§ 1051. Erroneous admission of evidence of changes in a city sidewalk since plaintiff's injury *held* not prejudicial.—City of Madisonville v. Stewart (Ky.) 421.

§ 1051. Where an action has been tried twice, and defendant's evidence makes out a prima facie case for him, a judgment for defendant will not be reversed for the admission of incompetent evidence not affecting the parties' rights.—Farmers' Bank of Wickliffe v. Wickliffe (Ky.) 498.

§ 1051. On the issue as to whether a sale of public lands had been forfeited by the state, error in the admission of certain evidence *held* harmless.—Slaughter v. Cooper (Tex. Civ. App.) 173.

§ 1051. Error, in the admission of a decedent's self-serving declarations as to his ancestor's family history to sustain a claim of title, *held* harmless, where the fact was shown by other competent evidence.—Kirby v. Boaz (Tex. Civ. App.) 223.

§ 1051. The error in admitting evidence of a fact previously established by evidence, admitted without objection, is harmless.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 1053. The error in admitting evidence in support of an issue is harmless, where no such issue is submitted to the jury.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 1054. A judgment of the court in a case tried without a jury will not be reversed because of erroneous admission of evidence which could not have affected the decision.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 1056. Where the jury awarded actual damages only, the error in excluding evidence relieving defendant from liability for exemplary damages was harmless.—Temple v. Duran (Tex. Civ. App.) 253.

§ 1057. Where the injuries set out in the amended petition, on which a personal injury action was tried, were in substance the same as those in the original petition, the exclusion of that part of the original petition, which set up the injuries, is not prejudicial.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 1060. Argument of counsel, relating to the testimony of defendant's witnesses as to the extent of plaintiff's injuries, *held* not prejudicial.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 1066. Where insured was entitled to recover on both parts of a policy, insurer was not prejudiced by the court's charge that the policy was divisible.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

§ 1066. In an action on an insurance policy, an instruction if inaccurate, *held* not prejudicial

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to defendant.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 1066. Where a count based upon an ordinance had been abandoned, the giving of an instruction based upon the ordinance *held* prejudicial error.—Reynolds v. United Rys. Co. (Mo. App.) 1093.

§ 1067. In an action against a carrier, failure to give a charge *held* not prejudicial.—Louisville & N. R. Co. v. Moore (Ky.) 666.

§ 1067. In an action for money received, where defendant claimed that the money sued for was retained as reasonable compensation for services, and plaintiff claimed there was an agreement for 10 per cent. compensation, an instruction that any contract for 10 per cent. compensation must have been made between the parties before the suit, *held* not so relevant so as to make its refusal reversible error.—Jenkins v. Clopton (Mo. App.) 759.

§ 1068. Where the judgment was correct under the undisputed evidence, no errors in instructions could have been prejudicial.—Kansas City Southern Ry. Co. v. Carl (Ark.) 932.

§ 1068. In an action for the death of a child struck by a street car, the error in an instruction *held* not prejudicial to plaintiff.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

§ 1068. Error in refusing special charges *held* harmless.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 1070. In an action on a note, the error in a verdict *held* not prejudicial to defendant.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 1073. A judgment for costs against a receiver was not prejudicial to him where it provided for payment only out of the property of the corporation.—International & G. N. R. Co. v. Ormond (Tex. Civ. App.) 899.

(I) Error Waived in Appellate Court.

§ 1075. An error in the award of judgment and execution for plaintiff *held* not reversible, where counsel for defendants waived the error.—Reineman v. Larkin (Mo.) 307.

§ 1078. An assignment of error in a motion for new trial, but not presented in appellant's brief, will be considered as waived or abandoned.—Hurley & Ross v. Oliver (Ark.) 920.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1127. A properly certified copy of the judgment must accompany a motion to affirm on certificate.—Thorn v. Lanier (Tex. Civ. App.) 715.

§ 1127. Under Rev. St. 1895, art. 1016, *held*, that a certificate for affirmance must be filed by appellee, or defendant in error, at the term of the appellate court to which the appeal or writ of error is returnable.—Thorn v. Lanier (Tex. Civ. App.) 715.

(C) Modification.

§ 1151. A judgment allowing interest from an earlier date than claimed in the petition is erroneous, and will be reformed.—Davidson v. Wills (Tex. Civ. App.) 540.

(D) Reversal.

§ 1163. Where the record shows the county court got no jurisdiction on appeal from a justice's court, because the latter entered no final judgment, *held*, the judgment of the former will be reversed, and cause remanded, with directions.—Brown v. McClendon (Tex. Civ. App.) 903.

§ 1170. In an action for personal injuries, the refusal of the court to order a physical examination of plaintiff *held* harmless, within Rev. St. 1899, § 865 (Ann. St. 1906, p. 812).—Shamp v. Lambert (Mo. App.) 770.

§ 1173. Reversal of a judgment as against one of two defendants *held* not to necessitate reversal as to the other.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 1173. Where, on appeal by two defendants, it appears from the record that no case was made against either, the judgment will be reversed as to both defendants, and the appeal will not be dismissed as to the one not prosecuting it.—McKee v. Rudd (Mo.) 312.

§ 1175. The court, on appeal in an action for penalties, *held* authorized, in view of plaintiff's concessions, to render judgment in his favor for the minimum penalty for each offense.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 1175. Where, under the undisputed evidence, the trial court should have directed a verdict for defendants the court of civil appeals will, upon reversal of judgment for plaintiffs, render judgment for defendants as the trial court should have done.—Lewis v. Mansfield Grain & Elevator Co. (Tex. Civ. App.) 585.

§ 1178. Where an appeal from a decree vacating a sale of collaterals was reversed and plaintiff's petition held insufficient, she would be permitted to amend on remand.—Bank of Cerulean Springs v. Gardner (Ky.) 608.

§ 1178. The general rule is that appellate courts may properly, when a judgment is reversed, remand to allow appellee to amend his pleadings, when it seems to be required in the interest of justice.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 1178. Under Rev. St. 1895, art. 1027, *held* that a case upon reversal could not be remanded to allow appellee to plead the statute of limitations against appellant's claim.—Tillman v. Erp (Tex. Civ. App.) 547.

(E) Rendition, Form, and Entry of Judgment.

§ 1185. Where, on affirmance, appellee was entitled to 10 per cent. damages, the failure of the clerk to so enter the judgment was a clerical mistake which might be corrected after the term.—Stewart v. Blue Grass Canning Co. (Ky.) 609.

(F) Mandate and Proceedings in Lower Court.

Presumptions as to performance of official duty by clerk of court on remand of case, see Evidence, § 83.

§ 1190. Disposition of cause transferred from the circuit to the chancery court stated upon reversal for proceedings consistent with opinion.—McDonald v. Shaw (Ark.) 935.

§ 1195. A decision of the Court of Appeals that defendant railroad company was liable for its vendor's breach of covenant *held* the law of the case on a new trial.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 1195. Reversal on the ground that the court erred in refusing a new trial for newly discovered evidence is a holding that the evidence, if produced, would require the trial court to arrive at a different conclusion.—Million v. Million's Ex'rs (Ky.) 985.

§ 1195. The decision on a prior appeal that evidence was admissible as to the contents of a receipt constituted the law of the case on retrial.—Million v. Million's Ex'rs (Ky.) 985.

§ 1195. A decision on appeal that the circuit court in partition in equity has jurisdiction to reimburse one holding an interest fee and a remainder in trust for expenses incurred

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in defending an ejectment action *held* to settle his right to reimbursement.—Coffman v. Gates (Mo. App.) 1078.

§ 1201. In view of the delay in offering an amendment to the answer, *held* not an abuse of discretion in denying it.—Louisville & N. R. Co. v. Gormley (Ky.) 965.

§ 1206. Where a judgment is appealed from and reformed, and the cause remanded, it is the duty of the district court clerk to issue execution for its enforcement.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 101–129, 233.

APPLICATION.

Of assets of partnership, see Partnership, § 183.
Of payment, see Payment, §§ 38–43.
To purchase school lands, see Public Lands, § 173.

APPOINTMENT.

Of judge, see Judges, § 6.
Of officers in general, see Officers, §§ 15–56.

APPRAISEMENT.

Of exempt property, see Exemptions, § 125.

ARBITRATION AND AWARD.

See Reference.

AREAWAYS.

Contributory negligence of person injured by falling into, see Negligence, § 136.

ARGUMENT OF COUNSEL.

See Trial, §§ 118–133.
In criminal prosecutions, see Criminal Law, §§ 699–730.

ARREST.

Arrest and detention of accused pending correction of error in execution for costs in criminal prosecution, see Costs, § 321.
Illegal arrest, see False Imprisonment.
On execution, see Execution, §§ 436–441.

ARREST OF JUDGMENT.

In criminal prosecutions, see Criminal Law, §§ 941–943.

ARSON.

See Fires.
Conspiracy to burn property, see Conspiracy, § 43.
Documentary evidence, see Criminal Law, § 444.
Testimony to corroborate accomplice, see Criminal Law, § 511.

§ 18. An indictment *held* to sufficiently charge the crime defined in Ky. St. 1909, § 1170 (Russell's St. § 3180), prohibiting house burning.—Lane v. Commonwealth (Ky.) 486.

§ 18. An indictment for house burning under Ky. St. 1909, § 1170 (Russell's St. § 3180), *held* also sufficient as an indictment for arson as a common-law felony.—Lane v. Commonwealth (Ky.) 486.

§ 31. In a prosecution for arson, evidence of insurance procured by accused *held* admissible only to prove motive.—Lane v. Commonwealth (Ky.) 486.

ASSAULT AND BATTERY.

Assault with intent to kill, see Homicide, §§ 86, 94.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 54. An injury *held* sufficiently serious to sustain a conviction of aggravated assault.—Fulkerson v. State (Tex. Cr. App.) 1111.

ASSESSMENT.

Of compensation for property taken for public use, see Eminent Domain, § 262.
Of damages, see Damages, §§ 206–216.
Of expenses of public improvements, see Highways, § 151.

ASSETS.

Of partnership, see Partnership, § 183.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 719–747.

ASSIGNMENTS.

Fraud as to creditors, see Fraudulent Conveyances.
In bankruptcy, see Bankruptcy, § 149.

Transfers of particular species of property, rights, or instruments.

See Bills and Notes, § 209; Covenants, §§ 73, 79.
Admeasurement or assignment of dower, see Dower, §§ 62–109.
Contingent interest of pledgor of corporate stock, see Corporations, § 123.
Corporate shares, see Corporations, § 123.
Right of re-entry for breach of condition of deed, see Deeds, § 168.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

Contingent interest of pledgor of corporate stock, see Corporations, § 123.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 149–320.

ASSOCIATIONS.

See Beneficial Associations.
Mutual benefit insurance associations, see Insurance, § 748.

ASSUMPSIT, ACTION OF.

See Money Received; Work and Labor.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 205–221, 260, 295.

ATTACHMENT.

See Execution.
Appellate jurisdiction of particular court in attachment proceedings, see Courts, § 223.
Exemptions, see Exemptions; Homestead.
Judicial notice of, see Evidence, § 43.
Jurisdiction of justice court, see Justices of the Peace, § 48.
Venue of attachment against realty, see Venue, § 5.

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III. PROCEEDINGS TO PROCURE.

(A) Jurisdiction and Venue.

Jurisdiction as dependent on real property being involved, see Courts, § 135.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 201. Where an attachment judgment is void, a sale thereunder is also void.—Sawyer v. Burris (Mo. App.) 321.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 217. Where the existence of an execution was not an issue for the jury, it was the court's duty on plaintiffs recovering a verdict to recite the issuance and levy of the attachment in the judgment.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

§ 217. A judgment recognizing an attachment *held* not fatally defective as foreclosing an attachment lien on the land levied on.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

ATTENDANCE.

Of juror, see Jury, §§ 58–72.
Of witness, see Witnesses, § 32.

ATTORNEY AND CLIENT.

Absence of counsel, ground for continuance, see Continuance, § 20.
Argument and conduct of counsel at trial in civil actions, see Trial, §§ 118–133.
Argument and conduct of counsel at trial in criminal prosecutions, see Criminal Law, §§ 699–730.
Attorney in fact of infant, authority of guardian to appoint, see Guardian and Ward, § 42.
Attorneys in fact, see Principal and Agent.
Harmless error in argument and conduct of counsel, see Appeal and Error, § 1060; Criminal Law, § 1171.
Objections to argument and conduct caused for purposes of review, see Appeal and Error, § 207.
Review of rulings as to argument and conduct of counsel as dependent on reservation in lower court of grounds of review, see Criminal Law, § 1037.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 126. Under Civ. Code Prac. § 444, a judgment may be obtained on motion by a client against his attorney for money collected or property received.—Board of Education of Mercer County v. Allin (Ky.) 676; Same v. Commonwealth, Id.

§ 126. Under Acts 1908, p. 133, c. 56 (Ky. St. 1909, § 4426), the county board of education *held* the proper party to ask a rule requiring the county attorney to pay over money collected under a judgment in an action by the commonwealth for the benefit of the common schools of the county.—Board of Education of Mercer County v. Allin (Ky.) 676; Same v. Commonwealth, Id.

§ 128. In an action for money had and received, consisting of funds of an estate collected by defendant for the heirs, 50 per cent. of which he claimed as compensation, defendant may show that under his agreement with the heirs he should receive that amount as compensation.—Jenkins v. Clopton (Mo. App.) 759.

§ 128. In an action for money received, consisting of funds of an estate collected by defendant, of which he retained 50 per cent. as a reasonable compensation, the fact that defendant in collecting the funds discovered that plaintiffs were entitled as heirs to another estate, and sued to recover it, *held* wholly irrelevant.—Jenkins v. Clopton (Mo. App.) 759.

§ 128. In an action for money received, where defendant claimed that the money was retained as the reasonable value of services performed, for which there was no agreed compensation, an instruction *held* to sufficiently present defendant's theory.—Jenkins v. Clopton (Mo. App.) 759.

§ 128. In an action for money received, in which defendant claimed the money retained as reasonable compensation for services, and plaintiff claimed that there was a special contract for compensation for a less sum, an instruction *held* not objectionable as being outside the issues because it authorized a verdict for plaintiff though defendant did not contract specially for compensation.—Jenkins v. Clopton (Mo. App.) 759.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Usurious transactions for payment of fees, see Usury, § 31.

(B) Lien.

§ 189. The attorney for complainant in a suit to cancel a contract giving defendant an option to purchase real estate *held* not to acquire a lien on the real estate for his fee.—Landreth v. Powell (Tenn.) 500.

ATTORNMENT.

Notoriety of, as affecting adverse possession, see Adverse Possession, § 30.

AUTHORITY.

Of agent, see Principal and Agent, § 97.
Of justice of the peace, see Justices of the Peace, § 48.
To amend bill of exceptions, see Appeal and Error, § 653.

AUTOMOBILES.

Liability of owner for injuries caused by negligence of chauffeur, see Master and Servant, § 330.
On streets, liabilities for injuries, see Municipal Corporations, §§ 705, 706.

BAILMENT.

Embezzlement or larceny by bailee, see Embezzlement.

Particular species of bailments, and bailments incident to particular occupations.

See Carriers, §§ 41–193; Depositaries; Pledges.

BANKRUPTCY.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

§ 9. Act of 1856 (Ky. St. §§ 1910–1917 [Russell's St. §§ 2104–2111]) *held* not a bankrupt or insolvency statute.—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

§ 9. Under Ky. St. §§ 1910–1917 (Russell's St. §§ 2104–2111) and Bankr. Act July 1, 1898, c. 54, §§ 3a(2), 60b, 30 Stat. 546, 562 (U. S. Comp. St. 1901, pp. 3422, 3445), right of state court to take jurisdiction of preferential mortgages by an insolvent debtor stated.—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

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II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

§ 20. The state court, having taken jurisdiction of an attack on a preferential mortgage, could adjudge a recovery against the debtor in personam in favor of the creditor against whom the preference was made, though the federal court had taken jurisdiction of the debtor's affairs, staying the execution until his application for discharge in bankruptcy has been acted upon by the federal court.—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

§ 20. Right of seller to sue buyer in the state court where the federal court, in bankruptcy proceedings, is unable to discharge the debtor from the debt.—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 149. Under Bankrupt Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), debts of solvent partners against bankrupt partners *held* an "unliquidated claim" against the bankrupts, within section 63, subd. "b," which was a provable debt when the petition was filed, and hence was barred by failure to present it.—Dycus v. Brown (Ky.) 1010.

(F) Claims Against and Distribution of Estate.

§ 314. The proper construction of the provision of Bankrupt Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), relating to provable debts, stated.—Dycus v. Brown (Ky.) 1010.

§ 320. Under Bankrupt Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), debts of solvent partners against bankrupt partners *held* an "unliquidated claim" against the bankrupts, within section 63, subd. "b," which was a provable debt when the petition was filed, and hence was barred by failure to present it.—Dycus v. Brown (Ky.) 1010.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 421. Creditors who had actual notice of the adjudication of their debtor in bankruptcy, and of the steps taken in the proceedings, were bound to present their claim, though they were not mentioned as creditors, and their claim was barred by the discharge, though never presented.—Dycus v. Brown (Ky.) 1010.

§ 421. Under Bankrupt Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), debts of insolvent partners against bankrupt partners *held* an "unliquidated claim" against the bankrupts, within section 63, subd. "b," which was a provable debt when the petition was filed, and hence was barred by failure to present it.—Dycus v. Brown (Ky.) 1010.

§ 426. A certain debt *held* not released under a discharge in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428).—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

§ 436. In an action against bankrupts after their discharge, by persons engaged in a joint transaction with them for the purchase and sale of tobacco, to recover loss in the partnership transaction, in which defendants set up their charge in bankruptcy, evidence *held* to show that plaintiffs knew, when defendants filed their petition in bankruptcy, that the transaction would result in loss leaving defendants indebted to them.—Dycus v. Brown (Ky.) 1010.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(C) Stockholders.

Competency of stockholder as witness in regard to transactions by bank with person since deceased, see Witnesses, § 142.

(D) Officers and Agents.

Competency of officer as witness in regard to transactions by bank with person since deceased, see Witnesses, § 142.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

Certificate of deposit as a promissory note, see Bills and Notes, § 42.
Creditors' bill to reach interests of pledgor of certificate of deposit, see Creditors' Suit, § 5.

BAR.

Of action by limitation, see Limitation of Actions, § 167.
Pleas in bar, see Pleading, § 129.

BATTERY.

See Assault and Battery.

BELIEF.

Of death of former spouse as a defense to prosecution for bigamy, see Bigamy, §§ 2, 17.

BELT LINE RAILROAD.

As common carrier, see Carriers, § 4.

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, § 748.
Privileged character of transactions between association and members, see Libel and Slander, § 45.

§ 19. One dealing with a corporation formed to furnish entertainment for a biennial meeting of a fraternal organization *held* not entitled to sue the state grand lodge and subordinate lodges of such organization on debts incurred by the corporation.—Palmer & Hardin v. Grand Lodge K. P. of Kentucky (Ky.) 678.

BENEFITS.

Acceptance of, as grounds of estoppel, see Estoppel, §§ 68–94.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

In civil actions, see Evidence, §§ 158–165.

BETTING.

See Gaming.

BIAS.

Of juror, see Jury, §§ 97–116.
Of witness, see Witnesses, §§ 369, 372.

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was dead was no defense, and could only be considered to mitigate the punishment.—Cornett v. Commonwealth (Ky.) 424.

§ 17. A bona fide belief by one who married while his first wife was living that she was dead could be considered by the jury to mitigate the punishment.—Cornett v. Commonwealth (Ky.) 424.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, § 153.

BILLS AND NOTES.

Alteration of check, burden of proof, see Alteration of Instruments, § 27.
Premium notes, see Insurance, § 367.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 42. A bank certificate of deposit *held* in effect a promissory note.—Krebs v. Blatz (Ky.) 436.

(E) Consideration.

Failure of consideration of notes given for purchase price of rights in public lands, see Public Lands, § 173.

III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 137. If interest was paid on a note in advance, it will be presumed that time was to be given to the end of the period for which it was paid.—Farmers' Bank of Wickliffe v. Wickliffe (Ky.) 498.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

Liability of indorser of certificate of deposit, see Bills and Notes, § 280.

(C) Transfer Without Indorsement.

§ 209. A check payable to the order of a person named may be transferred without a written assignment thereof so as to make the transferee the true owner thereof.—Maloney v. State (Ark.) 728.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 280. One who placed his name on the back of a certificate of deposit and delivered it to another, *held* liable thereon as assignor.—Krebs v. Blatz (Ky.) 436.

VII. PAYMENT AND DISCHARGE.

§ 430. The payee of a note accepting a renewal note *held* entitled to sue on the original note.—Corydon Deposit Bank v. McClure (Ky.) 446.

VIII. ACTIONS.

§ 465. In view of Act 1812 (Laws 1811–12, p. 180, c. 375) substantially readopted in Rev. § 489. If in an action on a note the pleader unnecessarily alleges a consideration it must be proved.—Bronston's Adm'r v. Lakes (Ky.) 1021.

§ 489. Under a plea of total failure of consideration for a note sued on, a partial failure may be shown.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 493. Where, in an action on a note, the consideration is impeached by a verified answer, the burden of proving want of consideration is on the defendant.—Bronston's Adm'r v. Lakes (Ky.) 1021.

§ 499. In an action on notes, the burden was upon defendant to prove certain credits claimed by him.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

§ 524. That notes sued on bore indorsement of plaintiff *held* not to affect his right to sue.—Bynum v. Hobbs (Tex. Civ. App.) 900.

BLASTING.

Liability of master for injuries to servant caused by, see Master and Servant, §§ 150, 205.

BLOCKING.

Injuries to servants caused by unblocked switches, see Master and Servant, § 112.

BODY EXECUTION.

See Execution, §§ 436–441.

BONA FIDE PURCHASERS.

From heirs, see Descent and Distribution, § 134.
Of goods, see Sales, § 234.
Of land, see Vendor and Purchaser, §§ 230, 231.

BONDS.

Bonds for title, see Vendor and Purchaser, § 27.
Bonds in legal proceedings, see Appeal and Error, § 389.
Of guardian, see Guardian and Ward, § 175.
Of sheriff or constable, see Sheriffs and Constables, § 157.
Secured by mortgage, see Mortgages, § 114.
Sureties on bonds, see Principal and Surety.

BOUNDARIES.

See Fences.

I. DESCRIPTION.

§ 3. A call in a description of a survey for a well-known line of a prior survey *held* to control a call for course and distance, and to include all land up to the marked line.—Bell v. Powers (Ky.) 991.

§ 3. A plat of a survey is inadmissible to control a description calling for the line of an old and established patent running from one known point to another.—Bell v. Powers (Ky.) 991.

§ 3. That a call in a survey was for the "line" of another survey between certain points which in fact consisted of four lines and three corners *held* immaterial.—Bell v. Powers (Ky.) 991.

§ 3. Where there are two descriptions, one consistent with the evident intention of the parties and the other rendering the deed inoperative, the false call will be rejected.—Hubbard v. Whitehead (Mo.) 69.

§ 3. Succeeding calls *held* under certain circumstances to control starting point, where in conflict.—Hubbard v. Whitehead (Mo.) 69.

§ 3. The calls in a patent constitute a written description, and when not ambiguous or conflicting, the boundaries of the land granted are to be determined from some of the calls of the grant, and extraneous facts can only be used to remove or determine conflicting calls.—Guill v. O'Bryan (Tex. Civ. App.) 593.

§ 3. In determining the true dividing line between surveys, if from a definite beginning point course and distance alone will with reasonable certainty locate and identify the line, course and distance will control.—Guill v. O'Bryan (Tex. Civ. App.) 593.

§ 3. Where no marked trees are on a patented survey identified as those of the grant, the true boundary must be ascertained by course and distance given in the patent.—Guill v. O'Bryan (Tex. Civ. App.) 593.

§ 18. The owner of land abutting on the meandered line of a lake has prima facie title to the center of the lake.—Johnson & Burr v. Elder (Ark.) 1066.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 35. Admissibility of certain evidence in an action to determine a boundary discussed.—Guill v. O'Bryan (Tex. Civ. App.) 593.

§ 37. In an action to determine the boundary between two surveys, evidence *held* to show that the true line runs so as to include the disputed land in defendants' survey.—Guill v. O'Bryan (Tex. Civ. App.) 593.

BREACH.

Of condition, see Insurance, §§ 335–367.
Of contract, see Contracts, §§ 280–312; Sales, §§ 161–187.
Of covenant, see Covenants, § 102.
Of warranty, see Sales, § 279.

BRIBERY.

Charge of, as libel, see Libel and Slander, § 10.

BRIEFS.

On appeal or writ of error, see Appeal and Error, §§ 758, 760.

BROKERS.

See Principal and Agent.

IV. COMPENSATION AND LIEN.

Parol or extrinsic evidence of contract for compensation, see Evidence, § 463.

§ 58. Where defendant real estate brokers in fact procured a purchaser for plaintiffs' property who executed a contract valid on its face with plaintiffs for the exchange of property, defendants were entitled to their commission whether or not plaintiffs misrepresented their property to the purchaser so as to justify him in refusing to exchange.—Lewis v. Mansfield Grain & Elevator Co. (Tex. Civ. App.) 585.

§ 63. Where a contract for the exchange of property provided that if the purchaser whom the broker procured, failed to perform, his title to a certain tract should pass to the other party in accordance with a deed deposited with the broker, failure to have such deed recorded upon the purchaser's failure to perform *held* to be the fault of the owner so that it would not prevent the broker from recovering commissions.—Lewis v. Mansfield Grain & Elevator Co. (Tex. Civ. App.) 585.

§ 74. A mere selling agent or broker has no such interest in a contract to purchase land as authorizes recovery for lost commissions from the purchaser who refuses to perform.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

§ 74. A contract between the owner and a purchaser procured by defendant brokers *held* not to make defendants' commissions depend upon the consummation of the exchange of property between them but upon the approval of the title of each party, nor were defendants bound to look to the purchaser for their commissions if he failed to perform, plaintiffs being bound to pay the commissions in such case.—Lewis v. Mansfield Grain & Elevator Co. (Tex. Civ. App.) 585.

V. ACTIONS FOR COMPENSATION.

§ 86. Evidence *held* to sustain an implied finding that a broker was the procuring cause of a sale.—Callen v. Bevil (Tex. Civ. App.) 369.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 100. A purchaser of land *held* not entitled to specific performance of the contract of purchase.—Shirley v. Coffin (Tex. Civ. App.) 181.

BUILDING CONTRACTS.

See Contracts, § 280.
Measure of damages for breach, see Damages, § 123.
Parol or extrinsic evidence, see Evidence, § 393.

BURGLARY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 2. Pen. Code 1895, art. 841, *held* to be an addition to articles 838 and 839, and under the three articles burglary is committed by discharging firearms into a house with intent to injure the person therein; the intent not necessarily being to commit a felony.—Railey v. State (Tex. Cr. App.) 1120.

§ 9. The unlawful entering a building within Kirby's Dig. §§ 1603–1605, defining burglary, defined.—Pinson v. State (Ark.) 751.

§ 9. Under Kirby's Dig. §§ 1603–1605, one *held* guilty of burglary.—Pinson v. State (Ark.) 751.

II. PROSECUTION AND PUNISHMENT.

Cumulative sentences for burglary and larceny, see Criminal Law, § 1210.
Evidence of other offenses, see Criminal Law, § 369.
Opinion evidence, see Criminal Law, § 448.

§ 39. In a prosecution for burglary under Pen. Code 1895, art. 841, certain evidence *held* properly excluded.—Railey v. State (Tex. Cr. App.) 1120.

§ 46. It was unnecessary for the instructions to give the number of the car alleged to have been burglarized, where the state elected to prosecute for the burglary of a car named.—Gilbert v. State (Tex. Cr. App.) 1126.

CALENDARS.

Computation of time, see Time.

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CANALS.

Restraining interference with, see Injunction, § 136.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.
Rescission of contracts in general, see Contracts, § 261.
Setting aside fraudulent conveyances, see Fraudulent Conveyances, §§ 295–309.

I. RIGHT OF ACTION AND DEFENSES.

§ 3. Rescission of a deed will be applied only where there is a failure of the entire consideration, or such nonperformance of a mutual dependent covenant as amounts to abandonment of contract.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

§ 14. Failure of a railroad company to comply with a provision of a contract *held* not ground for a suit to rescind the contract and a deed executed in pursuance thereto.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

§ 15. A bill for rescission cannot be ordinarily maintained for mere breach of contract for which complainant has an adequate remedy at law.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

II. PROCEEDINGS AND RELIEF.

Amendment of pleading after rendition of oral opinion by court, see Pleading, § 245.
Appellate jurisdiction as dependent on title of realty being involved, see Courts, § 231.

CANDIDATES.

For office, see Elections, §§ 139–158.

CAPIAS.

Capias pro fine for costs, see Costs, § 321.

CAR INSPECTORS.

As fellow servants of conductors, see Master and Servant, § 181.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

Excessive fines for violation of regulation, see Criminal Law, § 1214.
Law providing cumulative penalties for charging excessive rates as depriving of property without due process of law, see Constitutional Law, § 298.
Validity of law making rates fixed by railroad commission conclusive except in direct action to test validity as denying equal protection of law, see Constitutional Law, § 242.

§ 4. A belt line railway company *held* not a common carrier within the meaning of Acts 1905, p. 29, c. 25, § 1, relating to the venue of actions against common carriers.—Texas & P. Ry. Co. v. Henson (Tex. Civ. App.) 1127.

§ 12. Under Rev. St. 1895, arts. 4565, 4566, certain freight rates *held* unreasonable and unjust.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 13. A contract rate in a transportation contract which was a mistake *held* not a discrimination.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 13. The charging of a lower freight rate not open to all shippers is a discrimination.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 20. Under Rev. St. 1895, arts. 4573, 4575, a carrier *held* guilty of separate offenses, and liable to a penalty for each offense.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 20. Under Rev. St. 1895, art. 4575, a railroad making an overcharge under a mistake of law *held* liable to the penalties imposed.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 20. Under Rev. St. 1895, arts. 4573, 4581, a shipper *held* entitled to recover penalties for each separate act of extortion committed by the carrier demanding excessive freight charges.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 20. Under Rev. St. 1895, arts. 4568, 4575, a shipper *held* authorized to sue for excessive freight charges collected by the carrier, and for the penalties imposed without applying to the Railroad Commission for relief.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

II. CARRIAGE OF GOODS.

(A) Delivery to Carrier.

§ 41. Facts *held* to show a delivery of cotton to a railroad company for transportation before it was destroyed by fire.—Texas Midland R. R. v. H. L. Edwards & Co. (Tex. Civ. App.) 570.

(F) Loss of or Injury to Goods.

§ 134. In an action against a railroad for cotton destroyed by fire, while on the platform of a cotton compress company to be shipped over defendant road, evidence *held* to sustain a finding that the compress company was defendant's agent for receiving the cotton.—Texas Midland R. R. v. H. L. Edwards & Co. (Tex. Civ. App.) 570.

(H) Limitation of Liability.

§ 150. Public policy forbids a common carrier from exempting itself by contract from damages for loss by its own negligence.—Kansas City Southern Ry. Co. v. Carl (Ark.) 932.

§ 153. Where cotton had been delivered to a railroad company and accepted for shipment, the fact that the bills of lading, which had not been signed before the cotton was destroyed by fire, negatived the company's liability for destruction by fire *held* not to prevent a recovery of the value of the cotton.—Texas Midland R. R. v. H. L. Edwards & Co. (Tex. Civ. App.) 570.

(I) Connecting Carriers.

§ 180. Under the Hepburn amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), an initial carrier could not by contract limit the liability of a connecting carrier for loss of freight on its line.—Kansas City Southern Ry. Co. v. Carl (Ark.) 932.

§ 185. Where the initial carrier received goods for transportation to another state by a connecting carrier, in absence of contrary evidence, it is presumed that the goods were lost through the negligence of the last carrier.—Kansas City Southern Ry. Co. v. Carl (Ark.) 932.

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(J) Charges and Liens.

§ 192. Where both carrier and cattle shipper intended the cattle should be transported at the regular rate, which by mistake was not named in the contract, it was not material that the shipper had no knowledge of a contract provision for the correction of the rate, if erroneous. —Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 193. A cattle shipper, being liable for additional freight charge from a mistake in the rate, and having refused to pay the same, could not recover for injury to the cattle while detained by the last carrier, in the absence of negligence in caring for the cattle while so detained.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 193. A connecting carrier by receiving cattle from the initial carrier for a further transportation to destination is not bound by a freight rate specified by the initial carrier's agent through mistake.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

III. CARRIAGE OF LIVE STOCK.

Application of instructions to pleadings and issues in action for injuries, see Trial, § 251.
Opinion evidence as to value, see Evidence, § 497.

§ 210. If a carrier's agent ordered plaintiff to unload a horse at a place where there were no proper facilities, it was immaterial, upon plaintiff's right to recover for resulting injuries, whether contract of carriage was to unload the horse at that point or another.—Louisville & N. R. Co. v. Gormley (Ky.) 965.

§ 215. The crowded condition of the stockyards at its terminus *held* not to excuse a railroad company from liability for negligence in handling a shipment of cattle.—Texas & P. Ry. Co. v. Henson (Tex. Civ. App.) 1127.

§ 219. An initial carrier's negligence in naming an incorrect freight rate to a cattle shipper *held* not the proximate cause of injury to the cattle resulting from their detention by the ultimate carrier because of the shipper's refusal to pay the difference between the specified and correct rate.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 219. A cattle shipper, being liable for additional freight charge from a mistake in the rate, and having refused to pay the same, could not recover for injury to the cattle while detained by the last carrier, in the absence of negligence in caring for the cattle while so detained.—Texas Mexican Ry. Co. v. Reed (Tex. Civ. App.) 519.

§ 228. In an action against a railroad company for damages for injuries to a horse in unloading it, evidence *held* to sustain a verdict for $2,000.—Louisville & N. R. Co. v. Gormley (Ky.) 965.

§ 228. In an action against a carrier for injuries to cattle, an instruction that the burden of proof of the carrier's negligence on the whole case was on plaintiffs *held* proper.—Baker v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 907.

§ 230. Where there was evidence that cattle shipped died from their inherent condition, there was no error in submitting that phase of the carrier's defense to the jury.—Baker v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 907.

§ 230. An instruction requiring that a carrier must have used ordinary care in shipping plaintiff's cattle before it would be relieved from liability for ordinary shrinkage *held* not prejudicial to plaintiff.—Baker v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 907.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 247. One who re-entered a railroad company's depot to purchase a ticket to be used on another line *held* not a passenger of the company.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

(C) Performance of Contract of Transportation.

§ 277. Punitive damages *held* recoverable, where a conductor abused a passenger who boarded the train not knowing that it did not stop at the station to which he had a ticket.—Cincinnati, N. O. & T. P. Ry. Co. v. Strosnider (Ky.) 971.

§ 277. A verdict of $750 *held* not excessive, where a conductor abused and threatened a passenger who had boarded the train not knowing that it did not stop at his station.—Cincinnati, N. O. & T. P. Ry. Co. v. Strosnider (Ky.) 971.

§ 278. Whether signals by plaintiff at a railroad flag station were sufficient to attract the attention of the engineer *held* for the jury.—Louisville & N. R. Co. v. Moore (Ky.) 666.

(D) Personal Injuries.

Assumption by judge as to facts in instructions, see Trial, § 191.
Receiver of railroad company as party defendant, see Receivers, § 179.

§ 280. Instructions only requiring of a carrier's servants the exercise of ordinary care to protect passengers from injury *held* to call for a degree of care below the legal requirements.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 282. A railroad company is not liable for injuries to a passenger during other parts of the journey before becoming a passenger on its road.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 283. A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants. —Missouri, K. & T. Ry. Co. of Texas v. Gerren (Tex. Civ. App.) 905.

§ 284. A carrier is not responsible for injuries to a passenger by the acts of another passenger unless the carrier was negligent in not anticipating the danger and guarding against it. —Adams v. Louisville & N. R. Co. (Ky.) 419.

§ 284. A carrier's liability for injuries to a passenger caused by the acts of fellow passengers defined.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 284. A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by third persons. —Missouri, K. & T. Ry. Co. of Texas v. Gerren (Tex. Civ. App.) 905.

§ 287. A carrier *held* not negligent in failing to stop or slacken the speed of a train on a passenger's signal, resulting in injury to him. —Bruff v. Illinois Cent. R. Co. (Ky.) 475.

§ 303. A passenger is entitled to a reasonable time in which to alight.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 303. In an action for injuries to a passenger while attempting to alight caused by the premature start of the car, the conductor *held* bound to know that she was in the act of

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alighting.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 303. A car having been stopped in response to a passenger's signal to alight, the operatives should exercise care not to start it until assured that no person was in the act of alighting.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 303. In an action for injuries to a mail clerk while attempting to alight from his car, evidence *held* insufficient to establish negligence on the part of the carrier.—Houston & T. C. Ry. Co. v. Keeling (Tex. Civ. App.) 597.

§ 306. A leasor street railway company *held* not liable for injuries suffered by passengers resulting from the negligence of a servant or employé of the leasee.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 315. In an action for injuries to a street car passenger by an alleged premature start, plaintiff *held* not committed to the theory that the west side of a street intersection was the regular stopping place for the discharge of eastbound passengers.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 316. Injury to a person by a passing train at a flag station, *held* not within the rule res ipsa loquitur.—Bruff v. Illinois Cent. R. Co. (Ky.) 475.

§ 317. In a suit for injuries to a female passenger, made sick by the unsanitary condition of the car, *held* proper to admit evidence as to a child being sick in an adjoining compartment.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 320. In an action for injuries to a passenger by the fall of another passenger's suit case from the parcel rack, whether the carrier was negligent *held* for the jury.—Adams v. Louisville & N. R. Co. (Ky.) 419.

§ 321. Certain instructions in an action for injuries to a street car passenger by a premature start *held* a sufficient charge on the issue of whether she had a reasonable opportunity to alight.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 321. In an action for injuries to a street car passenger, the refusal of certain of plaintiff's requested instructions and the giving of defendant's request *held* erroneous.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 321. A request to charge failing to require a finding that the crew of defendant's car from which plaintiff alighted when injured knew or could have known that plaintiff was alighting in time to avoid hurting her was properly refused.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 321. Where a passenger introduced evidence to show that the street car halted to permit her to alight and was carelessly started, she was entitled to have such situation submitted to the jury, though she was mistaken in her claim as to the place where the car usually stopped.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

§ 321. In an action for injuries to a passenger *held* error to refuse defendant's request to charge as to the burden of proof.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

§ 321. In an action by a passenger for an assault committed by the auditor, the refusal of a charge as to previous misconduct of passenger *held* erroneous.—Missouri, K. & T. Ry. Co. of Texas v. Gerren (Tex. Civ. App.) 905.

(E) Contributory Negligence of Person Injured.

§ 327. A prospective passenger injured while attempting to stop a train which he intended to board *held* negligent.—Bruff v. Illinois Cent. R. Co. (Ky.) 475.

§ 341. A passenger *held* guilty of contributory negligence precluding a recovery for an assault committed by an employé.—Missouri, K. & T. Ry. Co. of Texas v. Gerren (Tex. Civ. App.) 905.

§ 347. Whether a passenger injured by the fall of a suit case from the parcel rack above her was negligent in not observing it, or in sitting under it without objection, *held* for the jury.—Adams v. Louisville & N. R. Co. (Ky.) 419.

CASE ON APPEAL.

Necessity for purpose of review, see Appeal and Error, § 544.

CATTLE.

See Animals.

CAUSE OF ACTION.

See Action; Malicious Prosecution, §§ 16, 21.

CENSUS.

§ 8. Rev. St. 1899, § 5895a (Ann. St. 1906, p. 2990), did not repeal section 6300 (page 3147), regulating the taking of a census of a city of the fourth class, except to determine the tax rate.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

CERTIFICATE.

Land certificate, see Public Lands, § 174.
Of deposit as promissory note, see Bills and Notes, § 42.
Of nomination, see Elections, §§ 139, 158.
Of trial court as to time of perfecting appeal as condition precedent to affirmance for failure to file transcript, see Appeal and Error, § 1127.
To notice of tax sale, see Taxation, § 658.

CERTIORARI.

I. NATURE AND GROUNDS.

§ 5. Certiorari *held* the proper remedy, where it affords an adequate remedy for an excess of jurisdiction, or the exercise by an inferior court or public officer of unauthorized powers.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

§ 14. The action of the county court is under the control of superior courts, exercised by certiorari.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

§ 28. Certiorari is the proper remedy to restrain inferior courts or public officers when they act in excess of their jurisdiction.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

§ 29. An inferior tribunal or officer having jurisdiction to act, and invested with discretionary powers, cannot be controlled by certiorari by a superior tribunal, however improper the discretionary power has been exercised.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

CHALLENGE.

To juror, see Jury, §§ 97–116.

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CHAMPERTY AND MAINTENANCE.

§ 3. The English statute (St. 32 Hen. VIII, c. 9) against the sale of pretended titles to lands not in possession is not a part of the common law of Arkansas, having been abrogated by the statutes extending the right of alienation.—Moore v. Sharpe (Ark.) 341; Morris v. Fontaine (Ark.) 347; Hurst v. Lund, Id.

§ 4. Ky. St. 1909, §§ 209 (Russell's St. §§ 1776, 1783), 216, declaring void champertous agreements, *held* not to render void the cause of action made the subject of such an agreement.—Cumberland Telephone & Telegraph Co. v. Maxberry (Ky.) 447.

CHANCERY.

See Equity.

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see Fraudulent Conveyances, § 154.

CHARACTER.

Evidence of admissible by reason of admission of similar testimony by adverse party, see Evidence, § 155.
Of accused in criminal prosecutions, see Criminal Law, §§ 369–380.
Of witness, see Witnesses, §§ 337–350.

CHARGE.

By carrier, see Carriers, §§ 12, 192, 193.
To jury in civil actions, see Trial, §§ 191–205.
To jury, in criminal prosecutions, see Criminal Law, §§ 770–823.

CHARITIES.

Liability of master for negligence of physician employed to treat servant, as a mere charity, see Master and Servant, § 92.

CHARTER.

Of municipal corporations, see Municipal Corporations, §§ 18, 21.

CHATTEL MORTGAGES.

See Pledges.

CHEAT.

See False Pretenses; Fraud.

CHECKS.

See Bills and Notes.
Alteration of, burden of proof, see Alteration of Instruments, § 27.

CHILDREN.

See Guardian and Ward; Infants.
Injuries to, caused by defect in street, care required, see Municipal Corporations, § 763.

CHURCHES.

See Religious Societies.

CIRCUMSTANTIAL EVIDENCE.

Weight and sufficiency, see Criminal Law, § 564.

CITIES.

See Municipal Corporations.

CITIZENS.

Equal protection of laws, see Constitutional Law, §§ 210–242.
Privileges and immunities, see Constitutional Law, § 207.

CIVIL RIGHTS.

See Constitutional Law, §§ 207, 210–242.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 314, 320.

CLASS LEGISLATION.

See Constitutional Law, § 207.

CLERICAL ERRORS.

Correction of in judgment rendered on appeal or error, see Appeal and Error, § 1185.

CLERKS OF COURTS.

Presumptions as to performance of official duty, see Evidence, § 83.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL AGREEMENT.

Parol evidence, see Evidence, § 443.

COLLATERAL ATTACK.

On judgment, see Judgment, §§ 470–518.
On judgment against infant, see Infants, § 112.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKING.

See Frauds, Statute of, § 23.

COLLECTION.

Of taxes, see Taxation, §§ 581, 589.

COLOR OF TITLE.

To sustain adverse possession, see Adverse Possession.

COMBINATIONS.

See Conspiracy; Monopolies, § 18.

COMITY.

Between courts, see Courts, §§ 480, 488.

COMMERCE.

Carriage of goods and passengers, see Carriers.
Conclusiveness on state courts of decision of federal Supreme Court, on question of what constitutes interstate and foreign commerce, see Courts, § 97.
Presumptions as to validity of regulations, see Constitutional Law, § 48.

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II. SUBJECTS OF REGULATION.

§ 33. A shipment *held* intrastate commerce governed by the rates fixed by the Texas Railroad Commission.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 33. The question whether a shipment of goods is intrastate or interstate commerce must be determined by the shipping contract.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Inquisition of lunacy, see Insane Persons, §§ 24, 25.
Railroad commission, application to for relief against excessive charges as condition precedent to recovery of penalty, see Carriers, § 20.
Validity of law making rates fixed by railroad commission conclusive except in direct action to test validity as denying equal protection of law, see Constitutional Law, § 242.

COMMISSIONERS.

Highway commissioners, see Highways, §§ 39, 41.
Railroad commissioners, application to for relief against excessive charges as condition precedent to recovery of penalty, see Carriers, § 20.
Validity of law making rates fixed by railroad commissioners conclusive except in direct action to test validity as denying equal protection of law, see Constitutional Law, § 242.

COMMISSIONS.

Of broker, see Brokers, §§ 58–74, 86.

COMMITMENT.

For contempt, see Contempt, § 64.
On charge of crime, see Criminal Law, § 210.

COMMITTEE.

Guardianship of insane persons, see Insane Persons, § 30.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

Abrogation of common law rule relating to sale of pretended title to lands not in possession, see Champerty and Maintenance, § 3.
Jurisdiction of county court, see Courts, § 183.

COMMON SCHOOLS.

See Schools and School Districts, § 12.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 260, 273.

COMPENSATION.

For property taken for public use, see Eminent Domain, § 124.

Of particular classes of officers or other persons.
See Brokers, §§ 58–74, 86; Guardian and Ward, § 150; Witnesses, § 32.
Servant, see Master and Servant, § 82.

COMPETENCY.

Of evidence in civil actions, see Evidence, § 155.
Of experts as witnesses, see Evidence, §§ 537, 539½.
Of jurors, see Jury, §§ 97–116.
Of witnesses in general, see Witnesses, §§ 48–202.

COMPLAINT.

In criminal prosecutions, see Criminal Law, § 210; Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPRESS COMPANIES.

As agents of carriers for receipt of goods, see Carriers, § 134.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Payment; Release.

§ 8. Insured's acceptance of a check which the company falsely claimed represented the cash surrender value of his policy which the company had forfeited *held* not to constitute a compromise settlement.—New York Life Ins. Co. v. Van Meter's Adm'r (Ky.) 438.

§ 19. A buyer inspecting the goods before an adjustment of the damages for noncompliance with the contract *held* not entitled to urge that his claim did not cover all the loss.—Hardy Buggy Co. v. Royal Body Co. (Ky.) 450.

COMPUTATION.

Of period of limitation, see Limitation of Actions, §§ 72–127.
Of time, see Time.

CONCLUSION.

Of witness, see Evidence, §§ 471–497.

CONCURRENT JURISDICTION.

Of courts, see Courts, §§ 480, 488.

CONDEMNATION.

Taking property for public use, see Eminent Domain.

CONDITIONAL SALES.

See Sales, § 479.

CONDITIONS.

Imposition of on granting equitable relief, see Equity, § 423.
In deeds, see Deeds, §§ 144, 168.
In insurance policies, see Insurance, §§ 335–367, 748.
Precedent to distraint for taxes, see Taxation, § 581.
Precedent to action for penalties for excessive charges by carriers, see Carriers, § 20.

CONDUCTORS.

Railroad conductors as fellow servants of car inspectors, see Master and Servant, § 181.

CONFIRMATION.

By senate of appointments by governor, see Officers, § 15.

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Of guardian's sale, see Guardian and Ward, § 108.

CONFLICT OF LAWS.

As to contract of agency, see Principal and Agent, § 2.
As to contract to send telegram, see Telegraphs and Telephones, § 27.
Conflicting jurisdiction of courts, see Courts, §§ 480, 488.

CONNECTING CARRIERS.

See Carriers, §§ 180, 185.

CONSIDERATION.

Of contract in general, see Contracts, § 117.

Of particular classes of contracts.

See Bills and Notes, §§ 465, 489.
Notes given for purchase price of rights in public lands, see Public Lands, § 173.
Sale of realty, see Vendor and Purchaser, § 15.

CONSOLIDATION.

Of actions, see Action, §§ 46, 50.
Of church societies, see Religious Societies, § 34.
Of corporations, see Corporations, § 590.

CONSPIRACY.

Combinations to monopolize trade, see Monopolies, § 18.
Evidence of acts and declarations of conspirators, see Criminal Law, § 424.

I. CIVIL LIABILITY.

(B) Actions.

Instruction on weight and sufficiency of evidence, see Trial, § 194.

§ 19. Evidence *held* to sustain a finding that defendant P. was connected with, and a party to, the conspiracy in question.—Weatherred v. Finley (Tex. Civ. App.) 895.

§ 21. In an action for conspiracy, an instruction that if one of the defendants was not a party to the fraud or had not conspired, or if another was not plaintiff's agent, the jury should find for the defendants, *held* properly refused.—Weatherred v. Finley (Tex. Civ. App.) 895.

§ 21. In an action for conspiracy a requested charge *held* objectionable as misleading the jury to disregard or minimize the weight of a subquent conveyance to one of the conspirators as affecting the original transaction.—Weatherred v. Finley (Tex. Civ. App.) 895.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 43. An indictment *held* to sufficiently charge a conspiracy to burn a dwelling house, and, having sufficiently described it for purposes of identification, was not objectionable for failure to allege the owner.—Lane v. Commonwealth (Ky.) 486.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTION.

Of religious societies, see Religious Societies, § 34.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See Bankruptcy, § 9; Courts, § 178; Eminent Domain, § 63; Physicians and Surgeons, § 2; Taxation, §§ 40, 42.
Enactment and validity of statutes, see Statutes, §§ 5, 64.
Special or local laws, see Statutes, §§ 92–97.
Subjects and titles of statutes, see Statutes, §§ 109, 113.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 38. The construction of a state statute which brings it in conflict with the Constitution will nullify it as effectually as if it had in the first instance been enacted in conflict therewith.—Gilkeson v. Missouri Pac. Ry. Co. (Mo.) 138.

§ 48. Act May 16, 1907 (Laws 1907, p. 500, c. 22), relating to foreign corporations, construed.—Western Union Telegraph Co. v. State (Tex. Civ. App.) 194.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

§ 70. The legislative exercise of the police power must be reasonable, and whether or not it is reasonable is for the courts to determine, but the necessity for the exercise of the power in a given case is addressed to the discretion of the Legislature.—Missouri & N. A. R. Co. v. State (Ark.) 930.

§ 70. The Constitution permits special legislation when general laws cannot be made applicable, and the Legislature is the sole judge of the necessity for a special statute.—Missouri & N. A. R. Co. v. State (Ark.) 930.

VI. VESTED RIGHTS.

§ 105. One contracting with the state must do so with knowledge that he must rely solely on the legislative branch for performance of the contract and for satisfaction of the state's just obligations, though the privilege of suing the state is extended to him, as the right to sue the state is not a vested right, and may be withdrawn at any time.—Pitcock v. State (Ark.) 742.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

§ 120. Statutes regulating the control and management of corporations within the state are not contracts, but only police regulations, which may be amended or repealed at pleasure.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 207. Enforcing against a foreign corporation already doing a local business in the state of a statute exacting conditions as prerequisite to doing such business *held* not an abridgment of privileges and immunities of a citizen of another state.—Western Union Telegraph Co. v. State (Tex. Civ. App.) 194.

X. EQUAL PROTECTION OF LAWS.

§ 210. Const. U. S. Amend. 14, *held* to apply to corporations and to forbid states, by

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arbitrary classification, to place burdens upon one class of persons not shared by others.—Missouri & N. A. R. Co. v. State (Ark.) 930.

§ 241. A statute requiring a certain railroad to fence its track in certain counties *held* not violative of Const. U. S. Amend. 14, because there are other railroads in that portion of the state and another railroad traverses one of the counties; the statute not being an arbitrary classification.—Missouri & N. A. R. Co. v. State (Ark.) 930.

§ 242. Rev. St. 1895, art. 4564, when considered in connection with articles 4565, 4566, *held* not to deny to the railroads the equal protection of the law in violation of the fourteenth amendment to the federal constitution.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

XI. DUE PROCESS OF LAW.

§ 257. Conviction of accused for murder before a judge pro tem appointed by the Governor without authority *held* a deprivation of life without due process of law, in violation of Const. U. S. Amend. 14.—Oates v. State (Tex. Cr. App.) 370.

§ 295. Act May 14, 1907 (Laws 1907, p. 447, c. 8), making a local option election binding unless contested within the time prescribed, and making the result of a contest binding though a person may not have been a party thereto, *held* not a denial of due process of law in violation of Const. U. S. Amend. 14.—Stockard v. Reid (Tex. Civ. App.) 1144.

§ 298. Rev. St. 1895, art. 4581, *held* not invalid as depriving one of his property without due process of law in violation of the fourteenth amendment to the federal Constitution.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

§ 305. A judgment rendered by a state judge does not deprive the defeated party of his property without due process of law, in violation of 14th amendment to the federal Constitution, merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to receive a part of the judgment for his fees.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

CONSTRUCTION.

Of contracts, instruments or judicial acts or proceedings.

See Contracts, §§ 144–212; Covenants, §§ 27–79; Deeds, §§ 90–168; Mortgages, § 114; Sales, §§ 68–88; Statutes, §§ 181–253; Wills, §§ 490–697.

Instructions, see Trial, § 295.

Insurance policy, see Insurance, § 146.

CONSTRUCTIVE POSSESSION.

Of property in general, see Property, § 10.

CONSTRUCTIVE TRUSTS.

See Trusts, § 95.

CONTEMPT.

Refusal of witness to answer questions, privilege of witness, see Witnesses, § 297.

Violation of injunction, see Injunction, §§ 219–230.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 64. Commitment of a witness for contempt in treating the court disrespectfully, failing to find in what the disrespect consisted, etc., *held* fatally defective under Rev. St. 1899, § 3576 (Ann. St. 1906, p. 2023).—Ex parte Shull (Mo.) 10.

CONTEST.

Of election, see Elections, §§ 285, 288.

CONTINGENT REMAINDERS.

Creation, see Wills, §§ 629, 634.

CONTINUANCE.

In criminal prosecution, see Criminal Law, §§ 590–614.

Rules of court relating to, see Courts, § 80.

§ 20. Where defendant had three attorneys, and the procuring of certain material testimony did not require the personal attendance of one of the attorneys, his absence was not ground for a continuance on the ground that it prevented defendant from procuring such testimony.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

§ 23. A continuance in proceedings to foreclose a lien on land *held* properly refused.—Burge v. Chestnut (Ky.) 989.

§ 24. In an action for injuries to plaintiff, the court did not err in denying defendant's application for a continuance to procure evidence, which was both cumulative and impeaching.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Cancellation, see Cancellation of Instruments.

Damages for breach, see Damages, §§ 123, 124.

Impairing obligation, see Constitutional Law, § 120.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of customs or usages, see Customs and Usages.

Operation and effect of usury laws, see Usury, §§ 1–113.

Parol or extrinsic evidence, see Evidence, §§ 399–463.

Restraining performance or breach, see Injunction, § 57.

Specific performance, see Specific Performance.

Subrogation to rights or remedies of creditors, see Subrogation.

Contracts of particular classes of persons.

See Corporations, § 448; Infants, § 49; Master and Servant; Municipal Corporations, §§ 335, 362.

Contracts relating to particular subjects.

See Mines and Minerals, § 77.

Particular classes of express contracts.

See Bills and Notes; Covenants; Depositaries; Indemnity; Insurance; Liens; Partnership; Sales.

Agency, see Principal and Agent.

Employment, see Master and Servant.

Leases, see Landlord and Tenant.

Sales of realty, see Vendor and Purchaser.

Suretyship, see Principal and Surety.

Particular classes of implied contracts.

See Covenants, § 14; Money Received; Work and Labor.

Particular modes of discharging contracts.

See Accord and Satisfaction; Compromise and Settlement; Payment; Release.

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I. REQUISITES AND VALIDITY.

(D) Consideration.

Notes given for purchase price of rights in public lands, see Public Lands, § 173.
Of bill or note, see Bills and Notes, § 489.

(F) Legality of Object and of Consideration.

§ 117. Insurance "expirations," consisting of custom and trade which would ordinarily be renewed in and held by an agency, are of value, and subject to sale, and the seller may protect the purchaser by agreeing to refrain from engaging in the business within a certain county for five years.—Bloom v. Home Ins. Agency (Ark.) 293.

§ 117. If an enterprise sold is disconnected with any plant or tangible property, and is a business with a good will and custom, the seller may agree to discontinue such calling, and abstain from such business.—Bloom v. Home Ins. Agency (Ark.) 293.

§ 117. Where a contract in restraint of trade is limited as to time and place, and is reasonable, the contract is not against public policy.—Bloom v. Home Ins. Agency (Ark.) 293.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 144. The rights and duties of parties to interstate contracts are determined by the law of the state where the contract is made unless a contrary intention appears.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 147. The cardinal rule for the interpretation of contracts is that the intention of the parties shall be effectuated.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 166. Failure to attach plans and specifications to a building contract, owing to no fault of the contractors, *held* immaterial.—Womble v. Hickson & Findley (Ark.) 401.

§ 168. The terms of a contract may be express or implied from acts, but there must be in either case a distinct intention common to both parties.—Blake v. Scott (Ark.) 1054.

(B) Parties.

Real party in interest in action on contract, see Parties, § 6.

(D) Place and Time.

§ 212. The time for performance of a contract where no time is specified *held* to be a reasonable time.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

IV. RESCISSION AND ABANDONMENT.

§ 261. Partial failure to perform the terms of a contract *held* to dissolve the contract.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 261. Where an agreement is mutual and dependent, and one party fails to perform his part, the other party may treat it as rescinded.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 261. Failure of one party to perform the terms of a contract *held* ground for rescission.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

V. PERFORMANCE OR BREACH.

§ 280. Where a building contract was silent as to the quality of material and workmanship, reasonably good material and reasonably skillful workmanship would be required.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 280. A builder of a warehouse *held* not liable as for breach of contract if the breaking down of the structure was due to the owner's overloading.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 303. While, when without fault, a party is disabled to perform a duty created by law, the law will excuse him, yet where by contract he creates a duty, he must make it good if he may, notwithstanding any accident by inevitable necessity.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 304. Possession taken by the owner of a building does not constitute an acceptance, unless intended as such.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 305. The owner of a warehouse having accepted it from the builder with full knowledge of the kind of materials and workmanship used *held* not entitled to recover as for breach of contract on a subsequent breaking down thereof.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 312. Where one sold a business, and agreed to refrain from competition for a certain term, it was a breach for him, either individually or as a partner of the firm, to engage in a competitive business.—Bloom v. Home Ins. Agency (Ark.) 293.

VI. ACTIONS FOR BREACH.

Real party in interest, see Parties, § 6.

§ 346. In an action on a special contract plaintiff can only recover on the contract alleged, and not on a different contract.—Jenkins v. Clopton (Mo. App.) 759.

§ 346. In an action for breach of contract for which no time for performance is specified, a general denial puts plaintiff on proof of his allegation that one year was a reasonable time within which defendants should have performed the contract, and defendant may introduce any evidence which goes to controvert the evidence introduced by plaintiff.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

CONTRADICTION.

Of record, see Appeal and Error, §§ 662–670.
Of witness, see Witnesses, § 398.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 68–85.

CONTROVERSY.

Amount or value in controversy as affecting appellate jurisdiction, see Courts, § 231.
Existence of actual controversy as requisite to appellate jurisdiction, see Criminal Law, § 1134.

CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

In fraud of creditors, see Fraudulent Conveyances.
In trust, see Trusts, §§ 17–41.

Conveyances by or to particular classes of persons.

See Corporations, §§ 435–446; Guardian and Ward, §§ 103–105; Husband and Wife, § 14.
Married women, see Husband and Wife, §§ 193–199.

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Conveyances of particular species of, or estates or interests in, property.

See Easements, § 25; Homestead, §§ 115, 119.
Separate property of married women, see Husband and Wife, §§ 193–199.
Standing timber, see Logs and Logging, § 3.
Swamp lands, see Public Lands, § 61.

Particular classes of conveyances.

See Deeds; Mortgages.

CONVICTS.

Authority of court of appeals to review order of county court contracting for employment of convicts, see Courts, § 231.
Conviction of felony as terminating risk under insurance certificate, see Insurance, § 748.
Liability of city for injuries to persons injured by breaking rock to pay fine, see Municipal Corporations, § 747.
Suit against penitentiary board to restrain violation of contract for convict labor as one against state, see States, § 191.

§ 10. Rev. St. 1899, § 1791 (Ann. St. 1906, p. 1249), construed, and *held* to apply only to persons convicted of a misdemeanor, so that the county court undertaking to provide for the employment of one convicted of a felony acts in excess of its jurisdiction.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

§ 10. Rev. St. 1899, §§ 1791–1793 (Ann. St. 1906, p. 1249), construed and *held* not to authorize the county court by contract to deprive the sheriff and jailor of the custody of prisoners, and all contracts for the employment of prisoners must be made subject to this restriction.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

CORPORATIONS.

As persons within constitutional guaranty of equal protection of law, see Constitutional Law, § 210.
Removal to federal court of action against corporation created by act of congress, see Removal of Causes, § 19.
Subject and title of statute, see Statutes, § 113.

Particular classes of corporations.

See Beneficial Associations; Municipal Corporations; Railroads; Religious Societies; Street Railroads.
Insurance companies, see Insurance.
Telegraph and telephone companies, see Telegraphs and Telephones.
Water companies, see Waters and Water Courses, § 196.

I. INCORPORATION AND ORGANIZATION.

Application of statute of frauds to misrepresentations by incorporators, see Frauds, Statute of, § 38.
Fraudulent representation by incorporators, see Fraud, §§ 21, 48, 58.

§ 30. A judgment against an incorporator of an insolvent corporation in favor of a judgment creditor in an action for fraud and deceit, based on oral representations of solvency, which were required to be in writing to render them liable, cannot be sustained on the ground that the judgment is righteous because defendants were officers and stockholders, and had not paid for their stock in money or its equivalent.—McKee v. Rudd (Mo.) 312.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(D) Transfer of Shares.

§ 123. Contingent interest of a pledgor of a certificate of stock in the hands of the pledgee to indemnify it as surety for pledgor, *held* assignable in equity.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

(E) Interest, Dividends, and New Stock.

Application of general statutes of limitations to action to recover dividends, see Limitation of Actions, § 25.

§ 153. A corporation *held* to have no right to make the defense, in behalf of either of certain parties, that its financial condition did not warrant the declaration of a dividend.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 155. Dividends belong to the owner of stock at the time they were declared.—Livingston County Bank v. First State Bank (Ky.) 451.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 317. Acts of persons in appropriating earnings of a corporation *held* constructive fraud as to a cestui que trust of one of the persons to whom stock of the corporation had been issued under a decree of court, and who had been directed to pay the cestui que trust's pro rata shares of the earnings of the corporation.—Allen v. Hutcheson (Tex. Civ. App.) 1141.

(D) Liability for Corporate Debts and Acts.

§ 339½. Officers of a corporation to escape liability under Ky. St. 1909, § 549 (Russell's St. § 2133), *held* required to exercise reasonable diligence to understand the condition of the corporation.—Allen v. Neale (Ky.) 612.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 388. Where a contract of a corporation has been so carried out that the corporation has received the benefits thereof, it cannot violate the contract, on the ground that it had no power to make it.—Bloom v. Home Ins. Agency (Ark.) 293.

§ 389. Where it was within the implied power of corporations to dispose of an insurance agency, it will be presumed that a contract with the purchaser not to engage in a competing business was not ultra vires.—Bloom v. Home Ins. Agency (Ark.) 293.

(B) Representation of Corporation by Officers and Agents.

§ 423. A corporation is not liable for the slanderous utterance of its servants, unless the actionable words were spoken by its express consent, direction, or authority or were ratified by it.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

§ 426. When knowledge is brought home to a corporation of the unauthorized act of an agent, it must promptly disavow it, or it will be held to have ratified the act.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 426. A corporation may ratify by passive acquiescence, as well as by affirmative action, the unauthorized acts of its agents, and its acquiescence, with knowledge if continued for a considerable time, operates as a ratification.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 426. A corporation may be bound by the act of its agent acting within the scope of his authority, or by acquiescing in and ratifying an unauthorized act done on its behalf by the agent.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

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§ 432. Evidence *held* to support a finding that a corporation ratified the acts of its president, whereby he consented to the construction of an interurban railroad across the land of the corporation binding the corporation.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 432. Where the unauthorized act of an agent of a corporation is beneficial to it, a presumption of ratification by the corporation arises from slight circumstances.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

(C) Property and Conveyances.

Escheat of property not necessary for corporate use, see Escheat, §§ 2, 4, 6.

§ 435. A corporation authorized to purchase, hold, and convey real property was not authorized to buy and hold lands in violation of Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153).—Commonwealth v. Louisville Property Co. (Ky.) 399.

§ 439. Under Sayles' Ann. Civ. St. 1897, art. 651, subd. 4, a corporation *held* authorized to grant to a traction company a right of way over its land.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 439. The right of a corporation to dispose of the real estate it is authorized to purchase is a necessary incident to its ownership thereof.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 446. A conveyance of land to a corporation incompetent by its charter to take title to real estate is valid until assailed directly by the state.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

(D) Contracts and Indebtedness.

§ 448. An agreement, for the benefit of a corporation to be subsequently organized, after organization *held* not void for want of mutuality.—Bloom v. Home Ins. Agency (Ark.) 293.

IX. REINCORPORATION AND REORGANIZATION.

§ 573. The time of a performance of a contract for the reorganization of a corporation in the absence of a definite stipulation *held* to be a reasonable time, dependent on the circumstances.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 573. A breach of a contract to reorganize a corporation *held* to authorize an action for damages.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 573. An agreement with trustees of a corporation as to the reorganization of the corporation construed.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 580. In an action for breach of an agreement to reorganize a corporation, and to sell bonds of the company in a certain amount, it was not necessary for plaintiff to show that the bonds would have netted the specified amount in excess of the indebtedness of the company, as there was no such contingency provided for in the contract.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 580. In an action for breach of a contract to reorganize a corporation *held*, that a requested instruction as to the estoppel of plaintiff to complain of the failure of defendant to perform should have been given.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

§ 580. In an action to rescind an agreement to reorganize a corporation, the introduction of bonds in evidence that were issued to plaintiff, *held* unnecessary.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

X. CONSOLIDATION.

§ 590. Consolidated corporation *held* liable for the torts of its constituent companies.—Palmer v. Chicago & A. R. Co. (Mo. App.) 1087.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 599. That a corporation's right to do business had been forfeited for its failure to pay franchise tax as required by Rev. St. 1895, art. 5243i, as amended by Laws 1905, p. 21, c. 19, and continued in Laws 1907, p. 502, c. 23, did not destroy its corporate existence, though it assigned its assets and ceased to do business.—Maloney Mercantile Co. v. Johnson County Sav. Bank (Tex. Civ. App.) 889.

§ 630. A corporation whose right to do business had been forfeited under Rev. St. 1895, art. 5243i, as amended by Laws 1905, p. 21, c. 19, and continued in Laws 1907, p. 502, c. 23, *held* entitled to be heard upon its plea of non est factum and other defensive pleas in an action against it on bills of exchange.—Maloney Mercantile Co. v. Johnson County Sav. Bank (Tex. Civ. App.) 889.

XII. FOREIGN CORPORATIONS.

Construction in favor of validity of law relating to permit to do business in state, see Constitutional Law, § 48.

Foreign insurance companies, see Insurance, § 20.

Regulations denying privileges and immunities of citizens, see Constitutional Law, § 207.

§ 636. Foreign corporations cannot object to conditions imposed by law precedent to their right to do business within the state.—State ex. rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 636. Extent of state's power to exact license fee from foreign corporations, stated.—Western Union Telegraph Co. v. State (Tex. Civ. App.) 194.

§ 651. Under Const. art. 4, § 22, *held*, that the Attorney General could proceed to oust a foreign corporation failing to comply with Act May 16, 1907 (Laws 1907, p. 500, c. 22), though the Legislature had not prescribed that penalty.—Western Union Telegraph Co. v. State (Tex. Civ. App.) 194.

CORRECTION.

Of charges by carrier after making special contract for transportation of live stock, see Carriers, § 192.

Of irregularities and errors at trial, see Trial, §§ 412, 424.

Of judgment, see Judgment, § 299.

Of mistake in application to purchase school lands, see Public Lands, § 173.

Of mistake in government survey, see Public Lands, § 26.

Of record on appeal or writ of error, see Appeal and Error, §§ 638–653.

CORROBORATION.

Of witness in general, see Witnesses, §§ 317–329.

COSTS.

V. AMOUNT, RATE, AND ITEMS.

§ 150. A party securing the publication of a legal notice without any express contract for the price *held* to agree to pay the regular price, which the court must fix at the sum prescribed

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by Kirby's Dig. § 4921.—Reed v. Doniphan Lumber Co. (Ark.) 275.

§ 150. Kirby's Dig. §§ 4919, 4921, relating to the publication of legal notices and the costs thereof, *held* not to prevent an individual at whose instance a legal notice is published from contracting for publication at any agreed price.—Reed v. Doniphan Lumber Co. (Ark.) 275.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Presumptions as to collection by clerk of Appellate Court on remand of case, see Evidence, § 83.
Reinstatement of appeal in order to assess damages, see Appeal and Error, § 807.

§ 238. Appellant, failing to call the attention of the trial court to an error in the judgment, *held* liable for the costs on appeal.—Davidson v. Wills (Tex. Civ. App.) 540.

§ 256. Under Gen. Laws 1907, p. 510, c. 24, § 5, *held* that where an appellant has the statement of facts copied in the record, instead of including the original therein, it should be charged with the cost thereof, though judgment is reversed.—Greenville Water Co. v. Beckham (Tex. Civ. App.) 709.

IX. IN CRIMINAL PROSECUTIONS.

§ 321. A capias pro fine for the costs of a successful criminal prosecution *held*, notwithstanding an error therein, to justify the arrest and detention of accused until the error is corrected by the court or the capias is satisfied by payment.—Johnson v. Scott (Ky.) 695.

CO-TENANCY.

See Tenancy in Common.

COUNCIL.

See Municipal Corporations, § 106.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEITING.

See Forgery.

COUNTIES.

See Municipal Corporations.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

Holding of other office, see Officers, § 30.

COURTS.

Contempt of court, see Contempt.
Criminal jurisdiction, see Criminal Law, § 103.
Judges, see Judges.
Judicial power, see Constitutional Law, § 70.
Jurisdiction of action to set aside decree in inquisition of lunacy, see Insane Persons, § 25.
Jurisdiction of court to order sale of school lands, see Public Lands, § 54.
Justices' courts, see Justices of the Peace.
Mandamus to inferior courts, see Mandamus, §§ 26–53.
Province of court and jury, see Trial, §§ 191–194.
Removal of action from state court to United States court, see Removal of Causes.
Review of decisions, see Appeal and Error.
Trial by court without jury, see Trial, § 340.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 33. The jurisdiction of courts of inferior jurisdiction and of courts not proceeding according to the course of the common law must affirmatively appear on the face of the proceedings.—Doddridge v. Patterson (Mo.) 72.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§ 74. If a witness is unable to appear because of illness, the court in its discretion may upon a motion of the party desiring the evidence permit the jury together with counsel and the parties to go to the witness, and there take his testimony.—Davis v. Commonwealth (Ky.) 429.

(C) Rules of Court and Conduct of Business.

§ 80. A court rule, providing that, after a case is set for trial, it shall not be reset or continued without consent of court, and on sufficient reasons, was reasonable.—Conrad Schopp Fruit Co. v. Bondurant (Ky.) 482.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89. Where no rule of property is disturbed, and the dignity and sovereignty of the state is involved, the court must overrule erroneous decisions.—Pitcock v. State (Ark.) 742.

§ 89. One suing the State Penitentiary Board to restrain its breach of a contract for convict labor cannot complain because the court determines that the suit is one against the state, within the prohibition in Const. art. 5, § 19, thereby overruling a prior decision authorizing the maintenance of a suit on the same contract against the same board.—Pitcock v. State (Ark.) 742.

§ 91. A ruling of law by the Supreme Court is binding upon the Court of Civil Appeals.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 93. Decisions which become rules of property should not be overruled, whether right or wrong.—Pitcock v. State (Ark.) 742.

§ 97. The decisions of the federal Supreme Court as to what constitutes intrastate commerce and interstate and foreign commerce are conclusive on the state courts.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 120. The county court *held* to have no jurisdiction to enjoin a judgment of a justice for less than $100.—Arnold v. McNinch & Raney (Tex. Civ. App.) 904.

§ 121. Where the amount gives the circuit court jurisdiction, plaintiff can have the case submitted to the jury, regardless of the amount which the proof shows he is entitled to recover, where there is some evidence to establish his claim.—Montgomery v. Glasscock (Ky.) 668.

§ 121. The county court was without jurisdiction of a cross-action for $750 in a suit by plaintiff to recover $550.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

(B) Courts of Particular States.

§ 135. Under Ky. St. 1909, § 966 (Russell's St. § 2813), that an attachment was obtained and levied on defendant's land *held* to give the circuit court jurisdiction, though the note sued

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on was for less than $50 and though otherwise, under Ky. St. 1909, § 1086 (Russell's St. § 3100), the justice's or quarterly court would have had exclusive jurisdiction.—Hatton v. Rogers (Ky.) 698.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

Control of action of by superior court by certiorari, see Certiorari, § 14.

§ 159. The grounds of the jurisdiction of inferior tribunals must appear affirmatively on the face of their proceedings.—Sawyer v. Burris (Mo. App.) 321.

§ 163. A contract granting certain rights in oil land *held* a conveyance of an interest in land, so that the county court had no jurisdiction to enforce by injunction that part of the contract requiring the grantee to deliver to the grantor a portion of all the oil to be produced.—Staley & Barnsdall v. Derden (Tex. Civ. App.) 1136.

§ 169. The constitutional provision, limiting the jurisdiction of the county court to suits where the amount in controversy exceeds $200 and does not exceed $1,000, applies to writs of injunction.—Staley & Barnsdall v. Derden (Tex. Civ. App.) 1136.

§ 170. To confer jurisdiction on the county court to enforce a contract whereby defendant, in consideration of a grant of the oil in certain land, agreed to give plaintiff a portion of the oil to be produced, it was necessary to allege the value of such oil to be within the limits prescribed by the constitutional provisions regulating the jurisdiction of the court.—Staley & Barnsdall v. Derden (Tex. Civ. App.) 1136.

§ 178. Under Const. §§ 142, 143, and Ky. St. 1909, §§ 1086, 3513 (Russell's St. §§ 3100, 1526), a police court *held* to have no jurisdiction of an action for injunction.—Brady v. Brannon (Ky.) 679.

§ 180. Under Const. § 139, and Ky. St. 1909, § 1051 (Russell's St. § 3126), *held*, a quarterly court has no jurisdiction of an action for injunction.—Brady v. Brannon (Ky.) 679.

§ 183. The county court is of statutory origin, and has no common-law or equitable jurisdiction.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 207. Under Const. Amend. 1884, § 4 (Ann. St. 1906, p. 244), and Rev. St. 1899, § 1598 (Ann. St. 1906, p. 1194) the Springfield Court of Appeals *held* to possess original jurisdiction to issue the writ of certiorari and other remedial writs.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

(B) Courts of Particular States.

§ 223. The court *held* not to have jurisdiction on appeal, irrespective of amount involved, in an attachment proceeding, in which a lien is sought on personal property.—H. Krish Co. v. Rigsby (Ky.) 479.

§ 223. The amount in controversy *held* less than $200, required by Ky. St. 1909, § 950 (Russell's St. § 2784), to give jurisdiction on appeal.—H. Krish Co. v. Rigsby (Ky.) 479.

§ 223. The action *held* one for recovery of money or personal property, within Ky. St. 1909, § 950 (Russell's St. § 2784), as to jurisdiction of appeal.—H. Krish Co. v. Rigsby (Ky.) 479.

§ 223. In an action against a railroad for injury to a passway, title to the passway *held* not involved so as to give the Court of Appeals jurisdiction of an appeal.—Illinois Cent. R. Co. v. Major (Ky.) 646.

§ 231. Before the Supreme Court can entertain an appeal on the ground that title to real estate is involved, within Const. § 12 (Ann. St. 1906, p. 218), the record must show that the title to the real estate mentioned in the pleadings will be directly affected by the judgment to be rendered.—Turner v. Morris (Mo.) 9.

§ 231. An appeal from a judgment in replevin *held* not to lie to the Supreme Court on the ground that title to real estate is involved, within Const. art. 6, § 12 (Ann. St. 1906, p. 218).—Turner v. Morris (Mo.) 9.

§ 231. A decree dismissing a suit to cancel a contract and a deed to certain real estate is appealable to the Supreme Court as involving title to land.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

§ 231. Supreme Court *held* to have jurisdiction of a case as involving over $4,500, under Rev. St. 1899, § 1649a, added by Laws 1901, p. 107 (Ann. St. 1906, p. 1208).—McCoy v. Randall (Mo.) 31.

§ 231. The Court of Appeals *held* authorized to issue certiorari to review an order of the county court contracting for the employment of one convicted of violating Rev. St. 1899, § 1838 (Ann. St. 1906, p. 1277), notwithstanding Const. art. 6, § 12, and Amend. 1884, § 5 (Ann. St. 1906, pp. 218, 244).—State ex rel. Sanks v. Johnson (Mo. App.) 780.

VII. UNITED STATES COURTS.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

§ 289. A complaint in an action against a carrier, in a state court, *held* not objectionable as raising a question of interstate commerce, over which federal courts alone have jurisdiction.—Porter v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 897.

(K) Territorial and Provisional Courts.

Presumptions as to continuance of rules of construction of territorial court after admission of territory as a state, see Evidence, § 67.

§ 428. The territorial courts which existed in the Indian Territory and Oklahoma Territory before the admission into the Union of Oklahoma as a state formed no part of the judicial system provided for in the federal Constitution, and such courts ceased to have any further existence on the admission of the state into the Union.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 480. Civ. Code Prac. §§ 284, 285, have no application where the injunction sought is only incidental to a suit to have an ordinance declared invalid, and the circuit court has jurisdiction.—Arnett v. Cardwell (Ky.) 964.

§ 480. Rev. St. 1895, art. 2996, relating to suits to enjoin execution of judgment, construed.—Kruegel v. Rawlins (Tex. Civ. App.) 216.

§ 488. Where the parties to an action at law did not object to the transfer thereof to the chancery court, and did not object to the chancery court entertaining and trying the action, any objection to the transfer was waived, and the chancery court had jurisdiction to try and determine the action.—Blake v. Scott (Ark.) 1054.

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(B) Implied Covenants.

§ 14. The meaning of the words "grant, bargain and sell" in a deed, within Rev. St. 1899, § 907 (Ann. St. 1906, p. 838), defined.—Waldermeyer v. Loebig (Mo.) 75.

II. CONSTRUCTION AND OPERATION.

(A) Covenants in General.

§ 27. A deed of trust construed, and *held*, that a grantor therein did not warrant that she had an indefeasible estate in fee.—Waldermeyer v. Loebig (Mo.) 75.

(D) Covenants Running with the Land.

Covenant in conveyance of railroad right of way, see Railroads, § 72.

§ 73. An agreement between a grantor in a deed, with covenant of warranty, and the grantee therein, by which the latter relieves the former of liability on the covenant, does not operate as an estoppel on a subsequent or remote grantee, or prevent him from suing on the warranty.—Snadon v. Salmon (Ky.) 970.

§ 79. A grantee who has been evicted *held* entitled to sue a remote grantor unless he seeks to recover on a warranty in a deed by a remote grantor with knowledge of the fact that the conveyance was not intended to pass title.—Snadon v. Salmon (Ky.) 970.

§ 79. A grantee *held* not entitled to sue a remote grantor on his covenant of warranty.—Snadon v. Salmon (Ky.) 970.

III. PERFORMANCE OR BREACH.

§ 102. A covenant of warranty presupposes that the title to the property is conveyed; and, where the title was not intended to pass, the grantee, if evicted, has not suffered any loss because he had no title.—Snadon v. Salmon (Ky.) 970.

IV. ACTIONS FOR BREACH.

Damages for breach of covenant to construct railroad station, see Railroads, § 72.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

Of witness, see Witnesses, §§ 317–398.

CREDITORS.

See Bankruptcy; Creditors' Suit; Fraudulent Conveyances.

Of intestate, see Descent and Distribution, §§ 134, 143.

Remedies against surety, see Principal and Surety, § 159.

Rights and remedies of surety, see Principal and Surety, § 187.

Subrogation to rights of creditor, see Subrogation.

CREDITORS' SUIT.

§ 5. The interest of a pledgor of a certificate of deposit in the hands of the pledgee to indemnify it against loss, as surety for pledgor, *held* such an interest as is properly reached by a creditors' bill.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 5. A creditors' bill will reach such assets of the debtor as are not subject to levy or garremedy to reach certain assets of the debtor, though he originally held the legal title thereto.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

CRIMINAL LAW.

Conviction of offense included in that charged, see Indictment and Information, §§ 189, 190.

Convicts, see Convicts.

Costs in criminal prosecutions, see Costs, § 321.

Grand jury, see Grand Jury.

Indictment, information, or complaint, see Indictment and Information.

Particular offenses.

See Arson; Assault and Battery, § 54; Bigamy; Burglary; Conspiracy, § 43; Contempt; Embezzlement; False Pretenses; Fires; Forgery; Gaming, §§ 72–102; Homicide; Larceny; Malicious Mischief; Obscenity; Perjury; Rape; Sodomy.

Against liquor laws, see Intoxicating Liquors, §§ 147–159, 226–239.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

Intent as element of crime in sale of liquors to minor, see Intoxicating Liquors, § 159.

§ 27. Under Rev. St. 1899, §§ 2393, 2395 (Ann. St. 1906, p. 1466), one convicted of violating section 1838 (page 1272) *held* convicted of a felony, though he is punished by imprisonment in the county jail.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

IV. JURISDICTION.

§ 103. Where an indictment for misdemeanor is transferred to the county court, the record must show an order of transfer, to sustain a conviction there.—Harris v. State (Tex. Cr. App.) 1116.

VII. FORMER JEOPARDY.

§ 187. A cause which is pending upon appeal is not such a judgment as will support a plea of former jeopardy.—Harvey v. State (Tex. Cr. App.) 501.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

Necessity of allegations in indictment as to preliminary examination, see Indictment and Information, § 47.

§ 210. Any credible person, cognizant of the facts, may make the complaint charging a criminal offense.—Wooten v. State (Tex. Cr. App.) 703.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 302. It being per se burglary to shoot into a house with the intent to injure a person therein, it was not error to permit the prosecuting attorney to dismiss indictments charging accused with assault to commit murder before trying him for the burglary arising out of the same transaction.—Railey v. State (Tex. Cr. App.) 1120.

X. EVIDENCE.

Harmless error in rulings on, see Homicide, § 339.

In particular criminal prosecutions.

See Arson, § 31; Forgery, §§ 40–44; Gaming, § 97; Homicide, §§ 158–255; Larceny, §§ 55–64; Malicious Mischief, § 9; Perjury, § 34; Rape, § 38; Sodomy, § 6.

For offense against liquor law, see Intoxicating Liquors, § 226.

(A) Judicial Notice, Presumptions, and Burden of Proof.

Burden of proof on motion to quash indictment, see Indictment and Information, § 140.

§ 304. Courts cannot judicially know that towns, even where they are county seats, are incorporated towns.—Bluitt v. State (Tex. Cr. App.) 168.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338. Evidence why a witness, on a trial for violating the local option law, did not make the complaint, *held* inadmissible.—Wooten v. State (Tex. Cr. App.) 703.

§ 359. Accused may meet the charge by showing that another or others committed the offense.—Wheeler v. State (Tex. Cr. App.) 166.

(C) Other Offenses, and Character of Accused.

§ 369. In a prosecution for homicide, evidence of another offense *held* inadmissible to prove the offense charged.—Ware v. State (Ark.) 927.

§ 369. In a prosecution for homicide, certain evidence *held* inadmissible because it would raise an issue not presented by the indictment.—Ware v. State (Ark.) 927.

§ 369. On a trial for violating Ky. St. 1909, § 1352 (Russell's St. § 3670), relating to obscene literature, certain evidence *held* incompetent.—Kinnaird v. Commonwealth (Ky.) 489.

§ 369. In a prosecution for keeping a gaming room, evidence that witnesses had seen gambling carried on at the place several times within six weeks prior to the commission of the alleged offense, relied on, was admissible.—Rasor v. State (Tex. Cr. App.) 512.

§ 369. Evidence that indictments against accused for another offense had been nol. pros'd *held* improperly admitted.—Railey v. State (Tex. Cr. App.) 1120.

§ 371. Evidence that one on trial for embezzlement from one carrier was also the agent of another carrier, and that there was also a shortage of funds belonging to the latter, is admissible on the question of motive and intent.—Lawshe v. State (Tex. Cr. App.) 865.

§ 376. The prosecution cannot resort to accused's bad character as a circumstance from which to infer guilt.—Ware v. State (Ark.) 927.

§ 377. Accused may offer in his defense evidence as to his good character.—Ware v. State (Ark.) 927.

§ 380. In a prosecution for homicide, certain testimony *held* not rendered admissible by the fact that defendant had showed his good character.—Ware v. State (Ark.) 927.

§ 380. In a prosecution for homicide, certain evidence *held* inadmissible to show the bad character of defendant.—Ware v. State (Ark.) 927.

(F) Admissions, Declarations, and Hearsay.

§ 407. To render a damaging statement of a third person, made in the presence of accused, who did not deny it, competent against accused, it must be shown that accused heard the statement, and that the circumstances naturally called for a reply on his part.—Maloney v. State (Ark.) 728.

§ 407. A damaging statement of a witness at the examining trial, made when testifying in the presence of accused, *held* not made under circumstances calling on accused to deny it, and the statement is inadmissible at the trial.—Maloney v. State (Ark.) 728.

§ 412. Evidence of a statement by accused that he thought he would have to kill decedent in the house, but got him started to the barn, etc., *held* admissible as substantive evidence.—Collett v. Commonwealth (Ky.) 426.

§ 413. In a murder case, certain testimony *held* properly excluded as a self-serving declaration of accused.—Hart v. State (Tex. Cr. App.) 508.

§§ 419, 420. An officer apprehending accused cannot testify to hearsay declarations of prosecutrix tending to identify or describe accused.—Sexton v. State (Ark.) 1075.

§§ 419, 420. In a homicide case, certain testimony *held* inadmissible as hearsay.—Wilson v. Commonwealth (Ky.) 430.

§§ 419, 420. In a murder case, certain evidence *held* properly excluded as hearsay.—Hart v. State (Tex. Cr. App.) 508.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 424. Conspiracy to set fire to a building, to obtain insurance on a building of one of the conspirators adjoining it, *held* not to terminate with the burning of the building, so as to render inadmissible a letter by one of the conspirators to the other, received the day after the fire.—Gracy v. State (Tex. Cr. App.) 705.

§ 424. *Held*, that a letter was not within the rule against the admission against a conspirator of acts or declarations of a co-conspirator, in his absence, after the accomplishment of the object of the conspiracy.—Gracy v. State (Tex. Cr. App.) 705.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 444. In a prosecution for arson letters written by accused to H. *held* inadmissible against accused, in the absence of proof showing them to have been written or authorized by him.—Lane v. Commonwealth (Ky.) 486.

(I) Opinion Evidence.

§ 448. Certain evidence *held* properly excluded as calling for a witness' opinion.—Railey v. State (Tex. Cr. App.) 1120.

(J) Testimony of Accomplices and Codefendants.

§ 511. In a prosecution for arson, evidence *held* insufficient to corroborate the testimony of an accomplice to sustain a conviction under Cr. Code Prac. § 241.—Lane v. Commonwealth (Ky.) 486.

§ 511. Two or more accomplices cannot corroborate each other.—Lane v. Commonwealth (Ky.) 486.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 539. Where accused makes a statement as required by the statute in the examining trial, the state, before introducing such testimony, must show a warning.—Kirkpatrick v. State (Tex. Cr. App.) 511.

§ 541. To render proof of the testimony of an absent witness given on a former trial admissible, it must be shown that the absent witness is dead, or beyond the jurisdiction of the court, or on diligent inquiry cannot be found.—Maloney v. State (Ark.) 728.

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(M) Weight and Sufficiency.

In particular criminal prosecutions.

See Forgery, § 44; Gaming, § 98; Homicide, §§ 234–255; Larceny, §§ 55–64; Malicious Mischief, § 9; Perjury, § 34; Rape, §§ 51, 53.

For offense against liquor law, see Intoxicating Liquors, § 236.

§ 564. Evidence on prosecution for malicious mischief *held* sufficient to prove venue.—Eno v. State (Ark.) 732.

§ 564. The venue of the crime charged may be proved by circumstantial evidence.—Douglass v. State (Ark.) 923.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 590. Denial of a continuance *held* not an abuse of discretion.—Walker v. State (Ark.) 925.

§ 593. The refusal to grant a continuance on the ground of the illness of counsel in prosecution for rape *held* erroneous.—Wilson v. Commonwealth (Ky.) 614.

§ 595. Refusal of a continuance *held* not abuse of discretion.—Clampett v. State (Ark.) 934.

§ 595. In a homicide case, *held* reversible error to deny a continuance to procure an absent witness when the state's attorney refused to permit an affidavit for continuance to be read as evidence.—Davis v. Commonwealth (Ky.) 429.

§ 595. A continuance for absence of a witness was properly denied, where the witness' affidavit showed that his testimony was hearsay.—Fulkerson v. State (Tex. Cr. App.) 1111.

§ 596. In a criminal case, a continuance for the purpose of securing impeaching testimony *held* properly refused.—Mumphreys v. State (Tex. Cr. App.) 504.

§ 596. As a rule continuances will not be granted to secure impeaching testimony.—Mumphreys v. State (Tex. Cr. App.) 504.

§ 598. It is only where there has been an abuse of discretion in refusing to continue a prosecution that the Appellate Court will disturb the ruling.—Clampett v. State (Ark.) 934.

§ 598. A continuance for absence of a witness *held* properly denied for lack of diligence.—Todd v. State (Tex. Cr. App.) 506.

§ 598. Under Code Cr. Proc. 1895, art. 798, a second application for a continuance for old and infirm absent witnesses *held* properly refused; accused having failed to take their depositions, as he might have done.—Kirkpatrick v. State (Tex. Cr. App.) 511.

§ 598. In a prosecution for violating the local option law, an application for a continuance *held* properly refused for want of diligence.—Deadweyler v. State (Tex. Cr. App.) 863.

§ 600. Accused's belief that certain absent witnesses, if present, would give beneficial testimony, did not authorize the reading to the jury of what was said in his affidavit for a continuance with respect to them.—Hoffman v. Commonwealth (Ky.) 690.

§ 614. An application for a second continuance must show that the testimony cannot be procured from any other source known to defendant.—Fulkerson v. State (Tex. Cr. App.) 1111.

XII. TRIAL.

In particular criminal prosecutions.

See Homicide, §§ 271–313; Perjury, § 36; Sodomy, § 7.

For offense against liquor law, see Intoxicating Liquors, § 239.

(A) Preliminary Proceedings.

§ 622. Cr. Code Prac. § 237, makes it the mandatory duty of the court to grant one of several codefendants a separate trial on his demand.—Hoffman v. Commonwealth (Ky.) 690.

§ 622. Notwithstanding Cr. Code Prac. § 237, the court is authorized to order a severance of trial as between joint defendants, either at the instance of the commonwealth or on its own motion.—Hoffman v. Commonwealth (Ky.) 690.

§ 632. Accused *held* not entitled to object that a case against him was called for trial before another case against him bearing a lower number on the docket.—Todd v. State (Tex. Cr. App.) 506.

§ 632. That accused was required to try a case relating to the sale of intoxicating liquor prior to the trial of a case, of a lower number on the docket, for keeping a disorderly house, *held* not error.—Todd v. State (Tex. Cr. App.) 506.

(B) Course and Conduct of Trial in General.

Exchange of circuits by judges pending prosecution, see Judges, § 29.

(C) Reception of Evidence.

§ 673. In a prosecution for arson, evidence of insurance procured by accused should be limited to proving motive.—Lane v. Commonwealth (Ky.) 486.

§ 673. In a prosecution for indecent exposure, where there was evidence of other similar acts by accused, the court properly instructed that the evidence of such other acts should not be considered as substantive evidence as to guilt, but only as bearing on intent.—Harvey v. State (Tex. Cr. App.) 501.

§ 678. Where two transactions were proved, and constituted a criminal offense, while the complaint charged but one transaction, accused must require the state to elect.—Wooten v. State (Tex. Cr. App.) 703.

§ 684. Evidence of a statement by accused in a prosecution for homicide *held* admissible in chief and not in rebuttal.—Collett v. Commonwealth (Ky.) 426.

§ 684. The court may in its discretion admit evidence offered in rebuttal which should have been offered in chief.—Collett v. Commonwealth (Ky.) 426.

(E) Arguments and Conduct of Counsel.

§ 699. Where the county attorney in his argument dwells on facts, the evidence to prove which has been withdrawn from the jury, the court should reprimand him.—Hart v. State (Tex. Cr. App.) 508.

§ 715. Exhibiting pistol cartridges in argument of county attorney in murder case to illustrate argument *held* not prejudicial to accused, though the cartridges had not been used in evidence.—Hinton v. Commonwealth (Ky.) 434.

§ 720½. For state's counsel in argument to denounce defendant as an "assassin and murderer," *held* not error.—Holt v. State (Ark.) 1072.

§ 721½. It is proper for the state's attorney to comment upon accused's failure to introduce a witness whose testimony would have been material.—Davis v. Commonwealth (Ky.) 429.

§§ 722½, 723. In a murder trial, argument of county attorney *held* proper.—Hinton v. Commonwealth (Ky.) 434.

§ 726. Argument of state's counsel *held* not to constitute error.—Railey v. State (Tex. Cr. App.) 1120.

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not to consider the remarks.—Groszoehmigen State (Tex. Cr. App.) 1113.

§ 730. Error in the argument of state's coun- *held* cured where, after objection thereto, e court instructed the jury not to consider e argument and at the conclusion thereof ve a special charge instructing them to the ne effect.—Railey v. State (Tex. Cr. App.) 20.

Province of Court and Jury in General.

In particular criminal prosecutions.

Homicide, § 271; Larceny, § 68; Perjury, 36.

741. The jury is the sole judge of the ;ht of the evidence.—Douglass v. State (Ark.)

742, 743. The jury is the sole judge of the ibility of accused and his witnesses testify- n his behalf.—Douglass v. State (Ark.) 923.

747. It is the exclusive province of the jury ıss upon conflicting evidence.—State v. My- Mo.) 131.

53. Where the evidence wholly failed to ct one with the crime, the court properly ed his acquittal.—Wilson v. Common- h (Ky.) 430.

53. Where there was nothing in the rec- o corroborate the evidence of accomplices onnect accused with the offense charged, de Prac. §§ 241, 242, require the court to an acquittal.—Lane v. Commonwealth 486.

3. In a prosecution for indecent exposure, evidence was admitted of complaints of similar acts by accused than that charged, ge that the evidence of such other acts not be considered as substantive evidence , but only as bearing on intent, *held* not weight of the evidence.—Harvey v. State r. App.) 501.

cessity, Requisites, and Sufficiency of Instructions.

ss error in rulings on, see Homicide, §

particular criminal prosecutions.

ming, § 102; Homicide, §§ 286-310; ıy, § 79.

Where the evidence raises an issue to accused, he is entitled to an affirma- rge thereon.—Wheeler v. State (Tex. .) 166.

It is the duty of the court to require to find all the essential elements of e embraced within the charge, and des- e nature and character of the punish- y are authorized to assess.—State v. (Mo.) 12.

In a homicide case, the failure to firmatively on an issue raised by the of accused *held* erroneous, notwith- the other instructions.—Wheeler v. c. Cr. App.) 166.

In a prosecution for gaming, the erly refused to charge that the wit- o had been engaged in play in de- establishment were accomplices.—Ra- e (Tex. Cr. App.) 512.

Where there is evidence justifying a of a lesser grade of the offense in- he indictment, it is proper to sub- stion of accused's guilt of the lesser kett v. State (Ark.) 732.

court should charge the jury to disregard the argument.—Hart v. State (Tex. Cr. App.) 508.

§ 800. Reference to a transaction in which prosecutrix was shot as a "scuffle" *held* not so misleading as to justify a reversal.—Groszoehmigen v. State (Tex. Cr. App.) 1113.

§ 806. In a murder case, the failure of the court to define a deadly weapon in the charge on murder in the second degree *held* not reversible error, in view of the evidence and the instructions defining murder in the first degree. —Wheeler v. State (Tex. Cr. App.) 166.

§ 814. A charge on accomplice testimony and necessary corroboration was not authorized, where an accomplice was not a witness and did not testify on the trial.—Gracy v. State (Tex. Cr. App.) 705.

§ 814. Charging in a larceny case on defendant's having given an explanation of his recent possession of the stolen article, when his possession was challenged, and the state having shown the falsity of it, *held* reversible error, where there was no evidence of explanation by him, except on the stand.—Dobbs v. State (Tex. Cr. App.) 859.

§ 822. Conflict in instructions on self-defense *held* not prejudicial.—York v. State (Ark.) 1070.

§ 823. The error in an instruction in a homicide case *held* cured by another instruction.—Green v. State (Ark.) 727.

(H) Requests for Instructions.

§ 825. It is not absolutely essential that an instruction should be requested; but, if it is sufficiently indicated to the court that it has failed to cover other subjects involved in the issues presented to the jury, that is all that is required.—State v. Nicholas (Mo.) 12.

§ 829. It was not error to refuse a request, the subjects of which were fully covered by instructions given.—Walker v. State (Ark.) 925; Rasor v. State (Tex. Cr. App.) 512; Deadweyler v. Same (Tex. Cr. App.) 863.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 845. An objection *held* sufficient to call the court's attention to its failure to embrace in the instructions, in the event the jury should find defendants not guilty of burglary, the subject of larceny from a dwelling house.—State v. Nicholas (Mo.) 12.

(J) Custody, Conduct, and Deliberations of Jury.

§ 857. Receiving, by the jury, of additional evidence other than that introduced on the trial, if it injuriously affects, or could injuriously affect, the accused's rights is ground for reversal. —Railey v. State (Tex. Cr. App.) 1120.

§ 862. Discussion in the jury room concerning the termination of prior trials of accused and of his codefendant *held* not fatal to a conviction.—Oates v. State (Tex. Cr. App.) 370.

§ 862. Certain conduct of a juror in a criminal case *held* not reversible error.—Railey v. State (Tex. Cr. App.) 1120.

§ 866. It was error for the jury, after finding defendant guilty of murder in the second degree, to fix the term of imprisonment by lot.—Walker v. State (Ark.) 925.

(K) Verdict.

In prosecution for homicide, see Homicide, § 313.

§ 894. Failure of accused to move for a reformation of a verdict before the jury was discharged waives formal defects therein.—Gillum v. Commonwealth (Ky.) 445.

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XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 941. Newly discovered evidence, merely cumulative of the evidence of accused, does not justify a new trial.—Douglass v. State (Ark.) 923.

§ 942. Evidence simply of an impeaching character is not such newly discovered evidence as will warrant a new trial.—Morris v. State (Tex. Cr. App.) 1112.

§ 943. Newly discovered evidence, simply contradictory of testimony of the state, does not justify a new trial.—Douglass v. State (Ark.) 923.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1020. Under Cr. Code Prac. § 347, *held*, that there is no appeal to the Court of Appeals from a judgment for a fine of $50 and 10 days' imprisonment.—Noe v. Commonwealth (Ky.) 421.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1037. Alleged improper argument by the commonwealth's attorney pointed out for the first time on a motion for new trial will not be considered.—Burch v. Commonwealth (Ky.) 996.

§ 1038. Failure to charge on alibi is not ground for reversal unless appellant requested a special instruction on that question.—Phillips v. State (Tex. Cr. App.) 1110.

§ 1056. Misdirecting in respect to the punishment *held* not available, unless excepted to at the time or challenged in the motion for new trial.—Robbins v. State (Tex. Cr. App.) 504.

1056. Under Code Cr. Proc. 1895, art. 723, *held* that, to predicate error on the charge, it must have been excepted to either on the trial or in a motion for new trial.—Gracy v. State (Tex. Cr. App.) 705.

§ 1063. Without a motion for new trial, the commonwealth cannot appeal from a judgment of dismissal in a misdemeanor case.—Commonwealth v. Rudisie (Ky.) 466.

§ 1063. Misdirecting in respect to the punishment *held* not available, unless excepted to at the time or challenged in the motion for new trial.—Robbins v. State (Tex. Cr. App.) 504.

§ 1063. Errors in instructions must be reserved in a motion for a new trial in order to be available on appeal.—Harvey v. State (Tex. Cr. App.) 605.

§ 1064. Exceptions to evidence *held* waived by not being brought forward in the motion for new trial.—Eno v. State (Ark.) 732.

§ 1064. An allegation in a motion for new trial *held* too general to require consideration of a certain question on appeal.—Bluitt v. State (Tex. Cr. App.) 168.

§ 1064. A ground of motion for new trial *held* not sufficient to point out misdirection in the charge as to the punishment, so as to make the error available on appeal.—Robbins v. State (Tex. Cr. App.) 504.

§ 1064. Where no complaint of the court's charge is made in the motion for new trial, as required by Code Cr. Proc. 1895, art. 723, alleged error therein will not be considered on appeal.—Benevidas v. State (Tex. Cr. App.) 1107.

§ 1065. Without action by the trial court on a motion for a new trial, the commonwealth cannot appeal from a judgment of dismissal in a misdemeanor case.—Commonwealth v. Rudisie (Ky.) 466.

(D) Record and Proceedings Not in Record.

§ 1088. A motion for a new trial cannot be considered as a part of the record, unless it is filed.—Harvey v. State (Tex. Cr. App.) 605.

§ 1090. In absence of a statement of facts or bill of exceptions containing the testimony, the sufficiency of the evidence to support the verdict cannot be reviewed on appeal.—Cassu v. State (Tex. Cr. App.) 505.

§ 1090. Objections to the court's action in retiring the jury *held* not available on appeal, because the matter was not preserved by bill of exceptions.—Lawshe v. State (Tex. Cr. App.) 865.

§ 1091. A bill of exceptions to the admission of certain evidence *held* too indefinite for review.—Todd v. State (Tex. Cr. App.) 506.

§ 1091. Bills of exception must be certain, and show clearly the exact question complained of.—Kirkpatrick v. State (Tex. Cr. App.) 511.

§ 1092. A bill of exceptions, not signed by the trial judge or in any manner approved, cannot be reviewed.—Todd v. State (Tex. Cr. App.) 506.

§ 1092. Where the bills of exceptions are so modified by the court as to deprive accused of what he believes to be fair and correct, he must take the statutory steps to protect himself.—Wooten v. State (Tex. Cr. App.) 703.

§ 1100. A statement of facts *held* insufficient to raise a certain issue.—Bluitt v. State (Tex. Cr. App.) 168.

§ 1122. An objection that the court erred in omitting to charge on assault and battery in a prosecution for maliciously cutting and wounding with intent to kill cannot be considered on appeal, in the absence of the evidence.—Gillum v. Commonwealth (Ky.) 445.

(G) Review.

§ 1134. On appeal from judgments of acquittal in prosecutions for obtaining property by false pretenses, and for forgery, the Supreme Court will not determine whether the indictments therein will bar another prosecution for the alleged wrong upon which the present prosecutions were based; the question being only a moot question.—Commonwealth v. Caldwell (Ky.) 480.

§ 1144. Where objection to a statement by the commonwealth's attorney was sustained, it would be presumed that the court admonished the jury not to consider it.—Hoffman v. Commonwealth (Ky.) 690.

§ 1144. Where the bill of exception complaining of the court's action in permitting the state to prove accused's testimony on the examining trial was not definite and clear, it must be presumed that the court ruled correctly, and that it was the sworn testimony of accused that was offered in evidence, and hence admissible.—Kirkpatrick v. State (Tex. Cr. App.) 511.

§ 1144. In the absence of a statement of facts, the appellate court will not assume that the charge was prejudicial.—Benevidas v. State (Tex. Cr. App.) 1107.

§ 1151. Refusal of a continuance will not be reviewed in the absence of manifest abuse of discretion.—Walker v. State (Ark.) 925.

§ 1151. A continuance is within the discretion of the trial court.—Clampett v. State (Ark.) 934.

§ 1156. Under the Code the ruling of the trial court on a motion for a new trial on the ground of misconduct of individuals influencing the jury is not reviewable.—Wilson v. Commonwealth (Ky.) 614.

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§ 1156. Alleged misconduct of the jury in reaching their verdict by lot being cognizable by the trial court, its conclusion, unless clearly wrong, will not be interfered with on appeal.—Benevidas v. State (Tex. Cr. App.) 1107.

§ 1159. The Supreme Court cannot interfere with a conviction supported by some evidence.—Wilson v. Commonwealth (Ky.) 430.

§ 1159. Where the evidence justified submission to the jury, a judgment of conviction will not be reversed because in the opinion of the Court of Appeals a preponderance of the evidence was in favor of accused's innocence.—Hinton v. Commonwealth (Ky.) 434.

§ 1159. The Court of Appeals cannot reverse a conviction which there is any evidence to support.—Burch v. Commonwealth (Ky.) 996.

§ 1160. Cr. Code Prac. § 281, *held* to preclude the Court of Appeals from reversing a criminal case on the evidence.—Wilson v. Commonwealth (Ky.) 614.

§ 1163. Prejudice to the substantial rights of accused from informality in the verdict must affirmatively appear, in order to justify reversal, where he did not move for a correction before the jury was discharged.—Gillum v. Commonwealth (Ky.) 445.

§ 1163. In matters of procedure and the order calling cases, a reversal will not be granted because of an improper order, unless injury or injustice is clearly shown.—Todd v. State (Tex. Cr. App.) 506.

§ 1166. Accused *held* not prejudiced by the court's denial of a change of venue.—Walker v. State (Ark.) 925.

§ 1166. Accused was not prejudiced by the denial of a continuance for absence of witnesses, where all the facts were testified to by an eyewitness who was produced.—Fulkerson v. State (Tex. Cr. App.) 1111.

§ 1166½. Error in ordering and summoning of talesmen on an insufficient showing *held* harmless.—Rasor v. State (Tex. Cr. App.) 512.

§ 1167. Action of the court in submitting only the first count of an indictment cured any error it committed in refusing to sustain a motion to require the state to elect which count would be relied on.—Railey v. State (Tex. Cr. App.) 1120.

§ 1168. The irregularity of admitting in rebuttal, instead of in chief, certain evidence, *held* not reversible in view of Cr. Code Prac. § 340.—Collett v. Commonwealth (Ky.) 426.

§ 1168. The Supreme Court will not reverse a conviction where it cannot say that the result was affected by the admission of evidence in rebuttal which should have been introduced in chief.—Collett v. Commonwealth (Ky.) 426.

§ 1169. In a prosecution for homicide, the admission of incompetent evidence *held* prejudicial to defendant.—Ware v. State (Ark.) 927.

§ 1169. The rule as to when incompetent testimony is prejudicial stated.—Ware v. State (Ark.) 927.

§ 1169. Matters in confession, erroneously admitted, *held* not prejudicial.—Holt v. State (Ark.) 1072.

§ 1169. Error in admitting confession *held* not error, in view of other confessions.—Holt v. State (Ark.) 1072.

§ 1169. Error in admitting evidence *held* cured by instruction to disregard.—Holt v. State (Ark.) 1072.

§ 1169. In a prosecution for burglary, error, if any, in admitting certain evidence *held* not prejudicial.—Railey v. State, (Tex. Cr. App.) 1120.

§ 1170½. Permitting accused to be asked a certain question as a witness *held* not reversible error, in view of his answer.—Hart v. State (Tex. Cr. App.) 508.

§ 1171. Improper argument of counsel *held* not ground for reversal.—Hart v. State (Tex. Cr. App.) 508.

§ 1172. Accused *held* not prejudiced by an instruction that, if the jury found him guilty, they should assess his punishment under Ky. St. 1909, § 1167 (Russell's St. § 3177), relating to arson, and not under section 1170 (Russell's St. § 3180), relating to house burning.—Lane v. Commonwealth (Ky.) 486.

§ 1173. Where the uncontradicted testimony, on a trial for perjury, shows that there was corroborating evidence as to some particular false statement, the failure to instruct that there must be corroborating evidence to justify a conviction is not prejudicial error.—Brooks v. State (Ark.) 740.

§ 1173. Failure to affirmatively charge on alibi *held* not ground for reversal under Code Cr. Proc. 1895, § 723.—Phillips v. State (Tex. Cr. App.) 1110.

§ 1173. The entry of several freight cars constituted the same burglary, so that failure in the charge to limit the effect of evidence that other cars had been entered to the showing of intent, etc., could not have injured accused.—Gilbert v. State (Tex. Cr. App.) 1126.

§ 1175. Accused *held* not entitled to complain of a conviction of an assault with intent to rape where the state's evidence, if believed, would have justified a conviction of rape.—Sexton v. State (Ark.) 1075.

(H) Determination and Disposition of Cause.

§ 1184. Where the jury erroneously fixed defendant's punishment at 17 years in penitentiary by lot, the Supreme Court on the Attorney General's suggestion could cure the error by modifying the sentence to the lowest term prescribed for the offense.—Walker v. State (Ark.) 925.

§ 1184. In a prosecution for rape where the uncontradicted evidence shows accused guilty of a lesser degree of the crime of which he was convicted, and judgment is set aside, the cause will be remanded, with directions to set aside the judgment and affirm the judgment convicting him of the lesser crime unless the state elects to take a new trial.—Green v. State (Ark.) 949.

§ 1186. A motion to reverse and remand the cause, not signed nor sworn to, cannot be considered.—Wooten v. State (Tex. Cr. App.) 703.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1210. If a defendant tried for burglary and larceny is acquitted of the burglary and convicted of the larceny, the character of the larceny of which he may be convicted depends entirely on the value of the property stolen.—State v. Nicholas (Mo.) 12.

§ 1210. If a defendant in committing a burglary also commits a larceny, it is immaterial what was the value of the property, and if convicted of both the punishment for the larceny is in addition to that for the burglary by imprisonment in the penitentiary.—State v. Nicholas (Mo.) 12.

§ 1214. Rev. St. 1895, art. 4581, relating to the recovery of penalties imposed on railroads, *held* not to authorize excessive fines in violation of Const. art. 1, § 13.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

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CROSS-EXAMINATION.

See Witnesses, §§ 268–277.

CURATIVE ACTS.

Relating to acknowledgment of conveyance of homestead, see Homestead, § 119.

CURTESY.

See Dower.

CUSTODY.

Of jury, see Criminal Law, §§ 857–866; Trial, § 307.

CUSTOMS AND USAGES.

Application to iron safe clause in insurance policy of customs of community, see Insurance, §§ 335, 669.

§ 5. The custom of the only two stores in a community as to closing hours *held* the custom of the community.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

DAMAGES.

Compensation for property taken for public use, see Eminent Domain, § 124.

Damages for particular injuries.

See Death, §§ 99, 101; Trespass, § 49.

Breach by buyer of contract for sale of goods, see Sales, §§ 369–388.

Breach by seller of contract for sale of goods, see Sales, § 418.

Breach of covenant to construct railroad station, see Railroads, § 72.

Levy on and sale of exempt property by sheriff, see Sheriffs and Constables, § 139.

Recovery in particular actions or proceedings.

See Detinue, § 19; Ejectment, §§ 127, 148; Trover and Conversion, § 44.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

Loss of profits as element of damages for failure to deliver goods sold, see Sales, § 418.

§ 33. Where plaintiff sustained hernia as the result of defendant's actionable negligence, plaintiff was not precluded from recovering full damages because he was predisposed to hernia.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§ 40. Plaintiff, who contracted to saw, into oak heading, timber to be furnished by defendants, *held* entitled to recover on a breach by defendants the profits he would have made had they carried out the contract.—Hurley & Ross v. Oliver (Ark.) 920.

§ 49. To recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause.—Western Union Telegraph Co. v. Archie (Ark.) 1045.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62. Where one is injured by the negligence of another, the latter is liable for the damages resulting, and the injured party is only required to use ordinary care to avert further injury.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

V. EXEMPLARY DAMAGES.

For use of abusive language by conductor, see Carriers, § 277.

VI. MEASURE OF DAMAGES.

For failure to deliver telegram, see Telegraphs and Telephones, § 70.

(A) Injuries to the Person.

§ 97. A recovery may be had for all pain or suffering the proximate result of the injury, whether before the trial, or such as is reasonably certain in the future.—Howard v. Henderson Traction Co. (Ky.) 954.

(C) Breach of Contract.

Breach of covenant to construct railroad station, see Railroads, § 72.

§ 123. An owner's measure of damages for breach of a building contract is the difference in the value of the building as constructed and what it would have been if constructed according to contract.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 124. The owner of a house, having refused to permit carpenters to perform their contract, was liable for the difference between the amount they would have received and what they were able to earn during the same time by reasonable diligence.—Womble v. Hickson & Findley (Ark.) 401.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

For particular injuries.

Abusive language by conductor, see Carriers, § 277.

Breach of covenant to construct railroad station, see Railroads, § 72.

Failure to deliver telegram, see Telegraphs and Telephones, § 71.

Flooding land, see Waters and Water Courses, § 178.

§ 130. In an action for injuries, a verdict allowing plaintiff $1,000 *held* not excessive.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 131. A verdict for $275 for injuries to plaintiff from a defective city sidewalk *held* not excessive.—City of Madisonville v. Stewart (Ky.) 421.

§ 131. Verdict of $700 for injury to hand of a child *held* not excessive.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

§ 132. In an action for injuries, a verdict for $2,700 *held* not excessive.—Louisville & N. R. Co. v. Freppon (Ky.) 454.

§ 132. A verdict for $1,000 in a personal injury action *held* not excessive.—Weil v. Kreutzer (Ky.) 471.

§ 132. A verdict in a personal injury action *held* not excessive.—City of Covington v. Bollwinkle (Ky.) 664.

§ 132. A personal injury verdict of $900 *held* not against the weight of testimony.—Monongahela River Consol. Coal & Coke Co. v. Kramer (Ky.) 978.

§ 132. A recovery of $35,000 for personal injuries *held* excessive by $10,000.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 132. In an action for injuries to a female passenger while alighting from a street car, a verdict for $6,000 *held* not excessive.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 132. *Held*, that a personal injury verdict of $2,000 was not excessive.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

§ 132. A verdict of $20,000 for personal injuries, *held* not excessive.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 133. Verdict of $825 for loss of the services of plaintiff's daughter, physician's services,

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etc., *held* not excessive.—Cincinnati, N. & C. Ry. Co. v. Cooke (Ky.) 956.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 157. In an action for damages to plaintiff's mare, the complaint *held* not to sufficiently plead special damages.—Montgomery v. Glasscock (Ky.) 668.

(B) Evidence.

Certainty of evidence, see Evidence, § 144.

(C) Proceedings for Assessment.

Refusal to require physical examination as a mere technical error not ground for reversal, see Appeal and Error, § 1170.
Review of discretion of court in ordering physical examination, see Appeal and Error, § 969.

§ 206. Court *held* to have acted within its discretion in refusing to require plaintiff to submit to a personal examination by physicians of defendant's choosing.—Keller & Brady Co. v. Berry (Ky.) 1009.

§ 206. The court, in an action for personal injuries, may make an order for the personal examination of plaintiff, and enforce it by affixing the proper penalty.—Shamp v. Lambert (Mo. App.) 770.

§ 208. Evidence *held* to warrant submission of the question of future suffering of a child from an injured hand.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

§ 216. The measure of compensatory damages for personal injury *held* erroneously stated by an instruction.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 216. In an action for injuries, instructions as to the measure of damages *held* not objectionable as allowing double damages for the same pain of body or mind and the same injury, and for mental distress disconnected from any injury.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 216. A charge *held* incorrect because it directed the jury to find against a party as to future injuries without reference to whether ordinary care had been used to prevent their aggravation.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

(D) Computation and Amount, Double and Treble Damages, and Remission.

§ 228. A verdict in replevin for certain animals which was excessive, in so far as it found the value of the animals, *held* cured by a remittitur of the excess.—Lewter v. Lindley (Tex. Civ. App.) 178.

DAMS.

See Waters and Water Courses, §§ 171–178.

DATE.

Sufficiency of process to sustain judgment as affected by omission to give date of filing of petition, see Judgment, § 17.

DAYS.

Inclusion or exclusion in computation of time, see Time, § 11.

DEATH.

Of grantor as revocation of authority to deliver deed, see Deeds, § 56.
Of party pending appeal, see Appeal and Error, § 334.
Of party to action ground for abatement, see Abatement and Revival, § 72.
Of petitioner for establishment of highway, necessity of revivor, see Highways, § 28.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

§ 2. Absence of an heir for more than seven years, during which the other heirs partitioned and sold the property without regard to his interest, *held* not to create a conclusive presumption of his death or bar his right to recover his interest on his return.—Grimes v. Miller (Mo.) 21.

§ 5. In the absence of evidence, the presumption is that persons killed in a common disaster died at the same time.—Walton & Co. v. Burchel (Tenn.) 391.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 17. The negligent failure of a telephone company to connect a messenger dispatched to call a doctor with the doctor's telephone *held* too remote to constitute it a proximate cause of an injured person's death.—Evans' Adm'r v. Cumberland Telephone & Telegraph Co. (Ky.) 959.

§ 29. The right of a minor to care, support, and maintenance is not a property right, and when deprived thereof by the wrongful killing of his parent, and the minor dies before collecting damages, his cause of action under Rev. St. 1899, §§ 2864, 2865 (Ann. St. 1906, pp. 1637, 1644), would not survive under sections 96 and 97 (Ann. St. 1906, pp. 369, 370), in favor of his executor or administrator.—Gilkeson v. Missouri Pac. Ry. Co. (Mo.) 138.

§ 31. At common law no action lies for an injury resulting in death, and an administrator is not entitled to sue therefor under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), giving a right of action to the husband or wife of the deceased or his minor child or children.—Gilkeson v. Missouri Pac. Ry. Co. (Mo.) 138.

§ 31. Where a father and son, killed in a common disaster, died at the same time, the right of action for the death of the son survived to his mother, brothers, and sisters.—Walton & Co. v. Burchel (Tenn.) 391.

(B) Jurisdiction, Venue, and Limitations.

§ 35. Under Rev. St. 1899, § 547; Laws 1905, p. 95 (Ann. St. 1906, p. 586), a right of action for causing the death of a railroad employé occurring in another state *held* enforceable in this state.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

(D) Pleading and Evidence.

§ 57. Where the petition in a death action specifically charges certain particular acts of negligence which are alleged to have been the cause of the death, plaintiff must recover, if at all, upon the specific charges alleged.—Evans v. Wabash R. Co. (Mo.) 36.

(E) Damages, Forfeiture, or Fine.

§ 99. In an action for a fireman's death by a collision of his engine with box cars, evidence *held* to sustain a verdict for plaintiff of $10,000.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 101. Where the evidence made it an issue in a death action whether each plaintiff had suffered loss from decedent's death, and the verdict for plaintiffs as a whole was not complained of as excessive, defendant cannot complain that the amount apportioned to one of plaintiffs was excessive.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

(F) Trial, Judgment, and Review.

Inadequate damages as ground for new trial, see New Trial, § 75.

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DEBTOR AND CREDITOR.

See Bankruptcy; Creditors' Suit; Fraudulent Conveyances.

DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators.
Testimony as to transactions with persons since deceased, see Witnesses, §§ 139–178.

DECEIT.

See Fraud.

DECLARATIONS.

As evidence in civil actions, see Evidence, § 271.
As evidence in criminal prosecutions, see Criminal Law, §§ 412, 413.

DECREE.

In equity, see Equity, § 423.

DEDICATION.

I. NATURE AND REQUISITES.

§ 15. Whether a landowner dedicated land to the public depends on his intention as manifested by his acts.—Frauenthal v. Slaten (Ark.) 395.

§ 16. A dedication to a city of the ground for a street may be made by parol, or by recording a plat laying off or otherwise indicating the location, length, and width of the street.—Hall v. Leeper (Ky.) 683.

§ 19. An owner of land, platting it and selling lots by reference to the plat, dedicates the streets and other public places marked thereon to the public.—Frauenthal v. Slaten (Ark.) 395.

§ 19. Where an open space on the plat of a city was designated "Spring Square," the plat indicated an intent of the owner of the ground to dedicate the square to the public.—Frauenthal v. Slaten (Ark.) 395.

§ 35. The acceptance of the dedication of a street may be by an express memorial of record, or by any act of acceptance.—Hall v. Leeper (Ky.) 683.

§ 37. The acceptance of the dedication of a street may be by the continued use of the ground as a public street for such time as would imply an acceptance.—Hall v. Leeper (Ky.) 683.

§ 44. Evidence *held* not to show the dedication of a street through a lot.—Hall v. Leeper (Ky.) 683.

DEEDS.

Acknowledgment of execution, see Acknowledgment.
Cancellation, see Cancellation of Instruments.
Covenants in deeds, see Covenants.
In fraud of creditors, see Fraudulent Conveyances.
In trust, see Trusts, §§ 17–41.

Deeds by or to particular classes of persons.

See Guardian and Ward, §§ 103–105; Husband and Wife, § 14; Partnership, § 68.
Married women, see Husband and Wife, §§ 193–199.

Deeds of particular species of, or estates or interest in, property.

See Easements, § 25.
Separate property of married women, see Husband and Wife, §§ 193–199.

Particular classes of deeds.

Trust deed, see Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 3. The common-law rule of livery of seisin is not in force in Arkansas.—Moore v. Sharpe (Ark.) 341; Morris v. Fontaine (Ark.) 347; Hurst v. Lund, Id.

§ 6. That an instrument is not acknowledged in a manner to authorize its registration *held* a circumstance tending to show that the parties did not intend it to be a completed conveyance.—Lipscomb v. Fuqua (Tex. Civ. App.) 193.

§ 25. A deed construed, and *held* not a mere quitclaim, but to convey the land described.—Merriman v. Blalack (Tex. Civ. App.) 552.

(B) Form and Contents of Instruments.

§ 41. Description in a deed may be made sufficient by reference to another recorded deed, or a recorded judgment or decree.—Kimbell v. Powell (Tex. Civ. App.) 541.

§ 41. In order to identify and render definite the description in a registered deed, resort may be had to an unrecorded district court judgment referred to in such deed.—Kimbell v. Powell (Tex. Civ. App.) 541.

(C) Execution.

§ 45. A variance in the names of the grantors in a deed as signed and their names recited in the premises *held* immaterial.—Merriman v. Blalack (Tex. Civ. App.) 552.

(D) Delivery.

§ 56. The death of grantor removes all authority to thereafter deliver the deed.—Givens v. Ott (Mo.) 23.

§ 58. *Held*, that there was no delivery of a deed during the lifetime of grantor.—Givens v. Ott (Mo.) 23.

II. RECORDING AND REGISTRATION.

§ 86. A deed is not properly registered unless the record shows that the acknowledgment is sufficient.—Merriman v. Blalack (Tex. Civ. App.) 552.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 90. A deed must be construed as a whole to ascertain the intention of the grantor.—Waldermeyer v. Loebig (Mo.) 75.

§ 93. The intent of parties to a deed must be given effect, and, to that end, that is certain which can be made certain.—Hubbard v. Whitehead (Mo.) 69.

§ 95. Where a word in a deed is misspelled, the court will construe the deed according to the meaning of the word intended.—Baustic v. Phillips (Ky.) 629.

§ 95. The intention of the parties to a deed must be arrived at from the language used therein in the absence of any mistake or oversight of the draftsman.—Hudson's Heirs v. Hudson's Adm'r (Ky.) 973.

§ 96. Recitals in a deed concerning former conveyances *held* sufficient prima facie to establish the facts stated.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 97. The habendum clause in a deed is controlled by the caption and granting clause, unless it appears from the language of the whole deed that it was intended that the habendum clause should control or limit the right taken

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under the caption or granting clause.—Hudson's Heirs v. Hudson's Adm'r (Ky.) 973.

§ 99. An instrument referred to in a deed is a part thereof, and the two become one when the court seeks to find the intent of the grantor.—Waldermeyer v. Loebig (Mo.) 75.

(B) Property Conveyed.

§ 111. In determining whether a deed was intended to include lots, *held*, that the court would consider that immediately upon its delivery grantor gave grantee actual possession of the lots, etc.—Hubbard v. Whitehead (Mo.) 69.

§ 111. Though a deed must so describe the land that it can be identified, the court will put itself in the position of the parties and consider the surrounding circumstances.—Hubbard v. Whitehead (Mo.) 69.

§ 111. A deed must be *held* to convey the largest estate which the language can be construed to convey.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 114. A recital that the grantors in a deed were heirs of M. *held* mere descriptio personæ, and that the deed should be construed to pass all the grantor's title from every source acquired, and was not limited to their rights as heirs of M.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 114. A recital that it was intended to convey all the land inherited by the grantors from G. and wife corrected a misdescription by which part of the land was omitted.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 114. An instrument *held* to convey grantor's one-half interest in all lands owned by him in the state from whatever source title was derived.—Merrill v. Bradley (Tex. Civ. App.) 561.

(D) Exceptions and Reservations.

Reservations of timber, see Logs and Logging, § 2.

(E) Conditions and Restrictions.

§ 144. Courts will construe clauses in deeds as covenants rather than as conditions if they can reasonably do so.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

§ 168. Under Kirby's Dig. §§ 736, 737, a grantor in a conditional deed may, on condition broken, declare a forfeiture by conveying the land to another who obtains title.—Moore v. Sharpe (Ark.) 341; Morris v. Fontaine (Ark.) 347; Hurst v. Lund, Id.

§ 168. The right of re-entry for condition broken was not assignable at common law, and could only be exercised by the grantor or by his privies in blood.—Moore v. Sharpe (Ark.) 341; Morris v. Fontaine (Ark.) 347; Hurst v. Lund, Id.

§ 168. At common law to forfeit a conditional freehold estate for condition broken, a re-entry was essential.—Moore v. Sharpe (Ark.) 341; Morris v. Fontaine (Ark.) 347; Hurst v. Lund, Id.

IV. PLEADING AND EVIDENCE.

Best and secondary evidence, see Evidence, § 159.

§ 210. Evidence *held* to sustain a decree canceling a deed from plaintiff to her daughter on the ground of want of consideration.—Diuguid v. Roberts (Ky.) 464.

§ 211. Evidence *held* to sustain a decree canceling a deed from plaintiff to her daughter on the ground of undue influence.—Diuguid v. Roberts (Ky.) 464.

§ 211. Evidence *held* not to support a finding that grantor knew what he was doing when he executed a deed in articulo mortis.—Givens v. Ott (Mo.) 23.

DE FACTO JUDGES.

See Judges, § 6.

DEFAMATION.

See Libel and Slander.

DELIVERY.

Of deed, see Deeds, §§ 56, 58.
Of goods sold, see Sales, § 161.
Of goods to carrier, see Carriers, § 41.
Of telegraph or telephone message, see Telegraphs and Telephones, §§ 37–38.
Time of delivery of goods sold, see Sales, § 81.

DEMAND.

Condition precedent to distraint for taxes, see Taxation, § 581.
For setting off exemptions, see Exemptions, § 126.

DEMURRER.

In pleading, see Pleading, §§ 214, 216.
To evidence, see Trial, § 150.
To indictment, see Indictment and Information, § 150.
To petition for establishment of highway, see Highways, § 29.

DENIALS.

In pleading, see Pleading, § 129.

DEPOSITARIES.

§ 4. A bank *held* to have no right to pay over money to a vendor of land, and to be liable for so doing to the purchaser, the depositor.—Hunter v. Wallace (Tex. Civ. App.) 180.

DEPOSITIONS.

See Witnesses.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

Acquiescence in allotment to heir as ground for estoppel against claiming interest in shares of other heirs, see Estoppel, § 90.

(B) Advancements.

§ 109. In case of intestacy, advancements must be brought in hotchpot if the heir would participate in the partition of the estate.—Montgomery's Trustee v. Brown (Ky.) 472.

(C) Debts of Intestate and Incumbrances on Property.

§ 134. Under Ky. St. 1909, § 2087 (Russell's St. § 3863), a "bona fide purchaser for a valuable consideration" defined.—Buchanan v. Boyd's Ex'r (Ky.) 981.

§ 134. Under Ky. St. 1909, § 2087 (Russell's St. § 3863), that a purchaser from an heir was judge of the circuit court and had notice of the pendency of an action against the ancestor to recover a money judgment *held* not to prevent his being a bona fide purchaser; the suit not seeking to subject the land.—Buchanan v. Boyd's Ex'r (Ky.) 981.

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§ 143. Under Ky. St. 1909, § 2087 (Russell's St. § 3863), one purchasing land in good faith from the widow and heirs of the deceased owner and paying therefor *held* to acquire title unless an action to subject the land to debts was filed within six months after it descended.—Buchanan v. Boyd's Ex'r (Ky.) 981.

DESCRIPTION.

Of debt secured by mortgage, see Mortgages, § 114.
Of property conveyed, see Boundaries, §§ 3, 18; Deeds, §§ 41, 111, 114.

DETINUE.

See Replevin.

§ 19. In detinue the measure of damages is, as a general rule, the value of the use of the property, thus its deterioration and necessary expense in recovering it.—Winstead v. Hicks (Ky.) 1018.

DEVISES.

See Wills.

DIAGRAMS.

Incorporation in appeal record of diagrams used at the trial, see Appeal and Error, § 524.

DILIGENCE.

In procuring evidence affecting right to new trial, see New Trial, § 102.
Of party asking relief, see Specific Performance, §§ 92, 95.

DIRECTING VERDICT.

In civil actions, see Trial, § 169.

DISABILITIES.

Contributory negligence of persons under disability, see Negligence, § 85.
Effect on limitation, see Limitation of Actions, § 72.

DISCHARGE.

Of guardian, see Guardian and Ward, § 23.

From indebtedness, obligation, or liability.

See Accord and Satisfaction; Bankruptcy, §§ 421–436; Compromise and Settlement; Release.

DISCRETION OF COURT.

Designation of person other than sheriff to summon jurors, see Jury, § 67.
Discharge of accused on direct verdict, see Indictment and Information, § 15.
Reception of evidence in rebuttal, see Criminal Law, § 684.
Review in civil actions, see Appeal and Error, §§ 959–971.
Review of discretionary rulings of lower court, see Criminal Law, §§ 1151, 1156.

DISMISSAL AND NONSUIT.

In particular actions or proceedings.

Appeal from justice court, see Justices of the Peace, § 166.
Appeal in probate proceedings, see Wills, § 364.
Appeal in replevin suit, see Replevin, § 116.
Appeal or writ of error, see Appeal and Error, §§ 776–807.
By committee of insane person, see Insane Persons, § 94.
To establish highway, see Highways, § 34.

II. INVOLUNTARY.

§ 62. Plaintiff and defendant having refused to comply with an order requiring trial of a set case on a specified day under a rule of the court, it properly dismissed plaintiff's petition and defendant's counterclaim without prejudice, under Civ. Code Prac. § 371, subd. 2.—Conrad Schopp Fruit Co. v. Bondurant (Ky.) 482.

DISPUTE.

Amount in dispute, jurisdictional amount, see Courts, § 231.

DISQUALIFICATION.

Of judge, see Judges, § 46.

DISSOLUTION.

Of corporation, see Corporations, §§ 599, 630.
Of insurance company, see Insurance, § 69.

DISTANCE.

Competency of expert witness as to distance within which locomotive may be stopped, see Evidence, § 539½.

DISTRIBUTION.

Of estate of decedent, see Descent and Distribution.

DISTRICT AND PROSECUTING ATTORNEYS.

Participation of in proceedings of grand jury, see Grand Jury, § 34.
Summary proceedings to require county attorney to pay over moneys recovered for benefit of school fund, see Attorney and Client, § 126.

DIVIDENDS.

On corporate stock, see Corporations, §§ 153, 155.

DIVORCE.

Enforcement against homestead of judgment for attorney's fees and costs, see Homestead, § 103.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(C) Pleading.

§ 93. A petition for divorce for outrage and cruelty rendering living together insupportable *held* sufficient, though showing frequent condonations.—Crossett v. Crossett (Tex. Civ. App.) 358.

(D) Evidence.

§ 130. Evidence *held* to justify an absolute divorce to a wife on the grounds of cruel and inhuman treatment.—Grow v. Grow (Ky.) 654.

(H) Fees and Costs.

Enforcement against homestead of judgment for attorney's fees and costs, see Homestead, § 103.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 252. A husband's right to property upon the granting of an absolute divorce to the wife stated.—Grow v. Grow (Ky.) 654.

DOCKETS.

Order of trial on different charges as affected by docket numbers, see Criminal Law, § 632.

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ıcorporation in appeal record, see Appeal and Error, § 524.

DOMICILE.

f parties as affecting venue, see Venue, § 30.

DONATIONS.

' rights in public lands, see Public Lands, § 143.

DOWER.

I. NATURE AND REQUISITES.

17. As to the widow of a deceased partner, l estate purchased with partnership funds is to be treated as personal property, but the low takes dower in so much of her husband's re as is not required to pay firm debts or in adjustment of equities between the partners mselves.—Bennett v. Bennett (Ky.) 495.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

enants of warranty in deed releasing dower, e Covenants, § 27.

II. RIGHTS AND REMEDIES OF WIDOW.

ealability of interlocutory judgment for wer, see Appeal and Error, § 73.

62. A landowner's widow, having appearn the suit to sell real estate to pay debts expenses of administration, and not having ned dower, *held* to have waived all claim eto.—Oldham v. McElroy (Ky.) 414.

'8. In an action by a widow for an allot- of dower, defendant's answer and crossion *held* insufficient to show that decedent's were held by him in trust or otherwise partnership alleged to have existed be- him and defendant.—Bennett v. Bennett 495.

09. Under Rev. St. 1899, § 2963 (Ann. St. p. 1706), a writ of possession in dower ıs should issue for the part of the land ff as dower, and not for the entire tract. neman v. Larkin (Mo.) 307.

)9. Under Rev. St. 1899, § 2977 (Ann. St. p. 1710), judgment in dower proceedings l not be personal, nor should execution personally against defendants for dam--Reineman v. Larkin (Mo.) 307.

DRUNKARDS.

enness as a defense to prosecution for ılt with intent to kill, see Homicide, § 94. ıce as to habits of drunkenness, see Evi-, § 132.
ctions on defense of drunkenness in crimprosecution, see Criminal Law, § 294.

DUE PROCESS OF LAW.

nstitutional Law, §§ 257–305.

DUPLICITY.

:tment, see Indictment and Information,

EASEMENTS.

asements, see Dedication; Highways.

§ 25. Facts *held* to entitle plaintiff to an injunction restraining defendant from obstructing a passway over his land.—Green v. Smock (Ky.) 618.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

Positive and negative testimony as to existence of gate in passway, weight and sufficiency, see Evidence, § 586.

§ 58. A grant of a passway over a particular part of the grantor's land *held* not to imply a negation of his right to erect gates where the way enters and leaves his land.—Lurker v. Ross (Ky.) 647.

EJECTMENT.

See Trespass to Try Title.
Joinder of cause of action for ejection with other cause, see Action, § 46.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. Under Rev. St. 1899, §§ 3056, 3058, 3060 (Ann. St. 1906, pp. 1756, 1758, 1759), ejectment *held* a possessory action.—Mann v. Doerr (Mo.) 86.

§ 23. Defendant having constructed a railroad on plaintiff's land under a license, plaintiff *held* not entitled to recover the land in ejectment.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

Pleading misjoinder of party, see Parties, § 92.

§ 45. Under Rev. St. 1899, § 3057 (Ann. St. 1906, p. 1757), the landlord *held* not a necessary or proper party to ejectment against his tenant in possession.—Mann v. Doerr (Mo.) 86.

§ 49. A landlord purposely taking on himself the burden of supporting his tenant's possession, attacked in ejectment, *held* to make himself responsible if the possession is adjudged wrongful. —Mann v. Doerr (Mo.) 86.

III. PLEADING AND EVIDENCE.

§ 82. Where plaintiff was defendant's source of title, plaintiff was not required to deduce title from the government in ejectment.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Separate trial of count in ejectment and count to quiet title, see Trial, § 3.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 127. Rents and profits by way of damage *held* not recoverable at common law in ejectment.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

§ 127. Where plaintiff in ejectment, under Rev. St. 1899, §§ 3058, 3066, 3068 (Ann. St. 1906, pp. 1758, 1764, 1765), could not recover possession, its judgment for mesne rents and profits by way of damages was unsustainable. —Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

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§ 148. Rev. St. 1899, § 3072 et seq. (Ann. St. 1906, p. 1766), *held* to contemplate an independent proceeding by an unsuccessful defendant in ejectment to recover for the improvements.—Mann v. Doerr (Mo.) 86.

ELECTION.

Between testamentary provisions and other rights, see Wills, §§ 778–800.

ELECTIONS.

Local option elections, see Intoxicating Liquors, §§ 31–33.
Of municipal officers, see Municipal Corporations, § 131.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

Mandamus to compel placing name of candidate on ballot, see Mandamus, § 154.

§ 139. Ky. St. § 1456 (Russell's St. § 4015), as to the filing of certificates of nomination, *held* mandatory.—Brodie v. Hook (Ky.) 979.

§ 150. Contestant of a primary election *held* not entitled to a recount of ballots under precinct petitions not referred to in his notice of contest.—Democratic Executive Committee of Lincoln County v. Baughman (Ky.) 468.

§ 152. Sustaining a demurrer to a notice of an election contest before a county executive committee *held* to terminate the contest.—Democratic Executive Committee of Lincoln County v. Baughman (Ky.) 468.

§ 154. The court can only compel a county executive committee to hear a primary election contest, but cannot review the committee's action or control the hearing or decision.—Democratic Executive Committee of Lincoln County v. Baughman (Ky.) 468.

§ 158. Nonobservance of provisions of Kirby's Dig. §§ 2777, 2779, 2780, 2788, 2790, as to certifications of nominations and printing of ballots, *held* not to render void an election where objection was not till after election.—Hogins v. Bullock (Ark.) 1064.

VII. BALLOTS.

Mandamus to compel placing name on ballot, see Mandamus, § 154.

X. CONTESTS.

Motion for judgment on pleadings, see Pleading, § 343.
Validity of statute enacted at called session of Legislature as dependent on whether within proclamation of Governor, see Statutes, § 5.

§ 285. A motion to dismiss an election contest because of the failure of plaintiff to verify the petition must be overruled where the original petition, which was later lost, was verified.—Phillips v. Ratliff (Ky.) 460.

§ 285. A defendant in an election contest who answered the petition before complaining of plaintiff's failure to verify it waived the right to compel its verification.—Phillips v. Ratliff (Ky.) 460.

§ 285. The court should not dismiss an election contest because of the failure of plaintiff to verify the petition without first giving him time and opportunity to verify it.—Phillips v. Ratliff (Ky.) 460.

§ 288. Ky. St. 1909, § 1596a, subsec. 12, *held* not to prevent an amended petition in an election contest to correct a mistake in the original petition in the number of votes received by the candidates.—Phillips v. Ratliff (Ky.) 460.

ELECTRICITY.

Restraining cutting of timber, see Injunction, § 52.

EMBEZZLEMENT.

Evidence of other offenses, see Criminal Law, § 371.

§ 43. Evidence offered by defendant on trial for embezzlement *held* properly rejected as immaterial.—Lawshe v. State (Tex. Cr. App.) 865.

§ 48. An instruction that the accused could be convicted of felony if the sum embezzled was in excess of $50 *held* sufficient under the facts.—Lawshe v. State (Tex. Cr. App.) 865.

EMERGENCIES.

Acts of servants in emergencies as contributory negligence, see Master and Servant, § 246.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 270–362.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 63. Kirby's Dig. § 3009, *held* not to authorize recovery of compensation by a landowner, where the county court declined to establish a new road over plaintiff's land, though the same was used by the public.—Craig v. Greenwood District, Sebastian County (Ark.) 280.

II. COMPENSATION.

(C) Measure and Amount.

§ 124. In condemnation proceedings for a right of way, the admission of evidence as to the market value of the land when the road was constructed, rather than at the time of trial, *held* not error.—Stephenville, North & South Texas Ry. Co. v. Moore (Tex. Civ. App.) 882.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 262. In condemnation proceedings, the admission of certain evidence *held* prejudicial.—Stephenville North & South Texas Ry. Co. v. Moore (Tex. Civ. App.) 882.

EMPLOYÉS.

See Master and Servant.

ENTRY.

Re-entry for breach of condition of deed, see Deeds, § 168.

ENTRY, WRIT OF.

See Ejectment.

EQUITABLE ESTOPPEL.

See Estoppel, §§ 56–114.

EQUITABLE LIENS.

See Liens, § 7.

EQUITABLE MORTGAGES.

See Mortgages, § 28.

EQUITY.

Equitable estoppel, see Estoppel, §§ 56–114.
Equitable liens, see Liens, § 7.

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Equitable mortgages, see Mortgages, § 28.
Review of findings by master on appeal, see Appeal and Error, § 1017.

Particular subjects of equitable jurisdiction and equitable remedies.

See Cancellation of Instruments; Creditors' Suit; Fraudulent Conveyances; Injunction; Partition, § 39; Quieting Title; Receivers; Specific Performance; Trusts.
Relief against judgment, see Judgment, §§ 403–460.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

Jurisdiction of county court, see Courts, § 183.
Transfer of cause to chancery court, see Courts, § 488.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 24. Where a statute imposing a penalty imposes the penalty for an act committed under a mistake of law, equity cannot relieve the guilty party.—Texas & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 256.

IV. PLEADING.

(E) Demurrer, Exceptions, and Motions.

Demurrer to cross-bill, see Pleading, § 210.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Appointment of master to assist in taking testimony as a referee, see Reference, § 35.

X. DECREE AND ENFORCEMENT THEREOF.

Power to hold case open after judgment, see Judgment, § 193.

§ 423. On issue joined in equity the court may grant the parties any relief the record shows them entitled to.—Smith v. Smith (Ky.) 1002.

§ 423. Equity may require as a condition to the relief granted a compliance by complainant with equitable terms.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

ERROR, WRIT OF.

See Appeal and Error.

ESCHEAT.

§ 2. Ky. St. 1909, § 567 (Russell's St. § 2153), providing for the escheating of land improperly held by a corporation, relates to a situation existing five years next preceding the time the statute is invoked.—Commonwealth v. Louisville Property Co. (Ky.) 399.

§ 4. Where a railroad company furnishes the money to purchase land, conveyed to a dummy corporation, not necessary for its legitimate business, and holds the title for more than five years, the property is subject to escheat, under Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153).—Commonwealth v. Louisville Property Co. (Ky.) 399.

§ 4. Powers of a dummy corporation organized by a railroad company to evade Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 2153), *held* not to affect the state's right to escheat real estate held by such corporation.—Commonwealth v. Louisville Property Co. (Ky.) 399.

§ 6. A petition by the commonwealth to escheat real estate, alleged to belong to a railroad company, for violation of Ky. St. 1909, § 567 (Russell's St. § 2153), *held* fatally defective.—Commonwealth v. Louisville Property Co. (Ky.) 399.

ESTABLISHMENT.

Of boundaries, see Boundaries, §§ 35, 37.
Of highways, see Highways, §§ 29–61.
Of lost instruments, see Lost Instruments.
Of public schools, see Schools and School Districts, § 12.
Of trusts, see Trusts, §§ 336–358.
Of will, see Wills, §§ 300–371½.

ESTATES.

See Dower.
Created by will, see Wills, §§ 597–616.
Decedents' estates, see Descent and Distribution; Executors and Administrators.
Estates for years, see Landlord and Tenant.
Tenancy in common, see Tenancy in Common.

ESTOPPEL.

By judgment, see Judgment, §§ 682–725.

III. EQUITABLE ESTOPPEL.

Of particular classes of persons, or persons in particular relations.

Married woman to claim property, see Husband and Wife, § 129.

To assert or deny particular facts, rights, claims, or liabilities.

Allege error on appeal or writ of error, see Appeal and Error, § 881.
Application of payments, see Payment, § 39.
Assert invalidity of deed to separate estate of married woman, see Husband and Wife, § 198.
Right to take appeal, see Appeal and Error, § 165.
To avoid or forfeit insurance policy, see Insurance, § 390.
To deny corporate power, see Corporations, § 388.

(A) Nature and Essentials in General.

§ 56. Estoppel operates only to protect the innocent, who are misled to change their condition in reliance on an appearance.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

(B) Grounds of Estoppel.

§ 68. An infant petitioning to dismiss a suit against his father and failing to withdraw the petition for nearly two years after reaching majority *held* in no position to complain of the decree entered in the suit.—Carroll v. Carroll (Ark.) 947.

§ 71. Plaintiff's father by his renunciation of title to a purchaser of the land in controversy *held* estopped to claim any interest as against the purchaser and his successors in interest.—Webb v. Hardaway (Ky.) 669.

§ 90. Where an heir consented to a division of decedent's land, and accepted the share allotted to him, he was estopped from asserting any interest in the shares allotted to the other heirs.—Franch v. Branger (Ky.) 437.

§ 94. A grantee *held* not to acquire title by estoppel.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

§ 94. An owner of land *held* not estopped to deny the validity of an oil lease, executed by another, having a deed which passed no title.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

(C) Persons Affected.

§ 98. A vendee is bound by an estoppel of his vendor, of which the vendee has knowledge

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at the time of the purchase.—Webb v. Hardaway (Ky.) 669.

(D) Matters Precluded.

§ 106. An estoppel may be relied on in a court of law as well as in equity.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

(E) Pleading, Evidence, Trial, and Review.

§ 110. Equitable estoppel, or an estoppel in pais, is not available as a defense, unless pleaded.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

§ 114. A vendee *held* not entitled to claim greater rights than his vendor could lawfully convey in the absence of a plea of bona fide purchaser for value without notice.—Webb v. Hardaway (Ky.) 669.

EVIDENCE.

See Witnesses.
Admissibility of evidence under pleading, see Pleading, § 382.
Applicability of instructions to evidence, see Trial, §§ 251–253.
Authority of court to adjourn session to place of residence of sick witness in order to take his testimony, see Courts, § 74.
Newly discovered evidence ground for new trial, see Criminal Law, § 941.
Power to appoint master or referee to take testimony, see Reference, § 35.
Production of documents by witness, see Witnesses, § 32.
Questions of fact for jury, see Trial, §§ 139–143.
Reception at trial, see Criminal Law, §§ 673–684; Trial, §§ 58, 79.
Verdict or findings contrary to evidence, see New Trial, § 75.

As to particular facts or issues.

See Accord and Satisfaction, §§ 11, 26; Adverse Possession, §§ 57, 114, 116; Boundaries, §§ 35, 37; Death, §§ 2, 5; Dedication, § 44; Deeds, §§ 210, 211; Fraudulent Conveyances, §§ 295, 299; Judgment, § 951; Lost Instruments; Partnership, § 44; Payment, §§ 65–73; Release, § 57.
Contributory negligence of servant injured, see Master and Servant, §§ 274, 281.
Incompetency or negligence of fellow servant, see Master and Servant, § 279.
Issuance of execution, see Execution, § 283.
Misrepresentation in securing power of attorney, see Principal and Agent, § 19.
Motive, see Arson, § 31.
Negligence of master, see Master and Servant, §§ 270, 278.
Ownership of property constituting wife's separate estate, see Husband and Wife, § 133.
Payment of purchase price, see Sales, § 181.

In actions by or against particular classes of persons.

See Master and Servant, §§ 265–281, 330; Principal and Surety, § 159; Railroads, §§ 396–398; Sheriffs and Constables, § 138; Street Railroads, § 114; Telegraphs and Telephones, § 66.
Attorney, see Attorney and Client, § 128.

In particular civil actions or proceedings.

See Conspiracy, § 19; Divorce, § 130; Forcible Entry and Detainer, § 29; Fraud, § 58; Habeas Corpus, § 85; Libel and Slander, §§ 101–112; Negligence, §§ 121, 134; Quieting Title, § 44; Replevin, § 71; Specific Performance, §§ 120–121; Trespass, § 45; Trespass to Try Title, § 38.
For breach of contract, see Sales, § 382.
For breach of contract to reorganize corporation, see Corporations, § 580.
For broker's commissions, see Brokers, § 86.
For injuries from acts of servant, see Master and Servant, § 330.
For injuries from negligence of telegraph or telephone company, see Telegraphs and Telephones, § 66.
For injuries from operations of street railroads, see Street Railroads, § 114.
For injuries from trespassing animals, see Animals, § 100.
For injuries to passenger, see Carriers, §§ 316, 317.
For injuries to persons on or near railroad tracks, see Railroads, §§ 396–398.
For injuries to servant, see Master and Servant, §§ 265–281.
For loss of or injuries to shipment, see Carriers, § 134.
For loss of or injuries to shipment of live stock, see Carriers, § 228.
For price of land, see Vendor and Purchaser, § 315.
For purchase price, see Sales, § 359.
On insurance policy, see Insurance, § 646.
Probate proceedings, see Wills, §§ 53, 300.

In criminal prosecutions.

See Arson, § 31; Criminal Law, §§ 304–564; Forgery, §§ 40–44; Gaming, §§ 97–98; Homicide, §§ 158–255; Larceny, §§ 55–64; Malicious Mischief; Perjury, § 34; Rape, §§ 38–53; Sodomy, § 6.
For offense against liquor laws, see Intoxicating Liquors, §§ 226, 236.
On motion to quash indictment, see Indictment and Information, § 140.

Review and procedure thereon in appellate courts.

See Appeal and Error, §§ 999–1017.
Assignment of errors in rulings on for purposes of review, see Appeal and Error, § 728.
Harmless error in rulings on, see Appeal and Error, §§ 1047–1057; Criminal Law, §§ 1168, 1169.

I. JUDICIAL NOTICE.

§ 5. Courts take judicial notice of facts commonly known by all mankind.—Reineman v. Larkin (Mo.) 307.

§ 5. The court judicially knows that prior to its admission into the Union, Oklahoma consisted of the territory of Oklahoma and Indian Territory, and that the territories were governed in a large measure by different laws emanating from different sources.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 6. The court will take notice that wood rots, but it will not infer that wood used in blocking a switch on a railroad track will rot between October and the 15th of the following August.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

§ 9. Courts take judicial notice of scientific facts.—Reineman v. Larkin (Mo.) 307.

§ 10. Courts take judicial notice of geographical facts.—Reineman v. Larkin (Mo.) 307.

§ 11. Courts take judicial notice of facts of current history.—Reineman v. Larkin (Mo.) 307.

§ 43. The court will take judicial cognizance of an attachment without formal introduction of the papers in evidence.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

II. PRESUMPTIONS.

As to particular facts or issues.

See Death, § 2; Payment, § 68; Usury, § 113.
Existence of partnership, see Partnership, § 44.
Survivorship, see Death, § 5.

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In particular civil actions or proceedings.

For injuries to passenger, see Carriers, § 316.
For injuries to persons on or near railroad tracks, see Railroads, § 396.
For injuries to servant, see Master and Servant, § 265.

§ 65. The official sureties of a public administrator and public guardian are presumed to know the statutes under which their principal is appointed, and that such statutes require the county court to confide to him the estates of both deceased persons and infant orphans.—Newman v. Flowers' Guardian (Ky.) 652.

§ 67. Proof of a decision rendered by the Supreme Court of the territory of Oklahoma in 1894, determining the law on a particular subject, *held* not such conclusive proof of the law of the state of Oklahoma as to warrant a charge that the law of the state of Oklahoma was as laid down in such decision.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 67. The courts will not presume that the decisions of the courts of a territory prevail after the territory has been admitted as a state.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 67. The court will not presume that a rule of construction adopted in the territory of Oklahoma by its territorial Supreme Court extended over and is made applicable after the admission of Oklahoma into the Union to a part of the state never a part of the territory.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 80. In the absence of evidence as to what the law of a sister state is at the time of a trial, it will be presumed that it is the same as the law of the forum.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 83. The presumption is that appraisers of land to be sold under foreclosure of a trust deed have performed their duty by actually viewing the property, and in other matters, as the law requires.—Arnold v. Watson (Ark.) 354.

§ 83. It is always presumed that in any official act or act purporting to be official the officer has not exceeded his authority.—Slaughter v. Cooper (Tex. Civ. App.) 173.

§ 83. Where a case is appealed to the Supreme Court and remanded, it will be presumed that the clerk either collected the costs before remand, or issued an execution for costs thereafter.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

§ 84. In the absence of evidence that a township is a fractional township within Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), the court must presume that it is an ordinary congressional township.—Doddridge v. Patterson (Mo.) 72.

III. BURDEN OF PROOF.

As to particular facts or issues.

See Accord and Satisfaction, § 26; Payment, § 65.
Consideration of note, see Bills and Notes, § 493.
Misrepresentation in securing power of attorney, see Principal and Agent, § 19.
Payment of note, see Bills and Notes, § 499.
Testamentary capacity, see Wills, § 52.
Validity of power of attorney, see Principal and Agent, § 190.

In particular civil actions or proceedings.

For injuries caused by negligence of servant, see Master and Servant, § 330.
For injuries to persons on or near railroad tracks, see Railroads, § 396.
For injuries to servant, see Master and Servant, § 265.
For libel, see Libel and Slander, § 101.
On insurance policy, see Insurance, § 646.
To establish trust, see Trusts, § 41.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 99. Evidence that an attorney, consulted with a view of employing him to bring the suit in question, did not bring it is irrelevant and immaterial.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

(B) Res Gestæ.

§ 121. In an action for the death of an employé engaged in putting fuel oil in an engine tender, by slipping on a greasy fuel box lid in descending from the tender, testimony that decedent was slow and awkward in filling the tender, and the engineer told him to hurry, and that he was delaying the engine, was admissible as res gestæ.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 127. Statements of bodily pain and suffering are admissible, if res gestæ, or the natural and usual expressions indicating present pain.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 128. Statements of bodily pain and suffering are admissible, if made to a physician to enable him to prescribe.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

(C) Similar Facts and Transactions.

In actions for injuries to passengers, see Carriers, § 317.

§ 132. In an action for injuries to a pedestrian by defect in a city sidewalk, evidence as to plaintiff's habit of drunkenness was inadmissible on the issue whether plaintiff was intoxicated at the time of the injury.—City of Madisonville v. Stewart (Ky.) 421.

(D) Materiality.

§ 144. The testimony of a witness as to the number of bales that could have been ginned, if there had been no delay in installing a press in a gin, *held* inadmissible because uncertain.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

(E) Competency.

§ 155. Where, in an action against an executor charging his testator with the burning of plaintiff's house, plaintiff offered proof attacking the testator's general character, the court properly allowed defendant to show in what respect his moral character was bad.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

V. BEST AND SECONDARY EVIDENCE.

§ 158. The written rules of a company *held* the best evidence thereof.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 159. Where the testimony of a witness showed that a deed was in existence and that inquiry of a certain person would show where it was, it was error to permit witness to testify as to the execution of such deed.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 165. Where the testimony of a witness showed that a deed was in existence, and that inquiry of a certain person would show where it was, it was error to permit witness to testify as to the contents of such deed.—Merrill v. Bradley (Tex. Civ. App.) 561.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 205. In an action on open accounts, certain evidence *held* admissible to establish the

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correctness of the accounts.—Stadtler v. South Texas Lumber Co. (Tex. Civ. App.) 1132.

§ 208. A pleading filed by plaintiffs, in which a void deed was set up as the source of M.'s title, *held* admissible against them as an admission.—Merriman v. Blalack (Tex. Civ. App.) 552.

(C) By Grantors, Former Owners, or Privies.

§ 231. Statements made in the absence of defendant *held* admissible.—Guion Mercantile Co. v. Campbell (Ark.) 164.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 271. Declarations of a decedent as to his ancestor's service in the Texas army *held* admissible.—Kirby v. Boaz (Tex. Civ. App.) 223.

§ 271. Evidence of a witness, who had observed plaintiff before and after his injury, that, subsequent thereto, he saw plaintiff try to do certain work, which he failed to accomplish, *held* not objectionable.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

IX. HEARSAY.

§ 314. Evidence of plaintiff's complaint of pain and soreness in his back *held* not objectionable as hearsay.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 317. Certain evidence *held* properly excluded as hearsay.—Hurley & Ross v. Oliver (Ark.) 920.

§ 317. Certain testimony *held* mostly hearsay.—Jenkins v. Clopton (Mo. App.) 759.

§ 317. Evidence that a witness had investigated defendants' claim to the land in controversy, and had told them they could not recover the land, *held* inadmissible.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 320. Testimony as to pedigree *held* properly admitted, where it was based, not only on self-serving declarations of decedent, but also on declarations of his wife, who had no interest.—Kirby v. Boaz (Tex. Civ. App.) 223.

§ 320. A sheriff's deed more than 30 years old, reciting a sale under a certain execution, *held* conclusive evidence of the issuance of the execution as recited.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

Admissibility of replevin bond as evidence in action for replevin, see Replevin, § 71.

(D) Production, Authentication, and Effect.

§ 370. In a suit to partition lands in which plaintiffs claimed an undivided one-half interest, the fact that the suit was a partition suit did not authorize the admission of a deed under which plaintiffs claimed title without proof of its execution and without the three days' filing and notice to defendants required by statute.—Merrill v. Bradley (Tex. Civ. App.) 561.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 399. Evidence of antecedent verbal representations *held* inadmissible where the parties executed a written contract without fraud or mistake.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 417. In an action against a bank and a vendor to recover money deposited by a purchaser, *held*, that evidence that the vendor was to furnish the purchaser an abstract of title was legitimate, as against the contention that the evidence added to and changed the written contract.—Hunter v. Wallace (Tex. Civ. App.) 180.

§ 419. Under Ky. St. 1909, § 470 (Russell's St. § 1775), the recited consideration of a conveyance may be shown to be otherwise by parol evidence.—Stamper v. Cornett (Ky.) 623.

(C) Separate or Subsequent Oral Agreement.

§ 443. Certain parol evidence *held* not inadmissible as varying or contradicting written contracts.—Burgie v. Bailey (Ark.) 266.

(D) Construction or Application of Language of Written Instrument.

§ 460. Where a petition applied for an order prohibiting the sale of liquor within three miles of a schoolhouse, parol evidence *held* admissible to identify the particular building intended.—Thomas v. Burke (Ark.) 1060.

§ 460. Extrinsic evidence *held* admissible to explain the calls of a deed and apply them to the subject-matter.—Hubbard v. Whitehead (Mo.) 69.

§ 463. A contract between the owner of property and one whom defendant real estate brokers procured to exchange property with the owner *held* not ambiguous so that plaintiffs could not show by parol that defendants' right to commissions depended upon the consummation of the contract of exchange.—Lewis v. Mansfield Grain & Elevator Co. (Tex. Civ. App.) 585.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471. Evidence that prior to the accident plaintiff was well, but that afterwards he had an impediment in his walk, *held* not objectionable as a conclusion.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 471. Evidence of plaintiff's wife, as to his unsuccessful attempt to assist her in certain work after his injury, *held* not objectionable as a conclusion.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 473. The inferences to be drawn from facts are for the jury, not a witness.—Hurley & Ross v. Oliver (Ark.) 920.

§ 497. Evidence as to the amount of loss in an action against a carrier, for damages resulting from negligence in transporting a shipment of cattle, *held* not an opinion of the witness.—Texas & P. Ry. Co. v. Henson (Tex. Civ. App.) 1127.

(B) Subjects of Expert Testimony.

§ 528. A physician may give his opinion as to whether plaintiff's condition is permanent or temporary.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

(C) Competency of Experts.

§ 537. A physician who had studied a particular disease as to which he is called to testify is qualified, though he has not made a specialty thereof or treated a patient therefor.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 537. Refusal to permit a medical expert to testify to an opinion as to whether plaintiff was suffering from a particular disease *held* an abuse of discretion.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

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(D) Examination of Experts.

§ 548. A physician who has examined an injured party merely to testify in his favor as a witness may not express an expert opinion based on subjective symptoms and fortify his opinion by acts and statements of the injured party which were purely voluntary.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 548. An expert opinion based on objective symptoms or on a hypothesis propounded is admissible.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 552. An expert opinion based on objective symptoms or on a hypothesis propounded is admissible.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 553. A hypothetical question assuming a fact not proved *held* improper.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 556. Physicians may describe the symptoms of a complaint in issue as given by accepted medical authorities.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

XIV. WEIGHT AND SUFFICIENCY.

Instructions on weight and sufficiency of evidence, see Trial, §§ 194, 235.

As to particular facts or issues.

See Accord and Satisfaction, § 11; Adverse Possession, § 114; Dedication, § 44; Fraudulent Conveyances, §§ 295, 299; Payment, § 73; Release, § 57.

Contributory negligence, see Negligence, § 134.
Contributory negligence of servant injured, see Master and Servant, § 281.
Incompetency or negligence of fellow servant, see Master and Servant, § 279.
Issuance of execution, see Execution, § 283.
Negligence of master, see Master and Servant, § 278.
Ownership of property constituting wife's separate estate, see Husband and Wife, § 133.

In particular civil actions or proceedings.

See Fraud, § 58; Libel and Slander, § 112; Specific Performance, § 121.

Contest of will, see Wills, § 55.
For breach of contract, see Sales, § 383.
For injuries to persons on or near railroad tracks, see Railroads, § 398.
For injuries to servant, see Master and Servant, §§ 276–281.
For loss of or injuries to shipment, see Carriers, § 134.
For purchase price, see Sales, § 359.
On bill or note, see Bills and Notes, § 524.
Probate proceedings, see Wills, § 300.

§ 586. In a suit to restrain the maintenance of a gate across a private road, the affirmative evidence of the existence of a gate across the road during its existence *held* entitled to more weight than the negative evidence of the same number of witnesses to the absence of any gate during such period.—Lurker v. Ross (Ky.) 647.

§ 588. Fact that a witness manifests partiality for the party who calls him is a proper matter for consideration of the jury in weighing his testimony.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 591. A party calling a witness does not vouch for the truth of his testimony.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

EXAMINATION.

Of expert witnesses, see Evidence, §§ 548–556.
To pleading, see Pleading, §§ 214, 216.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see Appeal and Error, § 544; Criminal Law, §§ 1090–1092.
Taking exceptions at trial, see Criminal Law, § 845; Trial, § 79.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 1. Statement of office of bill of exceptions.—Hanson v. Anderson (Ark.) 736.

§ 6. Record entries as such cannot be preserved in a bill of exceptions, as that is not its function.—Flanagan Milling Co. v. City of St. Louis (Mo.) 112.

§ 8. A bill of exceptions to the admission of evidence must be limited to the particular objection made.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

§ 24. Under Rev. St. 1899, § 728 (Ann. St. 1906, p. 720), an appeal from a final judgment in dower proceedings does not bring up the evidence at the trial introduced at a former term leading up to an interlocutory judgment, unless both the evidence and the exceptions were preserved by timely term bill of exceptions.—Reineman v. Larkin (Mo.) 307.

II. SETTLEMENT, SIGNING, AND FILING.

Computation of time for filing, fractions of a day, see Time, § 11.

§ 38. A previous order *held* required to authorize the filing of statements of fact and bills of exception within 10 days after adjournment of the court.—Kimbell v. Powell (Tex. Civ. App.) 541.

EXCESSIVE DAMAGES.

See Damages, §§ 130–133.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCUSABLE HOMICIDE.

See Homicide, §§ 105–120.

EXECUTION.

See Attachment.
Exemptions, see Exemptions; Homestead.
Of judgment of foreclosure, see Mortgages, § 488.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 97. In the absence of proof, it is presumed that the clerk of the circuit court issued an execution under the direction of the person controlling it, and when once issued, and delivered to the officer, the clerk loses control of it.—Johnson v. Scott (Ky.) 695.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 172. Rev. St. 1895, art. 2991, limiting time within which suit for injunction staying execution may be brought, construed.—Kruegel v. Rawlins (Tex. Civ. App.) 216.

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§ 283. In trespass to try title to land sold under execution, the court *held* to have erred in submitting to the jury as a controverted issue of fact whether an execution had been in fact issued on which the property was sold; the record proof thereof being conclusive.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

XI. EXECUTION AGAINST THE PERSON.

§ 436. Where a capias issued by the clerk of the circuit court or his deputy has been received by the sheriff or his deputy, neither the clerk nor his deputy may, without an order of court, correct any mistake as to the amount thereof, nor direct its return to the clerk's office.—Johnson v. Scott (Ky.) 695.

§ 440. The officer, in executing a precept commanding him to arrest an individual, may select such time of day as he thinks most expedient, and may use so much force as is necessary.—Johnson v. Scott (Ky.) 695.

§ 441. The officer, to whom a writ for the arrest of a judgment debtor is directed, must, after arresting the debtor, retain him in custody until the judgment has been satisfied or the debtor has been discharged by due process of law.—Johnson v. Scott (Ky.) 695.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Foreclosure of tax lien against estate, see Taxation, §§ 641, 647.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, §§ 139–178.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Public administrator as public guardian, see Guardian and Ward, § 175.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 121. Under Ky. St. 1909, §§ 3891, 3892 (Russell's St. §§ 3937, 3938), a will providing for sale of real estate for purpose of division and naming no executor, the administrator with the will annexed has the power of sale.—Evans v. Evans (Ky.) 619.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

Adverse possession by widow claiming right of quarantine, see Adverse Possession, § 62.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 330. Under Civ. Code Prac. § 489, indivisible real estate may be sold in a suit to settle the owner's estate.—Oldham v. McElroy (Ky.) 414.

(B) Application and Order.

§ 351. Where land belonging to a deceased co-tenant is sold to pay debts, the court should not collect the sale bonds, in excess of the share of the surviving co-tenant and enough to pay debts and administration expenses, without requiring a bond, under Civ. Code Prac. § 493.—Oldham v. McElroy (Ky.) 414.

§ 351. On the sale of real estate belonging to a decedent to pay debts, failure to execute the bond required by Civ. Code Prac. § 493, in which infants are interested, is sold to pay debts, a lien on the infants' share of the surplus is retained until bond is executed, under Civ. Code Prac. §§ 493, 497.—Oldham v. McElroy (Ky.) 414.

§ 351. Civ. Code Prac. § 493, requiring a bond on behalf of infants, *held* inapplicable to sales of an ancestor's realty to pay debts.—Oldham v. McElroy (Ky.) 414.

(C) Sale.

Estoppel of widow to claim dower, see Dower, § 62.

X. ACTIONS.

Competency of devisee to testify in favor of executor sued for wrongful act of testator, see Witnesses, § 140.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

Liabilities as public guardian, see Guardian and Ward, § 175.

Presumptions as to knowledge by sureties of law governing liabilities of public administrators, see Evidence, § 65.

EXEMPTIONS.

See Homestead.

III. WAIVER OR FORFEITURE.

§ 89. A right of exemption is a personal privilege, and may be waived by the debtor.—Parketon v. Pugsley (Mo. App.) 789.

§ 98. Where a debtor waived his right of exemption under Rev. St. 1899, § 3159 (Ann. St. 1906, p. 1795), and failed to select property as exempt under section 3162, there was a failure to impress the character of exempt property on his property.—Parketon v. Pugsley (Mo. App.) 789.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

Liability on official bond of constable selling exempt property under execution, see Sheriffs and Constables, § 157.

§ 119. While a judgment debtor may waive his exemption, the statute does not require him to notify the sheriff before the execution sale or before the execution of the indemnity bond that he claims the property as exempt.—Winstead v. Hicks (Ky.) 1018.

§ 125. Until an execution debtor electing to take property under Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), in lieu of the property exempt by section 3159, subds. 1, 2, makes his selection, the officer having the execution need not summon appraisers, as provided by section 3163.—Parketon v. Pugsley (Mo. App.) 789.

§ 126. A demand by an execution debtor that the officer set off his exemptions in lieu of property exempt by Rev. St. 1899, § 3159, subds. 1, 2 (Ann. St. 1906, p. 1795), *held* not to render any portion of the property exempt.—Parketon v. Pugsley (Mo. App.) 789.

§ 126. Where property is specifically exempted by statute, it continues to be such until the right thereto is waived, but where it is rendered exempt only by virtue of selection of the debtor, he must select in under the statute.—Parketon v. Pugsley (Mo. App.) 789.

§ 126. A debtor asserting his right of exemption under Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), *held* to thereby waive his right to claim

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property exempt by section 3159, subds. 1, 2.—Parketon v. Pugsley (Mo. App.) 789.

§ 133. In the absence of fraud operating to defeat the exemption right, plaintiff in execution is liable to respond only as for a trespass, when he has directed a levy on or sale of exempt property.—Parketon v. Pugsley (Mo. App.) 789.

§ 137. The giving of an indemnity bond to an officer holding an execution does not prevent the debtor claiming as exempt the property levied on from maintaining an action against the sheriff or the purchaser to recover the property.—Winstead v. Hicks (Ky.) 1018.

§ 138. Where an officer seizes exempt property and retains possession thereof, replevin or claim and delivery will lie therefor.—Parketon v. Pugsley (Mo. App.) 789.

§ 139. An officer seizing and selling property absolutely exempt may be sued either in trespass or in trover for conversion.—Parketon v. Pugsley (Mo. App.) 789.

§ 139. To sustain an action against the execution plaintiff for directing an officer to sell exempt property, it is essential that the property is specifically exempt, or is within the protection of the statute.—Parketon v. Pugsley (Mo. App.) 789.

§ 146. A plaintiff in execution, who directs an officer to levy on and seize exempt property, is liable in trespass or conversion, and the execution defendant may sue him alone, or sue him and the officer jointly.—Parketon v. Pugsley (Mo. App.) 789.

§ 149. In an action by an execution debtor against the sheriff or the purchaser at execution sale of exempt property, the measure of damages is the same as in detinue, viz., the value of the use of the property, plus its deterioration and necessary expense in recovering it.—Winstead v. Hicks (Ky.) 1018.

EXHIBITS.

Annexed to pleading, see Pleading, §§ 310, 312.

EXPERT TESTIMONY.

In civil actions, see Evidence, §§ 471–556.
In criminal prosecutions, see Criminal Law, § 448.

EXPLOSIVES.

Liability of master for injuries to servant, see Master and Servant, §§ 150, 205, 216, 265.

EXTENSION.

Of time for filing transcript on appeal in probate proceedings, see Wills, § 364.

EXTRADITION.

Lack of proper warrant as ground for motion to quash indictment, see Indictment and Information, § 137.

FACTORIES.

Inspectors, authority to fill vacancy in office, see Officers, § 56.
Inspectors, computation and expiration of term of office, see Officers, § 53.
Inspectors, occurrance of vacancy in office, see Officers, § 55.

FACTORS.

See Brokers; Principal and Agent.

FAILURE OF CONSIDERATION.

Of note, see Bills and Notes, § 489.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 3. False imprisonment lies where the imprisonment is without legal authority, and, where it is valid or apparently so, the remedy is by malicious prosecution.—Roberts v. Thomas (Ky.) 961.

§ 7. An action for trespass lies where a person has been arrested on a process irregularly issued and void; but a process merely voidable is, until set aside, a justification for an arrest made thereunder.—Johnson v. Scott (Ky.) 695.

§ 7. An action for false imprisonment does not lie for an arrest or imprisonment in due course or regular proceedings of a court having jurisdiction of the offense.—Johnson v. Scott (Ky.) 695.

FALSE PRETENSES.

Moot questions as not constituting ground for review, see Criminal Law, § 1134.

§ 7. Under Ky. St. 1909, § 1208 (Russell's St. § 3474), punishing the obtaining of money, etc., by false pretenses, a statement made by a minor that he is of age, resulting in inducing another to part with money, *held* a false statement within the statute.—Commonwealth v. Ferguson (Ky.) 967.

§ 30. An indictment in a prosecution for obtaining money and property by false pretenses *held* defective for not alleging that accused did not own the property which it was alleged he pretended to own in order to wrongfully obtain property from another.—Commonwealth v. Caldwell (Ky.) 480.

§ 36. Under Ky. St. 1909, § 1208 (Russell's St. § 3474), an indictment for obtaining money by false pretenses *held* not defective for failing to charge that the person to whom the false pretense was made sustained any loss.—Commonwealth v. Ferguson (Ky.) 967.

FALSE REPRESENTATIONS.

Affecting validity of power of attorney, see Principal and Agent, §§ 19, 24, 190, 193.

FALSE SWEARING.

See Perjury.

FATHER-IN-LAW.

Of attorney as judge, judgment rendered by as denial of due process of law, see Constitutional Law, § 305.

FEDERAL COURTS.

See Courts, §§ 289, 428.

FEDERAL QUESTIONS.

Ground for removal of cause, see Removal of Causes, § 19.
Grounds for jurisdiction, see Courts, § 289.

FEES.

Of witness, see Witnesses, § 32.

FELLOW SERVANTS.

See Master and Servant, §§ 181–202.

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FENCES.

Against stock, see Animals, § 98.

§ 4. Kirby's Dig. § 1397, a certain allegation in a complaint in an action to enforce a lien for a fencing assessment *held* unnecessary, and the assessment is presumed to be valid as against contention that it was made by the board of commissioners, and not by the county court, as provided by section 1388.—Eagle v. Board of Com'rs of Fencing Dist. No. 2, Lonoke County (Ark.) 340.

§ 4. That the cost of a fence was in the first instance paid out of money borrowed by the fencing board on their individual account *held* not to invalidate an assessment levied to pay such costs.—Eagle v. Board of Com'rs of Fencing Dist. No. 2, Lonoke County (Ark.) 340.

§ 4. Kirby's Dig. § 1399, relating to suits to enforce the collection of fencing assessments, *held* not to give the right to tax an attorney's fee.—Eagle v. Board of Com'rs of Fencing Dist. No. 2, Lonoke County (Ark.) 340.

FICTITIOUS NAMES.

Forgery by use of, see Forgery, §§ 8, 35, 40, 44.

FILING.

Bill of exceptions, see Exceptions, Bill of, § 38.
Criminal information or complaint, see Indictment and Information, §§ 43, 47.
Labor lien, see Master and Servant, § 82.
Pleading, see Pleading, § 340.
Record on appeal or writ of error, see Appeal and Error, §§ 627, 631.

FINAL JUDGMENT.

Appealability, see Appeal and Error, §§ 71–79.

FINDINGS.

Conformity of judgment, see Judgment, § 256.
On reference, see Reference, § 99.
Review on appeal or writ of error, see Appeal and Error, §§ 1008–1017.
Setting aside, see New Trial, § 75.

FINES.

Liability of city for injuries to prisoner in guard house on theory that payment of fines into city treasury makes the city engaged in a private enterprise in maintaining guard house, see Municipal Corporations, § 729.

FIRE INSURANCE.

See Insurance.

FIRES.

See Arson.

§ 7. In an action against an executor charging his testator with the burning of plaintiff's house, the court properly refused to allow to be read an indictment of defendant's testator for the burning of such house.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

§ 7. In an action against an executor charging his testator with the burning of plaintiff's house, plaintiff was properly not allowed to show by an insurance agent that his main witness, living near the house, had renewed a policy of insurance on her property shortly before the fire; there being nothing in his evidence connecting the testator therewith.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

§ 7. In an action against an executor charging his testator with the burning of plaintiff's house, *held*, that there was nothing in the evidence tending to show that his testator procured or induced any one else to set fire to the building.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

FLOWAGE.

See Waters and Water Courses, §§ 171–178.

FOLLOWING TRUST PROPERTY.

See Trusts, §§ 349, 358.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

I. CIVIL LIABILITY.

§ 6. While title cannot be tried in a forcible entry proceeding, possession can be.—Richie v. Owsley (Ky.) 1015.

§ 6. It is not competent to try title in forcible entry, but in whom the legal title was vested at the time of entry is necessary to be ascertained, where on that alone depends the question whether plaintiff was in actual possession when defendant entered.—Richie v. Owsley (Ky.) 1015.

§ 9. The same kind of actual possession that will in time ripen into a good title will maintain an action of forcible entry.—Richie v. Owsley (Ky.) 1015.

§ 28. It is always a relevant inquiry on a plea of not guilty in forcible entry proceedings whether plaintiff was in actual possession, as well as whether defendant forcibly entered.—Richie v. Owsley (Ky.) 1015.

§ 29. In forcible entry, it was error to exclude evidence for plaintiffs of a survey of land covering that in dispute made for a certain party prior to the patent to defendant's lessor, under whom he claimed the right to enter.—Richie v. Owsley (Ky.) 1015.

§ 29. In forcible entry, it was relevant in support of plaintiff's actual possession when defendant entered, that a tract covering the area in dispute was patented, and had been in the actual adverse possession of plaintiff's lessor and its vendors for 15 years prior to the patent to defendant's lessor.—Richie v. Owsley (Ky.) 1015.

§ 29. In forcible entry, title papers may be received to show the extent of possession, or to show that it was limited, if they do show it.—Richie v. Owsley (Ky.) 1015.

FORECLOSURE.

Of mortgage, see Mortgages, §§ 342–374, 405–488.

FOREIGN CORPORATIONS.

See Corporations, §§ 636, 651.

FORFEITURES.

Of exemption from execution, see Exemptions, §§ 89, 98.
Of franchise, see Corporations, §§ 599, 630.
Of insurance, see Insurance, §§ 390, 748.
Of oil lease, see Mines and Minerals, § 77.
Of rights acquired by purchaser of school lands, see Public Lands, § 173.
Of rights in public lands, see Public Lands, § 173.

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§ 8. To constitute forgery, the name alleged to be forged need not be the name of any person in existence, but may be fictitious.—Maloney v. State (Ark.) 728.

§ 12. A check *held* capable of working legal injury within the law punishing the uttering of forged instruments.—Maloney v. State (Ark.) 728.

§ 16. Elements of the crime of uttering a forged instrument determined.—Maloney v. State (Ark.) 728.

§ 32. An indictment for uttering a forged check *held* sufficient.—Maloney v. State (Ark.) 728.

§ 35. The jury, on a trial for uttering a forged instrument, must determine whether the person whose name appears signed to the instrument is real or fictitious; and, where they find that the name is fictitious, the inference arises that accused either forged the instrument, or knew that it was forged.—Maloney v. State (Ark.) 728.

§ 40. On a trial for uttering a forged check, it is competent to show that the person whose name is affixed to the check as drawer is fictitious, by the evidence of the proper officers of the bank on which the check is drawn that no person bearing such name had an account with the bank, or was a customer thereof.—Maloney v. State (Ark.) 728.

§ 44. On a trial for uttering a forged check, certain testimony *held* not to show that the name affixed to the check as drawer was fictitious.—Maloney v. State (Ark.) 728.

FORMER ADJUDICATION.

See Judgment, §§ 682–725.

FORMER JEOPARDY.

Bar to prosecution, see Criminal Law, § 187.

FORMS OF ACTION.

See Detinue; Ejectment; Replevin; Trespass, §§ 19–49; Trover and Conversion.

FRANCHISES.

Forfeiture, see Corporations, §§ 599, 630.
Grant by municipality, see Municipal Corporations, § 270.
Nonpayment of franchise tax by corporation as grounds for dissolution, see Corporations, § 599.

FRAUD.

See False Pretenses; Fraudulent Conveyances.
Acquisition of property creating trust, see Trusts, § 95.
Procuring making of will, see Wills, §§ 155, 156.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 12. Promise by a partner to advance more money to the firm if it would execute a mortgage on its property to secure his individual debt *held* insufficient to sustain a charge of deceit in obtaining the mortgage.—Conaway v. Newman Mill & Lumber Co. (Ark.) 353.

§ 21. A judgment creditor of an insolvent corporation suing incorporators for deceit *held*

II. ACTIONS.

(B) Parties and Pleading.

§ 48. In an action for injuries from fraudulent representations by incorporators, a separate paragraph in an answer *held* insufficient to rob defendants of the full benefit secured to them under Rev. St. 1899, § 3422 (Ann. St. 1906, p. 1965), by the first paragraph of answer, which was a general denial.—McKee v. Rudd (Mo.) 312.

(C) Evidence.

§ 58. In a suit by a judgment creditor of an insolvent corporation against incorporators for deceit, evidence *held* insufficient to show that defendants pointed to its charter, and thereby made its representations their own.—McKee v. Rudd (Mo.) 312.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

§ 23. An agreement *held* not a collateral undertaking to answer for the default of another, and hence not required to be in writing.—Burgie v. Bailey (Ark.) 266.

IV. REPRESENTATIONS.

§ 38. Rev. St. 1899, § 3422 (Ann. St. 1906, p. 1965), *held* to apply to the representations of incorporators as to the solvency of a corporation, made to one extending it credit, and to prevent recovery thereon when not in writing.—McKee v. Rudd (Mo.) 312.

IX. OPERATION AND EFFECT OF STATUTE.

Parol sale of land as color of title, see Adverse Possession. § 70.

§ 129. Where the lessee of land took actual possession, and made valuable improvements, the case was thereby taken out of the operation of the statutes of frauds.—Reichardt v. Howe (Ark.) 347.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(A) Grounds of Invalidity in General.

§ 20. The lease from wife of lessee and another not being recorded, *held* its provision for lien of landlords on crop was invalid to the extent of the lien given the wife.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

(I) Retention of Possession or Apparent Title by Grantor.

§ 154. Under Ky. St. § 2128 (Russell's St. § 4631), a surrender of personal property by husband to wife, not reduced to writing or recorded, *held* invalid against his other creditors.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

§ 184. A surrender of tobacco by husband to wife, invalid as against his other creditors,

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Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

§ 295. Evidence *held* sufficient to sustain a finding that a deed made by a mortgagor after the debt secured appeared to be barred by limitation, so as to have, under Kirby's Dig. § 5399, only the effect of an unrecorded mortgage as to third persons, was voluntary and fraudulent as against the mortgagee; the mortgage being still binding as an unrecorded mortgage.—Morgan v. Kendrick (Ark.) 278.

§ 299. Evidence *held* not to show that a conveyance of land was taken in a wife's name by the husband to defraud his creditors.—Hughes v. Jackson (Ky.) 644; Garrison v. Same, Id.

(I) Trial.

§ 309. In an action to set aside fraudulent conveyances, an instruction purporting to state the facts necessary to a finding for plaintiff *held* erroneous.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 309. A request to charge in a suit to set aside a fraudulent conveyance *held* properly refused as ignoring one of the theories of complainant's case.—Stone v. Stitt (Tex. Civ. App.) 187.

FREIGHT.

See Carriers, §§ 192, 193.

GAME.

Appellate jurisdiction, see Courts, § 223.

GAMING.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 72. The place of playing cards *held* not a private residence occupied by a family, within the exception to the gaming law (Laws 1907, p. 107, c. 49).—Robbins v. State (Tex. Cr. App.) 504.

(B) Prosecution and Punishment.

Duplicity in indictment, see Indictment and Information, § 125.
Evidence of other offenses, see Criminal Law, § 369.
Sufficiency of allegations in indictment as to venue of offense, see Indictment and Information, § 86.

§ 87. An indictment under Ky. St. § 1967 (Russell's St. § 3564), for permitting a machine not mentioned in section 1960 (section 3558) to be conducted in accused's house, *held* insufficient.—Commonwealth v. Estes (Ky.) 423.

§ 91. An indictment *held* to state an offense in violation of Acts 30th Leg. 1907, p. 107, c. 49, prohibiting the keeping of gambling places.—Rasor v. State (Tex. Cr. App.) 512.

§ 97. In a prosecution for maintaining a gambling room, evidence of what the deputy sheriff, in raiding the room, found and saw, *held* admissible.—Rasor v. State (Tex. Cr. App.) 512.

§ 98. Evidence *held* sufficient to sustain a conviction under an indictment charging the keeping and exhibiting, for the purpose of gaming, of a gaming table and bank.—Morris v. State (Tex. Cr. App.) 1112.

§ 102. In a prosecution for keeping and exhibiting, for the purpose of gaming, a gaming table and bank, the game being monte, failure to charge what is a banking game was not error; the statute expressly defining monte to be a banking game.—Morris v. State (Tex. Cr. App.) 1112.

GARNISHMENT.

See Attachment; Execution.
Inadequacy of remedy by, as ground of creditors' suit, see Creditors' Suit, § 5.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

Right to garnish funds of mutual insurance companies deposited with State Treasurer, see Insurance, § 70.

GATES.

Right of grantor of passway to erect gates therein, see Easements, § 58.

GOOD FAITH.

Of party asking equitable relief, see Specific Performance, §§ 92, 95.
Of purchaser, see Sales, § 234; Vendor and Purchaser, §§ 230, 231.

GOOD WILL.

Restraining breach of contract of sale, see Injunction, § 192.

§ 1. Good will is the probability that old customers will resort to the old place for the purpose of trade, and is recognized as a thing of value, which may be sold.—Bloom v. Home Ins. Agency (Ark.) 293.

GRAND JURY.

See Indictment and Information.
Privilege of witness, see Witnesses, § 297.

§ 34. Certain fact *held* not to show that the assistant district attorney was present when the grand jury was deliberating upon the indictment against accused, in violation of Code Cr. Proc. 1895, arts. 414, 559.—Moody v. State (Tex. Cr. App.) 1117.

GRANTS.

Of public lands, see Public Lands.

GUARANTY.

See Indemnity; Principal and Surety.
Requirements of statute of frauds, see Frauds, Statute of, § 23.

GUARD HOUSES.

Liability of city for injuries to prisoner, see Municipal Corporations, § 729.

GUARDIAN AD LITEM.

For insane person, see Insane Persons, § 94.

GUARDIAN AND WARD.

Guardianship of insane persons, see Insane Persons, § 30.

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II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§ 23. An order discharging a guardian on payment of court costs *held* not an absolute or final discharge.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 42. A power of attorney signed for an infant by his guardian is not binding upon the infant where the guardian was not authorized to bind him thereby.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 54. The action of the court in allowing a ward only 6 per cent. interest on the balance found due from the guardian *held* not erroneous. —France v. Shockey (Ark.) 1056.

§ 70. A power of attorney signed for an infant by his guardian is not binding upon the infant where the guardian was not authorized to bind him thereby, in absence of ratification on attaining majority.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 70. An instrument executed by one who was an infant when his guardian signed an unauthorized power of attorney for him *held* not a ratification of such unauthorized act.—Merrill v. Bradley (Tex. Civ. App.) 561.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 103. Confirmation of a guardian's sale of his ward's land under order of court, in some form, is necessary to pass title.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

§ 103. A guardian's application to make a specific private sale of his ward's land in accordance with specified terms and the court's order allowing the same *held* not a confirmation of the sale when completed.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

§ 104. Where a guardian's deed was invalid, the ward, after becoming a married woman, could not ratify and confirm it by accepting a part of the purchase money with full knowledge of the facts.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

§ 105. Where, after conditional discharge of a guardian, the court directed him to sell certain of the ward's land, the order of discharge could not be invoked to annul the order of sale. —Gillean v. Witherspoon (Tex. Civ. App.) 909.

VI. ACCOUNTING AND SETTLEMENT.

§ 150. Under Kirby's Dig. § 3828, the court in proceedings to confirm the final settlement of a guardian *held* authorized to allow the guardian compensation for his services.—France v. Shockey (Ark.) 1056.

§ 161. The court on appeal *held* not authorized to disturb the findings of the court in proceedings to confirm a guardian's final settlement, where the abstract of the evidence omits the testimony of the witnesses of the guardian. —France v. Shockey (Ark.) 1056.

§ 161. The court on appeal *held* not authorized to disturb the action of a court in proceedings to confirm a guardian's settlement allowing a credit of a specified sum for the support of the ward, notwithstanding Kirby's Dig. § 3792.—France v. Shockey (Ark.) 1056.

§ 168. An order of the probate court confirming an annual settlement of a guardian *held* conclusive unless corrected on appeal or other direct attack.—France v. Shockey (Ark.) 1056.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

Presumptions as to knowledge by sureties of law governing liabilities of public guardians, see Evidence, § 65.

§ 175. Ky. St. 1909, §§ 3903–3906 (Russell's St. §§ 3924–3927), *held* to impose upon one person both the duty of public administrator and public guardian, and the fact that the clerk of the court only styled an official "public administrator" in taking his official bond and for his order of appointment did not relieve him of the duty of public guardian; and hence his sureties could not object that they were not bound for his acts in that capacity.—Newman v. Flowers' Guardian (Ky.) 652.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

Determination of legality of incorporation of city, see Municipal Corporations, § 18.

§ 32. A person's arrest and detention for violating an ordinance of a city adopted by city under wrong name, *held* under color of authority.—Ex parte Keeling (Tex. Cr. App.) 605.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 85. Presumptions and intendments will not be indulged to sustain a conviction for a criminal contempt.—Ex parte Shull (Mo.) 10.

§ 99. That adoptive parents are better off financially than the natural father is not a controlling circumstance in determining the right of custody.—Orey v. Moller (Mo. App.) 1102.

§ 99. The father of a child has the first claim to its custody, unless he has abandoned it, is incapable to care for it, or there is some strong reason for denying his right.—Orey v. Moller (Mo. App.) 1102.

§ 99. The father of an infant, not having consented to the adoption of the child by defendants, and being a man of good character, etc., *held* entitled to regain the custody of the child.—Orey v. Moller (Mo. App.) 1102.

§ 117. Adverse determination of a proceeding in the circuit court by a father to obtain the custody of his infant child *held* not res judicata of a subsequent habeas corpus proceeding for the same purpose in the Court of Appeals. —Orey v. Moller (Mo. App.) 1102.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1027–1073.
In criminal prosecutions, see Criminal Law, §§ 1163–1175; Homicide, §§ 338–340.

HEARING.

In probate proceedings, see Wills, §§ 324, 332.

HEARSAY.

In civil actions, see Evidence, §§ 314–320.
In criminal prosecutions, see Criminal Law, §§ 419, 420.

HEIRS.

See Descent and Distribution.

HEPBURN ACT.

See Carriers, § 180.

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HIGH SCHOOLS.

See Schools and School Districts, § 12.

HIGHWAYS.

See Municipal Corporations, §§ 646–706, 755–821.

Accidents at railroad crossings, see Railroads, §§ 334–350.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 28. Where one of six landowners who had signed a petition for opening a road under Ky. St. 1909, § 4289 (Russell's St. § 5421), died, it was not error to refuse to enter an order of revivor, and continue the case for that purpose.—Story v. Little (Ky.) 1023.

§ 29. Were it necessary that the petition should state that the proposed road was required to enable the petitioners to travel to one of the places named in section 4288, Ky. St. 1909 (Russell's St. § 5420), the defect in failing to so state should have been taken advantage of by demurrer.—Story v. Little (Ky.) 1023.

§ 29. A petition for opening a road which sets forth every fact required by Ky. St. 1909, § 4289 (Russell's St. § 5421), *held* sufficient without stating that it was required to enable petitioners to travel to one of the places named in section 4288.—Story v. Little (Ky.) 1023.

§ 34. An order establishing a road which fixes the width at 30 feet and makes the line of survey the center is a sufficient compliance with Ky. St. 1909, § 4289 (Russell's St. § 5421), although neither the petition nor the report of the commissioners indicates the width of the proposed road.—Story v. Little (Ky.) 1023.

§ 39. The fact that road commissioners took luncheon with two of the petitioners for a new road *held* not to invalidate their report, in the absence of testimony showing improper conduct or conversation upon the part of petitioners.—Story v. Little (Ky.) 1023.

§ 41. While road commissioners could not amend their reports under the "General Statutes" under the Kentucky Statutes now in force, road commissioners may amend their report.—Story v. Little (Ky.) 1023.

§ 41. The report of road commissioners *held* good, though written in the office of the attorneys for petitioners, and though one of the attorneys at the request of the commissioners calculated the amount of ground that would be taken from each landowner for the proposed road.—Story v. Little (Ky.) 1023.

§ 58. Failure of a petition for a highway to state that it was necessary to reach one of the places to provide access to which a road may be established under Ky. St. 1909, § 4288 (Russell's St. § 5420), *held* immaterial on appeal where the omission was supplied by the commissioners' report.—Story v. Little (Ky.) 1023.

§ 58. Under the direct provisions of Ky. St. 1909, § 4303 (Russell's St. § 5435), the Court of Appeals have jurisdiction only of matters of law arising on the record on appeal in highway opening proceedings.—Story v. Little (Ky.) 1023.

§ 61. Where a party refused to accept damages allowed him by the report of road commissioners, and failed to recover as much either in the county or circuit court, he was not entitled to his costs.—Story v. Little (Ky.) 1023.

II. HIGHWAY DISTRICTS AND OFFICERS.

Imposition of duties of road officers on county commissioners as making them hold two offices, see Officers, § 30.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 107. A public road may be opened under the provision of Ky. St. 1909, § 4289 (Russell's St. § 5421).—Story v. Little (Ky.) 1023.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

Allegations as to time of delinquency in prosecution of poll tax delinquent, see Indictment and Information, § 87.

Suspension of statute relating to work on road by taxpayer, see Statutes, § 171.

Validity of law relating to work on road by taxpayer as denying equality and uniformity of taxation, see Taxation, § 40.

§ 151. An agreed statement of facts *held* not to warrant the assumption that poll taxes had been levied for certain years.—Bluitt v. State (Tex. Cr. App.) 168.

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

Partial invalidity of statute relating to work of foreign road by taxpayers, see Statutes, § 64.

HOLDING OVER.

By officer, see Officers, §§ 52–56.

HOMESTEAD.

See Exemptions.

I. NATURE, ACQUISITION, AND EXTENT.

(E) Liabilities Enforceable Against Homestead.

§ 101. Ky. St. 1909, § 1702 (Russell's St. § 4661), construed, and *held* to permit a wife, when abandoned, to share in the enjoyment of the homestead.—Nunn v. Page (Ky.) 442.

§ 103. Under Ky. St. 1909, § 900 (Russell's St. § 2687), a judgment against a husband for attorney's fees and costs in a suit for divorce by the wife subsequently dismissed cannot subject to its satisfaction the homestead of the husband exempt within section 1702 (Russell's St. § 4661).—Nunn v. Page (Ky.) 442.

II. TRANSFER OR INCUMBRANCE.

§ 115. Though the wife's name did not appear in the body of the mortgage of a homestead, and it contained no relinquishment of dower, and was not executed in compliance with the homestead statute, yet, where she signed and acknowledged it, it will be effective to create a lien as against her.—Ward v. Stark Bros. (Ark.) 382.

§ 115. An unmarried man may mortgage his homestead, though the same is exempt from execution.—Melton v. Beasley (Tex. Civ. App.) 574.

§ 119. A certificate of acknowledgment by a wife to a conveyance of a homestead *held* sufficient, under Kirby's Dig. § 3901; any defect therein being cured by Act March 20, 1903 (Acts 1903, p. 150; Kirby's Dig. §§ 783, 786).—Ward v. Stark Bros. (Ark.) 382.

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III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

Infancy as interrupting limitations of action to recover rents of homestead, see Limitation of Actions, § 72.

HOMICIDE.

II. MURDER.

§ 23. Murder in the second degree defined.—Wheeler v. State (Tex. Cr. App.) 166.

§ 23. Evidence *held* to make out a case of murder in the second degree.—Kirkpatrick v. State (Tex. Cr. App.) 511.

III. MANSLAUGHTER.

§ 45. The common-law rule as to the provocation which will reduce a killing to manslaughter *held* the law of Missouri.—State v. Heath (Mo.) 149.

IV. ASSAULT WITH INTENT TO KILL.

§ 86. A specific intent to take the life of the person assaulted is an essential element of assault to kill, under Kirby's Dig. § 1588.—Chowning v. State (Ark.) 735.

§ 94. In a prosecution for assault with intent to kill, it may be shown that accused was so drunk at the time he could not have entertained the necessary intent.—Chowning v. State (Ark.) 735.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 105. An officer or a private citizen, seeking to prevent a felon escaping, *held* required to exercise reasonable care to prevent the escape, without doing personal violence to the felon.—Green v. State (Ark.) 727.

§ 113. One, in good faith withdrawing from a difficulty voluntarily engaged in, *held* entitled to rely on self-defense.—State v. Heath (Mo.) 149.

§ 116. A proper instruction upon self-defense stated.—Wilson v. Commonwealth (Ky.) 430.

§ 120. In a murder case, where it appeared that accused, while in an altercation with decedent, either shot his pistol, or it was discharged, and decedent immediately ran 50 or 100 feet, pursued by accused, who was all the while shooting at him, and who finally shot him in the back, the issue of self-defense was not in the case.—Hart v. State (Tex. Cr. App.) 508.

VI. INDICTMENT AND INFORMATION.

Information for murder in first degree as including charge of lower grades, see Indictment and Information, § 189.
Necessity of allegations in indictment as to preliminary examination, see Indictment and Information, § 47.

VII. EVIDENCE.

(B) Admissibility in General.

Declarations by accused, see Criminal Law, § 412.
Evidence of other offenses, see Criminal Law, §§ 369, 380.
Hearsay evidence, see Criminal Law, § 419.
Self-serving declarations, see Criminal Law, § 413.

§ 158. Evidence of a threat made by defendant's wife in defendant's hearing shortly before the killing *held* admissible against him.—Hoffman v. Commonwealth (Ky.) 690.

§ 160. In a murder case, accused may show, in explanation of his possession of a pistol with which he killed decedent, that he had previously been threatened with great personal violence.—State v. Heath (Mo.) 149.

§ 169. In a prosecution for homicide, evidence that witness' two sons, just prior to the shooting, left her house and stated they were about to get fodder for a mule, *held* inadmissible.—Hoffman v. Commonwealth (Ky.) 690.

§ 183. In a prosecution for assault with intent to murder, evidence that thereafter prosecutrix's uncle obtained a check from defendant for $348.05 *held* inadmissible.—Groszoehmigen v. State (Tex. Cr. App.) 1113.

§ 190. In a murder case, certain testimony *held* properly excluded.—Hart v. State (Tex. Cr. App.) 508.

(E) Weight and Sufficiency.

§ 234. Evidence *held* to sufficiently connect one with the killing of another, so as to justify his conviction of some degree of homicide.—Pickett v. State (Ark.) 732.

§ 234. Where the case against accused was circumstantial only, and he showed that another person, or others, committed the homicide, he was entitled to acquittal, provided he did not assist in the offense.—Wheeler v. State (Tex. Cr. App.) 166.

§ 253. Evidence *held* to sustain a conviction of murder in the first degree.—Hoffman v. Commonwealth (Ky.) 690.

§ 255. Evidence *held* to justify a verdict of involuntary manslaughter.—Green v. State (Ark.) 727.

VIII. TRIAL.

(A) Conduct in General.

Argument and conduct of counsel, see Criminal Law, § 715.
Admission in rebuttal of evidence proper in chief, see Criminal Law, § 684.

(B) Questions for Jury.

§ 271. Whether an assault aroused the heat of passion necessary to reduce the killing to manslaughter is for the jury.—State v. Heath (Mo.) 149.

(C) Instructions.

Error in instructions cured by giving other instructions, see Criminal Law, § 823.

§ 286. In a murder case, the court *held* not required to charge on the right of accused to bear arms to protect himself, notwithstanding his evidence explaining his possession of the pistol with which he killed decedent.—State v. Heath (Mo.) 149.

§ 290. As a rule it is not necessary to define deadly weapons in the instructions in a homicide case, unless there is some question as to whether the weapons are of that character.—Wheeler v. State (Tex. Cr. App.) 166.

§ 294. In a prosecution, for assault to kill, an instruction on the defense of drunkenness *held* improperly refused.—Chowning v. State (Ark.) 735.

§ 300. An instruction on self-defense which makes the guilt or innocence of accused dependent on the existence of reasonable grounds of belief that he was in danger, regardless of how the danger appeared to him is erroneous.—Pickett v. State (Ark.) 732.

§ 300. To warrant the court in giving an instruction on the right of accused, on withdrawing in good faith from a difficulty voluntarily entered into, to defend himself, there should be some substantial testimony showing that accused, after the commencement of the difficulty,

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in good faith sought to withdraw from it.—State v. Heath (Mo.) 149.

§ 300. An instruction, on a trial for the murder of a teacher by a patron of a school, *held* properly refused because it commented on isolated facts and was argumentative.—State v. Heath (Mo.) 149.

§ 300. An instruction in a homicide case *held* properly refused because argumentative.—State v. Heath (Mo.) 149.

§ 304. In a prosecution for an assault to murder, an instruction *held* to sufficiently present the theory of accidental shooting.—Groszoehmigen v. State (Tex. Cr. App.) 1113.

§ 307. The court, in a homicide case, must submit the grades of the offense as shown by the testimony of the state and by the testimony of accused, though the testimony of the accused is uncorroborated.—State v. Heath (Mo.) 149.

§ 308. Instruction *held* to properly define murder in the second degree.—State v. Myers (Mo.) 131.

§ 309. In a homicide case, the failure to charge on manslaughter *held* reversible error, under the evidence.—Pickett v. State (Ark.) 732.

§ 309. Evidence *held* to furnish no sufficient basis for an instruction on manslaughter in the fourth degree.—State v. Myers (Mo.) 131.

§ 309. Where the provocation consists of an assault or personal violence sufficient to arouse the heat of passion necessary to reduce the killing to manslaughter, the issue of manslaughter in the fourth degree must be submitted to the jury.—State v. Heath (Mo.) 149.

§ 310. The offense of cutting and wounding in sudden heat or passion, defined by Ky. St. 1909, § 1242 (Russell's St. § 3185), *held* a degree of the offense of maliciously cutting and wounding with intent to kill, defined by section 1166 (Russell's St. § 3184), so that the court, on an indictment for the latter offense, properly submitted the other also.—Gillum v. Commonwealth (Ky.) 445.

§ 310. Evidence in a prosecution for assault to murder *held* to necessitate an instruction as to the law of aggravated assault, on the theory that the difficulty was begun by the prosecuting witness.—Heath v. State (Tex. Cr. App.) 862.

(D) Verdict.

Manner of arriving at verdict, see Criminal Law, § 866.

§ 313. Under Cr. Code Prac. § 257, subsec. 2, a verdict *held* to sufficiently indicate that accused was convicted of violating Ky. St. 1909, § 1166 (Russell's St. § 3184), and not section 1242 (Russell's St. § 3185).—Gillum v. Commonwealth (Ky.) 445.

X. APPEAL AND ERROR.

§ 338. Admission of hearsay testimony *held* highly prejudicial and reversible error.—Wilson v. Commonwealth (Ky.) 430.

§ 338. Evidence that witness' sons, just prior to the shooting, had stated they were going to get fodder for a mule, *held* not prejudicial to defendant.—Hoffman v. Commonwealth (Ky.) 690.

§ 338. In a murder case, admission of certain evidence *held* not reversible error.—Hart v. State (Tex. Cr. App.) 508.

§ 338. The admission of evidence in a manslaughter case, if error, *held* harmless, in view of the verdict imposing the minimum punishment for manslaughter.—Davis v. State (Tex. Cr. App.) 1108.

§ 339. In a murder case, exclusion of evidence, if error, *held* harmless.—Hart v. State (Tex. Cr. App.) 508.

§ 340. The error in an instruction on murder in the second degree *held* not reversible.—Wheeler v. State (Tex. Cr. App.) 166.

HOSPITALS.

Hospitals for treatment of injured employés, see Master and Servant, § 92.

HOTCHPOT.

Adjustment and deduction of advancements in equalization of bequests, see Wills, § 762.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Bigamy; Divorce; Dower; Marriage.

Right of abandoned wife to share in enjoyment of homestead, see Homestead, § 101.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 14. A deed *held* to give to husband and wife the use and joint occupancy of the land conveyed for life, with power to sell and on their death, without a sale, the land passed to the wife's heirs.—Hudson's Heirs v. Hudson's Adm'r (Ky.) 973.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(A) In General.

Marriage of woman executing power of attorney as constituting revocation, see Principal and Agent, § 42.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

Rights of widow of donee of public land, see Public Lands, § 143.

§ 119. A deed construed, and *held* to convey the land in controversy to a married woman in her separate right.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 129. A married woman cannot be estopped to assert her rights in land except for fraud, or acts equivalent thereto.—Gillean v. Witherspoon (Tex. Civ. App.) 909.

§ 133. In an action to compel a husband, after his wife's death, to account for certain property and mortgages which were in the name of the wife, evidence *held* to show that the husband acquired the property and mortgages with his own money, and did not intend to give it to his wife, though he put it in her name.—Carroll v. Carroll (Ark.) 947.

(C) Liabilities and Charges.

§ 169. A mortgage executed by a married woman *held* sufficiently acknowledged to convey her separate property.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

(D) Conveyances and Contracts to Convey.

§ 193. A wife's separate deed to her separate land *held* void.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 198. Neither a grantor under a subsequent deed reciting a void prior deed to her husband nor those claiming under the subsequent deed were estopped to deny the prior deed except against those claiming under it.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 199. A wife's separate deed to her separate land *held* not cured by subsequent recitals

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in the husband's deed to other land to the same grantee.—Merriman v. Blalack (Tex. Civ. App.) 552.

§ 199. A wife's void deed for want of jointure *held* not cured by a recital in a subsequent deed by her and others, after she became sole, that the land had been previously conveyed to her by the grantee.—Merriman v. Blalack (Tex. Civ. App.) 552.

VII. COMMUNITY PROPERTY.

Community rights of wife as affected by ignorance of existing former marriage of husband, see Marriage, § 54.

§ 260. A chose in action accruing to either spouse during the marriage by reason of an injury to the person is community property.—Ft. Worth & R. G. Ry. Co. v. Robertson (Tex. Civ. App.) 202.

§ 273. Where there was no evidence that an owner had any children entitled to share with him in the community property on the death of his wife, it could not be urged that he owned only a half interest, so that his mortgage only incumbered the property to that extent.—Melton v. Beasley (Tex. Civ. App.) 574.

HYPOTHETICAL QUESTIONS.

To expert witnesses, see Evidence, § 552.

IDENTITY.

Hearsay evidence of in criminal prosecution, see Criminal Law, §§ 419, 420.

IGNORANCE.

Of existing marriage of husband as affecting rights of wife, see Marriage, § 54.

ILLNESS.

Of counsel as ground for continuance in criminal prosecution, see Criminal Law, § 593.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, § 120.

IMPEACHMENT.

Of record, see Appeal and Error, §§ 662–670.
Of witness, see Witnesses, §§ 317–398.

IMPLIED CONTRACTS.

See Covenants, § 14; Money Received; Work and Labor.

IMPRISONMENT.

See Execution, §§ 436–441; False Imprisonment.
Habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Allowance or recovery of compensation, see Ejectment, § 148.
Liens, see Mechanics' Liens.
Public improvements, see Municipal Corporations, §§ 270–362.

INCOMPETENT PERSONS.

See Insane Persons.

INCORPORATION.

See Corporations, § 30; Municipal Corporations, §§ 18, 21.

INCUMBRANCES.

On homestead, see Homestead, §§ 115, 119.
On property of intestate, see Descent and Distribution, §§ 134, 143.

INDECENCY.

See Obscenity.

INDEMNITY.

See Principal and Surety.

§ 3. Indemnitors whose contract is not coincident with the principal obligation are not bound where there is no other consideration for it.—Wright v. Hawes (Ky.) 611.

§ 13. "Independent contractor" defined.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 315–324.

INDICTMENT AND INFORMATION.

See Grand Jury.
Harmless error in rulings on, see Criminal Law, § 1167.
Indictment against decedent for burning of property as evidence in action against his executors for injuries resulting therefrom, see Fires, § 7.

For particular offenses.

See Arson, § 18; False Pretenses, §§ 30, 36; Forgery, § 32; Gaming, §§ 87–91; Larceny, § 40; Obscenity, § 12.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 15. Whether accused should be discharged on the direction of a verdict for him at the close of the commonwealth's evidence in a forgery prosecution was a question for the exercise of the sound discretion of the trial court.—Commonwealth v. Caldwell (Ky.) 480.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 43. An information *held* sufficiently filed.—Wooten v. State (Tex. Cr. App.) 703.

§ 47. An information charging murder in the first degree need not allege that accused had been afforded a preliminary examination prior to the filing of the information.—State v. Heath (Mo.) 149.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Allegations of ownership in prosecution for conspiracy to burn property, see Conspiracy, § 43.

§ 86. An indictment charging the maintenance of a gambling room in T. county *held* to have sufficiently charged the venue.—Rasor v. State (Tex. Cr. App.) 512.

§ 87. Indictment for bigamy *held* not bad for alleging that the offense was committed after the indictment was found, in view of the other allegations to the contrary.—Cornett v. Commonwealth (Ky.) 424.

§ 87. A complaint and information in a prosecution of a delinquent poll tax payer to appear for road work *held* insufficient for failing to allege liability and delinquency for a year within the period of limitation.—Bluitt v. State (Tex. Cr. App.) 168.

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§ 106. The writing on which an indictment is founded must be set out therein, unless it has been lost or destroyed, or unless it contains matter too obscene to be perpetuated as a part of the record.—Kinnaird v. Commonwealth (Ky.) 489.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. An indictment charging gaming *held* not duplicitous.—Morris v. State (Tex. Cr. App.) 1112.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137. A motion to dismiss the indictment because the accused was brought into the state without a proper warrant of extradition *held* properly denied for want of proof.—Lawshe v. State (Tex. Cr. App.) 865.

§ 140. The burden is on accused to show the presence of an unauthorized person before the grand jury, when it was deliberating upon the indictment against him or voting upon the same.—Moody v. State (Tex. Cr. App.) 1117.

§ 150. Whether a writing is obscene in the sense that a prosecution will lie for the publication thereof *held* for the court, where a demurrer to the indictment was filed.—Kinnaird v. Commonwealth (Ky.) 489.

IX. ISSUES, PROOF, AND VARIANCE.

In prosecution for larceny, see Larceny, § 40.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189. An information charging murder in the first degree embraces all the lower grades of the offense.—State v. Heath (Mo.) 149.

§ 190. An assault with intent to rape is included in the charge of rape, and a conviction may be had of the former under an indictment for the latter.—Green v. State (Ark.) 949.

INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 280.

INFANTS.

See Guardian and Ward.
Computation of period of limitation in action by, see Limitation of Actions, § 72.
Contributory negligence on part of children, see Negligence, § 85.
Lien of for surplus on sale of land for payment of debts of ancestor, see Executors and Administrators, § 351.

IV. CONTRACTS.

§ 49. An infant is bound by his executed contract for services which is not so unreasonable as to show evidence of fraud or undue advantage.—Robinson v. Van Vleet (Ark.) 288.

VI. CRIMES.

False representations as to age inducing another to enter into a contract, see False Pretenses, § 7.

VII. ACTIONS.

§ 81. Under Rev. St. 1899, §§ 558–560 (Ann. St. 1906, pp. 589, 590), the guardian ad litem must be appointed for an infant in an action against him, and the acceptance of the guardian filed. Appearance in the case of a firm of attorneys, one of whom was the same name as the guardian appointed, does not constitute a waiver of the acceptance.—Reineman v. Larkin (Mo.) 307.

§ 112. A judgment against an infant, being voidable only, and not void, is not subject to collateral attack.—Reineman v. Larkin (Mo.) 307.

INFERIOR COURTS.

See Courts, §§ 159–183.

INFORMATION.

Criminal accusation, see Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

Relief against particular acts or proceedings.
See Execution, § 172.
Enforcement of judgment, see Courts, § 480.
Sale of intoxicating liquors on demised premises, see Landlord and Tenant, § 134.
Violation of liquor laws, see Intoxicating Liquors, § 279.

Review of proceedings for injunction.
Appellate jurisdiction dependent on jurisdiction of lower court, see Appeal and Error, § 20.
Waiver of right to appeal, see Appeal and Error, § 165.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

§ 5. Scope of remedy by mandatory injunction stated.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 44. Where the judgment of a creditor may be rendered unavailable by a transfer of equitable assets, equity will grant an injunction.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 52. Where an insolvent lessee, was permitted only to cut timber necessary for clearing the land, and for fences to be used on the land, he should be restrained from cutting the timber to sell.—Reichardt v. Howe (Ark.) 347.

(C) Contracts.

§ 57. An injunction restraining the breach of contract *held* proper, where the contract may be specifically enforced, and there is no other practicable mode of enforcement.—Pitcock v. State (Ark.) 742.

(E) Public Officers and Boards and Municipalities.

§ 84. The passing of an ordinance, an exercise of legislative function, will not be enjoined.—Slade v. City of Lexington (Ky.) 621.

(G) Personal Rights and Duties.

§ 98. The general rule is that injunction will not lie to restrain the publication of a libel, especially in view of the guaranty of liberty of speech in Const. art. 1, § 8.—Mitchell v. Grand Lodge Free & Accepted Masons of Texas (Tex. Civ. App.) 178.

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III. ACTIONS FOR INJUNCTIONS.

Amount in controversy as determining jurisdiction, see Courts, § 169.

§ 110. District courts, as courts of general jurisdiction, are empowered by law to issue and try injunctions.—Kruegel v. Rawlins (Tex. Civ. App.) 216.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 132. Doctrine that it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title does not apply where the effect of the injunction is only to restore plaintiff's possession, which had been forcibly invaded, and preserve the status until the party's rights could be determined.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

§ 134. Where the rights of the parties in an action for an injunction are doubtful, the court should look at the balance of convenience, and act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

§ 136. Certain facts *held* to warrant granting of a temporary prohibitive injunction forbidding interference with canal.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

(B) Continuing, Modifying, Vacating, or Dissolving.

Appealability of order refusing to dissolve, see Appeal and Error, § 71.

Filing motion to dissolve as waiver of right to appeal from order granting injunction, see Appeal and Error, § 165.

§ 163. Reformation of order granting an injunction allowed, where it grants a permanent injunction without notice, but the writ issued is in form a temporary injunction until the hearing.—Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co. (Tex. Civ. App.) 716.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

§ 192. In an action to restrain the seller of a business from engaging in a competing business, in violation of his contract of sale, the decree should enjoin defendant only, and not the other members of the firm of which he is a partner.—Bloom v. Home Ins. Agency (Ark.) 293.

VII. VIOLATION AND PUNISHMENT.

§ 219. Where the court had jurisdiction of the parties and subject-matter of the cause of action in which the injunction was issued, the fact that it was erroneously or improvidently issued does not excuse disobedience by those bound by it.—Pitcock v. State (Ark.) 742.

§ 219. A final decree rendered by a court without jurisdiction may be disobeyed with impunity.—Pitcock v. State (Ark.) 742.

§ 219. A court possesses the power of determining its jurisdiction, and while so doing may require the parties to preserve the existing status of the subject-matter, unless the pleadings show on their face that the court is wholly without jurisdiction of the subject-matter.—Pitcock v. State (Ark.) 742.

§ 221. Under Kirby's Dig. § 3984, actual notice of the issuance of an injunction, without formal service of the writ, *held* sufficient to put one violating it in contempt of court.—Pitcock v. State (Ark.) 742.

§ 230. The court, in proceeding to enforce by contempt a temporary injunction, need not consider the merits of the controversy or whether the injunction was properly granted.—Ft. Worth Driving Club v. Ft. Worth Fair Ass'n (Tex. Civ. App.) 213.

IN PAIS.

Estoppel, see Estoppel, §§ 56–114.

INQUISITION.

Of lunacy, see Insane Persons, §§ 24, 25.

INSANE PERSONS.

Duty of court as to making election under will for benefit of incompetent, see Wills, § 786.

II. INQUISITIONS.

§ 24. Where a person has been found incompetent, but one subsequent inquiry, viz., as to whether the condition has ceased to exist, or whether the first inquest was obtained by fraud, or was false when judgment was entered, is permitted.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

§ 25. An application to vacate a lunacy decree must be made to the court granting it, and is not within the jurisdiction of a court of another county.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

III. GUARDIANSHIP.

§ 30. Ky. St. § 2156 (Russell's St. § 4247), providing for lunacy inquisitions and the appointment of committees, applies only to persons who are incompetent by reason of mental unsoundness or imbecility.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

§ 30. A verdict finding defendant incompetent to manage his estate *held* insufficient to warrant the appointment of a committee for him.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

IX. ACTIONS.

§ 94. "Office of next friend" defined.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

§ 94. A suit to recover property of an incompetent may be properly brought by his next friend where he has no committee, and the commonwealth representative does not act.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

§ 94. Failure of the next friend of an incompetent having no committee to file an affidavit of qualification before suit is brought was waived if not objected to in due season.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

§ 94. Where, in a suit by an incompetent's committee, it appeared that his appointment was invalid, and he thereupon offered to prosecute the suit as next friend, the court should have permitted him to do so instead of dismissing the suit.—Upton's Committee v. Bush (Ky.) 1005; Same v. Gaddie, Id.

INSOLVENCY.

See Bankruptcy.

Of insurance company, see Insurance, § 69.

INSPECTION.

Duty of master to inspect appliances, see Master and Servant, § 124.

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Of tools, machinery, appliances and places for work, duty of servant as to inspection, see Master and Servant, § 235.

INSPECTORS.

Car inspectors as fellow servants of conductor, see Master and Servant, § 181.

INSTRUCTIONS.

In civil actions, see Trial, §§ 191–295.
In criminal prosecutions, see Criminal Law, §§ 770–823; Homicide, §§ 286–310.

INSTRUMENTS.

Regulations as to keeping and use of musical instruments in dram shops, see Intoxicating Liquors, § 116.

INSURANCE.

Combinations by insurance agents, see Monopolies, § 18.
Fact of procuring insurance as evidence in prosecution for arson, see Arson, § 31.

I. CONTROL AND REGULATION IN GENERAL.

§ 20. Act March 1, 1907 (Laws 1907, p. 315), prohibiting the licensing of insurance companies to do business in the state where the pay or salary of any one employé is more than $50,000, *held* applicable to any insurance company doing business in the state, as well as those who might enter thereafter.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 20. Act March 1, 1907 (Laws 1907, p. 315), does not attempt to fix the salaries of officers of insurance companies, but merely prohibits the granting of a new license to companies paying more than $50,000 to any one person.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 20. A license, authorizing an insurance company to do business within the state, is not a contract, but merely a grant of authority for one year.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 20. Insurance commissioner's refusal to renew an insurance company's license does not affect any former transaction, but merely prevents the transaction of new business.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 20. That a foreign insurance company had invested large sums of money in Missouri *held* not to prevent the insurance commissioner from refusing to renew its license under Act March 1, 1907 (Laws 1907, p. 315), on the theory of an implied contract between the corporation and state.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 20. Act March 1, 1907 (Laws 1907, p. 315), prohibiting the issuance of a renewal license to insurance companies paying more than $50,000 a year to any employé, *held* a valid police regulation, and not an attempt to regulate internal affairs of such associations.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

II. INSURANCE COMPANIES.

(A) Stock Companies.

Subject and title of statute relating to salaries of officers, see Statutes, § 113.

(B) Mutual Companies.

§ 69. The district court of Travis county had jurisdiction to forfeit for cause the charter of a mutual fire insurance company whose domicile was at Houston and appoint a receiver for the company.—Graham v. Sparks (Tex. Civ. App.) 597.

§ 70. Even if funds of a mutual fire insurance company deposited with the State Treasurer under Acts 1903, p. 168, c. 109, § 5, were not in custody of the law upon forfeiture of its charter and the appointment of a receiver, under section 9, such funds were held for the benefit of the policy holders in proportion to their insurance, and could not be garnished.—Graham v. Sparks (Tex. Civ. App.) 597.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

§ 146. Insurance contracts must be liberally construed in favor of the insured.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 146. In order to work a forfeiture under an insurance contract, it must clearly appear that the matter was within the contemplation of the parties at the time the contract was entered into; and, if the question be doubtful, the doubt must be resolved in favor of insured.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 146. The conditions of an insurance policy providing for the forfeiture of all or a portion of the indemnity, if insured engage in an occupation or act other than that mentioned in the policy, are strictly construed against the insurer.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

Acceptance of less than cash value by insured as accord and satisfaction, see Accord and Satisfaction, § 1.
Validity of compromise of surrender value, see Compromise and Settlement, § 8.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 335. An iron-safe clause in a fire insurance policy is valid.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

§ 335. An insurer *held* to have written a policy containing an iron-safe clause with reference to the custom of the community as to the usual hours of business.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

§ 335. In an action on a fire policy, an instruction as to plaintiff's breach of a condition requiring the keeping of an inventory in a fireproof safe *held* proper.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

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§ 336. Fire policies issued without the request of insured and by mistake *held* in effect no insurance, and their mere formal existence not to avoid a policy under the additional insurance clause.—North British & Mercantile Ins. Co. v. Robertson (Ky.) 630.

§ 336. Strict compliance with a clause in a fire insurance policy, forbidding other concurrent insurance unless permitted, is essential to a recovery.—Gross v. Colonial Assur. Co. (Tex. Civ. App.) 517.

§ 336. Rev. St. 1895, art. 3096aa, added by Acts 28th Leg. 1903, p. 94, c. 69, *held* not to abolish the doctrine of promissory warranties so that carrying other policies in excess of concurrent insurance permitted avoided the policy.—Gross v. Colonial Assur. Co. (Tex. Civ. App.) 517.

(E) Nonpayment of Premiums or Assessments.

§ 367. Nonpayment of a premium note *held* no bar to insured's right to extended insurance.—New York Life Ins. Co. v. Van Meter's Adm'r (Ky.) 438.

§ 367. The term "indebtedness," as used in a nonforfeiture provision in a life insurance policy, *held* not to include premium notes.—New York Life Ins. Co. v. Van Meter's Adm'r (Ky.) 438.

§ 367. On insured's failure to pay subsequent premiums, he acquired a vested right to extended insurance for a term specified in tables attached to the policy.—New York Life Ins. Co. v. Van Meter's Adm'r (Ky.) 438.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 390. A forfeiture under the additional insurance clause may be waived either by parol agreement or conduct of the insurer.—North British & Mercantile Ins. Co. v. Robertson (Ky.) 630.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

§ 504. An insurer sued on its fire policy, *held* under its answer and the evidence liable for only a part of the loss, according to the policy, without making another insurer a party.—Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n (Tex. Civ. App.) 599.

§ 504. Fire policies *held* to constitute double insurance, limiting the liability of one insurer according to the terms of its policy.—Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n (Tex. Civ. App.) 599.

§ 504. A stipulation in a fire policy *held* not to nullify a provision therein limiting insurer's liability to the same the loss sustained as the amount insured bore to the whole insurance.—Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n (Tex. Civ. App.) 599.

(E) Accident and Health Insurance.

§ 531. That defendant insurance company had classified in its manual the laborers engaged about an oilcloth and linoleum factory, and also laborers about oil wells under an extra hazard, *held* not to show a like classification of labor in handling gasoline.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

XIV. NOTICE AND PROOF OF LOSS.

§ 539. Under an accident policy requiring notice of injury within 10 days, insured *held* excused from complying with such provision, where by the injuries and medical treatment therefor, he was rendered unconscious for three weeks.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

XV. ADJUSTMENT OF LOSS.

Acceptance of less than cash value by insured as accord and satisfaction, see Accord and Satisfaction, § 1.

Validity of compromise of rights, see Compromise and Settlement, § 8.

XVIII. ACTIONS ON POLICIES.

§ 646. If under an accident policy a certain occupation was classed in the manual of defendant association as hazardous, rendering a higher rate of premium necessary, or affording a lesser amount of indemnity with the same premium than that pertaining to the ordinary occupation of insured, it was a matter within the knowledge of defendant, and the burden rested on it, in an action on the policy, to establish the same.—Roseberry v. American Benevolent Ass'n (Mo. App.) 785.

§ 668. In an action on a fire policy, whether insured's acts constituted a sufficient compliance with an iron-safe clause in a fire policy, *held* for the jury.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

§ 668. Whether fire policies constituting additional insurance in violation of that clause were issued without the request of insured and by mistake *held* for the jury.—North British & Mercantile Ins. Co. v. Robertson (Ky.) 630.

§ 669. In an action on a fire policy, a charge that the jury should consider the custom of closing hours and bookkeeping in the community in determining whether plaintiff had substantially complied with an iron-safe clause in the policy *held* proper.—Capital Fire Ins. Co. v. Kaufman (Ark.) 289.

XX. MUTUAL BENEFIT INSURANCE.

(D) Forfeiture or Suspension.

§ 748. Insured *held* not "convicted" of a felony within a certificate of life insurance, conditioned to be void on his being so convicted, where, after verdict, judgment, and sentence, he appealed, with suspension of sentence and judgment under Rev. St. 1899, § 2698 (Ann. St. 1906, p. 1590), and pending appeal he died.—Baker v. Modern Woodmen of America (Mo. App.) 794.

INTENT.

Element of offenses.

See Homicide, § 86; Larceny, § 3.

Sale of liquor to minor, see Intoxicating Liquors, § 159.

INTEREST.

See Usury.

Effect as to credibility of witness, see Witnesses, §§ 369, 372.

On funds of ward's estate, see Guardian and Ward, § 54.

Shares in corporation, see Corporations, §§ 153, 155.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 132–163.

INTERLOCUTORY JUDGMENT.

Appealability, see Appeal and Error, §§ 71–79.

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INTERPRETATION.

Of contracts, instruments, or judicial acts and proceedings.

See Contracts, §§ 144–212; Covenants, §§ 27–79; Deeds, §§ 90–168; Mortgages, § 114; Sales, §§ 68–88; Statutes, §§ 181–253; Wills, §§ 490–697.

Insurance policy, see Insurance, § 146.

INTERSTATE COMMERCE.

Regulation, see Commerce.

INTERVENTION.

In actions in general, see Parties, §§ 40, 51.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

Restrictions in leases as to sale of intoxicants on premises, see Landlord and Tenant, § 134.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

Law making local option election binding unless contested within certain time and making contest binding on person not party thereto, as denial as due process of law, see Constitutional Law, § 295.

III. LOCAL OPTION.

§ 31. A void local option election is not to be considered in determining whether an election has been held in the territorial subdivision within the legal period.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

§ 32. Cities, in order to be excluded from general local option election in a county, under Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), *held* only required to have 2,500 inhabitants, and not 2,500 qualified voters.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

§ 33. A county court's order for local option election, finding that there was no incorporated city or town in the county containing 2,500 inhabitants or more, *held* not subject to collateral attack.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

§ 33. A notice published for the holding of a local option election *held* a departure from the order for the election, which was therefore void.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

IV. LICENSES AND TAXES.

Priority between judgment and lien of person furnishing money for payment of license, see Judgment, § 785.

§ 72. The action of the council of the city of Texarkana on applications for liquor licenses as authorized by the charter (Sp. Laws 1907, p. 823, c. 104), *held* not reviewable by the courts.—Berger v. De Loach (Tex. Civ. App.) 591.

§ 72. The Legislature may confer on the council of a city the power to conclusively determine what persons shall obtain a liquor license.—Berger v. De Loach (Tex. Civ. App.) 591.

§ 74. Certain facts *held* not to prove that the council of Texarkana abused its discretion in acting on applications for a liquor license, as authorized by the charter (Sp. Laws 1907, p. 823, c. 104).—Berger v. De Loach (Tex. Civ. App.) 591.

§ 74. A party seeking relief by mandamus for an abuse by a city council of discretion conferred on it in ruling on applications for a liquor license has the burden of showing such abuse.—Berger v. De Loach (Tex. Civ. App.) 591.

§ 106. Under Ky. St. 1909, §§ 4204, 4208 (Russell's St. §§ 6146, 6150), a violation of a liquor license issued to a firm by one of the members thereof *held* to authorize the revocation of the license as against the firm and its members.—Lewis & Potter v. Commonwealth (Ky.) 643.

§ 108. An agreement relating to obtaining a liquor license *held* contrary to law, so that the state may, at its election, cancel the license.—Leon Mercantile Co. v. Anderson (Tex. Civ. App.) 868.

V. REGULATIONS.

Parol or extrinsic evidence of petition for special prohibition, see Evidence, § 460.

§ 116. Under Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), forbidding a dramshop keeper from keeping in his dramshop a piano, organ, or other musical instrument for the purpose of performing on or having the same performed, a musical slot machine *held* not a musical instrument prohibited by the statute.—Thiebes-Stierlin Music Co. v. Weiss (Mo. App.) 1099.

§ 130. A petition for the establishment of a three mile area in which the sale of liquor should be prohibited, under Kirby's Dig. § 5129, *held* not objectionable for uncertainty.—Thomas v. Burke (Ark.) 1060.

§ 130. Where a proposed prohibited district, within a radius of three miles of a schoolhouse, overlapped a state line, a ruling that, in determining whether the order was desired by a majority of the adult inhabitants of the district, the state line should be disregarded was erroneous.—Thomas v. Burke (Ark.) 1060.

§ 130. A party to a petition for a prohibition order *held* entitled to appeal from an order denying such relief, regardless of whether he was a qualified petitioner.—Thomas v. Burke (Ark.) 1060.

VI. OFFENSES.

Time of taking effect of statute, see Statutes, § 253.

§ 147. A sale of intoxicating liquors to a minor *held* to take place at the dealer's place of business.—Harper v. State (Ark.) 737.

§ 148. Under Ky. St. 1909, § 2558a (Russell's St. § 3646), Acts 1904, p. 160, c. 76, as amended by Act March 21, 1906 (Acts 1906, p. 363, c. 87), and Act March 19, 1908 (Acts 1908, p. 55, c. 15), a manufacturer could not sell intoxicating liquor to one not a wholesale or retail dealer.—Boggs v. Commonwealth (Ky.) 433

§ 148. That a distillery was not in operation when liquor was sold by the manufacturer at the distillery *held* not to make the sale a violation of Acts 1904, p. 160, c. 76, as amended by Act March 21, 1906 (Acts 1906, p. 363, c. 87).—Boggs v. Commonwealth (Ky.) 433.

§ 159. The offense of selling liquor to a minor in violation of the statute *held* complete when the sale is made to a minor, and the guilty intent of the seller is immaterial.—Harper v. State (Ark.) 737.

§ 159. One selling liquor *held* guilty of selling liquor to a minor.—Harper v. State (Ark.) 737.

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Evidence describing the buildings, fixd surroundings where defendant was to have illegally sold liquor *held* ad--Todd v. State (Tex. Cr. App.) 506.

In a trial for unlawfully selling in- liquors, evidence *held* to sustain a .—Goff v. State (Tex. Cr. App.) 503.

The evidence on a trial for violatocal option law *held* to sufficiently fix of the offense.—Wooten v. State (Tex. 703.

In a prosecution for violating the ion law, an instruction *held* to suffiesent question of good faith and misact by accused in selling the liquor.—er v. State (Tex. Cr. App.) 863.

TEMENT AND INJUNCTION.

An injunction restraining a subtenselling intoxicating liquors on the mises *held* violated by sales made by erson.—Ft. Worth Driving Club v. Ft. ir Ass'n (Tex. Civ. App.) 213.

INTOXICATION.

nse to prosecution for assault with inkill, see Homicide, § 94.
as to habits of, see Evidence, § 132.

IRON SAFE CLAUSE.

ance, §§ 335, 668.

ISSUES.

ctions, see Pleading, § 382.

JEOPARDY.

opardy bar to prosecution, see Crim-, § 187.

JOINDER.

of action, see Action, §§ 46, 50.

JOINT TENANCY.

cy in Common.
ttorney by one joint owner to anothale of property, see Principal and 34.

JUDGES.

; Justices of the Peace.
ng notice of proceedings against ans bona fide purchaser of interests of Descent and Distribution, § 134.
to judge, see Mandamus, §§ 26–53.
nd conduct at trial, see Trial, § 29.

INTMENT, QUALIFICATION, AND TENURE.

member of the bar selected by the to try a cause without authority judge de facto.—Oates v. State (Tex. 370.

PECIAL OR SUBSTITUTE JUDGES.

of murder on trial before judge apvithout authority as deprivation of ut due process of law, see Constituw, § 257.

ent districts to exchange on the disqualification of the resident judge.—Oates v. State (Tex. Cr. App.) 370.

§ 14. Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), amending Rev. St. 1895, arts. 1069, 1070, *held* not in violation of Const. art. 5, § 11, as depriving parties of the right to appoint a proper person from among the bar to try a case on the disqualification of a judge of the district court.—Oates v. State (Tex. Cr. App.) 370.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 29. For judges pending a trial before one of them to temporarily exchange circuits *held* not error.—York v. State (Ark.) 1070.

IV. DISQUALIFICATION TO ACT.

Judgment rendered by disqualified judge as denial of due process of law, see Constitutional Law, § 305.

§ 46. Const. art. 5, § 11, *held* not to disqualify a judge from trying an action, merely because he is the father-in-law of the attorney of plaintiff, who is, under his contract with plaintiff, entitled to receive for his fees a specified part of the judgment recovered.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

JUDGMENT.

Decisions of courts in general, see Courts, §§ 89–97.
Effect as curing defects in pleadings, see Pleading, §§ 409–435.
Enforcement by creditors' suit, see Creditors' Suit.
Necessity of filing copy of judgment on motion to affirm on certificate, see Appeal and Error, § 1127.

In actions by or against particular classes of persons.

See Infants, § 112; Partnership, § 219.

In particular civil actions or proceedings.

See Attachment, § 217; Specific Performance, § 131.
Decree in equity, see Equity, § 423.
Foreclosure, see Mortgages, § 488.
On appeal or writ of error, see Appeal and Error, §§ 1127–1206.

Review.

See Appeal and Error.
Harmless error, see Appeal and Error, § 1073.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 17. The omission of the citation to give the date of filing the petition renders a default judgment erroneous.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 193. *Held*, that an equity court cannot, any more than a law court, hold a case open after judgment for further adjudication on the merits.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 203. Under Rev. St. 1899, § 694 (Ann. St. 1906, p. 703), there can be only one final judgment, though the petition contains several

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counts, and though separate trials are had thereon.—Mann v. Doerr (Mo.) 86.

§ 218. Where a judgment was set aside because founded on improper proof, a subsequent judgment, based on competent proof, directing that the first decree be executed as the then judgment of the court, was not void.—Oldham v. McElroy (Ky.) 414.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 256. Where defendant denies all liability, and the amount claimed is not disputed, if any liability attached, a verdict for plaintiff was sufficient to support a judgment for the amount sued for.—Dine v. Donnelly (Ky.) 685.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 299. If a motion to modify is filed at the term when the judgment was entered, and is carried over to the next term without a ruling, it may be disposed of at the subsequent term.—Breeding v. Nelson (Mo. App.) 1080.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

§ 403. An independent suit based upon equitable grounds may be maintained to prevent the enforcement of an unjust judgment irrespective of statute.—Wolf v. Sahm (Tex. Civ. App.) 561.

§ 415. In a direct attack on a default judgment by suit to set it aside, whether the judgment is absolutely void need not be determined, but only where the facts are available in a direct proceeding, as an appeal, etc.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

§ 425. An amended petition *held* not to be ground for setting aside a default judgment.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

§ 426. Failure of a decree directing the sale of a pledged note to order a newspaper publication as required by St. § 14a (Russell's St. § 24), *held* only ground for avoidance of the decree on exceptions or to set it aside, as provided by Civ. Code Prac. § 518, subsecs. 4, 7.—Bank of Cerulean Springs v. Gardner (Ky.) 608.

§ 446. Where defendant's newly discovered evidence was not ground for a new trial because not applicable to any issue tried, its remedy was by suit to set aside the judgment.—Texas & P. Ry. Co. v. Smith (Ark.) 282.

(B) Jurisdiction and Proceedings.

§ 456. An equitable suit to prevent the enforcement of an unjust judgment is not barred until after four years.—Wolf v. Sahm (Tex. Civ. App.) 561.

§ 460. A petition to set aside a judgment directing the sale of collaterals *held* insufficient to justify vacation of the decree for fraud, unavoidable casualty, or misfortune.—Bank of Cerulean Springs v. Gardner (Ky.) 608.

§ 460. In a suit to set aside a default, *held*, that the petition was sufficient to entitle plaintiff to a submission on the merits of the issue, whether the facts sufficiently excused his failure to prosecute with the usual legal remedy by appeal or error.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

§ 470. A valid judgment is binding upon the parties thereto until set aside by a direct proceeding for that purpose.—Kruegel v. Rawlins (Tex. Civ. App.) 216.

(B) Grounds.

§ 497. A recital in a judgment that an estate which was the only defendant sued, though duly cited, did not appear, is meaningless, and affords no presumption in favor of service.—Perry v. Whiting (Tex. Civ. App.) 903.

(C) Proceedings.

§ 518. An appeal from a judgment is not a collateral, but in the nature of a direct, attack.—Reineman v. Larkin (Mo.) 307.

§ 518. A suit to set aside a default judgment *held* a direct, and not a collateral, attack thereon.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

Former determination affecting right to maintain habeas corpus proceedings, see Habeas Corpus, § 117.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

§ 682. A judgment in trespass to try title *held* not conclusive on defendant's prior grantee, not a party to the suit.—Elliott v. Morris (Tex. Civ. App.) 209.

§ 682. Under Sayles' Ann. Civ. St. 1897, art. 5275, a judgment against defendant, in trespass to try title, *held* not conclusive on his prior grantee.—Elliott v. Morris (Tex. Civ. App.) 209.

§ 707. An absent heir, who was presumed to be dead, and whose interest was not considered in a suit for partition of property, was not bound by the decree.—Grimes v. Miller (Mo.) 21.

(C) Matters Concluded.

§ 720. A judgment of a court of competent jurisdiction on a matter in issue is binding on the parties and their privies in another action between them.—Morgan v. Kendrick (Ark.) 278.

§ 720. In a suit involving the title to and possession of certain land, including the determination of a boundary, the judgment therein *held* res judicata as to the question of boundary.—Vincent v. Blanton (Ky.) 466.

§ 725. A former judgment is only conclusive of such matters as were essential to be determined.—Manning v. Green (Tex. Civ. App.) 721.

§ 725. Judgments for title and possession of land only *held* not conclusive as to the rights of defendants as holders of a purchase-money note reserving a lien on the land.—Manning v. Green (Tex. Civ. App.) 721.

XV. LIEN.

§ 785. A judgment creditor *held* not a lienholder for value, without notice of a third person's ownership of property.—Leon Mercantile Co. v. Anderson (Tex. Civ. App.) 868.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 951. Rev. St. 1895, Art. 4649, relating to the record of judgments, *held* inapplicable to the question whether an unrecorded judgment was available to identify certain land in controversy.—Kimbell v. Powell (Tex. Civ. App.) 541.

JUDICIAL DISCRETION.

Designation of person other than sheriff to summon jurors, see Jury, § 67.

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JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 5–43.
In criminal prosecutions, see Criminal Law, § 304.

JUDICIAL POWER.

See Constitutional Law, § 70.

JUDICIAL SALES.

Of property of decedent, see Executors and Administrators, §§ 330, 351.
Of property of infant, see Guardian and Ward, §§ 103–105.
On execution, see Execution, § 283.

JURISDICTION.

Lack of, as justification for violation of injunction, see Injunction, § 219.
Presumptions as to, on appeal or writ of error, see Appeal and Error, § 911.

Jurisdiction of particular actions or proceedings.

See Divorce, §§ 93, 130; Habeas Corpus, §§ 85–117; Injunction, § 110; Partition, § 39.
Criminal prosecutions, see Criminal Law, § 103.
For causing death, see Death, § 35.
For sale of school lands, see Public Lands, § 54.
Relief against judgment, see Judgment, §§ 456, 460.
To set aside decree in inquisition of lunacy, see Insane Persons, § 25.

Special jurisdictions and jurisdictions of particular classes of courts.

See Bankruptcy, § 20; Courts; Equity, § 24.
Appellate jurisdiction, see Appeal and Error, §§ 19, 20; Criminal Law, § 1020.
Justices' courts in civil cases, see Justices of the Peace, § 48.

JURY.

See Grand Jury.
Care required as to licensees in general, see Negligence, § 32.
Custody and conduct, see Criminal Law, §§ 857–866; Trial, § 307.
Disqualification or misconduct, ground for new trial, see New Trial, §§ 42, 54.
Instructions in civil actions, see Trial, §§ 191–295.
Instructions in criminal prosecutions, see Criminal Law, §§ 770–823.
Questions for jury in civil actions, see Trial, §§ 139–143.
Questions for jury in criminal prosecutions, see Criminal Law, §§ 741–763.
Taking case or question from jury at trial, see Trial, §§ 139–169.
Verdict in civil actions, see Trial, §§ 333, 343.
Verdict in criminal prosecutions, see Criminal Law, § 894.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

Review of ruling as to summoning talesman as dependent on prejudicial nature of error, see Criminal Law, § 1166½.

§ 58. Acts 30th Leg. 1907, p. 269, c. 139, known as the "jury wheel law," is valid.—Oates v. State (Tex. Cr. App.) 370.

§ 58. Jury wheel law (Laws 1907, p. 269, c. 139) *held* constitutional.—Rasor v. State (Tex. Cr. App.) 512.

§ 72. Efforts of a sheriff to summon absent jurors *held* insufficient to justify the court in directing the sheriff to summon talesmen.—Rasor v. State (Tex. Cr. App.) 512.

§ 72. Action of court in completing a panel *held* not error.—Railey v. State (Tex. Cr. App.) 1120.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 97. In a prosecution for violating the local option law, *held* not error to refuse to set aside the jury because many of the jurors were members of a local option league, and some had voted for local option.—Deadweyler v. State (Tex. Cr. App.) 863.

§ 103. A juror *held* qualified, notwithstanding an opinion formed from reading the newspapers.—Groszoehmigen v. State (Tex. Cr. App.) 1113.

§ 110. Any error in excusing jurors from the panel and summoning talesmen *held* not available; defendant not having peremptorily challenged the talesmen, or exhausted his peremptory challenges.—York v. State (Ark.) 1070.

§ 110. Any error in not excusing a juror for cause *held* waived, where defendant did not exhaust his peremptory challenges.—Holt v. State (Ark.) 1072.

§ 110. Where, after the court had selected a jury, over defendant's objections, partially composed of disinterested bystanders, another jury regularly drawn from the box became available for the trial, but defendant declined the court's offer to substitute it for the other jury, he cannot object to the trial before the jury partially drawn from the bystanders.—Weil v. Kreutzer (Ky.) 471.

§ 116. Fact that one of the regular panel of jurors, on examination as to his qualifications, stated that he had read about the case, and thought at the time he read about it that plaintiff ought to have damages, but that the matter had passed from his mind, and he had thought no more about it, was no ground for dismissal of the entire panel upon excusing the juror.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 48. Justices of the peace are of inferior and limited jurisdiction, and, when dealing with matters of attachment, do not proceed in accordance with the course of the common law, but by virtue of the statute.—Sawyer v. Burris (Mo. App.) 321.

§ 48. Under Rev. St. 1899, § 3840 (Ann. St. 1906, p. 2130), relating to attachment actions before justices of the peace, the situs of the property, when relied on to confer jurisdiction, must affirmatively appear on the face of the record.—Sawyer v. Burris (Mo. App.) 321.

IV. PROCEDURE IN CIVIL CASES.

§ 79. The nature of the citation in a justice's court stated, and the county court *held* not entitled to look to the justice's citation to determine what was plaintiff's cause of action.—Wooley v. Corley (Tex. Civ. App.) 1139.

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V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

In replevin suit, see Replevin, § 116.

§ 146. The county court *held* not to get jurisdiction on appeal from a justice's court, which entered no final judgment.—Brown v. McClendon (Tex. Civ. App.) 903.

§ 166. Under Rev. St. 1899, § 672 (Ann. St. 1906, p. 686) a judgment dismissing defendant's appeal from a justice's judgment *held* to be treated as set aside, though the record only inferentially showed that this was done; defendant having thereafter participated in the trial on the merits in the appellate court.—Breeding v. Nelson (Mo. App.) 1080.

§ 166. An order considered according to its substance *held* to be in effect an order sustaining a motion to set aside a judgment dismissing an appeal.—Breeding v. Nelson (Mo. App.) 1080.

§ 174. An amended petition filed in the county court, in an action in trover, begun in justice's court, *held* not to set up a cause of action different from that shown by the citation issued in the justice's court.—Wooley v. Corley (Tex. Civ. App.) 1139.

§ 174. Plaintiff, in an action in justice's court, could amend his petition on appeal to the county court so as to conform it to the details of the evidence developed at trial, without violating the rule against pleading a new cause of action by amendment.—Wooley v. Corley (Tex. Civ. App.) 1139.

§ 189. An order considered according to its substance *held* to be in effect an order sustaining a motion to set aside a judgment dismissing an appeal, and for affirmance of the original judgment.—Breeding v. Nelson (Mo. App.) 1080.

JUSTIFICATION.

For violation of injunction, see Injunction, § 219.
Of homicide, see Homicide, §§ 105–120.

KNOWLEDGE.

Affecting assumption of risks by servant, see Master and Servant, § 217.
Ignorance of existing marriage of husband as affecting rights of wife, see Marriage, § 54.
Necessity of pleading knowledge of railroad company as to defects in car causing injuries to licensee, see Railroads, § 282.
Of extent of authority of agent, see Principal and Agent, § 148.
Of falsity of report by corporate officers, see Corporations, § 339½.

LADDERS.

Liability of master for injury to servant caused by defects, see Master and Servant, §§ 116, 129, 217, 233.

LAKES.

As boundary, see Boundaries, § 18.

LANDLORD AND TENANT.

Landlord as proper party defendant in ejectment where tenant is in possession, see Ejectment, § 45.
Mining leases, see Mines and Minerals, § 77.
Tenant as proper party defendant in action against landlord to quiet title, see Quieting Title, § 30.

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

§ 50. A lease of land in possession of the alleged tenant and the execution of a note for the rent *held* void, where the tenant was then the owner of the land by adverse possession.—Johnson & Burr v. Elder (Ark.) 1066.

(B) Estoppel of Tenant.

Notoriety of attornment as affecting adverse possession, see Adverse Possession, § 30.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

§ 80. A subtenant is not liable on the contract between the landlord and the original lessee.—Ft. Worth Fair Ass'n v. Ft. Worth Driving Club (Tex. Civ. App.) 213.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 127. A written lease of patented land, title to which was created by the patent, and which had devolved on lessor either by conveyance or by operation of the statute of limitations prior to another's entry thereon, invests lessee with the actual possession at time of such entry.—Richie v. Owsley (Ky.) 1015.

§ 134. A lessee *held* not entitled to restrain the sublessee from selling intoxicants on the premises.—Ft. Worth Fair Ass'n v. Ft. Worth Driving Club (Tex. Civ. App.) 213.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

Pleading subrogation to right to rent as a conclusion, see Pleading, § 8.

(C) Lien.

§ 254. Landlord's lien under Ky. St. § 2317 (Russell's St. § 4574), *held* not lost by delay in bringing action.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

LANDS.

See Public Lands.

LAPSE.

Of devise or legacy, see Wills, § 858.
Of legacy, see Wills, § 775.

LARCENY.

See Embezzlement; False Pretenses.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3. To constitute larceny, the taking must be done with a felonious intent.—Douglass v. State (Ark.) 923.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 40. Evidence, in a prosecution for theft under Pen. Code 1895, art. 874, *held* insufficient to sustain a conviction.—Carson v. State (Tex. Cr. App.) 860.

(B) Evidence.

§ 55. Evidence *held* to sustain a conviction of horse theft.—Douglass v. State (Ark.) 923.

§ 55. In a prosecution for theft of a mule, evidence *held* to sustain a verdict of conviction.—Hernandez v. State (Tex. Cr. App.) 505.

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§ 61. On a trial for horse theft, the evidence *held* to justify a finding that the horse was stolen in the county in which the indictment was found.—Douglass v. State (Ark.) 923.

§ 64. Possession of property recently stolen, *held* to raise a presumption of guilt and a link in the evidence.—Douglass v. State (Ark.) 923.

§ 64. That accused in possession of stolen property makes a distinct assertion of title and ownership thereto, *held* evidence that he intended to convert the same, though his explanation, if honestly made, prevents his being guilty of larceny.—Douglass v State (Ark.) 923.

(C) Trial and Review.

Application of instructions to case, see Criminal Law, § 814.

§ 68. If there is any conflict whatever in the testimony as to the value of property stolen on which the character of the larceny of which accused may be convicted depends, the question should be submitted to the jury by appropriate instructions.—State v. Nicholas (Mo.) 12.

§ 79. In view of Rev St. 1899 § 1900, 1901 (Ann. St. 1906, pp. 1300 1301), *held*, that it was the duty of the court, in a prosecution for burglary and larceny from a dwelling house, wherein there was testimony both ways as to the value of the property stolen as being more or less than $30, to designate the punishment of larceny taking into consideration the value of the property and that it failed in this respect, and the failure was manifestly erroneous.—State v. Nicholas (Mo.) 12.

(D) Sentence and Punishment.

Cumulative sentences for burglary and larceny, see Criminal Law, § 1210.

LEASE.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Municipal Corporations, § 73.

LETTERS.

Evidence of payment by mail, see Payment, § 73.

LETTERS PATENT.

For public land, see Public Lands, § 151.

LEVY.

Of attachment, see Attachment, § 201.

LEWDNESS.

See Obscenity.

LIBEL AND SLANDER.

Restraining publication, see Injunction, § 98.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 10. A newspaper article referring to a member of the General Assembly and his support of a candidate for United States Senator *held* not to charge the member with bribery and not libelous.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

§ 10. It is not libelous to point out a seeming inconsistency in a public officer, and his acts are fairly open to criticism and comment.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 45. Qualified privilege in the law of libel defined.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 45. In determining whether a communication is privileged, the court *held* required to consider the exigencies of the situation of the person making the communication.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 45. Communications otherwise actionable *held* privileged when made by a voluntary society concerning the conduct or character of an officer or member.—Holmes v Royal Fraternal Union (Mo.) 100.

§ 45. A communication made by a fraternal beneficiary association to members concerning the conduct of an agent *held* a qualified privileged one.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 48. It is not libelous to point out a seeming inconsistency in a public officer, and his acts are fairly open to criticism and comment.—Branch v. Publishers: George Knapp & Co. (Mo) 93.

§ 51. One suing for libel based on a privileged communication *held* required to prove express malice.—Holmes v. Royal Fraternal Union (Mo.) 100.

IV. ACTIONS.

(A) Right of Action and Defenses.

Liability of corporation, see Corporations, § 432.
Liability of master for slander by servant, see Master and Servant, § 306.
Liability of partnership for slander by servant, see Partnership, § 169.

§ 75. An action for libel based on an article in a newspaper published by a corporation in one county and circulated in another county may be brought in the latter county.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 77. Slander, which is an oral utterance of defamatory matter, can only be committed by an individual, and two or more persons cannot jointly utter the same words, but each speaks for himself, and is liable for his own language.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

(C) Evidence.

§ 101. A defendant in libel has the burden of proving the privileged character of the communication complained of.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 101. Where the court determines that the communication complained of as libelous is a privileged one, the burden of proof shifts to plaintiff to show express malice, and where there is no substantial evidence of such malice the court must sustain a demurrer to the evidence.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 105. Where an article alleged to be libelous was not ambiguous, and, according to its natural significance attending its publication, did not charge a libel, witnesses *held* incompetent to testify as to their understanding of the article.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

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§ 105. In determining whether an article reflecting on the conduct of a public officer is libelous, it is proper to consider the circumstances surrounding the officer and the publisher of the article at the time of the publication.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

§ 112. In an action for libel based on a qualified privileged communication, evidence *held* not to show the existence of express malice.—Holmes v. Royal Fraternal Union (Mo.) 100.

§ 112. In an action for libel based on a qualified privileged communication, evidence *held* to show that the statements in the communication were substantially true.—Holmes v. Royal Fraternal Union (Mo.) 100.

(E) Trial, Judgment, and Review.

§ 123. Where the words in a publication charged to be libelous are ambiguous, or where, under the circumstances, they are susceptible of a double meaning, the question in what sense they were used is for the jury.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

§ 123. Notwithstanding the constitutional provision as to actions for libel, the court must determine matters of law in an action for libel, and must exclude incompetent evidence.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

§ 123. Where, in an action for libel, the court determined that the article did not charge bribery, it was error to permit witnesses to testify that they understood the article to charge bribery.—Branch v. Publishers: George Knapp & Co. (Mo.) 93.

§ 123. Where a libelous communication is alleged to be privileged, the court must determine the question of privilege in the first instance.—Holmes v. Royal Fraternal Union (Mo.) 100.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

See Pawnbrokers, § 4.
Effect of nonpayment of franchise tax by corporation as dissolution, see Corporations, § 599.
Foreign insurance company, see Insurance, § 20.
Mining, see Mines and Minerals, § 77.
Operation of railroad, see Railroads, § 65.
Sale of intoxicating liquors, see Intoxicating Liquors, §§ 72–108.

II. IN RESPECT OF REAL PROPERTY.

Injuries to licensees, see Railroads, §§ 274–282.

§ 58. A license, though ordinarily revocable, may not be so where the licensee has expended money by reason thereof, and has made improvements or invested capital in consequence thereof.—Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Ry. Co. (Mo.) 300.

LIENS.

Appellate jurisdiction of particular court in action to establish lien on personal property, see Courts, § 223.

Liens acquired by particular remedies or proceedings.

See Attachment, § 217; Judgment, § 785.

Particular classes of liens.

See Mechanics' Liens.
Attorney's liens, see Attorney and Client, § 189.
Landlord's lien for rent, see Landlord and Tenant, § 254.
Of infants for surplus on sale of land for payment of debt of ancestor, see Executors and Administrators, § 351.
Pledge, see Pledges.
Vendor's lien on lands sold, see Vendor and Purchaser, §§ 251–296.

§ 3. A transaction resulting in the execution and delivery of a note *held* to create a contract lien as between the parties and others not purchasers for value without notice.—Melton v. Beasley (Tex. Civ. App.) 574.

§ 4. If the instrument evidencing the agreement shows the intent of the parties to charge or pledge property, real or personal, as security, and the property is so described that it can be sufficiently identified, a lien is created.—Ward v. Stark Bros. (Ark.) 382.

§ 7. Equity looks through the form to the substance of the agreement, to determine whether it creates a lien.—Ward v. Stark Bros. (Ark.) 382.

LIFE ESTATES.

See Dower.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession.
Right to remand of case on appeal so as to allow pleading of statute of limitation, see Appeal and Error, § 1178.

Particular actions or proceedings.

For relief against judgment, see Judgment, § 456.
To restrain execution, see Execution, § 172.
To set aside sale or lease of school lands, see Public Lands, § 173.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§ 19. An interest in land *held* barred only by limitations affecting suits of trespass to try title.—Sherman v. Pickering (Tex. Civ. App.) 536.

§ 25. To be a promise in writing within the 10 years' limitation, Rev. St. 1899, § 4272 (Ann. St. 1906, p. 2347), the writing must contain words either expressing a promise to pay, or from which it may be implied.—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

§ 25. A resolution by corporate directors entered on the record of their meeting, declaring a dividend, and accompanied by a credit on the ledger in favor of a stockholder, *held* a promise in writing to pay money within the 10 years' limitation, Rev. St. 1899, § 4272 (Ann. St. 1906, p. 2347).—Ball v. Peper Cotton Press Co. (Mo. App.) 798.

II. COMPUTATION OF PERIOD OF LIMITATION.

(C) Personal Disabilities and Privileges.

§ 72. Children delaying more than three years after reaching their majority to sue their father for an accounting for rents of a homestead belonging to the wife *held* barred by limitations.—Carroll v. Carroll (Ark.) 947.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 102. Limitations do not affect the rights of the cestui que trust so long as the trust relation continues.—Carroll v. Carroll (Ark.) 947.

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(Carroll (Ark.) 947.

§ 102. Under Ky. St. § 2543 (Russell's St. § 209), the statute of limitations *held* not to apply in behalf of the trustee under an express enforceable parol trust respecting land.—Smith v. Smith (Ky.) 1002.

(H) Commencement of Action or Other Proceeding.

§ 127. In an action for personal injuries, *held*, that the statute of limitations had not run.—Ft. Worth & R. G. Ry. Co. v. Robertson (Tex. Civ. App.) 202.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 151. In view of Rev. St. 1895, art. 1869, an action on a note by a legatee thereof *held* not barred by limitations.—Melton v. Beasley (Tex. Civ. App.) 574.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 167. Under Kirby's Dig. § 5399, relating to foreclosure of mortgages after period of limitation on the debt, *held*, that when the debt secured is apparently barred, and there is no indorsement on the margin of the record, the mortgage as to third parties becomes in effect an unrecorded mortgage.—Morgan v. Kendrick (Ark.) 278.

§ 167. Where the debt secured by mortgage is apparently barred by limitations, rendering the mortgage the same as though unrecorded as to third persons, a lien cannot be defeated by placing the title to the property in a third person for the mortgagor's benefit, nor by giving the property away.—Morgan v. Kendrick (Ark.) 278.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 182. Acts 1905, p. 35, c. 29, *held* a statute of limitations, and not available as a defense unless specially pleaded under the express provisions of Rev. St. 1895, art. 3371.—Tillman v. Erp (Tex. Civ. App.) 547.

LIMITATION OF LIABILITY.

Of carrier, see Carriers, §§ 150, 153, 180.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

Notice of pendency of action against ancestor as affecting bona fides of purchaser of interests of heirs, see Descent and Distribution, § 134.

LIVERY OF SEISIN.

See Deeds, § 3.

LIVE STOCK.

Carriage of, see Carriers, §§ 210–230.
Injuries from operation of railroads, see Railroads, §§ 413, 446.

LOANS.

By pawnbroker, see Pawnbrokers.

LOCAL LAWS.

See Statutes, §§ 92–97.

LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 31–33.

LOCATION.

Of railroads, see Railroads, § 58.

LOGS AND LOGGING.

§ 2. A deed of land *held* to reserve to the grantor timber described.—Baustic v. Phillips (Ky.) 629.

§ 2. Where the vendor reserves the trees growing on the land or any portion thereof, they remain his property, and he may enter on the land and remove the same, or he may sell the right, or give license to another to exercise it.—Baustic v. Phillips (Ky.) 629.

§ 3. A contract for the sale of standing timber of described size *held* to convey only the trees which measure the required size at the date of the contract.—Griffin v. Anderson Tully Co. (Ark.) 297.

§ 3. A cross-complaint, in a suit by a grantee of standing timber, *held* to raise the issue of the grantee's violation of the contract.—Griffin v. Anderson Tully Co. (Ark.) 297.

§ 3. A contract for the sale of growing timber *held* to give the grantee timber cut during the fixed period, though not removed.—Griffin v. Anderson Tully Co. (Ark.) 297.

§ 3. Assigns of a grantee of timber rights *held* entitled to dam a slough sufficiently to float logs without injury to defendant.—Sidle v. Michark Mfg. Co. (Ark.) 349.

§ 3. Evidence *held* to sustain a finding that provision as to payment was by mistake omitted from the contract.—Rowe v. Charles (Ky.) 697.

§ 3. Under a contract for the sale of timber, the title did not pass immediately, where it was agreed that the contract should be void if payment was not made by a certain date.—Rowe v. Charles (Ky.) 697.

§ 3. In an action against a seller of standing timber for a deficiency in timber, which had been paid for, evidence *held* to justify a verdict for the seller on his counterclaim based on the buyer taking trees not included in the contract of sale.—Runyons v. Burchett (Ky.) 975.

§ 5. Standing timber is realty, unless bought with the intention of immediate severance from the soil, and standing timber, reserved to the grantor of the land, is realty.—Baustic v. Phillips (Ky.) 629.

LOST INSTRUMENTS.

Issues raised by general denial in action to foreclose mortgage alleged to be lost or destroyed, see Mortgages, § 459.

§ 8. An inference drawn from parts of a receipt indicating a payment of $50 *held* overcome by the testimony of four witnesses who had seen it when complete that it acknowledged a payment of $350.—Million v. Million's Ex'rs (Ky.) 985.

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LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Dangerous machinery, see Negligence, §§ 17, 23.
Liability of employer for defects, see Master and Servant, §§ 101–129.

MAIL.

Evidence of payment by mail, see Payment, § 73.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Libel and Slander, §§ 45–51, 112; Malicious Mischief.

MALICIOUS MISCHIEF.

Proof of venue, see Criminal Law, § 564.

§ 9. Evidence on prosecution for malicious mischief *held* sufficient for a conviction.—Eno v. State (Ark.) 732.

MALICIOUS PROSECUTION.

See False Imprisonment.

II. WANT OF PROBABLE CAUSE.

§ 16. To render a person liable for malicious prosecution, he must have acted maliciously and without probable cause.—Roberts v. Thomas (Ky.) 961.

§ 21. Advice of counsel is not a defense to an action for malicious prosecution unless the facts are fully and fairly laid before the counsel, and such advice will constitute probable cause only when reasonable diligence is used to learn the facts on which the advice of counsel is sought.—Gatz v. Harris (Ky.) 462.

§ 21. The advice of counsel, when properly obtained, is a defense to an action for malicious prosecution, however erroneous the advice may be.—Gatz v. Harris (Ky.) 462.

V. ACTIONS.

§ 71. In an action for malicious prosecution, where the defense was advice of counsel, whether defendant had, before obtaining plaintiff's prosecution for disorderly conduct, laid the facts fully and fairly before his counsel, *held*, under the evidence, to be for the jury.—Gatz v. Harris (Ky.) 462.

MANDAMUS.

Mandatory injunction, see Injunction, § 5.
To compel issuance of liquor license, see Intoxicating Liquors, § 74.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 26. The office of mandamus is to compel a court to act, and it cannot be issued to compel a proposed amended pleading.—Hardison v. Pace (Ky.) 671.

§ 53. Mandamus *held* not to lie to compel the quarterly court to set aside a judgment rendered.—Hardison v. Pace (Ky.) 671.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 72. Right of courts by mandamus to disturb decisions and actions of boards and officers having discretionary powers stated.—State v. Board of Education of Blount County (Tenn.) 499.

§ 79. County board of education *held* to have acted within its discretion in locating a school, under Acts 1907, p. 848, c. 236, § 10, subd. 4, so that its decision will not be disturbed by mandamus.—State v. Board of Education of Blount County (Tenn.) 499.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 154. A petition for mandamus to compel the county court clerk to place petitioner's name on the official ballot, where the certificate filed with such clerk, containing petitioner's name, was not filed until after the expiration of the time limited for such filing by Ky. St. § 1456 (Russell's St. § 4015), *held* sufficient.—Brodie v. Hook (Ky.) 979.

MANDATE.

See Mandamus.
To lower court on decision on appeal or writ of error, see Appeal and Error, §§ 1190–1200.

MANSLAUGHTER.

See Homicide, § 45.
Instructions on, see Homicide, § 309.

MANUFACTURES.

Factory inspectors, see Officers, §§ 53, 55, 56.

MAPS.

Incorporation in appeal record of maps used at trial, see Appeal and Error, § 524.

MARRIAGE.

See Bigamy; Divorce; Husband and Wife.
Marriage of woman executing power of attorney as constituting revocation, see Principal and Agent, § 42.

§ 54. The rights of a woman marrying a man in good faith who has a former wife living stated as to the community property.—Ft. Worth & R. G. Ry. Co. v. Robertson (Tex. Civ. App.) 202.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Work and Labor.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 82. An affidavit for a lien under Sayles' Ann. Civ. St. 1897, art. 3339b, for labor, *held* sufficient.—Partin, Fondren & Fowler v. Wallace (Tex. Civ. App.) 515.

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St. 1897, art. 3339a, *held* not such a lien as is given by Const. art. 16, § 37, to mechanics or artisans.—Partin, Fondren & Fowler v. Wallace (Tex. Civ. App.) 515.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

Release after accrual of liability, evidence of validity, see Release, § 57

§ 90. The master must use ordinary care for the safety of his servants.—Keller & Brady Co. v. Berry (Ky) 1009.

§ 92. Whether a railroad company maintaining a hospital department conducted the same as a mere charity for profit *held* for the jury.—Zumwalt v. Texas Cent. R. Co. (Tex. Civ. App.) 1133.

§ 92. A railroad company, undertaking as a charity to furnish medical treatment to sick and injured employés, *held* required only to exercise due care in employment of a physician.—Zumwalt v. Texas Cent. R. Co. (Tex. Civ. App.) 1133.

§ 97. To prove the negligence of a mine operator, because of his piling cinders in a mule track, *held* necessary to show that cinders so piled would be reasonably calculated to frighten a mule of ordinary gentleness.—Green River Coal & Coke Co. v. Phaup (Ky.) 651.

§ 97. A master *held* not liable for injuries to a mule driver in a mine merely because the mule became frightened at piles of cinders in the track.—Green River Coal & Coke Co. v. Phaup (Ky.) 651.

§ 97. A master is not required to provide against storms, extraordinary and unprecedented in their character in the locality, and, if an injury resulted to a servant during such a storm, there could be no recovery upon a mere proof of injury; but something that the master did or omitted to do must be proved to have been the cause of the injury.—Evans v. Wabash R. Co. (Mo.) 36.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102. A railroad company is bound to exercise reasonable care to provide a suitable place and suitable instruments and means with which its employés are required to work.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§§ 101, 102. A master is liable for damage caused by failure to furnish a servant a reasonably safe place in which to work.—Mason, Hanger & Coleman Co. v. Henry (Ky.) 1001.

§§ 101, 102. The master is bound to use reasonable care to furnish his servants safe appliances, and keep them in good order and condition.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. A master required to furnish reasonably safe appliances performs his duty when the appliances are safe according to the ordinary usage of business.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. The operation of a band saw for cutting lumber *held* not an extrahazardous employment.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. The master's obligation to furnish safe appliances for his servants is cast upon him by law, and is not a matter of contract.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. The master is bound to use reasonable care to furnish his servants safe appliances are safe according to the ordinary usage of business.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. The operation of a band saw for cutting lumber *held* not an extrahazardous employment.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. The master's obligation to furnish safe appliances for his servants is cast upon him by law, and is not a matter of contract.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§§ 101, 102. A master under duty to protect a servant engaged in setting up a machine need only exercise ordinary care in case the injury to the employé could have been foreseen by an ordinarily prudent person.—Dawson v. King (Tex. Civ. App.) 917.

§ 107. The duty of an employer to a servant engaged in setting up a machine in a building to provide him with a safe place to work, stated.—Dawson v. King (Tex. Civ. App.) 917.

§ 110. Defendant railroad company was negligent in permitting oil and grease to accumulate upon the top of an oil box on an engine which was slanting, and upon which an employé in performance of his duty slipped and was injured.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 111. It is the duty of a railroad company to keep its cars, cabooses, and the handrails thereof, in a reasonably safe condition for its employés who have to work with such instrumentalities.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 112. It is not negligence per se in Kansas to fail to block a railroad switch.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

§ 112. It was the duty of a railroad company to use ordinary care to keep its track in a reasonably safe condition for the protection of a fireman.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 112. It was the duty of a railroad engineer operating his engine on a switch to use ordinary care to discover that the track on which his engine was, was not obstructed by cars on the other track which were not within clearance distance.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 112. Grass growing on railroad track and obscuring unfilled space into which a brakeman stepped could operate as a cause to make omission to fill space negligence.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 116. A master *held* negligent in furnishing plaintiff a defective ladder which negligence was the proximate cause of plaintiff's injury.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 118. Contractor widening railroad tunnel *held* bound to furnish a laborer removing rock blown down by blasting a reasonably safe place to work.—Mason, Hanger & Coleman Co. v. Kennison (Ky.) 999.

§ 124. A railroad company is bound to exercise reasonable care by inspection to keep the place, means, and appliances furnished to employés in a reasonably safe condition.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§ 124. A master's duty to use reasonable care to provide servants with reasonably safe appliances and places to work, includes the duty to make a reasonable inspection.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

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§ 129. An injury to a servant operating a band saw *held* not to be the proximate result of the saw coming off the wheels on which it was running.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 129. Where an employé who was putting fuel oil in defendant's engine stepped upon the top of an oil box which was covered with grease, and slipped and fell, defendant's negligence in permitting the box to be covered with grease was the proximate cause of his injuries, caused by the fall.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 129. A master's negligence in furnishing plaintiff a defective ladder, *held* to be the proximate cause of plaintiff's injury.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

(C) Methods of Work, Rules, and Orders.

§ 135. The violation of a uniform safety custom in the operation of trains in defendant's railroad yard *held* to raise a cause of action to the same extent as if it had been a printed and published rule.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 137. Statement of care required of engineer of train on discovering peril of section hand on track.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 149. Where a servant when injured was in his proper place, it was not material whether he had been specially ordered by his foreman to occupy his position or not.—Mason, Hanger & Coleman Co. v. Henry (Ky.) 1001.

(D) Warning and Instructing Servant.

§ 150. A colliery company's failure to give miners notice of when a blast would be set off in a main entry *held* negligence.—Phenix Jellico Coal Co. v. Lemp (Ky.) 418.

(E) Fellow Servants.

§ 181. Under the statutes in force in February, 1907, a railroad conductor in charge of a gravel train and a car inspector were not fellow servants.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§ 198. The fireman and a brakeman of a train *held* fellow servants.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 198. Men employed to load cars *held* not fellow servants.—Missouri, K. & T. Ry. Co. of Texas v. Romans (Tex.) 1104.

§ 202. A railroad company *held* liable for injury to its brakeman, not causing death, only if the negligence of its engineer, causing it, was gross.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

(F) Risks Assumed by Servant.

§ 205. A laborer removing from a railroad tunnel rock blown down by blasting *held* not required to exercise any diligence to discover hidden dangers.—Mason, Hanger & Coleman Co. v. Kennison (Ky.) 999.

§ 205. A servant is not bound to look for hidden danger in the place given him by his master in which to work.—Mason, Hanger & Coleman Co. v. Henry (Ky.) 1001.

§ 205. Application of rule as to furnishing a safe place for a servant to work stated.—Keller & Brady Co. v. Berry (Ky.) 1009.

§ 208. One undertaking to drive a mule in a mine *held* to assume the dangers ordinarily incident to the occupation.—Green River Coal & Coke Co. v. Phaup (Ky.) 651.

§ 209. A servant having accepted employment to work with a band saw *held* to have assumed the ordinary dangers connected therewith.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 210. Statement as to assumption of risk by section hand in attempting to remove velocipede from track in face of approaching train.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 210. An employé whose duty it was to fill engine tenders with fuel oil, and who, in descending from a tender in the usual way after filling it, stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell, *held* not to have assumed the risk of injury.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 213. A railway employé does not assume the risk of the negligence of the railway company in the operation of a train.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 216. An infant servant, killed by the premature explosion of dynamite caused by the negligence of his father acting as foreman, *held* not to have assumed the risk.—Walton & Co. v. Burchel (Tenn.) 391.

§ 217. A mule driver in a mine *held* to have assumed the danger incident to the defective condition of the car in which he was riding.—Green River Coal & Coke Co. v. Phaup (Ky.) 651.

§ 217. Where a servant discovers or might discover that the machinery is unsafe, and continues in the employment, he cannot recover for injuries resulting.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 217. In an action by a servant for personal injuries, the neglect of the master to furnish a reasonably safe place to work, though with the servant's knowledge, does not make the danger arising therefrom a risk assumed by the servant.—Wilson v. United Rys. Co. of St. Louis (Mo. App.) 1083.

§ 217. A servant *held* to have assumed a certain risk of his employment.—Maxwell Ginning Co. v. Wallan (Tex. Civ. App.) 182.

§ 217. While a railroad fireman assumed the ordinary risks of his employment and all extraordinary risks of which he knew or should have known, he did not assume risks of which he had no knowledge due to the company's failure to exercise reasonable care.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 217. A servant injured while using a defective ladder, of which defect he had no knowledge, *held* not to have assumed the risk.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 217. Where a servant was injured by the breaking of a defective ladder, an instruction that he did not assume the risk, unless he knew of the defect at the very time he was injured, *held* proper.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 219. A servant may not work in a place where the danger is so obvious that an ordinarily prudent man would not take the risk.—Mason, Hanger & Coleman Co. v. Henry (Ky.) 1001.

§ 219. A servant does not assume the risk of danger from unsafe machinery unless the defects are obvious.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 221. The rule as to a master's liability on his agreement to repair defects in machinery *held* not to apply where he promises to equip a band saw with guards.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 221. A promise of a master's superintendent to furnish a guard for machinery which was not defective was without consideration, and

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the promise must have been the inducing motive which kept the servant at work, and without which he would have quit.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

(G) Contributory Negligence of Servant.

§ 233. Where an employé, who was engaged at night in filling a tender with fuel oil, in passing from the tender in the usual way stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell, he was not guilty of contributory negligence.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 233. A servant injured while attempting to use a defective ladder in accordance with directions of his superior, *held* not negligent.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 235. A servant, without knowledge of notices requiring inspection of tools, *held* not required to make such inspection.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex Civ. App.) 876.

§ 236. A railroad company *held* liable for injury to its section hand while riding a velocipede on the track by being struck by a train only in case of negligence after his peril was discovered.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 236. A servant whose duty required him to board a locomotive under an archway *held* entitled to presume that it would remain stationary until he was warned by bell or whistle.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 240. A railroad switchman *held* not negligent because attempting to uncouple a car by drawing out the coupling pin from the platform, instead of uncoupling by using a lever at the side of the car.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 246. The rule that acts done in an emergency on an impulse are not negligence as a matter of law applies to the protection of life as well as where the duty devolves on one to protect his employer's property.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 247. Any negligence of a brakeman in taking a position on the railroad in front of an engine, *held* not to preclude recovery for accident which would not have happened but for his foot getting caught between the ties.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 248. A railroad company *held* liable for injury to a section hand on track using railroad velocipede, though he was negligent in going there, where after discovery of peril ordinary care was not used to avoid injuring him.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

(H) Actions.

Applicability of instructions to case, see Trial, § 252.

Assumption by judge as to facts in instructions, see Trial, § 191.

Disjunctive and alternative allegations, see Pleading, § 20.

Instructions on weight and sufficiency of evidence, see Trial, § 194.

§ 256. A petition for injuries to a servant *held* to sufficiently show the nature of plaintiff's employment.—Dawson v. King (Tex. Civ. App.) 917.

§ 257. A petition for injuries to a servant *held* sufficient as against a special exception *held* to state a cause of action for common-law negligence in the retention of an incompetent servant.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 258. A petition for injuries to a servant by being struck by a door while engaged in getting a hammer from an upper floor in a building *held* to state a cause of action as against a general demurrer.—Dawson v. King (Tex. Civ. App.) 917.

§ 258. A petition for injuries to a servant *held* sufficient as against a special exception that it should have alleged that the rolling door by which plaintiff was injured was defectively constructed.—Dawson v. King (Tex. Civ. App.) 917.

§ 259. A petition for injuries to a servant *held* sufficient as against a special exception that the petition should have stated that the employés by whose negligence the door was left insecure, by which plaintiff was injured, were not his fellow servants or servants subject to his control.—Dawson v. King (Tex. Civ. App.) 917.

§ 260. A petition for injuries to a servant *held* sufficient as against a special exception that, plaintiff having assumed by his own choice an unusual and dangerous method, he assumed the risk.—Dawson v. King (Tex. Civ. App.) 917.

§ 261. A petition for injuries to a servant *held* sufficient as against a special exception that the negligent act of plaintiff was the cause of his injury.—Dawson v. King (Tex. Civ. App.) 917.

§ 261. A petition for injuries to a servant *held* sufficient as against a special exception that plaintiff should have alleged that the use of the door by which he was injured was necessary to a proper prosecution of his work.—Dawson v. King (Tex. Civ. App.) 917.

§ 261. A petition for injuries to a servant *held* sufficient as against a special exception that plaintiff in placing his hand on the rolling door by which he was injured committed a voluntary and unnecessary act not in the discharge of his duty.—Dawson v. King (Tex. Civ. App.) 917.

§ 264. The evidence requisite in an action against a railroad company for causing the death of a switchman stated.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

§ 264. Where a petition for injuries to a railroad servant stated a cause of action under Rev. St. 1899, §§ 2873, 2874, 2875 (Ann. St. 1906, pp. 1655–1657), it was not material that it also alleged negligence in keeping careless employés.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 265. Presumptions that the master has performed his duty to furnish safe and suitable appliances, and has no knowledge of defects, may be overcome by proof.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 265. A master's negligence in failing to provide reasonably safe appliances cannot be inferred by an accident to a servant.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 265. The burden of proof of a master's negligence, in an action for injuries to a servant, is on the servant.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 265. One suing for the death of a servant by the premature explosion of dynamite in charge of the foreman *held* to have the burden of proving that the explosion was caused by the

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negligence of the foreman.—Walton & Co. v. Burchel (Tenn.) 391.

§ 267. In an action for the death of a servant caused by the negligence of a foreman, the foreman's negligence may be proved by circumstances.—Walton & Co. v. Burchel (Tenn.) 391.

§ 270. In an action for injuries resulting from an alleged defective curved rail, plaintiff *held* entitled to introduce a rule of the railroad company requiring rails to be curved before laid.—Chesapeake & O. Ry. Co. v. Wiley (Ky.) 402.

§ 270. Why an engine was being backed with a car attached to make a coupling to another car is immaterial, and may not be shown, in an action for injury to the brakeman through the engine not being stopped on a signal therefor.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 270. That a railroad company had piled timber along its track, so that the view between its brakeman and engineer was obstructed, may be shown, in an action for injury to its brakeman through a stop signal for the engine not being obeyed, only as giving the reason why the brakeman communicated such signal to the engineer through the fireman, instead of to him directly.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 270. Nothing an intoxicated brakeman did or omitted to do having had anything to do with the injury to another brakeman, *held* such intoxication could not be shown, in an action against the railroad company for the injury.—Louisville & N. R. Co. Pearcy (Ky.) 1037.

§ 270. In an action for injuries to a servant, evidence *held* admissible in rebuttal to contradict the testimony of defendant's foreman.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 274. In an action for the death of an employé engaged in putting fuel oil in an engine tender, by slipping on a greasy fuel box lid in descending from the tender, testimony that decedent was slow and awkward in filling the tender, and the engineer told him to hurry, was admissible on the question of contributory negligence.—Houston & T. C. R. Co. v. Alexander (Tex. Civ. App.) 602.

§ 276. Where injuries to a servant may have been caused by either of two things for only one of which the master is responsible, *held*, that the servant could not recover.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 276. Evidence *held* to show that a storm, in progress at the time a railway fireman was injured in a collision, which obliterated the view of the track ahead, was a violent and unprecedented local storm which could not have been reasonably anticipated by the employés of the railroad company.—Evans v. Wabash R. Co., (Mo.) 36.

§ 276. Burden of proving negligence stated in an action for injuries to a servant.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 278. That a railroad employé was injured by a defective car step *held* insufficient to justify a recovery without proof of the railroad company's negligence.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§ 278. Failure of a railroad company's car inspectors to discover a defective car step *held* evidence of the railroad company's negligence.—St. Louis Southwestern Ry. Co. v. Lewis (Ark.) 268.

§ 278. Negligence of a master may be proved by evidence of a defect in the appliance causing the injury, discoverable by reasonable inspection.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 278. Burden of proving negligence stated in an action for injuries to a servant.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 278. Evidence in an action against a railroad company for causing the death of a switchman *held* not to sustain the allegations as to negligence.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

§ 278. In an action for a fireman's death by a collision, evidence *held* to sustain a finding of negligence.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 278. In an action for a fireman's death by collision, evidence *held* to sustain a finding that the engineer was negligent.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 279. In an action for the death of a locomotive fireman in a collision with another train, evidence *held* not to show that the engineer of decedent's engine negligently failed to keep a proper lookout ahead for signals.—Evans v. Wabash R. Co. (Mo.) 36.

§ 279. In an action for the death of a locomotive fireman in a collision with another train, evidence *held* not to show that those in charge of the other train, which had been compelled to stop because of fallen telegraph poles over the track negligently failed to give proper signals to the engineer of the colliding train to prevent the accident.—Evans v. Wabash R. Co. (Mo.) 36.

§ 279. In an action for the death of a servant by the premature explosion of dynamite in charge of the foreman, evidence *held* to establish facts justifying the inference that the explosion was caused by the negligence of the foreman.—Walton & Co. v. Burchel (Tenn.) 391.

§ 281. In an action for a fireman's death by a collision caused by his engine sideswiping box cars on a connecting switch, evidence *held* not to show that decedent saw the box cars before the collision.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 284. Whether a railroad company maintaining a hospital department conducted the same as a mere charity or for profit *held* for the jury.—Zumwalt v. Texas Cent. R. Co. (Tex. Civ. App.) 1133.

§ 285. In an action against a railroad company for injuries to an employé while loading a car, evidence *held* to make the condition which really caused plaintiff's injury a question for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Romans (Tex.) 1104.

§ 286. In an action for injuries to a servant, plaintiff *held* entitled to go to the jury on the question of defendant's negligence and as to whether plaintiff and the negligent employé were fellow servants.—Crawford v. Sawyer & Austin Lumber Co. (Ark.) 286.

§ 286. Evidence as to negligence of the engineer of a train after discovery of peril of a section hand on the track *held* to prevent direction of a verdict for the company.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 286. In an action for injuries to a servant, evidence *held* sufficient to go to the jury on the question of defendant's negligence.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 286. Evidence, in an action against a railroad for injuries to an employé *held* insufficient to go to the jury on the question of defendant's negligence.—Missouri, K. & T. Ry. Co. of Texas v. Romans (Tex.) 1104.

§ 286. Evidence *held* to raise the question of negligence of a railway company in carrying a car with a defective brakebeam, so as to support an instruction thereon.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

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Civ. App.) 709.

§ 287. Whether plaintiff and a co-employé were fellow servants *held* a question for the jury.—Crawford v. Sawyer & Austin Lumber Co. (Ark.) 286.

§ 289. Whether a fireman was negligent in remaining on the engine instead of jumping *held* for the jury.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 289. Whether a brakeman was guilty of contributory negligence in going on the track without waiting to see whether his stop signal to the engine was obeyed *held* a question for the jury.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 289. An injured railway switchman *held* not negligent as matter of law in boarding a moving car.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 289. A switchman attempting to uncouple a caboose from the front end *held* not negligent as matter of law in trying to board it at the front, instead of the rear, end.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 289. In an action by a servant for injuries received while helping to move a car partly loaded with ties, where it was not conclusively shown that he was careless in a way that helped bring about the accident, it was not error to refuse to direct a verdict for defendant. —Wilson v. United Rys. Co. of St. Louis (Mo. App.) 1083.

§ 289. Whether a brakeman killed while between two defective cars in a train while attempting to stop the train to prevent a wreck was guilty of contributory negligence *held* for the jury.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 289. In an action for a fireman's death by the collision of his engine with box cars on a connecting switch, whether decedent was excusable for not seeing the cars before the collision *held* for the jary.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 289. For a brakeman to be on the track to get on the engine in switching, *held* not negligence as a matter of law.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 291. Instructions in an action for injuries to an employé *held* far more favorable to the employer than it was entitled to.—Mason, Hanger & Coleman Co. v. Kennison (Ky.) 999.

§ 291. In an action by a servant for personal injuries, an instruction which required a jury finding that certain acts of negligence directly contributed to cause plaintiff's said injuries, instead of a finding that those acts caused the injuries *held* erroneous.—Wilson v. United Rys. Co. of St. Louis (Mo. App.) 1083.

§ 293. Statement of how instructions as to duty of engineer on discovering peril of section hand on track should be worded.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 293. There being evidence in an action for injury to a brakeman, through nonobservance of a stop signal given by him to the fireman, that the signal was not passed by the fireman to the engineer, *held* the jury should be instructed that, if it was not so passed, the company was not liable.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 293. In an action for a fireman's death by collision of his engine with box cars on a connecting switch, where there was evidence of decedent.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 293. In view of pleading and evidence in action for injury to brakeman from getting his foot caught between ties in the track, *held* the charge could not have been understood to authorize a recovery for a different defect than that pleaded.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 295. Instructions on assumption by a brakeman of risk of unsafe condition of railroad track, *held* not calculated to confuse and mislead the jury.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 296. In an action for injuries to a railroad fireman, an instruction that plaintiff was negligent as a matter of law in not leaping from the engine *held* erroneous.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

§ 296. An instruction as to contributory negligence of a servant suing for injury criticised, and a proper form given.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 296. In an action for the death of a brakeman, an instruction *held* not erroneous because it made the judgment of decedent the criterion by which his conduct was to be measured.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 296. In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, an instruction relating to his acting on the impulse of the moment *held* proper under the evidence.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302. A master is liable for injuries to person and property caused by the negligence of his servant, where the act resulting in the injury is done while the servant is acting within the scope of his employment.—Shamp v. Lambert (Mo. App.) 770.

§ 302. It is a sufficient prima facie showing to render a master liable for negligent injury by his servant that at the time the servant was actually engaged in the performance of the particular duties for which he was employed.—Shamp v. Lambert (Mo. App.) 770.

§ 306. To charge a master with libel for the defamatory words of a servant *held* necessary to allege and prove that the master directed or authorized the servant to speak the words or afterwards approved or ratified their speaking.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

(B) Work of Independent Contractor.

§ 315. One who employs a contractor exercising an independent employment to do a piece of work is not in general liable for the wrongs of the contractor, his subcontractors, or servants.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 315. Railroad company *held* not liable for the act of construction contractors in scattering rock on adjoining land, where the contractors had not completed the construction of the road or delivered it to the railroad company.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

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for the acts of an independent contractor stated.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 317. Where an independent contractor in the prosecution of his work exercises, in whole or in part, a franchise granted to his employer, the latter is liable for his torts.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 318. The defense of independent contractor is not available, where the work or the manner of its execution involves a duty to the public incumbent on the proprietor or employer.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 319. The defense of independent contractor is not available, where the injury is the direct or necessary consequence of the work to be done.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 323. The defense of independent contractor is not available where the act contracted to be done is wrongful or tortious in itself.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

§ 324. The defense of independent contractor is not available, where the proprietor interferes with the contractor in the performance of the work, or it has been completed and accepted.—Stephenville, N. & S. T. Ry. Co. v. Couch (Tex. Civ. App.) 189; Same v. Carter (Tex. Civ. App.) 192.

(C) Actions.

§ 329. The general rule that, when it is attempted to hold a master liable for the wrongful act of his servant, it is sufficient to describe the act, and charge that it was done by the servant acting within the scope of his employment, *held* not to apply when it is attempted to hold the master in slander for words spoken by his servant.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

§ 330. In an action for injuries to a pedestrian struck by an automobile, the proof *held* to show prima facie that plaintiff received her injury through the negligence of defendant's servant while acting within the scope of his employment.—Shamp v. Lambert (Mo. App.) 770.

MATERIALITY.

Of alteration of written instrument, see Alteration of Instruments.
Of evidence in civil actions, see Evidence, § 144.
Of testimony as element of perjury, see Perjury, § 36.

MAYOR.

Of city, election or appointment to fill vacancy, see Municipal Corporations, § 131.

MEASURE OF DAMAGES.

See Damages, §§ 97–124.

MECHANICS' LIENS.

Distinguished from labor lien, see Master and Servant, § 82.

tractor.—Spann v. King (Tex. Civ. App.) 207.

MENTAL SUFFERING.

Grounds for damages, see Damages, § 49.
Recovery for mental suffering caused by negligence of telegraph or telephone company, see Telegraphs and Telephones, § 68.

MERGER.

Of churches, see Religious Societies, § 34.

MESNE PROFITS.

In ejectment, see Ejectment, § 127.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

Estoppel of real owner of land to deny validity of lease by person holding legal title, see Estoppel, § 94.
Jurisdiction of action involving rights under oil lease dependent on amount in controversy, see Courts, § 170.
Oil lease as conveyance of an interest in land within law limiting jurisdiction of court, see Courts, § 163.

§ 77. The right to declare an oil lease forfeited is a personal privilege of the lessor, and when he elects to waive it no one else may take advantage of it.—New Domain Oil & Gas Co. v. Gaffney Oil Co. (Ky.) 699.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

Liabilities of mine operators for injuries to servants, duty to give warning of danger, see Master and Servant, § 150.

MINORS.

See Infants.

MISCONDUCT.

Of or affecting commissioners in proceedings for establishment of highway, see Hig[illegible]s, § 39.

MISREPRESENTATION.

See False Pretenses; Fraud.
Affecting validity of power of attorney, see Principal and Agent, §§ 19, 24, 190, 193.

MISTAKE.

Affecting adverse possession, see Adverse Possession, § 65.

In conveyances, contracts, or other transactions.

Application to purchase school lands, see Public Lands, § 173.
Contract for charges for transportation of livestock, see Carriers, §§ 192, 193.
In government survey, see Public Lands, § 2[illegible]

MITIGATION.

Of damages, see Damages, § 62.

MODIFICATION.

Of bill of exchange or promissory note, see Bills and Notes, § 137.
Of injunction, see Injunction, § 163.
Of judgment or order on appeal, see Appeal and Error, § 1151.

MONEY RECEIVED.

Action against attorney for funds collected, see Attorney and Client, § 128.
Recovery of tax paid, see Taxation, § 534.

§ 1. An action for money had and received will lie in lieu of an action on contract whenever defendant has received money which belongs to plaintiff, and which natural justice and equity require him to pay over.—Jenkins v. Clopton (Mo. App.) 759.

§ 19. In an action for money had and received, plaintiff *held* entitled to go to the jury on the question what compensation defendant was entitled to retain, though the special contract in regard thereto was not proved as alleged in the petition.—Jenkins v. Clopton (Mo. App.) 759.

MONOPOLIES.

Grants of privileges or immunities, see Constitutional Law, § 207.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 18. A combination of insurance agents and formation of a corporation *held* not in violation of Act Jan. 23, 1905, known as the "Anti-Trust Law" (Laws 1905, p. 1).—Bloom v. Home Ins. Agency (Ark.) 293.

MOOT QUESTIONS.

As ground for review in criminal prosecution, see Criminal Law, § 1134.

MORTGAGES.

By or to tenant in common, see Tenancy in Common, § 46.
Of homestead, see Homestead, § 115.
Of separate estate of married woman, see Husband and Wife, § 169.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 28. A duly executed and acknowledged instrument *held* an equitable mortgage.—Ward v. Stark Bros. (Ark.) 382.

§ 32. A deed absolute in form *held* required to be construed as a deed, and not as a mortgage.—Elliott v. Morris (Tex. Civ. App.) 209.

§ 37. In the absence of fraud or mistake in the execution of a deed absolute in form, the grantor is estopped to deny the bona fides of the transaction, or to impeach the deed by parol evidence that it was coupled with a secret trust contradictory of its terms and meaning.—Bennett v. Bennett (Ky.) 495.

(B) Form and Contents of Instruments

§ 50. The indebtedness clause of a mortgage *held* to sufficiently set forth the character of the indebtedness.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

II. RECORDING AND REGISTRATION.

§ 94. A defect in a record of a mortgage as to the description of the property does not invalidate the lien, where the original instrument was correct.—Ward v. Stark Bros. (Ark.) 382.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§ 114. A mortgage stating that it is security for a debt named cannot be made to cover other obligations.—Briggs v. Steel (Ark.) 754.

(D) Lien and Priority.

Priority of note given by devisee to equalize shares as required by will, effect of record of will as notice, see Wills, § 744.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

Presumption as to performance of duty by appraisers, see Evidence, § 83.

§ 342. A trustee cannot be substituted for the trustee named in a trust deed, unless the conditions authorizing the substitution exist.—Arnold v. Watson (Ark.) 354.

§ 342. The appointment of a substituted trustee in a deed of trust by the beneficiary therein *held* valid under the terms of the deed of trust and the facts.—Arnold v. Watson (Ark.) 354.

§ 342. Recitals in a deed, executed by a substituted trustee legally appointed, as established by the evidence, *held* prima facie true.—Arnold v. Watson (Ark.) 354.

§ 369. In an action to set aside a deed on foreclosure of the trust deed, evidence *held* not to show that the land was appraised at a grossly inadequate value.—Arnold v. Watson (Ark.) 354.

§ 369. In a suit to set aside a deed, executed by a substituted trustee in a trust deed to the beneficiary, evidence *held* not to show that the beneficiary, by fraud and collusion, prevented other bidders from participating in the sale.—Arnold v. Watson (Ark.) 354.

§ 374. Where land was sold in accordance with law and the provisions of the mortgage, it vested in the purchaser an equitable title, although no deed was made.—Morgan v. Kendrick (Ark.) 278.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

§ 405. The condition in an indemnity mortgage to save the mortgagee harmless *held* not broken until the mortgagee is damnified, but the condition in a mortgage to satisfy a liability, *held* broken on the accrual of the liability.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

§ 405. A surety on a supersedeas bond obtaining a mortgage to secure him from liability *held* entitled to foreclose the same.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

(F) Pleading and Evidence.

§ 459. In foreclosures, a general denial is sufficient to require proof of the execution of the mortgage, where it is alleged in the pleadings, or shown by the evidence, that the original has been lost or destroyed.—Blair v. Breeding (Tex. Civ. App.) 869.

(I) Judgment or Decree and Execution.

§ 488. Under the express provisions of Civ. Code Prac. § 694, the court, before ordering the sale of real property for payment of a debt, may determine from the pleadings whether the property can be divided without materially impairing its value.—Burge v. Chestnut (Ky.) 989.

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For particular purposes or relief.

Arrest of judgment in criminal prosecutions, see Criminal Law, §§ 941–943.
Continuance in civil actions, see Continuance.
Direction of verdict in civil actions, see Trial, § 169.
Dismissal of appeal or writ of error, see Appeal and Error, § 801.
New trial in civil actions, see New Trial, §§ 118, 150.
New trial in criminal prosecutions, see Criminal Law, §§ 941–943.
Presentation of objections for review, see Appeal and Error, §§ 193–231.
Quashing indictment or information, see Indictment and Information, §§ 137–140.
Relating to pleadings, see Pleading, §§ 343, 367.

MOTOR VEHICLES.

Liability of owner for injuries caused by negligence of chauffeur, see Master and Servant, § 330.
On streets, liabilities for injuries from, see Municipal Corporations, §§ 705, 706.

MUNICIPAL CORPORATIONS.

See Schools and School Districts, § 12.
Injunctions affecting, see Injunction, § 84.
Mandamus, see Mandamus, §§ 72, 79.
Ordinances relating to intoxicating liquors, see Intoxicating Liquors.
Special or local laws relating to classification of, see Statutes, § 92.
Street railroads, see Street Railroads.
Water supply, see Waters and Water Courses, § 196.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

Judicial notice of incorporation, see Criminal Law, § 304.

§ 18. The legality of the corporate existence of a city and the election and incumbency of its officers *held* subject to attack only in quo warranto, under Rev. St. 1895, art. 4343.—Ex parte Keeling (Tex. Cr. App.) 605.

§ 21. A person's arrest and detention for violating an ordinance of a city using a certain name *held* under color of authority.—Ex parte Keeling (Tex. Cr. App.) 605.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 73. Laws 1908, p. 156, c. 61, *held* not unconstitutional as a violation of the spirit of local self-government.—City of Louisville v. Commonwealth (Ky.) 411.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

Habeas corpus to obtain release for arrest and detention for violation of ordinance adopted by city under wrong name, see Habeas Corpus, § 32.

§ 106. The enacting clause of a city ordinance, in the form prescribed by Rev. St. 1895, art. 559, *held* sufficient.—Ex parte Keeling (Tex. Cr. App.) 605.

of mayor is to be filled by special elections.—Hogins v. Bullock (Ark.) 1064.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 270. Under Ky. St. 1909, § 3105 (Russell's St. § 1194), a city council *held* empowered to decide as to what sewers shall be constructed, and when the work shall be done at the common expense.—Bain v. City of Lexington (Ky.) 620.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 308. An abutting owner *held* liable to a contractor constructing a sidewalk and retaining wall in front of his premises.—Blake v. Scott (Ark.) 1054.

§ 314. Failure of a city to file plans and specifications of a proposed street improvement, as required by Rev. St. 1899, § 5859, as amended by Laws 1901, p. 65 (Ann. St. 1906, p. 2967), *held* not to invalidate the contract.—McCoy v. Randall (Mo.) 31.

§ 314. Specifications for a street improvement *held* not insufficient, because not stating the established grade of the street.—McCoy v. Randall (Mo.) 31.

(C) Contracts.

§ 335. Acceptance by a city of a bid for doing street improvements, under Rev. St. 1899, § 5859, as amended by Laws 1901, p. 65 (Ann. St. 1901, p. 2967) *held* not required to be by ordinance.—McCoy v. Randall (Mo.) 31.

§ 362. Where an original ordinance, authorizing street improvements to be made, provides for an extension of time for completion of the work, and an ordinance granting an extension is passed prior to the expiration of the time first given, the extension is valid.—McCoy v. Randall (Mo.) 31.

(F) Enforcement of Assessments and Special Taxes.

Appellate jurisdiction of suit to restrain enforcement as dependent on amount in controversy, see Courts, § 231.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

Habeas corpus to obtain release of arrest and detention for violation of ordinance adopted by city under wrong name, see Habeas Corpus, § 32.

§ 594. An ordinance which only prescribes a minimum and not a maximum penalty is void for uncertainty.—Arnett v. Cardwell (Ky.) 964.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

Liability of owner of automobile for injuries caused by negligence of chauffeur, see Master and Servant, § 330.

§ 646. Under Ky. St. 1909, § 3561 (Russell's St. § 1583), a city of the fourth class may acquire streets, or the ground therefor, by conveyance, by a dedication of the owner, or by condemnation.—Hall v. Leeper (Ky.) 683.

town, belong to the municipality for the use of the public traveling upon them for their whole length and width.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 665. The public will not be heard in equity to complain of an abutting owner's act, which does not unreasonably interfere with the public's use of a street for travel.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 666. A town may prohibit the erection of steps extending upon the sidewalk by a general ordinance of uniform application.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 667. The erection of steps extending over a sidewalk *held* not a purpresture or public nuisance which could be abated.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 667. A lot owner may acquire by prescription an exclusive right to occupy a public street with his building or partial obstruction.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 671. A petition, in an action to compel the removal of an obstruction in an alleged street, *held* fatally defective.—Hall v. Leeper (Ky.) 683.

§ 696. Any permanent structure built upon any part of the public streets which interferes with their use by the public may be per se a nuisance, and may be abated by the municipality.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 697. Any permanent structure built upon any part of the public streets which interferes with their use by the public may be per se a nuisance, and may be abated by the courts at the instance of the town.—Pickrell v. City of Carlisle (Ky.) 1029.

§ 705. Duty of a chauffeur to stop when he saw that a pedestrian in the street was confused as to which way the automobile was going to turn after warning, stated.—Weil v. Kreutzer (Ky.) 471.

§ 705. An automobile being almost as deadly as, and even more dangerous than a street or railroad car, greater care is imposed upon the driver in propelling it along the street.—Weil v. Kreutzer (Ky.) 471.

§ 705. It is negligence to back an automobile suddenly without warning, or without looking out for the safety of pedestrians, across a public street crossing, where persons are almost constantly getting on and off street cars.—Shamp v. Lambert (Mo. App.) 770.

§ 706. In an action for injuries by being struck by defendant's automobile in the street, whether defendant was guilty of negligence in operating the machine *held*, under the evidence, for the jury.—Weil v. Kreutzer (Ky.) 471.

§ 706. In an action for injuries sustained by being struck by defendant's automobile in the street, whether plaintiff was guilty of contributory negligence at the time of the collision *held* under the evidence for the jury.—Weil v. Kreutzer (Ky.) 471.

§ 706. Whether a pedestrian struck by an automobile backing onto a public street crossing was guilty of contributory negligence *held* for the jury.—Shamp v. Lambert (Mo. App.) 770.

§ 706. In an action for injuries to a pedestrian struck by an automobile, the testimony *held* to authorize submission to the jury of the issue whether defendant owned the automobile, and whether his servant operated it at the time of the accident.—Shamp v. Lambert (Mo. App.) 770.

§ 720. Held, that a city is not responsible for injury to a prisoner in its guardhouse by fellow prisoners because of its failure to provide a suitable keeper.—Morgan v. City of Shelbyville (Ky.) 617.

(B) Acts or Omissions of Officers or Agents.

§ 747. A city *held* not liable for injuries sustained by one while breaking rock on the municipal rock pile to pay a fine, in consequence of a splinter of the hammer used by another striking him in the eye.—Jackson v. City of Owingsville (Ky.) 672.

(C) Defects or Obstructions in Streets and Other Public Ways.

Evidence as to habits of person injured, see Evidence, § 132.

§ 755. A city adopting a city improvement plan which is palpably unsafe for travelers *held* liable for injuries resulting to persons therefrom.—City of Covington v. Bollwinkle (Ky.) 664.

§ 763. A city must keep its streets and sidewalks in a reasonably safe condition for use by travelers in the usual modes, and it is liable for injuries resulting from neglect of such duty.—City of Covington v. Bollwinkle (Ky.) 664.

§ 763. Children and adults are entitled to the benefit of the rule requiring a city to keep its streets and sidewalks in a reasonably safe condition for use by travelers in the usual modes.—City of Covington v. Bollwinkle (Ky.) 664.

§ 784. The evidence, in an action for injuries to a child falling from a sidewalk into an open gutter and into a catch-basin *held* to establish the negligence of the city.—City of Covington v. Bollwinkle (Ky.) 664.

§ 785. A city *held* negligent in permitting the existence of a hole near the edge of a sidewalk for several months.—City of Madisonville v. Stewart (Ky.) 421.

§ 804. An instruction that if plaintiff, when injured, was drunk from the voluntary use of intoxicating liquors, he was not using ordinary care, *held* proper.—City of Madisonville v. Stewart (Ky.) 421.

§ 804. A child of only 20 months cannot be charged with contributory negligence, even if negligence be shown, for falling from the sidewalk into the gutter and slipping thence into the catch-basin.—City of Covington v. Bollwinkle (Ky.) 664.

§ 816. A petition, in an action against a city for injuries to a child falling from a sidewalk into a gutter and into a catch-basin, *held* to state a cause of action against a demurrer.—City of Covington v. Bollwinkle (Ky.) 664.

§ 821. A pedestrian injured by stepping into a hole in a sidewalk *held* not negligent as a matter of law.—City of Madisonville v. Stewart (Ky.) 421.

§ 821. Whether plaintiff, who was injured by stepping into a hole in a defective sidewalk at night, was intoxicated at the time, *held* for the jury.—City of Madisonville v. Stewart (Ky.) 421.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 867. Under Ky. St. 1909, § 3105 (Russell's St. § 1194), a city council *held* empowered to in-

cur, with the assent of a two-thirds vote of the people, an indebtedness for sewer construction, though the act for the government of cities of the second class does not in terms authorize the council to order an election.—Bain v. City of Lexington (Ky.) 620.

(D) Taxes and Other Revenue, and Application Thereof.

§ 957. Where it is neither alleged nor proved that a tax, the collection of which is resisted, was not levied in part, or at least to the excess over 75 cents to pay interest on debt allowed, by Const. § 157, the presumption will not be indulged that the Constitution has been violated.—Morgan v. Board of Councilmen of City of Frankfort (Ky.) 1033.

MURDER.

See Homicide, § 23.

MUSICAL INSTRUMENTS.

Regulations as to keeping and use of in dramshops, see Intoxicating Liquors, § 116.

MUTUAL AID SOCIETIES.

See Beneficial Associations.

MUTUAL BENEFIT INSURANCE.

See Insurance, § 748.

MUTUAL INSURANCE COMPANIES.

See Insurance, §§ 69, 70.

NAMES.

Corporate name of city, see Municipal Corporations, § 21.
Forgery by use of fictitious names, see Forgery, §§ 8, 35, 40, 44.
Habeas corpus to obtain release for arrest and detention for violation of ordinance adopted by city under wrong name, see Habeas Corpus, § 32.
Of partnerships, see Partnership, § 68.
Signatures, see Signatures.
Variance as to names in deeds, see Deeds, § 45.

NAVIGABLE WATERS.

See Waters and Water Courses.

NEGLIGENCE.

Causing death, see Death, §§ 17–101.
Measure of damages, see Damages, § 97.

By particular classes of persons.

See Carriers, §§ 134, 150, 153, 180, 185, 280–321; Municipal Corporations, §§ 729–821; Railroads, §§ 274–446.
Employers, see Master and Servant, §§ 90–206.
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 26–74.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 274–446; Street Railroads, §§ 75–118.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 2. Where there is no duty, there can be no actionable negligence.—Coin v. John H. Talge Lounge Co. (Mo.) 1.

§ 2. There can be no negligence in the absence of any duty.—Hufft v. St. Louis & S. F. R. Co. (Mo.) 120.

§ 3. The degree of care required is in direct proportion to the degree of danger and of injury which would probably be caused by negligence.—Weil v. Kreutzer (Ky.) 471.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 17. The negligence complained of being leaving uncovered an opening through which passed the handrail of a moving stairway in a store, *held* it was immaterial that otherwise the stairway was of the usual pattern.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

§ 23. Statement of liability of store proprietor for injury to child of customer from an uncovered opening through which ran the handrail of a moving stairway.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 32. Plaintiff *held* a mere licensee when injured by the explosion of a steam pipe, due to the negligence of defendant's employés.—Indian Refining Co. v. Mobley (Ky.) 657.

II. CONTRIBUTORY NEGLIGENCE.

Of passenger, see Carriers, §§ 323–347.
Of person injured at railroad crossing, see Railroads, § 334.
Of person injured by wrongful or negligent use of street, see Municipal Corporations, § 706.
Of person injured on or near railroad tracks, see Railroads, §§ 381–385.
Of person injured on street, see Municipal Corporations, § 804.
Of servant, see Master and Servant, §§ 233–248, 261, 274, 281, 289, 296.

(A) Persons Injured in General.

§ 68. One conducting himself with that care usually exercised by a person of ordinary prudence exercises sufficient care for his protection, and he need not anticipate negligence on the part of others which may result in injury to him.—Shamp v. Lambert (Mo. App.) 770.

§ 72. A person, forced to act in the face of imminent danger, is not negligent because he does not take the safest course.—Woodson v. Prescott & N. W. R. Co. (Ark.) 273.

(B) Children and Others Under Disability.

§ 85. A child is only bound to exercise the care of those of its own age and understanding.—Cincinnati, N. & C. Ry. Co. v. Cooke (Ky.) 467.

§ 85. Whether a child accidentally or intentionally put its hand in a dangerous place in a store *held* immaterial; it having been too young for contributory negligence.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

§ 85. Where a minor possesses such a degree of intelligence as to appreciate the danger involved in his act, he is chargeable with contributory negligence as any other person.—Freeman v. Garcia (Tex. Civ. App.) 886.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

§ 119. In an action for negligence, allegations as to specific negligence must be substantially proved as alleged.—Newlin v. St. Louis & S. F. R. Co. (Mo.) 125.

(B) Evidence.

§ 121. Negligence must be directly proved or the facts shown from which it may be reason-

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that an uncovered opening and the handrail of a moving stairway passing through it was likely to excite a child's curiosity, and induce it to put its hand therein.—Hillerbrand v. May Mercantile Co. (Mo. App.) 326.

(C) Trial, Judgment, and Review.

In action for injuries by wrongful or negligent use of street, see Municipal Corporations, § 706.

§ 136. Whether a person, injured by falling into an areaway, could have avoided the fall by exercising ordinary care *held* for the jury.—Bender v. Weber (Mo. App.) 385.

§ 136. One falling into an areaway *held* not guilty of contributory negligence as a matter of law.—Bender v. Weber (Mo. App.) 385.

§ 136. The court may declare one guilty of contributory negligence precluding a recovery for a personal injury, only where he voluntarily encountered dangers, and assumed a situation fraught with imminent peril to his safety.—Shamp v. Lambert (Mo. App.) 770.

§ 136. Where more than one inference can be fairly drawn from the facts, as to the care, or want of care, of one suing for a personal injury, the question of contributory negligence is for the jury.—Shamp v. Lambert (Mo. App.) 770.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see New Trial, §§ 102–108.
Ground for new trial in criminal prosecutions, see Criminal Law, § 941.
Ground for relief against judgment, see Judgment, § 446.

NEW PROMISE.

Within statute of limitations, see Limitation of Actions, § 151.

NEWSPAPERS.

Publication of notice of sale of pledge, see Pledges, § 57.

NEW TRIAL.

In criminal prosecutions, see Criminal Law, §§ 941–943.
Necessity of motion for purpose of review, see Appeal and Error, §§ 292, 305; Criminal Law, § 1063.
Presumptions as to rulings on motion for, see Appeal and Error, § 932.
Remand by appellate court for new trial, see Appeal and Error, §§ 1190–1206.
Review of discretionary rulings on motion for in criminal prosecution, see Criminal Law, § 1156.
Review of rulings on motion for as dependent on record on appeal or writ of error, see Criminal Law, § 1088.

I. NATURE AND SCOPE OF REMEDY.

§ 1. "New trial" defined.—Texas & P. Ry. Co. v. Smith (Ark.) 282.

(Russell's St. §§ 3070, 3076), a verdict cannot be set aside on the ground that a juror had served within 12 months.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

§ 54. Incompetency of a juror *held* cause for setting aside the verdict, provided due diligence was exercised to discover the facts before the juror was selected.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 75. Under Civ. Code Prac. § 341, *held* that, where the recovery in an action for death equals the actual pecuniary loss, a new trial cannot be granted.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

§ 75. Where, in an action for injury to a person, the evidence showed the amount of the pecuniary loss sustained, and the verdict was insufficient as compensation, a new trial might be granted.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

§ 75. In an action for death, a new trial *held* to be properly granted where the evidence showed the pecuniary loss the estate of decedent sustained, and the amount assessed was insufficient as compensation.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

(H) Newly Discovered Evidence.

§ 102. An application for a new trial for newly discovered evidence, *held* insufficient for want of an affidavit of diligence.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 103. Under Kirby's Dig. § 6215, subd. 7, where the only issue in an action for killing stock was their value, defendant was not entitled to a new trial for newly discovered evidence of alleged contributory negligence.—Texas & P. Ry. Co. v. Smith (Ark.) 282.

§ 104. A new trial will not be granted for newly discovered evidence, which is merely cumulative.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 108. A new trial will not be granted for newly discovered evidence unless it would change the result.—Million v. Million's Ex'rs (Ky.) 985.

§ 108. A new trial will not be granted for newly discovered evidence, the subject of which is to contradict an inference from the evidence of the successful party.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

Presumption on appeal as to grounds for extension of time for filing application, see Appeal and Error, § 933.

§ 118. Extension of time to file motion for new trial, though in terms to a day beyond the term, *held*, under Civ. Code Prac. § 342, to be good to the end of the term.—Dickerson v. Eastern Kentucky Lumber Co. (Ky.) 662.

§ 150. On an application for a new trial for newly discovered evidence, the affidavit of the new witness must be filed, and show that the testimony will be available on another trial.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

NEXT OF KIN.

See Descent and Distribution.

NOLLE PROSEQUI.

See Criminal Law, § 302.

NOMINATION.

For office, see Elections, §§ 139–158.

NONRESIDENCE.

Cancellation of liquor license issued for benefit of nonresident, see Intoxicating Liquors, § 108.
Demand for payment of taxes by nonresidents as condition precedent to distraint, see Taxation, § 581.

NONSUIT.

Before trial, see Dismissal and Nonsuit.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Taxation of costs for publication of, see Costs, § 150.

As affecting particular classes of persons.

Purchaser of realty, see Vendor and Purchaser, § 230.

As affecting particular rights, duties, and liabilities.

Right to mechanic's lien, see Mechanics' Liens, § 122.

Of particular facts, acts, or proceedings not judicial.

Authority of agent, see Principal and Agent, § 148.
Loss insured against, see Insurance, § 539.
Misrepresentations in procuring power of attorney, see Principal and Agent, §§ 190, 193.

Of particular judicial proceedings.

See Trial, § 3.
Sale of pledge under foreclosure decree, see Pledges, § 57.
Sale on foreclosure of pledge, sufficiency of notice as affecting right to equitable relief against judgment, see Judgment, §§ 426, 460.

NOTORIETY.

Of adverse possession, see Adverse Possession, § 30.

NUISANCE.

Violation of liquor laws, see Intoxicating Liquors, § 279.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

Maintenance of steps on sidewalk by abutting owner, see Municipal Corporations, § 667.

OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, § 120.

OBSCENITY.

Demurrer to indictment, see Indictment and Information, § 150.
Evidence of other writings in prosecution for giving away of obscene literature, see Criminal Law, § 369.

§ 7. Ky. St. 1909, § 1352 (Russell's St. § 3670), relating to obscene literature, *held* not to apply to a letter sent by one to another, and intended to be private and personal.—Kinnaird v. Commonwealth (Ky.) 489.

§ 7. A letter *held* not obscene within Ky. St. 1909, § 1352 (Russell's St. § 3670).—Kinnaird v. Commonwealth (Ky.) 489.

§ 12. Under Cr. Code Prac. § 122, an indictment *held* not to charge a violation of Ky. St. 1909, § 1352 (Russell's St. § 3670), prohibiting the selling or giving away of obscene literature.—Kinnaird v. Commonwealth (Ky.) 489.

OBSTRUCTIONS.

Of easements, see Easements, § 58.

OFFER.

Of proof, see Trial, § 58.

OFFICERS.

Injunctions affecting, see Injunction, § 84.
Mandamus, see Mandamus, §§ 72, 79.

Particular classes of officers.

See Judges; Justices of the Peace; Receivers; Sheriffs and Constables.
Corporate officers, see Corporations, §§ 317, 339½, 423–432.
Municipal officers, see Municipal Corporations, §§ 131, 747.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(B) Appointment.

§ 15. Where the General Assembly meets in special session for legislative purposes pursuant to the call of the Governor, the Senate may confirm appointments made by the Governor.—State ex rel. Sikes v. Williams (Mo.) 64.

§ 15. A statute, creating an office to be filled by appointment made by the Governor with the advice and consent of the Senate, *held* to contemplate that the Governor may make an appointment when the Senate is not in session, and that Senate will when in session act thereon.—State ex rel. Sikes v. Williams (Mo.) 64.

(C) Eligibility and Qualification.

§ 30. Sp. Laws 1897, p. 150, c. 110, as amended by Sp. Laws 1905, p. 262, c. 30, *held* not violative of Const. art. 16, § 40.—Bluitt v. State (Tex. Cr. App.) 168.

(F) Term of Office, Vacancies, and Holding Over.

§ 52. Where the law creates an office and prescribes the length of term without fixing the date for the beginning or ending thereof, the appointive power may fix the commencement and the end of the term.—State ex rel. Sikes v. Williams (Mo.) 64.

§ 53. Where the law creates an office and prescribes the length of term without fixing the date for the beginning or ending thereof, the appointive power may fix the commencement and the end of the term.—State ex rel. Sikes v. Williams (Mo.) 64.

§ 53. Laws 1901, p. 197 (Ann. St. 1906. §§ 8145–4 to 8145–8), creating the office of factory inspector, *held* to authorize the Governor to fix the commencement and ending of the term of office.—State ex rel. Sikes v. Williams (Mo.) 64.

§§ 55, 56. Laws 1901, p. 197 (Ann. St. 1906. §§ 8145–4 to 8145–8), creating the office of factory inspector, *held* to recognize the right of the Governor to appoint at any time after the expiration of the term of an incumbent.—State ex rel. Sikes v. Williams (Mo.) 64.

OIL.

Oil lease, see Mines and Minerals, § 77.

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OPINIONS.

Of courts, see Courts, §§ 89–97.

ORDERS.

Review of appealable orders, see Appeal and Error.

ORDINANCES.

Municipal ordinances, see Municipal Corporations, §§ 106, 308, 314, 594.

OSTEOPATHY.

See Physicians and Surgeons, §§ 2, 6.

OWNERSHIP.

Allegations of, in indictment for conspiracy to burn property, see Conspiracy, § 43.

PARENT AND CHILD.

See Guardian and Ward; Infants.

Liability of master for injuries to infant servant caused by negligence of the father acting as foreman, see Master and Servant, § 216.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 399–463.

PARTIES.

Death ground for abatement, see Abatement and Revival, § 72.

Domicile or residence as affecting venue, see Venue, § 30.

In particular actions or proceedings.

See Ejectment, § 45; Libel and Slander, § 77; Quieting Title, § 30.

To establish highway, see Highways, § 28.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Collateral attack on judgment, see Judgment, § 518.

Persons concluded by judgment, see Judgment, §§ 682, 707.

Review as to parties and parties to proceedings in appellate courts.

See Appeal and Error, § 878.

Harmless error in misjoinder of parties, see Appeal and Error, § 1036.

On appeal or writ of error, see Appeal and Error, § 334.

To conveyances, contracts, or other transactions.

See Fraudulent Conveyances, § 184; Usury, § 113.

Persons affected by estoppel, see Estoppel, § 98.

I. PLAINTIFFS.

(A) Persons Who may or must Sue.

§ 6. Under Kirby's Dig. § 5999, providing that every action must be prosecuted in the name of the real party in interest, where a contract is entered into for the benefit of the third person, such third person may maintain an action for breach.—Bloom v. Home Ins. Agency (Ark.) 293.

(B) Joinder.

For slander, see Libel and Slander, § 77.

Plaintiff in execution and officer seizing and selling exempt property, see Exemptions, § 146.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 40. Under Civ. Code Prac. §§ 23, 28, the county board of education *held* entitled to be made, on petition, a party to an action involving the distribution of school funds.—Board of Education of Mercer County (Ky.) 676; Same v. Commonwealth, Id.

§ 51. Under Kirby's Dig. § 6145, authorizing the amendment of a complaint by adding or striking out the names of parties at any time in furtherance of justice, the question when and whether parties should be brought in, as necessary to a complete determination of the controversy, is within the discretion of the trial court.—Bloom v. Home Ins. Agency (Ark.) 293.

§ 51. Under Sayles' Ann. Civ. St. 1897, art. 1208, a new party cannot be brought in unless such party was properly suable in the county where the suit is pending.—Texas & P. Ry. Co. v. Henson (Tex. Civ. App.) 1127.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 80. Under Rev. St. 1899, §§ 598, 602 (Ann. St. 1906, pp. 624, 628), defendant *held* to have waived the objection of defect of parties plaintiff.—Sawyer v. Burris (Mo. App.) 321.

§ 92. Misjoinder of parties in an action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), and in ejectment, *held* properly pleaded in the answer.—Mann v. Doerr (Mo.) 86.

PARTITION.

Rights of parties as affected by validity of power of attorney under which conveyance is made to them, see Principal and Agent, §§ 190, 193.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

Joinder of cause of action for partition with other cause, see Action, § 46.

Persons concluded by judgment, see Judgment, § 707.

Separate trials of count in ejectment and count to quiet title, see Trial, § 3.

§ 39. A partition suit which deals with equitable interests is in equity, and a court of chancery has jurisdiction notwithstanding the statutory remedy in partition.—Coffman v. Gates (Mo. App.) 1078.

PARTNERSHIP.

Application to entire firm of injunction against member, see Injunction, § 192.

Conversion of partnership property as affecting dower rights of widow of partner, see Dower, § 17.

Illegal sale of liquor by partner as ground for revocation of license of firm, see Intoxicating Liquors, § 106.

I. THE RELATION.

(A) Creation and Requisites.

§ 5. An agreement to share profits is an essential element in every partnership, and the absence of profit sharing is conclusive that a partnership does not exist.—Sawyer v. Burris (Mo. App.) 321.

§ 5. The mere fact that one received one-fourth of the net profits of a business conducted by another *held* not of itself to constitute him a copartner with such other as between themselves.—Sawyer v. Burris (Mo. App.) 321.

§ 12. Plaintiffs and defendants *held* partners in the purchase and sale of tobacco.—Dycus v. Brown (Ky.) 1010.

§ 17. The relation of partnership lies in contract, and is to be determined always as between the alleged partners by reference to the matter of intention.—Sawyer v. Burris (Mo. App.) 321.

(C) Evidence.

§ 44. While participation in the profits of a business raises the presumption of the existence of a partnership, such presumption is not conclusive, but may be rebutted by a showing of facts to the contrary.—Sawyer v. Burris (Mo. App.) 321.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

§ 68. A deed to a partnership in its firm name, when the purchase was by the partners individually, *held* not void in equity, but subject to correction.—Spaulding Mfg. Co. v. Godbold (Ark.) 1063.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(B) Nature and Extent of Firm Liabilities.

§ 169. Partners may be *held* liable as a firm for slander committed by a servant when they authorized him to speak slanderous words for them, or where they ratified the servant's act.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

§ 169. A partnership is, like a corporation, a legal entity, except in a more limited sense, and a firm, like a corporation, may have agents, and be liable for their acts of commission and omission in all cases where a corporation would be liable.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

§ 169. A partnership is not liable for the slanderous utterance of its servants unless the actionable words were spoken by its express consent, direction, or authority, or were ratified by it.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

§ 169. A firm engaged in the business of selling liquor to liquor dealers is not liable for slanderous words uttered by a traveling salesman with respect to a concern not a competitor, where the firm neither authorized the salesman to speak the words or ratified them.—Duquesne Distributing Co. v. Greenbaum (Ky.) 1026.

(C) Application of Assets to Liabilities.

§ 183. An insolvent firm may mortgage its property to secure individual in preference to partnership debts.—Conaway v. Newman Mill & Lumber Co. (Ark.) 353.

(D) Actions by or Against Firms or Partners.

§ 219. A judgment in the name of a partnership, objection not having been made before judgment, *held* not void.—Spaulding Mfg. Co. v. Godbold (Ark.) 1063.

PART PAYMENT.

As satisfaction, see Accord and Satisfaction, §§ 7, 11.

PASSENGERS.

See Carriers, §§ 277–347.

PATENTS.

For public lands, see Public Lands, § 151.

PAWNBROKERS.

§ 4. Under an ordinance providing for license tax on pawnbrokers and one upon persons retailing pistols, *held*, that a pawnbroker selling pistols at retail must obtain both licenses.—Stevens v. City of Louisville (Ky.) 977.

PAYMENT.

See Accord and Satisfaction; Compromise and Settlement; Tender.

Subrogation on payment, see Subrogation.

Of particular classes of obligations or liabilities.

Bill of exchange or promissory note, see Bills and Notes, § 430.

Price of goods sold, see Sales, §§ 179–187.

Taxes, see Taxation, § 534.

I. REQUISITES AND SUFFICIENCY.

§ 5. A creditor is not bound by a payment to one not acting as his agent or authorized to receive the money.—Garth v. Runner's Ex'r (Ky.) 681; Same v. Davis & Johnson, Id.

II. APPLICATION.

§ 38. Debtor *held* to have the primary right to direct application of payment.—Briggs v. Steel (Ark.) 754.

§ 39. Creditor *held* entitled to make appropriation of payment, where debtor does not do so.—Briggs v. Steel (Ark.) 754.

§ 39. Defendant *held* estopped from denying his liability as assignor on certificates of deposit, or that certain payments were not intended to be applied thereon.—Krebs v. Blatz (Ky.) 436.

§ 43. The law will apply a payment to the oldest item of an account, where not appropriated by either debtor or creditor.—Briggs v. Steel (Ark.) 754.

§ 43. An item of an account not due when a payment is made is not the oldest item, to which the payment will be applied in the absence of appropriation by either debtor or creditor.—Briggs v. Steel (Ark.) 754.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 65. The burden of proving payment is on the party alleging it.—Barrett v. Kern (Mo. App.) 774.

§ 68. It will be presumed that a payment made should be applied on notes, though none of them had then matured, where that was the only debt owing by the debtor.—Briggs v. Steel (Ark.) 754.

§ 73. While the sending of money orders through the mail may be prima facie evidence that they were received, and of payment, it was no evidence of payment where the letter containing them was improperly addressed.—Jenkins v. Clopton (Mo. App.) 759.

PEDIGREE.

Hearsay evidence, see Evidence, § 320.

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PENALTIES.

For failure of railroad company to fence right of way, see Railroads, § 103.
For violation of regulations by carrier, see Carriers, § 20.
Jurisdiction of equity to relieve from, see Equity, § 24.

PENETRATION.

Instructions relating to in prosecution for sodomy, see Sodomy, § 7.

PENITENTIARIES.

Suit against penitentiary board as one against state, see States, § 191.

PERFORMANCE.

Of contract, see Contracts, §§ 280–312.
Of covenant, see Covenants, § 102.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

§ 34. To justify a conviction for perjury, where there is only one accusing witness, his testimony must be corroborated as to the falsity of some particular statement.—Brooks v. State (Ark.) 740.

§ 34. On a trial for perjury, the testimony of a witness, testifying to the falsity of the alleged perjured testimony, *held* not sufficiently corroborated to justify a conviction.—Brooks v. State (Ark.) 740.

§ 34. On a trial for perjury, the testimony of a witness, testifying to the falsity of the alleged perjured testimony, *held* sufficiently corroborated to justify a conviction.—Brooks v. State (Ark.) 740.

§ 36. Where the undisputed evidence, on a trial for perjury, shows that the alleged false testimony was material, the failure to instruct that the perjured testimony must be material *held* not erroneous.—Brooks v. State (Ark.) 740.

PERSONAL INJURIES.

Particular causes or means of injury.

See Negligence.
Operation of railroads, see Railroads, §§ 274–282, 334–350, 356–401.

Particular classes of persons injured.

Employé, see Master and Servant, §§ 90–206.
Passenger, see Carriers, §§ 280–321.
Traveler on highway, see Municipal Corporations, §§ 755–821.
Traveler on highway crossing railroad, see Railroads, §§ 334–350.

Remedies.

Measure of damages, see Damages, § 97.

PERSONAL PROPERTY.

See Property.

PETITION.

In judicial proceedings.

See Mandamus, § 154.
In bankruptcy, see Bankruptcy, § 20.

In proceedings not judicial.

For prohibition order, see Intoxicating Liquors, § 130.
For sale of school lands, see Public Lands, § 54.
To establish highway, see Highways § 29.

PHYSICAL EXAMINATION.

Refusal to require as a mere technical error not ground for reversal, see Appeal and Error, § 1170.
Review of discretion of court as to ordering, see Appeal and Error, § 969.

PHYSICAL SUFFERING.

Ground for damages, see Damages, § 33.

PHYSICIANS AND SURGEONS.

Liability of railroad company for malpractice of physician employed to treat injured servant, see Master and Servant, § 92.
Opinion evidence, see Evidence, § 528.
Statements to physicians as res gestæ, see Evidence, § 128.

§ 2. Const. art. 16, § 31, authorizing the passage of laws regulating physicians and surgeons, *held* to authorize the passage of Acts 30th Leg. 1907, p. 224, c. 123, requiring the licensing of physicians and surgeons, including osteopaths.—Ex parte Collins (Tex. Cr. App.) 501.

§ 6. An osteopathic practitioner *held* within Acts 30th Leg. 1907, p. 224, c. 123, and therefore not entitled to practice without a license.—Ex parte Collins (Tex. Cr. App.) 501.

PISTOLS.

Necessity of special license to pawnbroker for sale of, see Pawnbrokers, § 4.

PLACES FOR WORK.

Duty of master to provide, see Master and Servant, § 101.

PLATS.

Dedication of streets, see Dedication, § 19.

PLEA.

In civil actions, see Pleading, §§ 93–129.

PLEADING.

Admissions in pleading as evidence, see Evidence, § 208.
Applicability of instructions to pleadings, see Trial, §§ 251–253.
Use of pleadings to aid in construction of verdict, see Trial, § 343.

Allegations as to particular facts, acts, or transactions.

See Damages, § 157; Estoppel, §§ 110, 114.
Assumption of risk by servant, see Master and Servant, § 260.
Contributory negligence of servant injured, see Master and Servant, § 261.
Knowledge of railroad company as to defects in car causing injuries to licensee, see Railroads, § 282.
Negligence of fellow servant, see Master and Servant, § 259.
Negligence of master, see Master and Servant, § 258.
Relation of master and servant, see Master and Servant, § 257.
Statute of limitations, see Limitation of Actions, § 182.

In actions by or against particular classes of persons.

See Master and Servant, §§ 256–264, 329; Railroads, § 345; Receivers, § 183; Sheriffs and Constables, § 137; Street Railroads, § 110.

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For allotment of dower, see Dower, § 78.
For causing death, see Death, § 57.
Foreclosure, see Mortgages, § 459.
For equitable relief against judgment, see Judgment, § 460.
For injuries caused by defective street, see Municipal Corporations, § 816.
For injuries from acts of servants, see Master and Servant, § 329.
For injuries from operation of street railroad, see Street Railroads, § 110.
For injuries to persons at railroad crossings, see Railroads, § 345.
For injuries to servant, see Master and Servant, §§ 256–264.
For purchase price, see Sales, §§ 354–355.
Indictment or criminal information or complaint, see Indictment and Information.
To enforce vendor's lien, see Vendor and Purchaser, § 280.
To escheat realty, see Escheat, § 6.

Review of decisions and pleading in appellate courts.

Estoppel to allege error in submission of issues raised by answer though not alleged in petition, see Appeal and Error, § 882.
Harmless error in rulings on, see Appeal and Error, §§ 1041, 1042.
Objections to rulings on for purposes of review, see Appeal and Error, §§ 193, 197.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8. Allegation of petition that plaintiff, one of two landlords, who paid the other landlord her share of the rent, was subrogated to the rights of the other, *held* a mere legal conclusion.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

§ 8. An allegation in an injury action against a railroad company that plaintiff was struck by a projection from a passing freight train while walking along the track *held* not objectionable as alleging a conclusion.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 20. The petition for death of servant, based on negligence after discovered peril, *held* not to aver that the peril was seen.—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 34. In determining whether a complaint states a cause of action as against a demurrer, every reasonable intendment must be indulged in to support the complaint.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

§ 34. While on demurrer and before judgment, pleadings are strictly construed against the pleader, after verdict or judgment they are liberally construed to sustain the judgment, and merely formal defects will be *held* cured.—Winstead v. Hicks (Ky.) 1018.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

In action for injuries to servant, see Master and Servant, §§ 256–261.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 93. A party may file inconsistent pleas.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

§ 129. Averments of a petition are confessed by failure to deny them.—Dycus v. Brown (Ky.) 1010.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 177. An answer *held* insufficient, so that failure to deny its allegations was not an admission of their truth.—Montgomery v. Glasscock (Ky.) 668.

§ 177. A party does not admit the allegations of every pleading which he fails to deny.—Montgomery v. Glasscock (Ky.) 668.

§ 177. Under Rev. St. 1895, art. 1193, a telegraph company, relying on a special contract to relieve itself from liability for delay in the delivery of a message, *held* required to prove the contract, notwithstanding the replication of plaintiff.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

V. DEMURRER OR EXCEPTION.

To petition for establishment of highway, see Highways, § 29.

§ 210. A demurrer to an amended answer and cross-bill in a suit in equity, which does not question the sufficiency of the pleadings, but alleges new matter in pais, is improper.—Coffman v. Gates (Mo. App.) 1078.

§ 214. Admissions arising on a demurrer do not make good vague and insufficient averments or conclusions of the pleading demurred to or supply its omissions of essential facts.—Bennett v. Bennett (Ky.) 495.

§ 214. For the purposes of a general demurrer, the averments of a petition must be accepted as true.—Le Master v. Dalhart Real Estate Agency (Tex. Civ. App.) 185.

§ 216. In considering a demurrer to a petition, only matters appearing on the face of the petition will be considered.—Porter v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 897.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236. The quarterly court may within its discretion refuse to allow amendments to pleadings offered for some future advantage on a trial in another court.—Hardison v. Pace (Ky.) 671.

§ 236. Refusal of a trial amendment *held* to be within the discretion of the court.—Dine v. Donnelly (Ky.) 685.

§ 245. The court may permit the filing of an amended petition after it had handed down a verbal opinion in plaintiff's favor.—Diuguid v. Roberts (Ky.) 464.

§ 257. Where the answer alleged that a sum was included in a note by mistake, an amendment to the answer alleging that such sum represented an attorney's fee paid by plaintiff in trying to collect a debt from defendant prior to his adjudication in bankruptcy was properly refused.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

VII. SIGNATURE AND VERIFICATION.

In action by or against receiver, see Receivers, § 183.
Petition in election contest, see Elections, § 2[illegible].

VIII. PROFERT, OYER, AND EXHIBITS.

§ 310. Where exhibit attached to petition in ejectment showed title in another, petition stated no cause of action.—Smith v. Phelps (Ky.) 656.

§ 312. Instruments forming the foundation of the action and made exhibits to the complaint control the averments of the complaint. —Cazort & McGehee Co. v. Dunbar (Ark.) 270.

X. FILING, SERVICE, AND WITHDRAWAL.

§ 340. Where the petition and amended petition were lost without plaintiff's fault, the court properly permitted the filing of a substituted petition and amended petition constituting substantially correct copies of the originals. —Phillips v. Ratliff (Ky.) 460.

XI. MOTIONS.

§ 343. A defendant in an election contest *held* not entitled to judgment on the pleadings. —Phillips v. Ratliff (Ky.) 460.

§ 367. The proper mode of correcting defective averments in a pleading is by motion to make the same more definite and certain.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

XII. ISSUES, PROOF, AND VARIANCE.

Objections for purposes of review, see Appeal and Error, § 197.

In particular actions or proceedings.

See Ejectment, § 82; Forcible Entry and Detainer, § 28.
For breach of contract, see Contracts, § 346.
For causing death, see Death, § 57.
For injuries to passenger, see Carriers, § 315.
For injuries to persons at railroad crossings, see Railroads, § 345.
For injuries to servant, see Master and Servant, § 264.
For purchase price, see Sales, § 355.
On bill or note, see Bills and Notes, § 489.
To foreclose mortgage, see Mortgages, § 459.

§ 382. Under a general denial defendant may prove any fact which goes to show that plaintiff never had any cause of action.—South Texas Telephone Co. v. Huntington (Tex. Civ. App.) 242.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

Waiver of verification of petition in election contest, see Elections, § 285.

§ 409. Plaintiff, if a plea is too indefinite or uncertain, should request a more detailed allegation.—Briggs v. Steel (Ark.) 754.

§ 418. In an action against a telephone company for failure to deliver a death message, the petition *held* sufficient where defendant joined issue on the petition.—Cumberland Telephone & Telegraph Co. v. Maxberry (Ky.) 447.

§ 435. In an action against a seller of standing timber, an answer *held* sufficient after verdict and judgment to state a cause of action on a counterclaim.—Runyons v. Burchett (Ky.) 975.

PLEDGES.

See Pawnbrokers.
Creditors' bill to reach interests of pledgor of certificate of deposit, see Creditors' Suit, § 5.
Equitable relief against judgment foreclosing pledge, see Judgment, §§ 426, 460.
Of corporate stock, see Corporations, § 123.

§ 57. St. § 14a (Russell's St. § 24), providing for the publication of notice of judicial sales, *held* applicable to a sale of a note pledged as collateral under a decree foreclosing the pledge.—Bank of Cerulean Springs v. Gardner (Ky.) 608.

POLICE COURTS.

See Courts, § 178.

POLICE POWER.

Of municipality, see Municipal Corporations, § 594.

POLICY.

Of insurance, see Insurance.

POLITICAL RIGHTS.

Suffrage, see Elections.

PONDS.

See Waters and Water Courses, §§ 171–178.

POSSESSION.

See Adverse Possession.
Of demised premises, see Landlord and Tenant, §§ 127, 134.
Retention by grantor in fraudulent conveyance, see Fraudulent Conveyances, § 154.

POST OFFICE.

Evidence of payment by mail, see Payment, § 73.

POWERS.

Authority of administrator with will annexed, see Executors and Administrators, § 121.
Of attorney, see Principal and Agent.
Of attorney to sell land of infant, authority of guardian to sign, see Guardian and Ward, § 42.
Of sale in mortgage, see Mortgages, §§ 342–374.

PRACTICE.

In particular civil actions or proceedings.

See Contempt, § 64; Detinue; Divorce, §§ 93, 130; Ejectment; Habeas Corpus, §§ 85–117; Mandamus, § 154; Replevin; Trespass to Try Title, § 38.
Condemnation proceedings, see Eminent Domain, § 262.

Particular proceedings in actions.

See Abatement and Revival; Continuance; Costs; Damages, §§ 157–228; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Parties; Pleading; Reference; Removal of Causes; Trial; Venue.
Verdict, see Trial, §§ 333, 343.

Particular remedies in or incident to actions.

See Attachment; Injunction; Receivers; Tender.

Procedure in criminal prosecutions.

See Criminal Law.
For offenses against liquor laws, see Intoxicating Liquors, §§ 226–239.

Procedure in exercise of special or limited jurisdiction.

In bankruptcy, see Bankruptcy, § 20.
In equity, see Equity.
In justices' courts, see Justices of the Peace, § 79.

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Justices of the Peace, §§ 146–189; New Trial.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1027–1073.

PRELIMINARY EXAMINATION.

On criminal charge, see Criminal Law, §§ 539, 541.

PRELIMINARY INJUNCTION.

See Injunction, §§ 132–163.

PRELIMINARY PROCEEDINGS.

In criminal prosecution, harmless error, see Criminal Law, § 1166.

PREMIUMS.

For insurance, see Insurance, § 367.

PRESCRIPTION.

Acquisition of rights, see Adverse Possession, §§ 4, 13.
Establishment of street, see Municipal Corporations, § 648.

PRESUMPTIONS.

In civil actions, see Evidence, §§ 65–84.
On appeal or error, see Appeal and Error, §§ 907–939; Criminal Law, § 1144.

PRIMARY ELECTIONS.

See Elections, §§ 139–158.

PRINCIPAL AND AGENT.

Authority of guardian to sign power of attorney for infant, see Guardian and Ward, § 42.
Combinations by insurance agents, see Monopolies, § 18.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Brokers.
Agency of partner for firm, see Partnership, § 169.
Corporate agents, see Corporations, §§ 317, 339½, 423–432.
Municipal agents, see Municipal Corporations, § 747.

I. THE RELATION.

(A) Creation and Existence.

§ 1. The relation of principal and agent cannot exist, where the person acting acts for himself and is without authority to act for the other.—Palmer & Hardin v. Grand Lodge K. P. of Kentucky (Ky.) 678.

§ 2. Where a power of attorney not coupled with an interest was given in California with nothing in its terms to indicate where it was to be executed, and in an attempt to carry out the powers conferred land in Texas is sought to be sold, the law of Texas will control.—Gilmer v. Veatch (Tex. Civ. App.) 545.

§ 19. In a suit to partition lands, in which plaintiffs claimed an undivided half interest

561.

§ 24. In a suit to partition land in which plaintiffs claimed an undivided one-half interest through a conveyance by an attorney in fact of defendants, evidence *held* to make it a jury question whether defendants were induced by misrepresentations to execute the power of attorney under which such attorney acted.—Merrill v. Bradley (Tex. Civ. App.) 561.

(B) Termination.

§ 34. A power of attorney given by joint owners of land to another joint owner of the same land to sell and convey it, which conveys to the attorney no interest in the land to be sold, is not a power coupled with an interest.—Gilmer v. Veatch (Tex. Civ. App.) 545.

§ 34. An instrument authorizing the sale of land, etc., *held* a power of attorney coupled with an interest.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 42. Where a woman, after executing a power of attorney to sell her interest in land and before a sale was made by the agent, married, the marriage revoked the power.—Gilmer v. Veatch (Tex. Civ. App.) 545.

§ 43. In Texas lands cannot be sold under a naked power of attorney after the death of the principal.—Gilmer v. Veatch (Tex. Civ. App.) 545.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

Requests for instructions as to assurance of authority of agent, see Trial, § 260.

§ 97. An agent *held* not empowered, under a letter from his principal, to release the latter's lien under a sale bond.—Garth v. Runner's Ex'x (Ky.) 681; Same v. Davis & Johnson, Id.

(C) Unauthorized and Wrongful Acts.

§ 148. A recorded instrument revoking a power of attorney to recover and sell lands and a conveyance of lands to the agent *held* sufficient to put purchasers of such lands from the agent who had examined the revoking instrument upon notice as to the agent's right to sell any land under the power of attorney.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 148. If the purchasers of land under an agent acting under a power of attorney were not shown to have notice that such power was obtained by the owner by misrepresentations, the fact that it was so obtained would not affect their title.—Merrill v. Bradley (Tex. Civ. App.) 561.

(F) Actions.

§ 190. In a suit to partition lands in which plaintiffs claimed a one-half interest through a conveyance by an attorney in fact of defendants, the burden was on defendants to show that plaintiffs had notice of the fact that the power of attorney, under which the attorney acted, was obtained by misrepresentations.—Merrill v. Bradley (Tex. Civ. App.) 561.

§ 193. In a suit to partition lands, in which plaintiffs claim an undivided half interest through a conveyance by an attorney in fact, evidence *held* to make it a jury question whether plaintiffs had notice that the power of attorney was procured by such attorney by misrepresentation.—Merrill v. Bradley (Tex. Civ. App.) 561.

ance of duties of office or trust, see Guardian and Ward, § 175.
Liabilities on bonds for performance of duties of trust or office, see Sheriffs and Constables, § 157.
Subrogation of sureties to rights of principal, see Subrogation, § 7.

IV. REMEDIES OF CREDITORS.

§ 159. In an action against a surety, where the defense was that he had been released by the extension of the notes without his consent, the burden of proof thereof was upon the surety.—Farmers' Bank of Wickliffe v. Wickliffe (Ky.) 498.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

§ 187. A judgment by consent against the surety on a supersedeas bond *held* only prima facie evidence of the amount of the liability of the principal in the bond.—Cazort & McGehee Co. v. Dunbar (Ark.) 270.

PRINTING.

Record on appeal or writ of error, see Appeal and Error, §§ 627, 631.

PRISONS.

Character of imprisonment, whether in jail or penitentiary, as determining whether a crime is a felony or misdemeanor, see Criminal Law, § 27.
Liability of city for injuries to persons injured by breaking rock to pay fine, see Municipal Corporations, § 747.
Liability of city for injuries to prisoner, see Municipal Corporations, § 729.
Suit against penitentiary board as one against state, see States, § 191.

PRIVATE ROADS.

Rights of way, see Easements.

PRIVILEGE.

Effect on limitation, see Limitation of Actions, § 72.
Of witness as to testimony, see Witnesses, § 297.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see Libel and Slander, §§ 45–51.
Disclosure by witness, see Witnesses, §§ 199, 202.

PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, §§ 16, 21.

PROBATE.

Of will, see Wills, §§ 300–371½.

PROCEDURE.

See Cross-references under practice.

PROCESS.

Taxation of costs for publication of, see Costs, § 150.
To sustain judgment, see Judgment, § 17.
§ 79.

Particular forms of writs or other process.
See Execution; Injunction; Mandamus; Replevin.

PROFITS.

Loss of, as element of damages for failure to deliver goods sold, see Sales, § 418.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

Of death, see Death, §§ 2, 5.
Of loss insured against, see Insurance, § 539.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 105, 257–305.
Conversion of partnership realty as affecting dower rights of widow of partner, see Dower, § 17.
Licenses in respect to real property, see Licenses, § 58.

Of particular classes of persons.
See Religious Societies, §§ 23–24.

Particular species of property.
See Animals; Good Will; Mines and Minerals.
Logs or timber, see Logs and Logging.

Remedies involving or affecting property.
Protection of rights of property by injunction, see Injunction, §§ 44, 52.

Transfers and other matters affecting title.
See Adverse Possession.
Dedication to public use, see Dedication.
Escheat, see Escheat.
Taking for public use, see Eminent Domain.

§ 10. The owner of a legal title is in constructive possession of all land within his boundary not in actual possession of somebody else.—Richie v. Owsley (Ky.) 1015.

PROVINCE OF COURT AND JURY.

In civil actions, see Trial, §§ 191–194.
In criminal prosecutions, see Criminal Law, §§ 741–763.

PROVOCATION.

For commission of homicide, see Homicide, § 45.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see Damages, §§ 33–49.
Of delay in transportation of live stock, see Carriers, § 219.
Of injury to servant, see Master and Servant, §§ 129, 247.

PUBLIC ADMINISTRATORS.

As public guardians, see Guardian and Ward, § 175.

PUBLICATION.

Of notice of sale of pledge, see Pledges, § 37.
Of notice of sale on foreclosure of pledge, sufficiency of notice as affecting right to equitable relief against judgment, see Judgment, §§ 426, 440.
Taxation of costs for publication of notice, see Costs, § 150.

PUBLIC DEBT.

See Municipal Corporations, §§ 867, 957.

PUBLIC GUARDIANS.

See Guardian and Ward, § 175.

PUBLIC IMPROVEMENTS.

By municipalities, see Municipal Corporations, §§ 270–362.

PUBLIC LANDS.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(A) Surveys.

§ 26. A mistake in a government survey of a lake may be corrected.—Johnson & Burr v. Elder (Ark.) 1066.

(E) School and University Lands.

Presumptions as to territorial extent of townships as affecting disposition of school land, see Evidence, § 84.

§ 54. Under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), the county court *held* without authority to sell school lands except on a proper petition of the householders of the township.—Doddridge v. Patterson (Mo.) 72.

§ 54. A petition praying for a sale of school lands in a township *held* not sufficient to confer jurisdiction on the county court to order a sale under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867).—Doddridge v. Patterson (Mo.) 72.

§ 54. The county court is a court of inferior jurisdiction, and on a proceeding before it for a sale of school lands under Rev. St. 1899, § 8161 (Ann. St. 1906, p. 3867), the statutory directions must be observed before it can acquire jurisdiction.—Doddridge v. Patterson (Mo.) 72.

(F) Swamp and Overflowed Lands.

§ 61. Certain land within the meandered lines of a lake, if land instead of lake bed passed to the state under a federal patent of unsurveyed swamp lands, and if the land had been declared such instead of lake bed, the upland owner acquired no riparian rights therein.—Johnson & Burr v. Elder (Ark.) 1066.

III. DISPOSAL OF LANDS OF THE STATES.

§ 143. To acquire title to land under the donation laws, all the requirements of the statute must be fulfilled.—McCracken v. Sisk (Ark.) 725.

§ 143. A donee of land under the donation laws cannot alienate, or in any way dispose of, the land, and no greater right is given him than that of possession.—McCracken v. Sisk (Ark.) 725.

§ 143. Under Kirby's Dig. §§ 4815, 4832, the right to perfect a donation of land and submit final proof *held* extended to the widow on the death of the donee before the time to submit final proof; and, on her making final proof, she is entitled to a deed in her own right.—McCracken v. Sisk (Ark.) 725.

§ 151. If there be no other or older grant from the state to lands covered by a patent under which a party claims, the patent confers on him the legal title, unless another has by actual adverse possession acquired title thereto dehors a patent.—Richie v. Owsley (Ky.) 1015.

§ 151. If land in dispute in forcible entry was patented prior to a patent to plaintiff's lessor under whom he claimed the right to enter, the latter patent would be void, and could not be received as evidence tending to limit the possession of plaintiff's lessor.—Richie v. Owsley (Ky.) 1015.

§ 172. In an action by a vendee against his vendor to recover a payment made on land, the sale of which to defendant by the state was claimed to have been forfeited, a certified copy of an award by the commissioner of the land office to a third party made subsequent to the sale by defendant to plaintiff *held* admissible, and to raise the presumption that the first sale had been forfeited before the second was made.—Slaughter v. Cooper (Tex. Civ. App.) 173.

§ 172. Under Acts 1901, p. 294, c. 125, § 3, an indorsement by the commissioner of the General Land Office on an application for the purchase of public land that the same was forfeited for failure to reside on the land *held* not evidence of forfeiture as against the purchaser.—Slaughter v. Cooper (Tex. Civ. App.) 173.

§ 172. When a legislative grant is not made in discharge of some obligation of the government that the law would recognize, the grant is not in a legal sense anything but an act of sovereign grace and a pure donation.—Sherman v. Pickering (Tex. Civ. App.) 536.

§ 173. Acts 1895, p. 67, c. 47, § 11 (Rev. St. 1895, art. 4218f), regulating sale of public free school lands, construed to require a declaration of forfeiture before public lands sold and abandoned will be open to resale.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. Acts 1901, p. 294, c. 125, § 3, regulating sale of public school lands, construed to require declaration of forfeiture before public lands sold and abandoned will be again open for sale.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. The acceptance of the offer of the state, and the compliance by the applicant to purchase therewith, *held* to be what will constitute him a purchaser of school lands, and not the acceptance of his application by the Land Commissioner.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. If public school land is not on the market when application therefor is filed, the application confers no rights upon the applicant, and cannot be made effective by the acceptance of the Land Commissioner.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. If public school land is not on the market and subject to sale when application therefor is filed, a subsequent award by the Commissioner, after the land comes on the market, upon the premature application, is void.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. Award of public land on an application made before it came on the market, after the land had been forfeited and had again come on the market, *held* void.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. Acts 1905, p. 35, c. 29, prescribing a time within which a person claiming the right to purchase or lease public school land previously sold or leased to others, shall sue, was intended to bar after one year an action to set aside an award of school land by the Commissioner because of insufficient application.—Tillman v. Erp (Tex. Civ. App.) 547.

§ 173. School lands settled on and sold to another *held* to be the subject of contract, though

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other, reinstated the sale and awarded the land to such other, *held* good defense to the plea of failure of consideration of the notes given for the lands, which were secured by a vendor's lien.—Bynum v. Hobbs (Tex. Civ. App.) 900.

§ 173. A sale of school land prior to the adoption of Acts April 19, 1901 (Laws 1901, p. 294, c. 125), is governed by the law of 1895 (Laws 1895, p. 63, c. 47), requiring forfeitures of sales of school land for nonresidence to be declared by the commissioner.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 173. A purchase of school land *held* not absolutely void because of a mistake in the application.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 174. Effect of a statute, passed to relieve one entitled to a bounty warrant certificate barred by limitations, stated.—Sherman v. Pickering (Tex. Civ. App.) 536.

§ 175. Where a resurvey of land was had, and the former field notes corrected so that the survey embraced less land, and a patent issued on the corrected field notes only, the owner, in the absence of a showing of mistake, is bound by the patent calls.—Guill v. O'Bryan (Tex. Civ. App.) 593.

§ 178. Where the state through its regular authorized officer makes an award of public lands to one authorized to purchase, the land so far passes out of the state as to authorize its sale by the purchaser, thereby creating between himself and his purchaser the relation of vendor and vendee, and, where possession accompanies such transfer, the second purchaser may not thereafter successfully plead a total failure of consideration upon the forfeiture of his vendor's title.—Slaughter v. Cooper (Tex. Civ. App.) 173.

§ 178. A sale of public land, the title to which is in the state, is not a consideration for the promise to pay another therefor.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 178. A grantee of a purchaser of school land, while the law of 1895 (Laws 1895, p. 63, c. 47), relating to forfeitures, was in force, *held* to take such title as supports an action against a mere trespasser.—Samples v. Wever (Tex. Civ. App.) 1129.

PUBLIC SCHOOLS.

See Schools and School Districts, § 12.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.
Water companies, see Waters and Water Courses, § 196.

PUBLIC USE.

Dedication of property, see Dedication.
Taking property for public use, see Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 196.

PUNISHMENT.

See Criminal Law, §§ 1210, 1214.
For violation of injunction, see Injunction, §§ 219–230.

PURPRESTURE.

On streets, see Municipal Corporations, § 667.

QUARANTINE.

Adverse possession by widow claiming right of quarantine, see Adverse Possession, § 62.

QUARTERLY COURTS.

See Courts, § 180.

QUASHING.

Indictment or information, see Indictment and Information, §§ 137–140.
Report of commissioners in proceedings for establishment of highway, see Highways, § 39.

QUESTIONS FOR JURY.

In civil actions, see Trial, §§ 139–143.
In criminal prosecutions, see Criminal Law, §§ 741–763; Homicide, § 271.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. An action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), *held* to lie irrespective of the possession of either plaintiff or defendant.—Mann v. Doerr (Mo.) 86.

§ 10. In a suit to quiet title, plaintiff must succeed on the strength of his own title, and not on the weakness of that of his adversary.—Johnson & Burr v. Elder (Ark.) 1066.

II. PROCEEDINGS AND RELIEF.

§ 29. In a suit to quiet title, plaintiffs *held* not to have sustained the burden of proof of a paper title to the property in controversy or a better possessory title than that held by defendant.—Burchel v. Withers (Ky.) 469.

§ 30. A tenant in possession under a written lease is a proper party defendant in an action to quiet title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), brought against the landlord claiming title.—Mann v. Doerr (Mo.) 86.

§ 36. Under Civ. Code Prac. § 125, subsec. 2, an answer in an action for the recovery of land *held* to sufficiently describe the land in controversy.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 986.

§ 44. In an action to quiet title, evidence that plaintiff's president knew of the erection of a building by defendant on the land in controversy seven years before, without making objection thereto, *held* admissible.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 986.

§ 47. Evidence in an action to quiet title *held* insufficient to warrant submission to the jury of defendant's claim of possession to the land in controversy.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 986.

QUITCLAIM.

See Deeds, § 25.
Deed as color of title, see Adverse Possession, § 71.

RAILROAD COMMISSIONERS.

Application to, for relief against excessive charges as condition precedent to recovery of penalty, see Carriers, § 20.
Validity of law making rates fixed by railroad commissioners conclusive except in direct action to test validity as denying equal protection of law, see Constitutional Law, § 242.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

§ 58. Acts 1905, p. 265, relating to the construction and maintenance of a station at a certain point on the line of a railroad, *held* invalid.—Louisiana & A. Ry. Co. v. State (Ark.) 284.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Notice to vendee of railroad company of covenants in conveyance of right of way, see Vendor and Purchaser, § 230.

§ 61. A conveyance of land for an interurban railroad right of way is not void because the corporation is not authorized to take and hold land, to exercise the right of eminent domain, or to construct and operate an interurban road.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 63. A corporation owning land over which a traction company constructed its track *held* not entitled to oust the company, but limited to an action for damages.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 64. Letters written by a railroad's assistant engineer to a landowner *held* admissible as evidence of authority of the railroad's former employés to make the contract sued on, or to show ratification thereof.—St. Louis, I. M. & S. Ry. Co. v. Sanders (Ark.) 337.

§ 65. Evidence *held* to support a finding that a corporation owning land agreed to the construction of a right of way over the land for a traction company, authorizing the company to claim the right of way.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 65. A corporation giving its consent to the construction of a railroad track over its land *held* not entitled to revoke the consent but confined to an action for damages resulting from the use of the land.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 65. A traction company constructing its right of way over land with the consent of the owner without first complying with municipal ordinances is entitled to hold its right of way as against the owner.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 65. A traction company constructing an interurban road over land with the consent of the owner *held* entitled to rely on estoppel to prevent the owner from ousting it.—Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 72. In an action for breach of a railroad's contract to construct a levee, the measure of damage is the reasonable cost of building the levee the railroad company contracted to construct.—St. Louis, I. M. & S. Ry. Co. v. Sanders (Ark.) 337.

§ 72. Facts *held* to establish sufficient privity to entitle a widow and her daughter to recover for breach of a railroad company's contract to construct a proper levee in consideration of a conveyance of a railroad's right of way.—St. Louis, I. M. & S. Ry. Co. v. Sanders (Ark.) 337.

§ 72. A railroad's separate agreement to construct a levee, executed at the same time a landowner conveyed a right of way for a nominal consideration, *held* an enforceable contract by the railroad company to construct the levee ance of land to it for a right of way *held* a covenant running with the land, and binding on the grantor's successor.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 72. A verdict for $1,350 for breach of a railroad's covenant to erect and maintain a station on land conveyed to it for a right of way *held* not excessive.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 72. In an action for breach of a railroad company's covenant to construct its station on land purchased from plaintiff, evidence of the price received for other nearby land on a part of which the station was erected, *held* admissible.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 72. In an action for breach of a railroad's covenant to construct and maintain a station on land conveyed to it for a right of way, plaintiff's measure of damages was the additional value, if any, which would have accrued to his adjoining lands, but for the breach.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 72. A provision in a deed to a railroad right of way *held* to constitute a covenant binding the railway company to construct and maintain a station on the strip conveyed.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

Jurisdiction of action for injury to passway as dependent on title to realty being involved, see Courts, § 223.

Liabilities for work of independent contractors, see Master and Servant, § 315.

Liability for injuries from diversion of water course causing overflow, see Waters and Water Courses, § 178.

Regulations denying equal protection of law, see Constitutional Law, § 241.

§ 103. A statute requiring a railroad company to fence its right of way construed.—Missouri & N. A. R. Co. v. State (Ark.) 930.

X. OPERATION.

(D) Injuries to Licensees or Trespassers in General.

§ 274. Statement of duty of railroad company as to running trains at a place in constant use by the public.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 275. A railroad company *held* liable to a servant of a consignee of a car of coke for injuries sustained by the door of the car falling on him because of defects therein, as he was attempting to open it to unload the freight.—Louisville & N. R. Co. v. Freppon (Ky.) 454.

§ 282. In an action against a railroad company for injuries to a servant of the consignee of a car load of coke, the petition *held* not defective for failure to charge that the railroad company knew of the defect, and that plaintiff did not.—Louisville & N. R. Co. v. Freppon (Ky.) 454.

§ 282. In an action for injuries to a third person by a car door falling on him, whether he was himself negligent *held* for the jury.—Louisville & N. R. Co. v. Freppon (Ky.) 454.

§ 282. In an action for injuries to a child from being run over by an engine, an instruction *held* within the pleadings.—Freeman v. Garcia (Tex. Civ. App.) 886.

§ 282. In an action for injuries to a child from being run over by an engine, evidence

from being run over by an engine, evidence *held* to show that plaintiff was guilty of contributory negligence.—Freeman v. Garcia (Tex. Civ. App.) 886.

(F) Accidents at Crossings.

§ 334. Refusal of an instruction that it was contributory negligence for plaintiff not to whip his horses across the track upon discovery of a train near him, if thereby he could have escaped, *held* not error, since the peril may have been so imminent as to excuse him for failing to adopt the best course.—Palmer v. Chicago & A. R. Co. (Mo. App.) 1087.

§ 345. Petition, in an action for injury in a railroad crossing accident, considered, and *held* not to declare on a statute of Illinois making defendant liable for the torts of its constituent companies, so as to make it incumbent on plaintiff to introduce such a statute in proof of his allegation and preclude him from recovering at common law.—Palmer v. Chicago & A. R. Co. (Mo. App.) 1087.

§ 350. Whether a person injured in a railroad crossing accident was guilty of contributory negligence *held* for the jury.—Palmer v. Chicago & A. R. Co. (Mo. App.) 1087.

(G) Injuries to Persons on or near Tracks.

Pleading negligence as a conclusion in action for injuries, see Pleading, § 8.

§ 356. One walking along the railroad track in a space commonly used by pedestrians for a walk with the knowledge and consent of the company was a licensee, and the company was bound to use ordinary care not to injure him.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 357. A railroad company *held* liable for injuries to a person on a part of the track which the company had no right to expect was clear if he might have been seen in time to have prevented the injury, but, if he was injured on a track that was usually clear, there would be no liability unless the company's servants actually saw his peril in time to have prevented his injury.—Hufft v. St. Louis & S. F. R. Co. (Mo.) 120.

§ 358. Under Rev. St. 1899, § 1123 (Ann. St. 1906, p. 970), a railroad company *held* not liable for injuries received by a bare licensee in crossing the company's tracks by having his foot caught in an unblocked frog.—Hufft v. St. Louis & S. F. R. Co. (Mo.) 120.

§ 369. Statement of duty of railroad company as to warning persons crossing track.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 372. Statement of duty of railroad company as to speed of train as to persons crossing track.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 376. The duty of train employés towards a trespasser on the track stated.—Creager's Adm'r v. Illinois Cent. R. R. Co. (Ky.) 458.

§ 376. Statement of duty of railroad company as to precautions as to persons crossing track.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 376. A railroad engineer, on discovering the peril of a person on the track, must use every means within his power to avoid running him down, and this duty continues until the danger of a collision is past.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 383. The rule of stop, look, and listen where one crosses a railroad track at a place in constant use by the public *held* not to obtain in Kentucky.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 385. Statement of duty of traveler as to care for his safety when crossing a railroad.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 390. A person's contributory negligence, in being on a railroad track, is no defense in an action for injuries from being struck by a train, based on discovered peril.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 390. That a railroad track was properly fenced and cattle guards erected at the place a person on the track was struck by a train is no defense to a recovery on the theory of discovered peril.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 390. In an action for injuries to pedestrian on a railroad track struck by a train, evidence of the use of the track at the place of the accident by pedestrians, *held* immaterial.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 396. In absence of evidence to the contrary, negligence by the railroad company may be inferred from the projecting of a cross-tie on a passing train which struck a pedestrian walking along the track at a safe distance from the train.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 396. If a pedestrian was struck by a projection from a train while walking along the track at a safe distance from the train, the burden was upon the company in an action for resulting injuries to show that it was without fault.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 398. In an action for injuries to a pedestrian by being struck by a projection from a passing freight train, evidence *held* not to show contributory negligence.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 398. In an action for injuries to one walking along a railroad track by being struck by a projection from a passing freight train, evidence *held* to sustain a verdict for plaintiff.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 400. In an action for the death of a trespasser on defendant's tracks, evidence *held* not to show that the train employés discovered intestate's peril in time to prevent his death by ordinary care.—Creager's Adm'r v. Illinois Cent. R. R. Co. (Ky.) 458.

§ 400. Whether one crossing a railroad track exercised ordinary care for his safety *held* a question for the jury.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 400. Evidence of gross negligence and consequent punitive damages *held* insufficient to go to the jury in case of an engine colliding with a person crossing a railroad.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 400. In an action against a railroad company for injuries to a pedestrian on the track struck by a train, the issue of discovered peril *held*, under the evidence, for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 401. Instruction submitting a question unwarranted by evidence *held* improper.—Louisville & N. R. Co. v. Miller (Ky.) 648.

§ 401. An instruction in an action against a railroad company for injuries to a person on its track *held* erroneous.—Hufft v. St. Louis & S. F. R. Co. (Mo.) 120.

§ 401. In an action for injuries to a person struck by a train, the evidence *held* to show that his peril was discovered in time to have enabled the engineer to stop.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

(H) Injuries to Animals on or near Tracks.

§ 413. A railroad company *held* not liable for injuries to stock passing upon the right of way through a private gate, in the absence of negligence in the operation of a train.—Missouri, K. & T. Ry. Co. of Texas v. Butler (Tex. Civ. App.) 176.

§ 446. Whether a railroad company's servants failed to use a proper degree of care to avoid striking plaintiff's animals after discovering them on the track, *held* for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Butler (Tex. Civ. App.) 176.

RAILROAD VELOCIPEDES.

Liability of master for injuries to servant in use of, see Master and Servant, §§ 210, 236, 248.

RAPE.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

Felony or misdemeanor, see Criminal Law, § 27.

II. PROSECUTION AND PUNISHMENT.

Conviction of assault with intent as being included in charge of completed offense, see Indictment and Information, § 190.

(B) Evidence.

§ 38. In a prosecution for rape, a statement made by accused four or five months before the commission of the offense *held* admissible to corroborate prosecutrix.—Sexton v. State (Ark.) 1075.

§ 48. In a prosecution for rape, evidence of the officer who apprehended accused *held* not objectionable on the theory that it was evidence that prosecutrix identified or described her assailant to the witness who thereupon caused defendant to be apprehended, and as such was hearsay.—Sexton v. State (Ark.) 1075.

§ 48. The particular facts stated by prosecutrix on making an alleged complaint for rape can only be brought out on her cross-examination by defendant, unless he undertakes to impeach her testimony as to the fact of her having made complaint.—Sexton v. State (Ark.) 1075.

§ 51. In view of Kirby's Dig. §§ 2005, 2006, *held* that evidence was insufficient to support a conviction of rape.—Green v. State (Ark.) 949.

§ 53. Evidence *held* to show a defendant charged with rape was guilty of assault with intent to rape.—Green v. State (Ark.) 949.

(C) Trial and Review.

Grounds for continuance, see Criminal Law, § 593.

(D) Sentence and Punishment.

Modification of judgment by appellate court, see Criminal Law, § 1184.

RATIFICATION.

Of acts of corporate agents, see Corporations, § 426.
Of acts of corporate officers, see Corporations, § 432.
Of conveyance by married woman, see Husband and Wife, § 199.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, §§ 6–29; Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REAL PROPERTY.

See Property.
Jurisdiction as dependent on real party being involved, see Courts, § 135.
Limitations applicable to actions to recover, see Limitation of Actions, §§ 19, 25.
Title to realty as question in issue affecting appellate jurisdiction, see Courts, § 231.

RECEIVERS.

Of insurance company, see Insurance, § 70.

VI. ACTIONS.

§ 179. The receiver of a railroad company was a proper party to a passenger's suit for injuries arising prior to the receiver's appointment.—International & G. N. R. Co. v. Ormond (Tex. Civ. App.) 899.

§ 183. An allegation of the appointment of a receiver and an order authorizing him to defend actions against defendant corporation need not be proved in the absence of a sworn denial.—International & G. N. R. Co. v. Ormond (Tex. Civ. App.) 899.

RECORDS.

Of particular facts, acts, instruments, or proceedings not judicial.

See Deeds, § 86; Mortgages, § 94; Wills, § 744.

Of judicial proceedings.

Abstract for purpose of review, see Appeal and Error, §§ 582, 586.
Transcript on appeal or writ of error, see Appeal and Error, §§ 494, 511; Criminal Law, §§ 1088–1122.

Records as notice, and as affecting priorities.

Record of attempted revocation of power of attorney, see Principal and Agent, § 148.
Record of will as notice to persons dealing with devisee, see Wills, § 744.

REDEMPTION.

From tax sales, see Taxation, § 699.

RE-ENTRY.

For breach of condition of deed, see Deeds, § 168.

REFERENCE.

II. REFEREES AND PROCEEDINGS.

§ 35. The chancery court has power to appoint a master to assist it in taking testimony, etc., as well inherently as under Kirby's Dig. § 633.—Claypool v. Johnston (Ark.) 941.

§ 48. A master, appointed to take testimony as to the value of fruit trees and report the evidence, was not authorized to make a finding

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as to the value of the trees.—Claypool v. Johnston (Ark.) 941.

III. REPORT AND FINDINGS.

§ 99. The effect of the report of a master, appointed upon the court's own motion, and of one appointed by the parties' consent, as well as court's duty, under Kirby's Dig. § 6337, to review the report of a master appointed upon its own motion, stated.—Claypool v. Johnston (Ark.) 941.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.
Deed to partnership, see Partnership, § 68.

REGISTRATION.

See Deeds, § 86; Mortgages, § 94.

REHEARING.

See New Trial.

REINCORPORATION.

See Corporations, §§ 573, 580.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Payment.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 57. A release by an ignorant servant of liability for personal injuries while confined in a hospital *held* not to be enforced, unless upon the clearest proof that it was fairly obtained.—Keller & Brady Co. v. Berry (Ky.) 1009.

RELEVANCY.

Of evidence in civil actions, see Evidence, §§ 99–155.
Of evidence in criminal prosecutions, see Criminal Law, §§ 338, 359.

RELIGIOUS SOCIETIES.

§ 5. The constitution *held* the contract of association in a church, binding upon all portions of it, as well as the judicatories thereof.—Boyles v. Roberts (Mo.) 805.

§ 12. Civil courts should investigate the jurisdiction of ecclesiastical courts, even though accepting proper decrees therefrom.—Boyles v. Roberts (Mo.) 805.

§ 12. Where beyond the constitutional provisions of the church, acts of a church judicatory will be declared void.—Boyles v. Roberts (Mo.) 805.

§ 23. In the event of division in a church, that portion adhering to the existing creed *held* entitled to the church property.—Boyles v. Roberts (Mo.) 805.

§ 23. Persons leaving the Cumberland Presbyterian Church and going into the Presbyterian Church of the United States of America *held* dissenters, and in no position to claim the property of the former church.—Boyles v. Roberts (Mo.) 805.

§ 23. In determining property rights, courts will compare creeds, and award the property to the persons adhering to the doctrine existing prior to the schism in the church.—Boyles v. Roberts (Mo.) 805.

§ 24. Civil courts, in determining property rights, will investigate whether a church judicatory has acted within its constitutional grant of power.—Boyles v. Roberts (Mo.) 805.

§ 24. Civil courts will investigate ecclesiastical decrees, where necessary in determining property rights.—Boyles v. Roberts (Mo.) 805.

§ 24. In a case involving title to property, if the parties litigant are not all members of the church, the courts must take the Confession of Faith and interpret it as they would any other instrument, and should not accept as conclusive the interpretation put upon it by the church court.—Boyles v. Roberts (Mo.) 805.

§ 28. The interpretation put upon its dogmas by a church *held* binding on its members, but not on those who are not.—Boyles v. Roberts (Mo.) 805.

§ 34. There might be such a similarity between Confessions of Faith as to warrant united action between the churches, without such an identity as is required to pass the property of one to the other.—Boyles v. Roberts (Mo.) 805.

§ 34. Certain identity of faiths, etc., *held* not that identity which the law demands when determining the right to transfer property of one religious organization to another.—Boyles v. Roberts (Mo.) 805.

§ 34. There was no identity of doctrine between the confession of faith of the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church, and hence, as against members of the Cumberland Presbyterian Church adhering to its faith, its property could not be passed to the Presbyterian Church of the United States of America in pursuance of any attempted union between them.—Boyles v. Roberts (Mo.) 805.

§ 34. Under the constitution of the Cumberland Presbyterian Church, *held*, that its General Assembly had no power, without submitting the matter to the presbyteries, to surrender the name and organization of the church and dissolve it, by consenting to its absorption by the Presbyterian Church of the United States of America.—Boyles v. Roberts (Mo.) 805.

§ 34. The constitution of the Cumberland Presbyterian Church, having mentioned the specific way by which mergers or unions can be formed with the church—that is, by receiving other bodies "under its jurisdiction"—excludes the idea of enlargement by that church going in under another organization.—Boyles v. Roberts (Mo.) 805.

§ 34. It could not be implied that power to effect a merger of the Cumberland Presbyterian Church with the Presbyterian Church of the United States of America was given to the Cumberland General Assembly at the beginning of church organization, and there have been no additional powers given since.—Boyles v. Roberts (Mo.) 805.

§ 34. The theory that the power of the General Assembly of the Cumberland Presbyterian Church is derived, not from the people composing the church, but from the Divine Founder, could not be invoked to sustain an otherwise unauthorized union with the Presbyterian Church of the United States of America.—Boyles v. Roberts (Mo.) 805.

REMAINDERS.

Creation by will, see Wills, § 634.

REMAND.

Of cause on appeal or writ of error, see Appeal and Error, §§ 1190–1206.

REMEDY AT LAW.

Effect on jurisdiction of equity, see Cancellation of Instruments, §§ 14, 15.

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Of damages, see Damages, § 223.

REMOVAL.

Of obstructions in street, see Municipal Corporations, § 696.

REMOVAL OF CAUSES.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. An action brought against a federal corporation *held* removable to the federal court.—Texas & P. Ry. Co. v. Huber (Tex.) 1106.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

Of bill of exchange or promissory note, see Bills and Notes, § 430.

RENT.

See Landlord and Tenant, § 254.

REPEAL.

Of statute, see Statutes, §§ 152–161.

REPLEVIN.

See Detinue.

IV. PLEADING AND EVIDENCE.

§ 71. In an action for replevin, the replevin bond was admissible in evidence.—Lewter v. Lindley (Tex. Civ. App.) 178.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 116. Where defendant in replevin, who appealed from a justice's judgment, was in possession of the property, he had no absolute right to dismiss his appeal, so as to thereby escape an order for the return of the property or judgment against him and his sureties on the appeal bond.—Breeding v. Nelson (Mo. App.) 1080.

REPLICATION.

See Pleading, § 177.

REPLY.

See Pleading, § 177.

REPORT.

On reference, see Reference, § 99.

REPUTATION.

Of animals, evidence of, in action for trespass by, see Animals, § 100.

REQUESTS.

For instructions in civil actions, see Trial, §§ 255–262.
For instructions in criminal prosecutions, see Criminal Law, §§ 825, 829.

Of contract, see Contracts, § 261.

RESERVATIONS.

Of timber on sale of land, see Logs and Logging, § 2.

RESERVOIRS.

See Waters and Water Courses, §§ 171–178.

RES GESTÆ.

In civil actions, see Evidence, §§ 121–128.

RES JUDICATA.

See Judgment, §§ 682–725.
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Tax sales, see Taxation, §§ 641–658.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1. A contract of sale, like all other contracts, consists of an agreement between the parties and in addition thereto a delivery of the chattel.—Harper v. State (Ark.) 737.

§ 23. A manufacturer receiving an order for machinery and accepting the cash payment *held* required to either accept or reject the order within a reasonable time, and, on his retaining the cash payment after the expiration of a reasonable time, he cannot claim that the order was not accepted.—Enterprise Mfg. Co. v. Campbell (Ky.) 1040.

II. CONSTRUCTION OF CONTRACT.

§ 68. Under a contract by which defendant bank sold to plaintiff bank all its capital stock and other property, plaintiff *held* entitled to certain property.—Livingston County Bank v. First State Bank (Ky.) 451.

§ 81. Rights of a seller under a contract for sale of railroad ties, calling for their delivery on a railroad right of way, and for payment of the market price when delivered, stated.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 81. A contract for the manufacture of automatic bale systems *held* to make time of the essence, rendering the seller liable for damages for failure to make deliveries within the time stipulated.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

§ 88. What would constitute a reasonable time to make delivery of railroad ties contracted for *held* to be for the jury.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 161. A delivery by a seller to a carrier *held* a delivery to the buyer.—Harper v. State (Ark.) 737.

§ 161. Delivery of goods by the seller to a carrier other than that designated by the buyer *held* not a delivery of the goods to the buyer.—Woodbine Children's Clothing Co. v. S. Goldnamer & Son (Ky.) 444.

§ 179. A buyer of machinery for delivery on designated dates may waive his right to refuse to accept the same after the dates designated in the contract, and he may receive the same and hold the seller liable for damages for the delay in delivery.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

§ 180. A buyer of machinery for delivery in installments *held* not to waive any claim for damages for the failure of the seller to make deliveries on the dates specified in the contract.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

§ 181. In an action to recover a balance due for railroad ties furnished, burden of proof of negligence or wrongful delay in delivery *held* to be on defendants.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

(D) Payment of Price.

§ 187. A contract for the manufacture and sale of machines *held* not to entitle the seller to interest on the price, unless the machines were ready for delivery.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 201. Where a contract of sale is silent as to the particular carrier by whom the goods are to be transported, a delivery by the seller to a carrier in the usual and ordinary course of business transfers the property to the buyer.—Harper v. State (Ark.) 737.

§ 201. Where by the buyer's direction goods are delivered to a carrier to be shipped to him, the property passes as soon as the goods are placed in the carrier's possession.—Woodbine Children's Clothing Co. v. S. Goldnamer & Son (Ky.) 444.

§ 202. A purchaser of ties *held* to acquire title on payment of part of the purchase price and taking possession of the ties.—Guion Mercantile Co. v. Campbell (Ark.) 164.

(D) Bona Fide Purchasers.

§ 234. The lessor of a quarry on regaining possession thereof could not pass title to rock theretofore sold by his lessee to plaintiffs, and left on the premises.—Chesapeake & O. Ry. Co. v. Wendt (Ky.) 661.

VI. WARRANTIES.

§ 279. A contract for the manufacture of automatic bale systems, with a warranty, *held* modified by a subsequent agreement of the parties.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 354. Admission in an answer in an action for the balance due on an account construed.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 355. A variance between pleading and proof in an action on a balance due on an account *held* not material.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 359. In an action by a materialman for lumber sold, evidence *held* to show that the contractor was indebted to the materialman as shown by the accounts.—Stadtler v. South Texas Lumber Co. (Tex. Civ. App.) 1132.

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§ 369. Remedies of seller, stated, where insolvent buyer mortgages the goods to secure preferred creditors.—Louisville Dry Goods Co. v. Lanman (Ky.) 1042.

§ 382. Bills of lading in an action by a seller of coal for damages for breach of contract of purchase *held* admissible in evidence.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

§ 383. Evidence in an action for damages for breach of contract to purchase coal of plaintiff *held* to show that the coal tendered defendant was the kind ordered by him.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

§ 388. An instruction in an action brought by a seller of coal to recover damages for breach of contract *held* proper.—Maricle v. McAlister Fuel Co. (Tex. Civ. App.) 221.

VIII. REMEDIES OF BUYER.

Impeachment of compromise of claim for damages, see Compromise and Settlement, § 19.

(C) Actions for Breach of Contract.

§ 418. A buyer of a sawmill suing for the non-delivery of the mill *held* entitled to show that he had contracts with third persons to saw timber, together with the reasonable profits that he could make therefrom.—Enterprise Mfg. Co. v. Campbell (Ky.) 1040.

§ 418. Certain damages claimed by a buyer suing the seller for nondelivery *held* too remote, and not within the contemplation of the parties.—Enterprise Mfg. Co. v. Campbell (Ky.) 1040.

§ 418. A buyer of a sawmill *held* to have terminated the contract on a designated date, so that his damages were limited to such damages as he suffered between the time the mill could have been delivered and such date.—Enterprise Mfg. Co. v. Campbell (Ky.) 1040.

§ 418. A buyer of a sawmill suing for the nondelivery thereof may recover the reasonable expenses of any trips which he made to the point of delivery prior to his termination of the contract to ascertain why the mill had not been shipped.—Enterprise Mfg. Co. v. Campbell (Ky.) 1040.

§ 418. A buyer of automatic bale systems held entitled to recover for loss of profits and extra cost of installation because of the failure of the seller to make deliveries on the dates contracted for.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

§ 418. Evidence of loss of profits to buyer of machinery *held* sufficient to warrant recovering for loss of profits, because of the failure of the seller to deliver the same on the dates contracted for.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

IX. CONDITIONAL SALES.

§ 479. Evidence *held* to sustain a verdict, finding that a conditional seller had elected to retake the property and cancel the debt.—Nashville Lumber Co. v. Robinson (Ark.) 350.

§ 479. In an action by a conditional seller of goods on the conditional sale note, an instruction *held* objectionable as misstating the defense.—Nashville Lumber Co. v. Robinson (Ark.) 350.

§ 479. A conditional seller may not, after retaking the property, maintain an action on the debt.—Nashville Lumber Co. v. Robinson (Ark.) 350.

SCHOOL LANDS.

See Public Lands, § 54.

SCHOOLS AND SCHOOL DISTRICTS.

Special prohibition of sale of liquors near school houses, see Intoxicating Liquors, § 130.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

County board as proper party to request rule requiring county attorney to pay over moneys recovered for benefit of school fund, see Attorney and Client, § 126.

Persons entitled to intervene in proceedings to determine right to funds, see Parties, § 40.

§ 12. The schools of a city belong to the state's common school system, and their trustees are officers of the state.—City of Louisville v. Commonwealth (Ky.) 411.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

Mandamus to control action of county board in consolidating districts, see Mandamus, § 79.

(C) Government, Officers, and District Meetings.

County board as proper party to request rule requiring county attorney to pay over moneys recovered for benefit of school fund, see Attorney and Client, § 126.

Mandamus to control action of county board, see Mandamus, § 79.

(E) District Debt, Securities, and Taxation.

Limitations as to uniformity, see Taxation, § 42.

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Necessity of allegations of consideration in action on unsealed note, see Bills and Notes, § 465.

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In civil actions, see Evidence, §§ 158–165.

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Livery of seisin, see Deeds, § 3.

SELF-DEFENSE.

See Homicide, §§ 113–120, 190, 300.

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As evidence, see Evidence, § 271.

SEPARATE ESTATE.

Of married women, see Husband and Wife, §§ 119–199.

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See Master and Servant, § 82; Work and Labor.

Contract of infant for, see Infants, § 49.

SERVITUDE.

See Easements.

an indemnity bond given the sheriff for damages for the levy on and sale of exempt property, it was error to adjudge that the damages be set off by the amount of the original judgment.—Winstead v. Hicks (Ky.) 1018.

SETTLEMENT.

See Accord and Satisfaction; Compromise and Settlement; Payment; Release.

By guardian of infant, see Guardian and Ward, §§ 150–163.

SEWERS.

See Municipal Corporations, § 270.

SHERIFFS AND CONSTABLES.

III. POWERS, DUTIES, AND LIABILITIES.

Right to set off original judgment in action on indemnity bond for wrongful execution, see Set-Off and Counterclaim, § 22.

§ 98. A sheriff or other officer, to whom a writ of execution is directed and delivered, must execute it according to its terms; and, where the process is issued on a judgment which is not void, the officer executing it is protected by it.—Johnson v. Scott (Ky.) 695.

§ 137. In an action by an execution defendant, on an indemnity bond given to the sheriff by the execution plaintiff, to recover damages for the levy on and sale of alleged exempt property, allegations of the petition *held* sufficient to sustain a judgment for plaintiff.—Winstead v. Hicks (Ky.) 1018.

§ 138. In an action by an execution defendant on an indemnity bond given to the sheriff, evidence *held* to support a finding that plaintiff notified the sheriff that he claimed the property levied on to be exempt.—Winstead v. Hicks (Ky.) 1018.

§ 139. In an action by the execution defendant on an indemnity bond given the sheriff by the execution plaintiff, the measure of damages for levying on and selling exempt property is the same as in trover, viz., the value of the property, with interest (in the discretion of the jury) from the time of its conversion.—Winstead v. Hicks (Ky.) 1018.

§ 151. In an action against a surety on an indemnity bond to an attaching sheriff, a defense that the sheriff, in levying, had acted wantonly, willfully, maliciously, and contrary to the attaching creditors' instructions, was an affirmative defense, the burden to establish which rested upon the surety.—Dine v. Donnelly (Ky.) 685.

§ 151. Evidence *held* not to show that a sheriff acted willfully and maliciously and against the wishes and directions of attaching creditors in levying an attachment.—Dine v. Donnelly (Ky.) 685.

IV. LIABILITIES ON OFFICIAL BONDS.

§ 157. An action on an official bond of a constable *held* to lie on his disregarding Rev. St. 1899, § 3163 (Ann. St. 1906, p. 1799), and levying on and selling exempt property.—Parketon v. Pugsley (Mo. App.) 789.

SICKNESS.

Of counsel as ground for continuance in criminal prosecution, see Criminal Law, § 593.

SIGNATURES.

§ 5. Kirby's Dig. § 7799, providing for attesting the signature by mark of persons who cannot write, is not exclusive; and where a person, whose name is signed by mark, appeared before an officer and acknowledged execution of the instrument, it is valid, though the signature is not attested.—Ward v. Stark Bros. (Ark.) 382.

SKELETON BILL OF EXCEPTIONS.

Correction or amendment on appeal, see Appeal and Error, § 653.

SLANDER.

See Libel and Slander.

SODOMY.

§ 6. Evidence *held* to support a conviction of sodomy.—Moody v. State (Tex. Cr. App.) 1117.

§ 7. Instruction on a trial for sodomy *held* to sufficiently cover the question of penetration of the animal.—Moody v. State (Tex. Cr. App.) 1117.

SPACE.

Competency of expert witness as to space within which locomotive may be stopped, see Evidence, § 539½.

SPECIAL LAWS.

See Statutes, §§ 92–97.

SPECIAL SESSIONS.

Of general assembly, authority of Senate to affirm appointment of officers, see Officers, § 15.

SPECIFIC PERFORMANCE.

Restraining breach of contract as constituting a negative specific enforcement, see Injunction, § 57.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 7. Plaintiff's refusal to accept a vendor's offer to convey the land without obtaining the release of certain vendor's liens which he had contracted to satisfy was no defense to plaintiff's subsequent suit for specific performance.—Durham v. Breathwit (Tex. Civ. App.) 890.

§ 7. The filing of a suit in trespass to try title which was subsequently turned into a suit for specific performance *held* no defense to plaintiff's right to specific performance.—Durham v. Breathwit (Tex. Civ. App.) 890.

§ 13. Inability of a vendor to perform his engagement to procure a release of certain liens *held* no defense to a suit for specific performance.—Durham v. Breathwit (Tex. Civ. App.) 890.

III. GOOD FAITH AND DILIGENCE.

§ 92. Plaintiff's waiver of a vendor's obligation which he had been unable to perform *held*

fense to an action by the vendor for specific performance.—Garth v. Runner's Ex'x (Ky.) 681; Same v. Davis & Johnson, Id.

IV. PROCEEDINGS AND RELIEF.

§ 120. In an action for specific performance, evidence of plaintiff's possession and improvements *held* admissible on the issue of his abandonment of the contract.—Durham v. Breathwit (Tex. Civ. App.) 890.

§ 121. A vendor's statement that he was unable to procure certain vendor's lien notes or show payment *held* insufficient to establish his defense to a suit for specific performance that it was impossible for him to perform.—Durham v. Breathwit (Tex. Civ. App.) 890.

§ 131. In a suit for specific performance, a verdict *held* sufficient to justify a judgment as between all the parties, including a stakeholder joined as a defendant.—Durham v. Breathwit (Tex. Civ. App.) 890.

SPELLING.

Construction of deed as affected by, see Deeds, § 95.

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See Intoxicating Liquors.

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By witness inconsistent with testimony, see Witnesses, §§ 379–389.
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II. GOVERNMENT AND OFFICERS.

Trustees of city high schools as state officers, see Schools and School Districts, § 12.

VI. ACTIONS.

Prescription as against state, see Adverse Possession, §§ 4, 114.
Withdrawal of right to sue state as impairment of vested right, see Constitutional Law, § 105.

§ 191. A suit against state officers *held* a suit against the state, within Const. art. 5, § 19, where the state is the real party in interest.—Pitcock v. State (Ark.) 742.

§ 191. A suit against a state officer to prevent him from doing an unlawful act to the injury of complainant, or a suit to compel an officer to perform a purely ministerial act imposed by statute, *held* not a suit against the state within Const. art. 5, § 19.—Pitcock v. State (Ark.) 742.

§ 191. A suit to restrain the State Penitentiary Board from violating a contract for convict labor *held* a suit against the state within the prohibition of Const. art. 5, § 19.—Pitcock v. State (Ark.) 742.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.
Laws denying due process of law, see Constitutional Law, §§ 257–305.
Laws denying equal protection of laws, see Constitutional Law, §§ 210, 242.
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Statute of frauds, see Frauds, Statute of.
Statutes of limitation, see Limitation of Actions, §§ 19, 25.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 5. Proclamation of Governor convening the 30th Legislature in special session *held* to sufficiently state the purposes of the session, as required by Const. art. 3, § 40, to authorize the enactment of Act May 14, 1907 (Laws 1907, p. 447, c. 8), relating to contests of local option elections.—Stockard v. Reid (Tex. Civ. App.) 1144.

§ 64. Even if Sp. Laws 1897, p. 150, c. 11, as amended by Sp. Laws 1905, p. 262, c. 30, relating to highways gave the power of suspension of the law in violation of Const. art. 1, § 28, the law would not be held invalid for the reason, but the law would stand, and the provision for suspension would fail.—Bluitt v. State (Tex. Cr. App.) 168.

§ 64. Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), amending Rev. St. 1895, art. 1069, *held* not invalid in so far as it provides for an exchange of judges, even if the last clause limiting the right of the parties to select a judge were in violation of Const. art. 5, § 11.—Oates v. State (Tex. Cr. App.) 370.

§ 64. An entire statute will not fall because of unconstitutional provisions, if sufficient remains to effect the object without the aid of the invalid portions.—Oates v. State (Tex. Cr. App.) 370.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 92. It is no objection to a classification of cities for legislative purposes that one of the classes contains but one city.—City of Louisville v. Commonwealth (Ky.) 411.

§ 95. Laws 1908, p. 156, c. 61, requiring a minimum school tax of 36 mills in cities of the second class, *held* not in violation of Const. § 181.—City of Louisville v. Commonwealth (Ky.) 411.

§ 95. Laws 1908, p. 156, c. 61, requiring a minimum school tax rate of 36 mills in cities of the second class, *held* not special legislation in violation of Const. § 59, subsec. 15.—City of Louisville v. Commonwealth (Ky.) 411.

§ 97. Under Const. art. 8, § 9, as amended in 1890, giving the Legislature power to pass local laws for the maintenance of public roads and highways, it could give control to the county commissioners over citizens residing in incorporated cities and towns as respects work upon such roads and highways.—Bluitt v. State (Tex. Cr. App.) 168.

III. SUBJECTS AND TITLES OF ACTS.

§ 109. A statute does not violate Const. art. 4, § 28 (Ann. St. 1906, p. 185), requiring but one subject to be expressed in the title, where

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it is not designed to cover vicious and incongruous legislation.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

§ 113. Act March 1, 1907 (Laws 1907, p. 315), relating to the salaries of employés of life insurance companies, *held* not objectionable as containing a plurality of subjects not expressed in its title.—State ex rel. Equitable Life Assur. Society of United States v. Vandiver (Mo.) 45; State ex rel. Metropolitan Life Ins. Co. v. Same (Mo.) 63; State ex rel. Prudential Life Ins. Co. of America v. Same, Id.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§§ 152, 158. A statute is held to be repealed only by an express provision of a subsequent law or by necessary implication.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

§ 161. A later statute will not impliedly repeal a former one, where the two are not irreconcilably inconsistent and can stand together.—State ex rel. Holladay v. Rinke (Mo. App.) 159.

§ 171. Sp. Laws 1897, p. 150, c. 110, amended by Sp. Laws 1905, p. 262, c. 30, creating a road system for Ellis county, *held* not violative of Const. art. 1, § 28.—Bluitt v. State (Tex. Cr. App.) 168.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

Statutes relating to time for filing certificates and petitions of nomination, see Elections, § 139.

§ 181. The court, in construing a statute, will so interpret it as to conform with the intent of the Legislature, and it must be given a reasonable construction, keeping in view the purposes of, as well as the circumstances surrounding, its enactment.—State ex rel. Sikes v. Williams (Mo.) 64.

§ 181. The effect and consequences of any proposed construction of the law may be considered in ascertaining the probable intention of the Legislature.—State ex rel. Sanks v. Johnson (Mo. App.) 780.

§ 211. The court in construing a statute may look to its title as an aid in ascertaining the intention thereof.—Kinnaird v. Commonwealth (Ky.) 489.

§ 214. If a statute is not ambiguous, its meaning and legislative intent must be determined from the language used.—Gross v. Colonial Assur. Co. (Tex. Civ. App.) 517.

§ 225. Where there are two statutes, and the provisions of one apply specially to a particular subject, which clearly includes the matter and the other general in its terms, and such that, if standing alone, it would include the same matter, and they thus conflict with each other, the special act must be taken as an exception, if not a repeal of the general statute, especially where the special statute was enacted subsequent to the general statute.—Gilkeson v. Missouri Pac. Ry. Co. (Mo.) 138.

(B) Particular Classes of Statutes.

§ 241. A penal statute is to be strictly construed.—Thiebes-Stierlin Music Co. v. Weiss (Mo. App.) 1099.

(C) Time of Taking Effect.

§ 253. Act approved March 19, 1908 (Acts 1908, p. 55, c. 15), relating to the violation of a local option law, would not apply to a transaction made in March of that year in view of Const. § 55.—Boggs v. Commonwealth (Ky.) 433.

(D) Retroactive Operation.

Statutes relating to acknowledgment of conveyance of homestead, see Homestead, § 119.

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I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Lease of road as affecting liability for injuries to passenger, see Carriers, § 306.

II. REGULATION AND OPERATION.

Applicability of instructions to case in action for injuries, see Trial, § 252.

§ 75. An ordinance requiring motormen to keep a vigilant watch for all persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to stop within the shortest time and space practicable consistent with safety of passengers, is a reasonable exercise of police power.—Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 90. Where a standing vehicle is close to the street car track, the fact that a part of the car passes the vehicle in safety will not excuse the company if another part of the car strikes it. —Louisville Ry. Co. v. Flannery (Ky.) 663.

§ 90. A motorman *held* required to stop the car until a vehicle near the track is moved to a place of safety.—Louisville Ry. Co. v. Flannery (Ky.) 663.

§ 94. The violation of an ordinance requiring motormen to keep a vigilant watch for persons on foot, either on the track or moving toward it, is negligence per se.—Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 95. To relieve a street railroad company from liability for killing a child struck by a car on the ground that the child came on the track so close to the car that the motorman, by ordinary care, could not stop it in time to prevent the injury, it must appear that the car was run at a reasonable speed.—Netter's Adm'r v. Louisville Ry. Co. (Ky.) 636.

§ 110. In an action for injuries to a traveler in collision with a street car, the petition *held* to sufficiently charge that the motorman's failure to use ordinary care to discover plaintiff's peril, and his operation of the car at an unsafe speed, and the failure to use any care to stop in time to prevent the injury, were the causes thereof.—Galveston Electric Co. v. Wilkins (Tex. Civ. App.) 538.

§ 114. Evidence in an action for injury to a driver of a steam roller thrown therefrom by collision with a street car *held* to support a finding that the motorman could by ordinary care have avoided the collision after the danger became apparent.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

§ 117. In an action for injuries by being thrown to the ground by catching plaintiff's foot while crossing over a pile of old rails, ties, etc., which defendant had piled along the street, whether defendant had the right to make the repairs in that manner, and used more of the

killed by a street car, evidence *held* sufficient to warrant the submission of the case to the jury on the view that, after she was struck by the car, she was dragged to her death by the motorman's failure to stop it quicker, and that the car could have been stopped sooner than it was. —Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 118. In an action for the death of a child killed by a street car, an instruction *held* not to be subject to an objection that it submitted a question of law and was misleading.—Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 118. In an action for the death of a child, *held*, that there was no error in an instruction relating to contributory negligence.—Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 118. In an action for injury to a steam roller driver thrown therefrom by collision with a street car, *held*, that there was no error in the use of the words "vigilant watch" in an instruction, taking it in its entirety, and especially when considered with an instruction defining ordinary care.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

§ 118. A requested charge in a street car collision case *held* defective and confusing.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

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See Highways; Municipal Corporations, §§ 646–706, 755–821.

SUBLETTING.

See Landlord and Tenant, § 80.

SUBROGATION.

Pleading subrogation as a conclusion, see Pleading, § 8.

§ 1. Subrogation *held* only allowed where there is some equitable reason for it.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

§ 7. Sureties of a sheriff, who have been obliged to make good a default of the sheriff *held* entitled to be subrogated to his rights in an indemnity bond given by attaching creditors. —Dine v. Donnelly (Ky.) 685.

§ 26. One who pays a debt for another voluntarily *held* not ordinarily subrogated to the rights of the creditor.—Jones v. Louisville Tobacco Warehouse Co. (Ky.) 633.

§ 27. Equity will subrogate one advancing money to pay a purchase-money note, reserving a lien on the land, to the creditor's rights under the lien.—Manning v. Green (Tex. Civ. App.) 721.

§ 41. An action by a cross-petition *held* properly brought under Civ. Code Prac. § 96, subsec. 3.—Dine v. Donnelly (Ky.) 685.

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II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 40. Sp. Laws 1897, p. 155, c. 110, § 15, amended by Sp. Laws 1905, p. 263, c. 30, § 15, making persons delinquent in payment of poll taxes required by Sayles' Ann. Civ. St. 1897, art. 5048, subject to road duty, *held* not violative of Const. art. 8, § 1.—Bluitt v. State (Tex. Cr. App.) 168.

§ 42. Laws 1908, p. 156, c. 61, providing for a minimum school tax in cities of the second class, *held* not in violation of Const. § 181, because the tax is nonuniform.—City of Louisville v. Commonwealth (Ky.) 411.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

§ 534. A sale of land for delinquent taxes *held* void under the rule that a bona fide attempt to pay all the taxes frustrated by the mistake of the collector is equivalent to actual payment.—Scroggin v. Ridling (Ark.) 1053.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 581. Under Ky. St. 1909, § 4149 (Russell's St. § 6008), no demand for delinquent taxes is required in case of a nonresident.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

§ 589. Where, in an action for taxes, those for certain years were admittedly barred by limitation, it was error to include them in the judgment.—Morgan v. Board of Councilmen of City of Frankfort (Ky.) 1033.

(C) Remedies for Wrongful Enforcement.

Jurisdiction of police court, see Courts, § 178.
Jurisdiction of quarterly court, see Courts, § 180.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 641. There can be no citation to an estate as an estate to appear to defend an action.—Perry v. Whiting (Tex. Civ. App.) 903.

§ 647. There can be no judgment against an estate as an estate.—Perry v. Whiting (Tex. Civ. App.) 903.

§ 648. Where a suit to foreclose a lien for taxes was brought solely against an estate, and citation was addressed to such estate, and judgment rendered against it, the owner of the property was not bound.—Perry v. Whiting (Tex. Civ. App.) 903.

§ 652. A petition to restrain a sale of land sold to the state for taxes *held* insufficient.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

§ 658. A county clerk's failure to attach to the record of the list and notice of sale of delinquent tax land the certificate required by Mansf. Dig. § 5763, *held* fatal.—Johnson & Burr v. Elder (Ark.) 1066.

X. REDEMPTION FROM TAX SALE.

§ 699. Under Ky. St. 1909, §§ 4152, 4154 (Russell's St. §§ 6010, 6014), the owner of land sold to the state for taxes may devest the state's title after the expiration of two years by paying the taxes, penalties, and interest, prior to a sale of the land by the revenue agent.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 727. Ky. St. 1909, § 4154 (Russell's St. § 6014), regulating the title acquired by the state to land sold to it for taxes and not redeemed, *held* valid.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

§ 730. Under Ky. St. 1909, §§ 4152, 4154 (Russell's St. §§ 6010, 6014), the state, on bidding in land, acquires a lien for taxes and penalty until the redemption period has expired, when the fee vests in the state, if the land is not redeemed.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

§ 734. A county attorney's failure to perform the duties required by Ky. St. 1909, § 4153 (Russell's St. § 6013), with reference to land sold to the state for taxes, does not affect the state's title to land so sold and not redeemed within two years.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

§ 736. Where land sold to the state for taxes was not redeemed within two years, the state's title was not barred by limitation until 15 years after the expiration of the redemption period.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

(B) Tax Deeds.

As color of title, notoriety of possession thereunder, see Adverse Possession, § 30.

(D) Rights and Remedies of Purchaser of Invalid Title.

§ 823. Ky. St. 1909, § 4036 (Russell's St. § 5928), providing for a lien on tax lands on vacation of the sale, *held* applicable to lands sold to the state for taxes, as well as lands sold to individuals.—James v. Blanton (Ky.) 951; Same v. Luscher (Ky.) 954.

TELEGRAPHS AND TELEPHONES.

II. REGULATION AND OPERATION.

Assumption by judge as to facts in instruction in action for negligence in delivery of message, see Trial, § 191.

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Negligent failure to transmit message calling physician as proximate cause of death, see Death, § 17.
Waiver of objections to pleading in action for failure to deliver message, see Pleading, § 418.

§ 26. Act Cong. July 24, 1866, c. 230, 14 Stat. 221, *held* not to give telegraph companies accepting its terms a federal charter rendering them agencies of the federal government, whereby a state would not be able to prescribe conditions upon their right to do a local business in the state.—Western Union Telegraph Co. v. State (Tex. Civ. App.) 194.

§ 27. The law of the state from which a telegram is sent for delivery in another state determines whether the addressee may recover for mental anguish for negligent delay in the delivery of the message at destination.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 31. A telegraph company may prescribe reasonable rules for its business, and reasonable hours during which messages may be sent and delivered at certain offices.—Western Union Telegraph Co. v. Harris (Ark.) 1051.

§ 36. The contractual obligation of a telephone company accepting a message for transmission is to use reasonable diligence to deliver it to the addressee.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 37. A telegraph or telephone company accepting a message for delivery beyond its ordinary delivery limits, and exacting a fee in advance, *held* required to use only reasonable diligence or ordinary care to deliver the message within a reasonable time.—Cumberland Telephone & Telegraph Co. v. Maxberry (Ky.) 447.

§ 38. A transmitting agent who knows, or should know, that on account of the closing of the receiving office there will be delay in delivery of an urgent message must inform the sender of the fact, and the telegraph company is liable for damages resulting from his failure to do so.—Western Union Telegraph Co. v. Harris (Ark.) 1051.

§ 38. A transmitting agent of a telegraph company *held* bound to know the rules of other offices as to office hours.—Western Union Telegraph Co. v. Harris (Ark.) 1051.

§ 56. The addressee of a message may sue a telephone company for mental anguish resulting from the breach of contract to promptly deliver the message.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 57. A contract by a telegraph company for the transmission of a message *held* a contract rendering it liable for the negligence of another company employed in the performance of the contract.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

§ 66. Evidence in an action against a telegraph company for negligence in delivering a message as to what a boy at the hotel to whom the message was delivered said *held* inadmissible.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

§ 66. In an action against a telegraph company for mental anguish caused by negligence in delivering a message, evidence that plaintiff's father had made him a gift of land, and that he was financially unable to visit his father often, *held* admissible.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

§ 66. In an action against a telegraph company for negligence in delivering a message, evidence as to the method of attempting to find an addressee when no address was given except the name of the town *held* inadmissible.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

§ 66. A telephone company sued in Texas by an addressee of a message sent from Arkansas for delivery in Oklahoma, for mental anguish for failure to promptly deliver, *held* to have the burden of proving that the laws of Arkansas do not permit a recovery for mental anguish.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 66. A telephone company sued in Texas for mental anguish for nondelivery of a message sent from Arkansas for delivery in Oklahoma *held* required to show that a recovery could not be had under the laws of Oklahoma for mental anguish for a tort committed therein.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 66. In an action against a telegraph company for failure to deliver a message, thereby depriving the sender of the privilege of buying bank stock, certain evidence *held* admissible.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

§ 66. A sender of a message, suing for the negligent delay in the delivery thereof because he was thereby deprived of the privilege of buying bank stock, need only show that he would have obtained the stock if the message had been promptly delivered to the sendee.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

§ 66. In an action against a telegraph company for negligent delay in delivering a message, thereby depriving the sender of the privilege of buying bank stock, certain evidence *held* to show that the sender would have acquired the stock had the message been promptly delivered.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

§ 66. In an action for failure to transmit a telegram, evidence *held* to justify a finding that if plaintiff had received the message in time she could have attended her father's funeral.—Western Union Telegraph Co. v. McDavid (Tex. Civ. App.) 893.

§ 68. Evidence *held* not to show that one suffered mental anguish because of the nondelivery of a telegram.—Western Union Telegraph Co. v. Archie (Ark.) 1045.

§ 68. A contract by a telephone company for the delivery of a message entered into in the state of Arkansas contains among the substantive provisions the right granted the addressee by Kirby's Dig. § 7947, to recover damages for mental anguish for a failure of a performance of its duty.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

§ 70. In an action against a telegraph company for failing to deliver to plaintiff a message whereby plaintiff was deprived of attending her sister's funeral, rule as to measure of damages stated.—Western Union Telegraph Co. v. Teague (Ky.) 484.

§ 71. There is no fixed rule for measuring damages for failure of a death message, and it must clearly appear that the amount allowed is excessive before it will be disturbed on appeal.—Western Union Telegraph Co. v. McDavid (Tex. Civ. App.) 893.

§ 71. In an action for failure to deliver a message, $1,350 damages *held* not excessive.—Western Union Telegraph Co. v. McDavid (Tex. Civ. App.) 893.

§ 73. Whether the sender of the message, suing for the negligent delay in delivery because he was thereby deprived of the privilege of purchasing bank stock from the sendee, would have obtained the stock had the message been promptly delivered is for the jury.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

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Telegraph Co. v. Sockwell (Ark.) 1046.

§ 74. Requested instructions in an action against a telegraph company for mental anguish caused by negligence in delivering a message *held* properly refused.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

§ 74. In an action against a telephone company for failing to deliver a message, form of instructions as to care required of defendant, duty of delivery under contract, and as to damages, prescribed.—Cumberland Telephone & Telegraph Co. v. Maxberry (Ky.) 447.

§ 74. In an action for failure to deliver a telegram, failure to define "reasonable time" *held* not error.—Western Union Telegraph Co. v. McDavid (Tex. Civ. App.) 893.

TENANCY IN COMMON.

Power of attorney by one joint owner to another for sale of property, see Principal and Agent, § 34.

III. RIGHTS AND LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS.

§ 46. Right of tenant in common, who has purchased the other tenant's interest and given lien notes therefor, to have an artificial division of the property before foreclosure stated.—Burge v. Chestnut (Ky.) 989.

TENDER.

§ 24. The fact that defendant tendered to plaintiffs half the funds collected for them is no defense to an action therefor, if plaintiffs did not accept the money tendered, such tender not amounting to payment, and hence an instruction for defendant, if he paid over the money less 50 per cent. thereof, and such amount was a reasonable compensation, was properly refused.—Jenkins v. Clopton (Mo. App.) 759.

TERMS.

Of courts, see Courts, § 74.
Of leases, see Landlord and Tenant, § 80.
Of office, see Officers, §§ 52–56.

TERRITORIES.

Presumptions as to continuance of rules of construction of territorial court after admission of territory as a state, see Evidence, § 67.
Territorial courts, see Courts, § 428.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY.

See Wills, §§ 50–55.

THEFT.

See Larceny.

THEORY.

Review as dependent on theory of cause in trial court, see Appeal and Error, § 856.

TIMBER.

See Logs and Logging.

For particular acts in or incidental to judicial proceedings.

Appointment of appraisers of exempt property, see Exemptions, § 125.
Filing certificate of trial court as to time of perfecting appeal as condition precedent to affirmance for failure to file transcript, see Appeal and Error, § 1127.
Filing findings, see Trial, § 390.
Motion for new trial, see New Trial, § 118.
Restraining execution, see Execution, § 172.

For particular acts not judicial.

Claiming exemptions, see Exemptions, § 119.
Delivery of goods sold, see Sales, § 81.
Filing certificates and petitions of nomination, see Elections, § 139.
Filing labor lien, see Master and Servant, § 82.
Injuries to insured, see Insurance, § 539.
Performance of contract, see Contracts, § 212.
Taking effect of statute, see Statutes, § 253.

§ 11. Where, on January 29th, parties were allowed six months within which to file a bill of exceptions, bill filed July 30th, at 58 minutes past 11 p. m., was too late.—Judkins v. Myers (Ark.) 1045.

TITLE.

See Escheat.
Color of title, see Adverse Possession.
Execution sale affecting, see Execution, § 283.
Of statutes, see Statutes, §§ 109, 113.
Removal of cloud, see Quieting Title.
Retention of apparent title by grantor, see Fraudulent Conveyances, § 154.
Tax titles, see Taxation, §§ 727–823.
Title insurance, see Insurance, § 504.
Title of lessor, see Landlord and Tenant, § 50.
Title to realty as question in issue affecting appellate jurisdiction, see Courts, § 231.
To realty as affecting jurisdiction of particular appellate courts, see Courts, § 223.
To sustain trespass, see Trespass, § 19.
To sustain trespass to try title, see Trespass to Try Title, § 8.

TOOLS.

Liability of employer for defects, see Master and Servant, §§ 101–129.

TORTS.

Causing death, see Death, §§ 17–101.

Liabilities of particular classes of persons.

See Municipal Corporations, §§ 729–821.
Agents, see Principal and Agent, § 148.
Employés, see Master and Servant, §§ 302–330.

Particular torts.

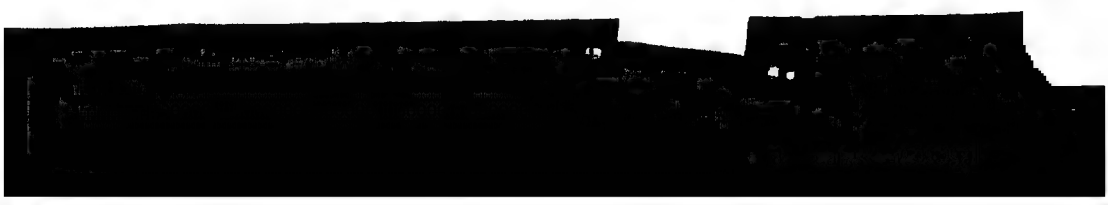
See Conspiracy, §§ 19, 21; False Imprisonment, §§ 3, 7; Forcible Entry and Detainer, §§ 6–29; Fraud; Libel and Slander; Malicious Prosecution; Negligence; Trespass; Trover and Conversion.

Remedies for torts.

See Trespass, §§ 19–49; Trover and Conversion, § 44.
Measure of damages, see Damages, § 97.

TOWNS.

See Municipal Corporations; Schools and School Districts, § 12.



I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

Judicial notice of incorporation, see Criminal Law, § 304.
Presumptions as to territorial extent, see Evidence, § 84.

TRANSCRIPTS.

Of record for purpose of review, see Appeal and Error, § 601; Criminal Law, §§ 1088–1122.

TRANSITORY ACTIONS.

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TRESPASS.

Injuries to trespassers, see Railroads, §§ 274–282.
Liability for injuries from trespassing animals, see Animals, §§ 98, 100.
Liability of officer seizing and selling exempt property, see Exemptions, § 139.
Restraining trespass, see Injunction, § 44.
To the person, see False Imprisonment.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

§ 6. A purchaser of real estate, who unlawfully interferes with the personal property of another, stored in a building on the premises either under a verbal or written contract with the vendor, is liable for the damages to the property—Temple v. Duran (Tex. Civ. App.) 253.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 19. In an action for timber trespass on land, plaintiff must recover on his own title, not on the weakness of defendant's title.—Ashcraft v. Courtney (Ky.) 625.

(C) Evidence.

§ 45. In an action for injuries to personal property, certain evidence *held* admissible on the issue of exemplary damages.—Temple v. Duran (Tex. Civ. App.) 253.

§ 45. In an action for injuries to saloon fixtures, certain evidence as to another's ownership of the fixtures *held* inadmissible.—Temple v. Duran (Tex. Civ. App.) 253.

§ 45. In an action for damages to personal property wrongfully removed from a leased building, the consent of a third person to the removal *held* immaterial on the issue of actual damages, in the absence of proof that the third person had authority to give such consent.—Temple v. Duran (Tex. Civ. App.) 253.

(D) Damages.

§ 49. In an action for injuries to personal property, plaintiff *held* entitled to only recover the damages suffered on account of being deprived of the use of the property, in violation of the contract had with a third person who owned the same.—Temple v. Duran (Tex. Civ. App.) 253.

(E) Trial, Judgment, and Review.

§ 68. In an action for damages to personal property, an instruction on the measure of damages *held* sufficient, in the absence of a request supplying the omission complained of.—Temple v. Duran (Tex. Civ. App.) 253.

TRESPASS TO TRY TITLE.

See Ejectment.
Institution of action of as waiver of right to specific performance of contract, see Specific Performance, § 7.

I. RIGHT OF ACTION AND DEFENSES.

§ 8. In trespass to try title by a grantee of the purchaser of the land from the state, defendant cannot show that the purchaser perpetrated a fraud on the state, without showing a right in himself to the land other than through the purchaser.—Elliott v. Morris (Tex. Civ. App.) 209.

II. PROCEEDINGS.

§ 38. Plaintiffs in trespass to try title, being deprived of the claim of common source of title, must deraign title from the sovereignty.—Merriman v. Blalack (Tex. Civ. App.) 552.

TRIAL.

See Witnesses.
Trespass to try title to real property, see Trespass to Try Title.

Proceedings incident to trials.

See Continuance; New Trial; Reference.
Conformity of judgment to verdict or findings, see Judgment, § 256.
Entry of judgment after trial of issues, see Judgment, §§ 193–256.
Summoning and impaneling jury, see Jury, §§ 58–72.

Trial of actions by or against particular classes of persons.

See Master and Servant, §§ 284–296; Railroads, §§ 350, 400, 401, 446; Street Railroads, §§ 117–118.
Telegraph or telephone company, see Telegraphs and Telephones, §§ 73–74.

Trial of particular civil actions or proceedings.

See Conspiracy, § 21; Libel and Slander, § 123; Money Received, § 19; Negligence, § 136; Quieting Title, § 47; Trespass, § 68.
For breach of contract, see Sales, § 388.
For breach of contract of transportation, see Carriers, § 278.
For delay in delivery of telegram, see Telegraphs and Telephones, §§ 73–74.
For injuries caused by defective street, see Municipal Corporations, § 821.
For injuries caused by negligent use of street, see Municipal Corporations, § 706.
For injuries from operation of street railroad, see Street Railroads, §§ 117–118.
For injuries to animals from operation of railroad, see Railroads, § 446.
For injuries to passenger, see Carriers, §§ 320, 321.
For injuries to persons at railroad crossings, see Railroads, § 350.
For injuries to persons on or near railroad tracks, see Railroads, §§ 400, 401.
For injuries to servant, see Master and Servant, §§ 284–296.
For loss of or injuries to shipment of live stock, see Carriers, § 230.
For money collected by attorney, see Attorney and Client, § 128.
For purchase price, see Sales, § 364.
For value of services, see Work and Labor, § 30.
On insurance policy, see Insurance, §§ 668, 669.
Probate proceedings, see Wills, §§ 324, 332.
Suits to set aside fraudulent conveyances, see Fraudulent Conveyances, §§ 309, 310.

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Trial of criminal prosecutions.

See Burglary, § 46; Criminal Law, §§ 590–614, 622–894; Embezzlement, § 48; Gaming, § 102; Homicide, §§ 271–313; Larceny, §§ 68, 79; Perjury, § 36; Sodomy, § 7.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 3. Where, to avoid a multiplicity of suits, the petition as authorized by Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), unites a count to quiet title under section 650 with a count in ejectment, the court may grant separate trials.—Mann v. Doerr (Mo.) 86.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 29. An admonition by the judge against smoking in the courtroom *held* proper.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

IV. RECEPTION OF EVIDENCE.

Authority of court to adjourn session to place of residence of sick witness in order to take his testimony, see Courts, § 74.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 58. Where no tenable objection is presented to the introduction of testimony, a request to withdraw the same *held* addressed to the discretion of the trial court.—Postal Telegraph Cable Co. of Texas v. Harriss (Tex. Civ. App.) 358.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 79. When on the first appearance of improper testimony, counsel raised the statute of frauds, and his objection on that ground is overruled, he need not continuously interpose a like objection to all similar testimony in order to preserve the point once clearly made.—McKee v. Rudd (Mo.) 312.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

Exceptions to for purposes of review in criminal prosecutions, see Criminal Law, § 1037.
Harmless error, see Appeal and Errror, § 1060; Criminal Law, § 1171.
Objections to for purposes of review, see Appeal and Errror, § 207.

§ 118. Counsel may present to the jury their theory of the law applicable, so that, where plaintiff alleged in an action for injuries caused by being struck by a projection from a passing train that the train was running at a high speed, plaintiff's counsel could argue that such excessive speed was negligence.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

§ 121. A statement of plaintiff's counsel, in argument, that the statute (Rev. St. 1895, art. 2268) allowed witnesses only $1 a day, and that defendant was paying his witnesses from C. more than such sum, *held* not reversible error.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 121. In an action for injuries to a railroad employé, certain of defendant's witnesses having testified that they had been furnished free transportation to the place of trial, the court did not err in permitting plaintiff's attorney to argue that this was a violation of Gen. Laws 1907, p. 93, c. 72.—Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.) 876.

§ 121. A statement made by plaintiff's counsel in argument, concerning the testimony of a physician, *held* proper.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 133. Where the court charged that in arriving at a verdict the jury were to be governed by the law given in the instructions, and the charges given were correct, any error in the views of counsel as to the law applicable stated to the jury in argument could not have misled the jury.—St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

As to particular facts, issues or subjects.

See Accord and Satisfaction, § 27; Damages, § 208.
Construction of contract of sale, see Sales, § 88.
Contributory negligence, see Negligence, § 136.
Contributory negligence of passenger, see Carriers, § 347.
Contributory negligence of person injured on street, see Municipal Corporations, § 706.
Contributory negligence of servant, see Master and Servant, § 289.
Incompetency or negligence of fellow servant, see Master and Servant, § 287.
Misrepresentations in securing power of attorney, see Principal and Agent, § 24.
Negligence of master, see Master and Servant, § 286.
Validity of power of attorney, see Principal and Agent, § 193.

In particular civil actions or proceedings.

See Libel and Slander, § 123; Malicious Prosecution, § 71.
For delay in delivery of telegram, see Telegraphs and Telephones, § 73.
For injuries caused by defective street, see Municipal Corporations, § 821.
For injuries caused by negligent use of street, see Municipal Corporations, § 706.
For injuries from operation of street railroads, see Street Railroads, § 117.
For injuries to animals from operation of railroad, see Railroads, § 446.
For injuries to passengers, see Carriers, § 320.
For injuries to persons at railroad crossings, see Railroads, § 350.
For injuries to persons on or near railroad tracks, see Railroads, § 400.
For injuries to servant, see Master and Servant, §§ 284–289.
On insurance policy, see Insurance, § 668.

§ 139. A peremptory instruction for plaintiffs should not be given if there is any evidence to support the contention of defendant.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 986.

§ 139. A peremptory instruction, involving the absence of a fact, may not be given when one has testified to the existence of the fact.—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 139. The weight of evidence is for the jury.—Gordon v. Kansas City Southern Ry. Co. (Mo.) 80.

§ 140. The question of the truth or falsity of testimony is for the jury.—Burgie v. Bailey (Ark.) 266.

§ 140. The weight to be attached to the testimony of witnesses *held* for the jury.—Slezak v. St. Louis Transit Co. (Mo. App.) 1095.

§ 141. Where the facts are undisputed, and but one legitimate inference can be drawn from them, the court, and not the jury, should determine their effect.—Western Union Telegraph Co. v. Teague (Ky.) 484.

§ 143. Where the evidence was conflicting upon material facts, a peremptory instruction was properly refused.—Phenix Jellico Coal Co. v. Lemp (Ky.) 418.

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§ 143. Where the weight of the evidence for plaintiff and defendant is equal on a disputed question of fact, a motion to direct a verdict is properly overruled.—Cincinnati, N. & C. Ry. Co. v. Cooke (Ky.) 467.

§ 143. A conflict in the proof becomes a question for the jury.—Spencer v. St. Louis Transit Co. (Mo.) 108.

§ 143. Where the evidence of two sets of witnesses is conflicting, the issue is for the jury.—Haynes-Langenberg Mfg. Co. v. Houser (Mo. App.) 1078.

(B) Demurrer to Evidence.

§ 150. Failure of a bill to set aside a contract and deed to contain an offer to put defendant in statu quo ante *held* not ground for sustaining a demurrer to any evidence to support the case made.—Haydon v. St. Louis & S. F. R. Co. (Mo.) 15.

(D) Direction of Verdict.

Presumptions as to on appeal or error, see Appeal and Error, § 927.

§ 169. To sustain an assignment complaining of the refusal to give a peremptory instruction for a party having the burden of proving a fact, the evidence establishing the fact must be such as authorizes the court to assume as a matter of law that the fact was established.—Western Union Telegraph Co. v. Parsley (Tex. Civ. App.) 226.

VII. INSTRUCTIONS TO JURY.

Assignment of errors for purpose of review, see Appeal and Error, § 730.
Exceptions for purposes of review in criminal prosecutions, see Criminal Law, § 1038.
Harmless error, see Appeal and Error, §§ 1066–1068; Criminal Law, §§ 1172, 1173.
Incorporation in appeal record, see Appeal and Error, § 525.
Review of rulings on as dependent on motion for new trial, see Appeal and Error, § 292.

As to particular issues or subjects.

See Adverse Possession, § 116; Damages, § 216.
Assumption of risk by servant injured, see Master and Servant, § 295.
Contributory negligence of servant injured, see Master and Servant, § 296.
Negligence of master, see Master and Servant, § 293.

In particular civil actions or proceedings.

See Trespass, § 68.
For breach of contract, see Sales, § 388.
For injuries from operation of street railroad, see Street Railroads, § 118.
For injuries to passenger, see Carriers, § 321.
For injuries to persons on or near tracks, see Railoads, § 401.
For injuries to servant, see Master and Servant, §§ 291–296.
For negligence of telegraph or telephone company, see Telegraphs and Telephones, § 74.
For purchase price, see Sales, § 364.
On insurance policy, see Insurance, § 669.
Probate proceedings, see Wills, § 332.
To set aside fraudulent conveyance, see Fraudulent Conveyances, § 309.

(A) Province of Court and Jury in General.

§ 191. In an action against a telegraph company for mental anguish caused by negligence in delivering a message to plaintiff, an instruction *held* not erroneous as assuming facts.—Western Union Telegraph Co. v. Sockwell (Ark.) 1046.

§ 191. In an action for injuries to a passenger while endeavoring to alight from a street car, the court *held* entitled to assume that the conductor "had reason to suspect" that she was in the act of alighting.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 191. Evidence *held* to justify a clause in an instruction that a car from which plaintiff was endeavoring to alight when injured started with a "sudden movement."—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 191. A request to charge assuming as a fact that rheumatism and sciatica might not result from injury to plaintiff's spinal cord or nerves was properly refused.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 191. An instruction *held* not to assume that when a brakeman was injured he was standing between the rails of the track.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 192. It is not error for the court to assume in its charge a fact established by undisputed testimony.—Stone v. Stitt (Tex. Civ. App.) 187.

§ 192. It is not error to assume, in the instructions, a fact shown by the undisputed evidence.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 193. In an action for conspiracy an instruction *held* not objectionable as an intimation that in the court's opinion the evidence on the issue of conspiracy was sufficient.—Weatherred v. Finley (Tex. Civ. App.) 895.

§ 194. In an action by a light and heating company for breach of a contract to light and heat a hotel, an instruction *held* to eliminate an issue as to plaintiff's violation of an agreement to furnish hot water, and to this extent to be on the weight of the evidence, and erroneous.—Long v. Consumers' Light & Heating Co. (Tex. Civ. App.) 172.

§ 194. An instruction which states the meaning of a written instrument admitted in evidence, and which instructs the jury as to its legal effect, is not on the weight of the evidence.—Temple v. Duran (Tex. Civ. App.) 253.

§ 194. An instruction *held* not on weight of evidence.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 194. In an action for conspiracy a requested charge *held* objectionable as on the weight of the evidence.—Weatherred v. Finley (Tex. Civ. App.) 895.

(B) Necessity and Subject-Matter.

§ 219. In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, the refusal to give a charge defining the term "sudden impulse" *held* not erroneous.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 219. The court is not required to define a term of ordinary use when used in its popular sense.—Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

(C) Form, Requisites, and Sufficiency.

§ 235. It is error to instruct that a certain inference may or may not be drawn from a particular fact or condition, when such inference must be drawn from all the facts and circumstances in the case relating thereto; such instruction being on the weight of the evidence.—Gallagher v. Neilon (Tex. Civ. App.) 564.

§ 237. A requested charge that the jury should find for defendant if there was any doubt in their mind, from the testimony, whether an instrument sued on was a bill of sale or a mortgage, *held* properly refused.—Lewter v. Lindley (Tex. Civ. App.) 178.

§ 237. A charge, requiring a party to "establish" his case by a preponderance of the evidence, is improper.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

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(D) Applicability to Pleadings and Evidence.

§ 251. Instructions must not only be within the scope of the evidence, but they must be within the scope of the petition.—Hufft v. St. Louis & S. F. R. Co. (Mo.) 120.

§ 251. Instructions, proceeding on the theory that one of two causes of action on which plaintiff was not permitted to recover was the only one alleged, *held* properly denied.—Lewis v. Wabash R. Co. (Mo. App.) 1090.

§ 251. Where a party alleged facts entitling him to the foreclosure of a deed operating as a mortgage, an instruction authorizing a verdict for defendant, not alleging or proving facts sufficient to defeat the foreclosure, *held* erroneous. —Elliott v. Morris (Tex. Civ. App.) 209.

§ 251. In an action for injuries to pedestrian on a railroad track struck by a train; an instruction submitting the issue of contributory negligence, *held* properly refused.—Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871.

§ 251. Refusal to submit an issue of contributory negligence in an action against a carrier *held* not error.—Texas & P. Ry. Co. v. Henson (Tex. Civ. App.) 1127.

§ 252. It is not error to refuse instructions requested, where they are inapplicable to the evidence.—Guion Mercantile Co. v. Campbell (Ark.) 164.

§ 252. Where, in an action for breach of a building contract, there was no evidence that certain statements by the builder concerning the building had been omitted from the contract by fraud or mistake, the court erred in submitting such issue to the jury.—Hartford Mill Co. v. Hartford Tobacco Warehouse Co. (Ky.) 477.

§ 252. Where the evidence is that only the engineer of a train discovered the peril of a section hand on the tracks, *held*, the instructions should be not as to discovery of the peril by the "agents and servants" of the company, but by the "engineer."—Chesapeake & O. Ry. Co. v. Lang's Adm'x (Ky.) 993.

§ 252. Instructions should be based on the evidence, and a view of the case should not be set out in an instruction when there is no evidence to support it.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

§ 252. Where there was evidence, in an action for injury to a brakeman, of no negligence of a superior servant of the railroad company, except that of its engineer, the instructions as to finding negligence should have been as to that of the "engineer," instead of that of its "agents" and superior "servants."—Louisville & N. R. Co. v. Pearcy (Ky.) 1037.

§ 252. The court was not required to charge that a passenger could not recover for injuries received from a premature start as she was endeavoring to alight where there was no evidence of the time given.—Westervelt v. St. Louis Transit Co. (Mo.) 114.

§ 252. An instruction *held* error; it not being supported by the evidence.—Reynolds v. United Rys. Co. (Mo. App.) 1093.

§ 252. A request to charge *held* properly refused as unsupported by the evidence.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 252. A request to charge, submitting an issue not raised by the evidence, is properly refused.—Galveston Electric Co. v. Wilkins (Tex. Civ. App.) 538.

§ 252. In trespass to try title, where defendant claimed by limitations, a charge that the inclosure of a tract claimed would be sufficient, notwithstanding temporary breaks in the fence, if enough was left to give notice of defendant's adverse claims, was properly refused where the evidence did not show any break in the only fence constructed by defendant before the period of limitations began to run.—Hedrick v. Kilgore (Tex. Civ. App.) 892.

§ 253. Instructions requested for defendant which ignored facts essential to a finding for him were properly refused.—Jenkins v. Clopton (Mo. App.) 759.

§ 253. A request to charge *held* properly refused as ignoring other injuries testified to than that specified.—Pecos & N. T. R. Co. v. Coffman (Tex. Civ. App.) 218.

§ 253. An instruction ignoring issues pleaded and sustained by evidence sufficient to raise a jury question is properly refused.—Reagan Round Bale Co. v. Dickson Car Wheel Co. (Tex. Civ. App.) 526.

§ 253. An instruction, in an action for injuries to a traveler in collision with a street car, *held* not objectionable for ignoring the question whether the car could have been stopped in time to have avoided the collision with safety to passengers.—Galveston Electric Co. v. Wilkins (Tex. Civ. App.) 538.

(E) Requests or Prayers.

§ 255. In an action for a balance due on an account, *held* that, if defendants were not satisfied with a charge, they should have requested a specific instruction explaining its meaning.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 255. The court is not bound to instruct on defendant's theory of the case unless requested to do so by proper instruction.—Jenkins v. Clopton (Mo. App.) 759.

§ 256. Where an instruction is not affirmatively erroneous, a party must request a proper charge supplying the omissions complained of. —Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232.

§ 260. It is not error to refuse requested instructions, where they are fully covered by others given.—Guion Mercantile Co. v. Campbell (Ark.) 164; Woodson v. Prescott & N. W. R. Co. (Ark.) 273; Jenkins v. Clopton (Mo. App.) 759; Knowles v. Northern Texas Traction Co. (Tex. Civ. App.) 232; Galveston Electric Co. v. Wilkins (Tex. Civ. App.) 538; Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577; St. Louis Southwestern Ry. Co. of Texas v. Wilcox (Tex. Civ. App.) 588; Same v. Ford (Tex. Civ. App.) 709; Missouri, K. & T. Ry. Co. of Texas v. Mitcham (Tex. Civ. App.) 871; Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 883.

§ 260. Instructions given in an action for injuries in a railroad crossing accident *held* to sufficiently inform the jury on the issue of contributory negligence to render harmless the refusal of a certain charge.—Palmer v. Chicago & A. R. Co. (Mo. App.) 1087.

§ 260. In a will contest on the ground of undue influence and lack of testamentary capacity, the refusal of special charges *held* proper in view of the general charge.—Gallagher v. Neilon (Tex. Civ. App.) 564.

§ 260. In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, the refusal to give a charge on contributory negligence *held* not erroneous

in view of the charge given.—Trinity & B. V. Ry. Co. v. Elgin (Tex. Civ. App.) 577.

§ 260. It was not error to refuse a requested charge where the facts grouped therein were sufficiently grouped and submitted in the main charge.—St. Louis Southwestern Ry. Co. of Texas v. Holt (Tex. Civ. App.) 581.

§ 261. A party cannot complain of the refusal to give a charge unless it is correct in every particular.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 262. The insertion in an instruction given at plaintiff's request of a requirement which she was not bound to prove in order to recover *held* not to preclude her from having the case submitted in another instruction stating only the facts essential to her recovery.—Groshong v. United Rys. Co. of St. Louis (Mo. App.) 1084.

(G) Construction and Operation.

§ 295. An abstract instruction, if not based on the evidence, *held* not reversible error.—C. H. Smith Tie & Timber Co. v. Weatherford (Ark.) 943.

§ 295. Instructions on assumption by a brakeman of risk of unsafe condition of railroad track, *held* not calculated to confuse and mislead the jury.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

§ 295. Paragraph of a charge cannot be considered as assuming a fact, when other paragraphs clearly leave it to the jury.—St. Louis Southwestern Ry. Co. of Texas v. Ford (Tex. Civ. App.) 709.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 307. It is the better practice not to allow the jury to take papers to the jury room for examination after the case is submitted unless by consent of counsel.—Watson's Ex'r v. Watson (Ky.) 626.

IX. VERDICT.

Harmless error, see Appeal and Error, § 1070.
Presumptions as to on appeal or error, see Appeal and Error, § 930.

(A) General Verdict.

§ 333. In an action on a note and to foreclose a vendor's lien, the verdict, when aided by the petition, *held* sufficiently definite.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 343. The petition may be looked to, to aid in construing the verdict.—Samples v. Wever (Tex. Civ. App.) 1129.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

§ 390. Acts 1st Called Sess. 30th Leg. 1907, p. 446, c. 7, § 1, authorizes the filing of conclusions of law and fact within 10 days after adjournment of the court, without a previous order.—Kimbell v. Powell (Tex. Civ. App.) 541.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 412. Where defendants, basing their objection on the statute of frauds, urged that plaintiff was not entitled to make proof of his allegations by parol evidence, and the objection to oral proof is overruled, they did not afterwards waive the objection by voluntarily testifying to the alleged conversations as understood by them.—McKee v. Rudd (Mo.) 312.

§ 412. The statute of frauds, raised by defendants' general denial, was not waived by requesting a finding of facts based on all the testimony, a part of which had been admitted over their objection, based on the statute.—McKee v. Rudd (Mo.) 312.

§ 412. The statute of frauds raised by defendants' general denial *held* not to have been waived by a request for declarations of law, nor by a motion for a new trial which failed to mention the statute.—McKee v. Rudd (Mo.) 312.

§ 424. Error in refusing a charge as to the burden of proof in an action for injuries to a passenger *held* not cured by the giving of a special charge in conflict with a charge given for plaintiff.—International & G. N. R. Co. v. Duncan (Tex. Civ. App.) 362.

TROVER AND CONVERSION.

Conversion by officer seizing and selling exempt property, see Exemptions, § 139.

II. ACTIONS.

(D) Damages.

§ 44. The general rule is that in trover the measure of damages is the value of the property, with interest (in the discretion of the jury) from the time of its conversion.—Winstead v. Hicks (Ky.) 1018.

TRUST DEEDS.

See Mortgages.

TRUSTS.

Appointment of new trustee in mortgage, see Mortgages, § 342.
Combinations to monopolize trade, see Monopolies, § 18.
Effect of trust on limitation, see Limitation of Actions, § 102.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§§ 17, 18. A parol agreement of the grantee in a conveyance of land to hold it for the use and in trust for the one furnishing the consideration is valid and not within the statute of frauds.—Smith v. Smith (Ky.) 1002.

§ 25. At common law a use or trust was not required to be declared in any particular way.—Smith v. Smith (Ky.) 1002.

§ 41. In an action on secured notes the burden of showing that a trust to resell the property was different from that shown by the notes and mortgage was upon defendant.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

(B) Resulting Trusts.

§ 63. Though under Ky. St. § 2353 (Russell's St. § 2050), resulting trusts are abolished, the grantee in a conveyance is nevertheless liable to those contributing the purchase money, as for money had and received; the status of the parties being that of trustee and cestui que trust under an express trust.—Smith v. Smith (Ky.) 1002.

§ 72. A "resulting trust" is one arising on the naked fact that one furnishes the consideration, while the title is taken to another, a stranger, without an agreement as to the use or trust.—Smith v. Smith (Ky.) 1002.

(C) Constructive Trusts.

§ 95. Where the legal title to property has been obtained through actual fraud, equity impresses a constructive trust on the property in favor of the one equitably entitled thereto.—Bragg v. Hartney (Ark.) 1059.

§ 95. A constructive trust *held* created in favor of the heirs of one who paid the price of

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trust to administer complete justice.—Gilliean v. Witherspoon (Tex. Civ. App.) 909.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(A) Rights of Cestui Que Trust as against Trustee.

§ 336. If a verbal trust to convey property on certain terms was legal, the beneficiary must enforce it according to the terms of the agreement, and cannot enforce the trust as he thinks it should have been established by the agreement.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 349. Where the legal title to property has been obtained through actual fraud, equity impresses a constructive trust on the property and may reach it in the hands of the wrongdoer or a subsequent holder.—Bragg v. Hartney (Ark.) 1059.

§ 358. No change in the form of trust property will prevent the beneficiary from reaching it if it can be identified as a distinct fund or specifically separated.—McCormick v. McCormick's Adm'r (Ky.) 450.

TUNNELS.

Duty of master to furnish servant a safe place to work, see Master and Servant, §§ 118, 205.

UNDUE INFLUENCE.

Procuring making of will, see Wills, §§ 155, 156.

UNIONS.

Of churches, see Religious Societies, § 34.

UNITED STATES.

See Census.
Courts, see Courts, §§ 289, 428; Removal of Causes.
Public lands, see Public Lands, §§ 26–61.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

USAGES.

See Customs and Usages.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 1. "Usury" defined.—Briggs v. Steel (Ark.) 754.

§ 30. A sale of goods at a profit of from 10 to 20 per cent., to secure a profit on the goods, and not to evade the usury law, *held* not in itself usurious.—Briggs v. Steel (Ark.) 754.

§ 31. An agreement between creditor and debtor that the former should purchase mortgaged property and resell it to the debtor for the price paid plus an attorney's fee paid out in attempting to collect a debt from the debtors prior to their adjudication in bankruptcy was valid, and was not usurious for including the attorney's fee.—Forsythe v. Lexington Banking & Trust Co. (Ky.) 962.

VACANCY.

In office, see Officers, §§ 52–56.

VALUE.

Limits of jurisdiction, see Courts, § 231.

VARIANCE.

In names in deed, see Deeds, § 45.

VELOCIPEDES.

Railroad velocipedes, liability of master for injuries to servant in use of, see Master and Servant, §§ 210, 236, 248.

VENDOR AND PURCHASER.

See Sales.
Adverse possession, see Adverse Possession, § 63.
Conclusiveness of judgment as against a prior grantee, see Judgment, § 682.
Death of principal as revocation of power of attorney to sell land, see Principal and Agent, § 43.
Purchasers at sale on execution, see Execution, § 283.
Purchasers at tax sale. see Taxation, §§ 727–736, 823.
Purchasers of school lands, see Public Lands, § 54.
Purchasers of swamp lands, see Public Lands, § 61.
Specific performance of contract, see Specific Performance.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 15. Facts *held* not to show a partial or total failure of consideration for a note given by a purchaser.—Samples v. Wever (Tex. Civ. App.) 1129.

§ 27. An instrument *held* not a valid bond for title.—Burchel v. Withers (Ky.) 469.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

Refusal to accept incumbered title as waiver of right to specific performance, see Specific Performance, § 7.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

§ 207. A contract for the sale of land vested in the purchaser rights which he could transfer to another.—Durham v. Breathwit (Tex. Civ. App.) 890.

(B) As to Third Persons in General.

Operation against vendee of estoppel against vendor, see Estoppel, § 98.

(C) Bona Fide Purchasers.

§ 230. A railroad company's successor *held* charged with notice of its predecessor's covenant in a deed to construct a station on land conveyed to it for a right of way.—Louisville, H. & St. L. Ry. Co. v. Baskett (Ky.) 957.

§ 230. A deed executed under a power of attorney authorizing sale of heirs' interest in estate of their grandfather *held* to pass the entire interest of heirs in community property of

erty from defendants to discover whether it was community property unless they had notice of that fact; defendants being heirs.—Merrill v. Bradley (Tex. Civ. App.) 561.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

Right of subrogation by party paying note for purchase price, see Subrogation, § 27.

§ 251. Vendor's intention to retain the superior title should be given effect where it can be gathered from the language used.—Lipscomb v. Fuqua (Tex. Civ. App.) 193.

§ 280. A variance between the petition and the proof *held* corrected by the subsequent pleadings justifying a judgment foreclosing a contract lien.—Melton v. Beasley (Tex. Civ. App.) 574.

§ 296. Instrument *held* not to vest the absolute title to the land in the purchaser, with an implied lien only for the unpaid purchase money, but to show an intent that the superior title should remain in vendor until full performance by the purchaser.—Lipscomb v. Fuqua (Tex. Civ. App.) 193.

(B) Actions for Purchase Money.

§ 308. A purchaser, who has received a conveyance with warranty and has been put in possession, cannot resist payment because of a defective title, unless vendor is insolvent, or a nonresident, or has practiced actual fraud.—Atkinson v. Hager (Ky.) 955.

§ 315. In an action by heirs to recover the price of lands conveyed by their ancestor, evidence *held* to support a finding that the actual consideration was different from that recited in the deed, and that it was not paid.—Stamper v. Cornett (Ky.) 623.

VII. REMEDIES OF PURCHASER.

Refusal to accept incumbered title as waiver of right to specific performance, see Specific Performance, § 7.

(A) Recovery of Purchase Money Paid.

Liability of depositary of earnest money, see Depositaries, § 4.

VENUE.

Of action for libel, see Libel and Slander, § 75.

I. NATURE OR SUBJECT OF ACTION.

§ 5. The words "lien, or other incumbrance or charge," in Civ. Code Proc. § 62, subd. 3, requiring an action for the sale of real property under a mortgage, lien, or other incumbrance or charge, to be brought in the county wherein the subject of the action is situated, *held* not to embrace an attachment lien.—Hatton v. Rogers (Ky.) 698.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 30. Under Civ. Code Prac. § 79, service of summons on defendant in P. county *held* not to authorize a judgment against him in E. county, where he did not reside in the latter county when the action was brought there.—Hatton v. Rogers (Ky.) 698.

VERDICT.

Directing verdict in civil actions, see Trial, § 169.

Operation and effect as curing defects in pleadings, see Pleading, §§ 409–435.
Review on appeal or writ of error, see Appeal and Error, §§ 999–1004.
Setting aside, see New Trial, § 75.

VERIFICATION.

Of account of witness for fees and mileage, see Witnesses, § 32.
Of petition in election contest, see Elections, § 285.

VESTED REMAINDERS.

Creation, see Wills, §§ 629, 634.

VESTED RIGHTS.

Protection, see Constitutional Law, § 105.

VICE PRINCIPALS.

See Master and Servant, §§ 181–202.

VILLAGES.

See Municipal Corporations.

VOTERS.

See Elections.

WAGES.

See Master and Servant, § 82.

WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Pleading, §§ 409–435; Trial, §§ 412, 424.
By next friend of insane person, see Insane Persons, § 94.
Error waived in appellate court, see Appeal and Error, §§ 1075, 1078.
Record on appeal as writ of error, see Appeal and Error, § 644.
Transfer of causes as between different courts, see Courts, § 488.

Of rights or remedies.

See New Trial, §§ 102–108; Specific Performance, § 7.
Acceptance of appointment as guardian ad litem, see Infants, § 81.
Affidavit of qualifications of next friend of insane person, see Insane Persons, § 94.
Exemption from execution, see Exemptions, §§ 89, 98.
Forfeiture of insurance, see Insurance, § 330.
Forfeiture of oil lease, see Mines and Minerals, § 77.
Right to appeal, see Appeal and Error, § 165.

WARDS.

See Guardian and Ward.

WARNING.

Duty of master to warn servant of danger, see Master and Servant, § 150.
Necessity of warning to accused before making statement in examining trial, see Criminal Law, § 539.

WARRANTY.

On sale of goods, see Sales, § 279.

WATERS AND WATER COURSES.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 171. In an action against a railroad for causing obstruction of water of a creek by a bridge, an instruction making its liability depend on whether the bridge obstructed water to a greater extent than an old one *held* not the issue which should have been submitted.—Southern Ry. Co. v. A. M. E. Church's Trustees of Harrodsburg (Ky.) 972.

§ 178. Where, at the time of suit against a railroad for flooding land, it has depreciated by reason thereof, the owners may recover for such depreciation, though they do not sue for future damages.—Madisonville, H. & E. R. Co. v. Gatton (Ky.) 640.

§ 178. A verdict of $200 against a railroad for diverting a water course and overflowing land *held* not so palpably against the evidence or excessive as to indicate passion or prejudice.—Madisonville, H. & E. R. Co. v. Gatton (Ky.) 640.

§ 178. Rule stated as to the damages recoverable for obstructing water of a creek by a bridge on a railroad, where only two overflows, occurring some months apart and lasting only a short time, are complained of.—Southern Ry. Co. v. A. M. E. Church's Trustees of Harrodsburg (Ky.) 972.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 196. A private water company *held* not required to install a filter plant under its contract with the city.—City of Georgetown v. Georgetown Water, Gas, Electric & Power Co. (Ky.) 428.

(B) Irrigation and Other Agricultural Purposes.

Injunction to restrain interference with canal, see Injunction, § 136.

WAYS.

Private rights of way, see Easements.
Public ways, see Highways; Municipal Corporations, §§ 646-706, 755-821.

WEAPONS.

Necessity of special license to pawnbroker for sale of weapons, see Pawnbrokers, § 4.
Shooting into house as burglary, see Burglary, § 39.

WIDOWS.

Dower, see Dower.
Rights of widow of donee of public land to complete the donation, see Public Land, § 143.

WILLS.

See Descent and Distribution; Executors and Administrators.
Construction and execution of trusts, see Trusts.

II. TESTAMENTARY CAPACITY.

§ 50. "Testamentary capacity" defined.—Watson's Ex'r v. Watson (Ky.) 626.

§ 52. The burden of proving testamentary incapacity *held* to shift to contestant on proponent's proof of execution, and in the absence of intrinsic evidence of incapacity.—Watson's Ex'r v. Watson (Ky.) 626.

§ 53. In a proceeding to probate a will contested on the ground of testamentary incapacity and undue influence, evidence of proceedings six months after the execution of the will resulting in a judgment finding testator mentally incompetent to manage his estate *held* inadmissible.—Watson's Ex'r v. Watson (Ky.) 626.

§ 55. In a will contest, evidence *held* to support a finding that testator was mentally incompetent to make a will.—Gallagher v. Neilon (Tex. Civ. App.) 564.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 88. An instrument to take effect only upon grantor's death *held* testamentary in character and insufficient as a deed.—Givens v. Ott (Mo.) 23.

(F) Mistake, Undue Influence, and Fraud.

§ 155. "Undue influence" defined.—Watson's Ex'r v. Watson (Ky.) 626.

§ 155. Undue influence is a species of fraud.—Gallagher v. Neilon (Tex. Civ. App.) 564.

§ 156. Where testator's mind was so impaired by disease, old age, or mental anguish as to render him an easy dupe to the acts and intrigues of those by whom he was surrounded, and that the will, by which he made a different disposition of the property from what he otherwise would have done, was procured by taking advantage of his condition, the will will not be admitted to probate.—Gallagher v. Neilon (Tex. Civ. App.) 564.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(H) Evidence.

§ 300. Where in a will contest undue influence and lack of testamentary capacity are charged, any issue arising under any phase of the case may be established or disproved by direct or circumstantial evidence.—Gallagher v. Neilon (Tex. Civ. App.) 564.

(I) Hearing or Trial.

Requests for instructions, see Trial, § 260.

§ 324. In proceedings to probate a will, the submission to the jury of the question whether testator executed the will, and the question of the genuineness of the signature thereto, *held* erroneous.—Watson's Ex'r v. Watson (Ky.) 626.

§ 324. In a will contest, the questions of testamentary capacity and of undue influence or fraud exerted over testator in procuring a will are questions of fact, to be determined by the jury from all the facts and circumstances of the case.—Gallagher v. Neilon (Tex. Civ. App.) 564.

§ 332. In a will contest, a charge *held* not on the weight of evidence as giving undue prominence to a certain phrase repeated in several paragraphs of the charge.—Gallagher v. Neilon (Tex. Civ. App.) 564.

(K) Review.

§ 359. Under Ky. St. 1909, § 1404 (Russell's St. § 3947), a widow renouncing her husband's will, and electing to take under the law, *held* not entitled to appeal from the order probating the will.—Thompson v. Thompson (Ky.) 641.

§ 364. Under Ky. St. 1909, § 4830 (Russell's St. § 3976), and Civ. Code Prac. §§ 738, 740, 758, an appeal taken from a judgment probating a will after the lapse of more than one year will be dismissed if no application was made to extend the time.—Williamson v. Maynard (Ky.) 967.

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§ 371½. The limitation in Ky. St. 1909, § 4850 (Russell's St. § 3976), *held* available on motion made at or before the case is submitted on the merits.—Williamson v. Maynard (Ky.) 967.

VI. CONSTRUCTION.

(A) General Rules.

§ 490. Rule as to admissibility of parol evidence to show intent of testatrix to devise property not belonging to her, so as to require an election by the devisee, stated.—McDonald v. Shaw (Ark.) 935.

(C) Survivorship, Representation, and Substitution.

§ 548. A provision, that the share of any child in remainder who died without children should go to the other children, *held* to refer to death without issue before the death of the life tenant.—Garrard v. Kendall (Ky.) 997.

§ 552. Under Ky. St. §§ 2064, 4841 (Russell's St. §§ 3841, 3964), *held*, that a will must be construed to mean "sisters" as a class, which being the case, the devise was controlled by section 4841, and the descendants of a half-sister of testator, dead when the will was made, took the estate she would have taken.—Barnhill v. Sharon (Ky.) 983.

(E) Nature of Estates and Interests Created.

§ 597. In case of doubt, the law favors the fee rather than a lesser estate.—Garrard v. Kendall (Ky.) 997.

§ 601. Under a devise giving the property to testator's wife to use as she saw fit, his wife *held* to take a fee notwithstanding a subsequent provision giving any remainder to testator's children.—Garrard v. Kendall (Ky.) 997.

§ 602. A will construed, and *held* not to provide for testator's grandchildren.—Smith v. Phelps (Ky.) 656.

§ 607. A will construed, and *held* to create an estate tail, converted by Ky. St. 1909, § 2343 (Russell's St. § 2045), into a fee.—Taggart's Ex'r v. Taggart (Ky.) 693.

§ 607. A will construed, and *held* to give to testator's children the fee in the one-third devised to the widow for life.—Taggart's Ex'r v. Taggart (Ky.) 693.

§ 614. A will construed, and *held* to give testator's widow a life estate only.—Taggart's Ex'r v. Taggart (Ky.) 693.

§ 616. A will *held* to give the widow a life estate, so that she would have only such estate in property purchased with the proceeds of property sold by her which belonged to the estate.—McCormick v. McCormick's Adm'r (Ky.) 450.

(F) Vested or Contingent Estates and Interests.

§ 629. The law favors the vesting of estates.—Garrard v. Kendall (Ky.) 997.

§ 634. Will construed, and *held* to pass to M. and testator's daughter vested remainders.—Hackney v. Tucker (Ky.) 417.

§ 634. A life estate and remainder will be *held* vested where it can be fairly done without too great violence to the language used.—Hackney v. Tucker (Ky.) 417.

§ 634. That an estate is to take effect after the termination of an intervening estate will not prevent both estates from vesting at the same moment.—Hackney v. Tucker (Ky.) 417.

(I) Actions to Construe Wills.

§ 697. Equity will not entertain a suit to construe a will brought by persons who have no interest therein.—Garrard v. Kendall (Ky.) 997.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 725. The owner of both the legal and equitable title to funds that would arise from the sale of real estate under the direction of a will may, if he so elect, under the doctrine of equitable conversion and reconversion, take the real estate itself.—Givens v. Ott (Mo.) 23.

§ 744. A mortgagee of a devisee's interest *held* bound to take notice of the public records containing the will, and to be charged with knowledge of a prior lien note executed by the devisee to equalize his mother's share under the will.—Montgomery's Trustee v. Brown (Ky.) 472.

(C) Advancements, Ademption, Satisfaction, and Lapse.

§ 758. Though an advancement is not a debt, testator may impose the payment thereof as a condition of the receipt of a share of the estate by the person advanced.—Montgomery's Trustee v. Brown (Ky.) 472.

§ 759. A provision charging a devisee with an advancement *held* equivalent to requiring him to account for the sum specified in the settlement of the estate.—Montgomery's Trustee v. Brown (Ky.) 472.

§ 759. The term "advancement" used in a devise *held* to have been used in its popular, and not in its technical, sense.—Montgomery's Trustee v. Brown (Ky.) 472.

§ 762. Mode of settlement of an estate under a will devising testator's property specifically to his wife and two children stated.—Montgomery's Trustee v. Brown (Ky.) 472.

§ 762. An estate having been completely settled without payment of a devisee's note given to equalize his mother's share, it would be presumed that his interest in the residuary estate was insufficient to pay the note.—Montgomery's Trustee v. Brown (Ky.) 472.

§ 775. Under Ky. St. 1909, § 4843 (Russell's St. § 3966), property devised to one who died before testator passed at testator's death as if no will had been made.—Garrard v. Kendall (Ky.) 997.

(D) Election.

§ 778. Doctrine of election in equity stated.—McDonald v. Shaw (Ark.) 935.

§ 786. Court *held* not required to make an election for an incompetent person.—McDonald v. Shaw (Ark.) 935.

§ 800. Basis of the doctrine of election being that a person cannot assume two inconsistent positions and accept and reject under the same instrument, a person in making an election can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency.—McDonald v. Shaw (Ark.) 935.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 858. Under will, *held* that, a beneficiary having refused to accept a bequest, it passed under the residuary clause.—Givens v. Ott (Mo.) 23.

WITNESSES.

See Evidence.
Authority of court to adjourn session to place of residence of sick witness in order to take his testimony, see Courts, § 74.
Experts, see Evidence, §§ 471–556.
Opinions, see Evidence, §§ 471–556.

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Perjury, see Perjury.
Testimony of accomplices, see Criminal Law, § 511.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 32. A witness in a civil case *held* not entitled to have his fees for attendance and mileage taxed against the losing party unless he proves his account in compliance with Kirby's Dig. § 3254.—Lansing Wheelbarrow Co. v. Montgomery (Ark.) 1052.

§ 32. Kirby's Dig. § 3524, requiring the accounts of witnesses to be sworn to, *held* not subject to abrogation by a customer of reporting verbally to the clerk the number of days' attendance.—Lansing Wheelbarrow Co. v. Montgomery (Ark.) 1052.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 48. Under Ky. St. 1909, § 1180 (Russell's St. § 3714), *held* that accused on trial for murder who had previously been convicted of false swearing was disqualified from testifying in his own behalf notwithstanding Cr. Code Prac. § 223, subd. 1.—Hinton v. Commonwealth (Ky.) 434.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 139. Under the express provisions of Civ. Code Prac. § 606, witnesses are incompetent to testify for themselves as to conversations of persons deceased.—Stamper v. Cornett (Ky.) 623.

§ 140. Civ. Code Prac. § 606, *held* not to prevent an agent from testifying for his principal as to transactions with the agent of another, although the latter agent is dead at the time of giving such testimony.—Paducah Cooperage Co. v. Paducah Veneer & Lumber Co. (Ky.) 386.

§ 140. Civ. Code Prac. § 606, subsec. 2, clearly recognizes the right of persons interested in an estate to testify for its protection, and hence a devisee may testify in favor of the executor sued for a wrongful act of the testator.—Ratliff v. Daniel's Ex'r (Ky.) 1034.

§ 142. A cashier of, and stockholder in, a bank was incompetent to testify for the bank as to a transaction with a person since deceased.—Farmers' Bank of Wickliffe v. Wickliffe (Ky.) 498.

§ 145. Plaintiff, in foreclosure *held* not disqualified to testify by reason of being an heir and representative of the deceased mortgagee.—Blair v. Breeding (Tex. Civ. App.) 869.

§ 150. Under Civ. Code Prac. § 606, subd. 2, certain testimony as to an oral agreement between defendant and plaintiff's deceased grantor *held* inadmissible in an action to recover possession.—Howell v. Salt Lick Lumber Co. (Ky.) 645.

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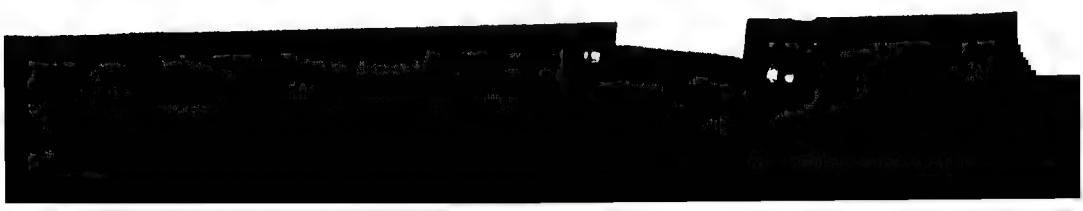

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